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Managing H-1B Employees In A Down Economy

Law360, New York (December 03, 2009) -- Employment attorneys advise clients to treat similarly situated employees alike. However, this principle is difficult to apply to a workforce including H-1B workers — especially in a down economy where salary cuts, furloughs and reduced hours are imposed.

In many ways, H-1B workers need to be treated better than U.S. workers.

H-1B status is used by companies to hire foreign nationals into many professional occupations including engineering, financial analysis and computer science.

H-1B workers must be paid certain minimum salaries; H-1B workers must be paid the required salary even during unproductive times (i.e., furloughs); and full-time H-1B workers cannot be automatically reduced to part-time hours.

This sounds strikingly unfair that foreign national workers receive more protections than U.S. workers, but the U.S. Department of Labor takes the position that this is exactly what employers signed up for when they hired H-1B workers.

The DOL initially imposed these heightened requirements for H-1B workers to "protect" the U.S. worker by creating safeguards against hiring foreign workers at reduced wages that then drive down U.S. workers' salaries.

However, in times of economic downturn, the U.S. worker is more exposed to salary cuts and the like because H-1B workers are afforded additional protections.

With some strategic planning and creative adjustments, employers can balance their interests in (1) reducing costs; (2) complying with the H-1B requirements; and (3) mitigating the likelihood of a discrimination claim by its U.S. workers.

Salary Reductions

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H-1B workers must be paid the higher of the prevailing wage or the wage paid by the employer to similarly situated employees, and when the prevailing wage controls, there is little flexibility for reducing the H-1B worker's salary.

For instance, a small employer pays its entry level IT analysts $35,000, but the prevailing wage set by the DOL is $40,000. The H-1B worker needs to be paid $40,000.

In this situation, if the employer wishes to impose a 10 percent pay cut across the board, it cannot reduce the H-1B worker's wage because he must be paid no less than the prevailing wage, which is his current salary.

If the employer wishes to retain the IT analyst, but with a 10 percent salary cut, the employer can consider putting him in a position with a lower prevailing wage. Creating a new position can be difficult, though, because the position must be H-1B eligible.

This generally means that the position must require a bachelor's degree in a specialized field. In other words, an IT technician job may have a low enough prevailing wage, but it won't qualify for H-1B status.

The employer may be forced to choose between keeping the H-1B worker at $40,000 while reducing the U.S. IT analysts down 10 percent or terminating the H-1B worker.

In addition, even if the newer, lower paying position is H-1B eligible, the employer will be required to pay for the preparation and filing of an amended H-1B petition.

These costs could outweigh the benefits of the salary cuts because the filing fees for an H-1B petition can be almost $2,500, not including attorney fees for the preparation of the petition.

Finally, if the issue is not appropriately handled and the employer reduced an H-1B employee's wages below prevailing wage, the employer could incur liability for back pay and fines.

Managing Furloughs

H-1B workers can be put into unproductive status, but they must be paid their full required wage even while they are unproductive.

Thus, an employer's goal of a furlough — reducing operation costs and compensation costs — is not reached in full with regard to H-1B workers.

One solution to this may be to require the H-1B workers to take some sort of paid leave (e.g., vacation or PTO) during the furlough.

An employer's ability to do this will depend on the terms of the leave policy and governing employment contracts or collective bargaining agreements.

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The employer must then decide if it will require U.S. workers to also take paid leave during the furlough.

H-1B status is not itself a protected class, but if all of the H-1B workers are of the same national origin, the H-1B employees may be able to craft a national origin discrimination claim alleging that individuals of their national origin were discriminated against by requiring that they use their PTO while other workers were not required to do the same.

Reduction in Hours

When an employer hires an H-1B worker, the employer commits to either full-time or part-time employment. Full-time employment requires at least 35 hours per week, but often the employer states that it will provide 40 hours per week.

An employer can reduce the hours for which it pays an H-1B worker only after it amends the H-1B petition. Thus, an employer can reduce an H-1B worker from full-time to part-time, but it will require procedural steps and they can be costly.

First, a new prevailing wage analysis may be required and the wages may have gone up with the passage of time. Second, the filing fees alone can be more than $2,500. Third, legal fees to prepare the amendment will be incurred.

The employer may pay $5,000 in costs to reduce the compensation of the H-1B worker by $5,000. And the employer must keep in mind that if business picks up and it wants to move the employee back into full-time, the same costs and steps will need to be followed again.

Managing a work force with H-1B employees can be complicated — especially when difficult decisions such as pay cuts, furloughs and reductions in hours are contemplated.

Each employment decision can have significant implications on the employment and status of the foreign national as well as serious consequences, even financial liability, for the employer.

Navigating these employment decisions requires expertise in both immigration and employment law. Making decisions without consulting an attorney with immigration expertise can result in expensive consequences or liability.

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