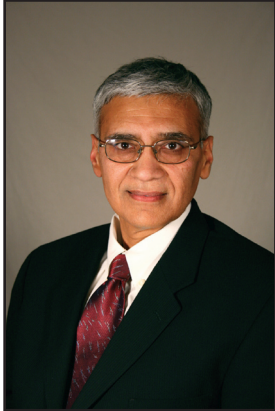


Immigration Law In The Workplace



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Immigration law is a complex field and employers are not likely to know when they can be liable, the consequences, and the likely enforcement issues.

THE LAWS, regulations, and interpretations shaping immigration policy and the functions of the immigration-related bureaus of the Department of Homeland Security are of interest to the general public and a wide variety of professionals. You are very likely, perhaps even certain to run into immigration issues if you are: an in-house counsel, a university/education lawyer, an M&A/corporate lawyer, a litigator, a labor/employment lawyer, a business lawyer or general practitioner/contracts lawyer including government contracts lawyer, or part of a business/management team or HR of an organization. The purpose of this article is to sensitize you and alert you to some of the more precarious issues that we see in our practice. (Note that we are not covering aspects of immigration law that relate to criminal law; and of necessity, we will have to oversimplify many aspects of our discussion.)

GOVERNING LEVELS, REGULATING AGENCIES, AND INFORMATION AVAILABLE • Like all agency practice, immigration law is derived from many sources, including the U.S. Constitution, Immigration and Nationality Act, agency regulations, agency adjudications, standard operating procedures (unique to each agency and known by different names per agency), policy memoranda

(which, unfortunately, often replace regulations), practice conventions, and indeterminate or “gray” areas.

The Department Of State

One of the regulating agencies is the U.S. Department of State (DOS), <http://travel.state.gov/>. DOS has been given the responsibility to adjudicate and issue visas through the U.S. embassies and consulates. A U.S. visa allows an alien (“alien” is the term of art used for who is not a permanent resident or a national of the United States) to apply for entry to the United States in a visa classification identified by letters A through U (A Visa, B Visa, etc.). Each visa classification allows for a specific purpose. Note, however, that a visa does not grant the alien the right to enter the United States. The visa allows an alien to travel to the border of the United States and apply to be admitted. Hence, issuance of a visa is not ipso facto a guarantee that an alien will be admitted into the United States. Please note, the distinction between a nonimmigrant visa (NIV) and an immigrant visa (also known as a “green card”), which gives an individual the right to live and work in USA permanently.

Admission To United States

Once an alien receives a visa, he or she then travels to the United States and seeks admission from the Bureau of Customs and Border Protection (CBP), <http://www.cbp.gov/>. For some visas, CBP inspectors determine admission into the United States, and the length of stay, at the port of entry for each alien. For most work visas, the conditions and the length of stay are pre-determined. CBP possesses the right only to grant or refuse entry.

Benefits Application

Immigration benefits applications within the United States are adjudicated by the United States Citizenship and Immigration Services (USCIS) (previously known as the INS), <http://www.uscis.gov/portal/site/uscis>.

USCIS oversees many elements of the U.S. immigration system including but not limited to: citizenship, lawful permanent residency, family and employment-related immigration, employment authorization, inter-country adoptions, asylum and refugee status, replacement immigration documents, and foreign student authorization.

Other Regulatory Actors

Other regulatory actors include Department of Labor (DOL), <http://www.foreignlaborcert.doleta.gov/hiring.cfm>. The DOL is responsible for protecting the U.S. workforce and related investigation and enforcement. The Department of Justice (DOJ), <http://www.usdoj.gov/crt/osc/>, is responsible for ensuring compliance with immigration related discrimination laws. Immigration and Customs Enforcement (ICE), <http://www.ice.gov/>, is responsible for investigations and enforcement.

State Legislation

In recent years, States have started legislating on certain aspects of immigration law. In the first two months of 2008, over 350 immigration-related proposals were unveiled in various state legislatures as per a count conducted by the Associated Press. *See* Associated Press, *States Aim at Immigration Crackdown With More Than 350 Bills up for Consideration Nationwide*, <http://www.foxnews.com/story/0,2933,336011,00.html?sPage=fnc/us/immigration>, (March 7, 2009). However, the United States are not quite “United” when it comes to immigration. In a September 24, 2007 DOJ press release, it was noted that the DOJ sued the State of Illinois. This lawsuit sought to invalidate an Illinois state law that endeavored to forestall employers from using the Department of Homeland Security’s E-Verify system. *See* Department of Justice Press Release, #07-757 (Sept. 24, 2007), available at www.justice.gov/archive/opa/pr/2007/September/07_civ_757.html.

A Word Of Caution

We are often asked whether inquirers can obtain reliable information on immigration law directly from the government, namely the regulating agencies mentioned above. The simple answer is no, you cannot. People untrained in law run the government's public information functions and often these functions are contracted out to private companies. Note that except for cases of affirmative misconduct, there exists no equitable estoppel against bad advice given by agency personnel. Your best bet for getting (semi-) reliable information is the particular agency's Web site and the instructions on the pertinent forms. If utilizing information from a government Web site, it is good practice to take a print out and date the information. If later, the information turns out to be incorrect, the printouts could serve as evidence against allegations of willful violations.

IMMIGRATION RULES REGARDING THE HIRING OF A "NON-U.S." WORKER •

There are many commonly discussed topics and special rules that employers should be aware of when hiring a foreign worker. One of the most frequently contemplated concerns includes whether the employee can pay the legal fees and expenses of the process. The answer depends upon the type of benefit being sought. In many cases, like those of H-1 employees, the laws require employers to pay certain government fees. Additionally, the laws do not permit employers to take deductions from employees' salaries. A review with competent counsel is always recommended in such circumstances to ensure the employer is abiding by all applicable laws.

Recruitment And Advertising

Another topic of interest pertains to recruitment advertising. In many cases, there exist special rules for advertising, such as those for green card applications. There are also special rules for H-1B

dependent employers (those with 15 percent or more H-1 employees on their work force) that an employer must adhere to. Beyond the recruitment phase, when a nonimmigrant worker is hired, there are also up-front documentation requirements. These requirements could be simple or fairly complicated. For instance, refer to the H-1 compliance information discussed below and available at http://www.dol.gov/dol/allcfr/ETA/Title_20/Part_655/Subpart_H.htm.

IMMIGRATION RULES IN MAINTAINING EMPLOYMENT OF A "NON-U.S. WORKER" •

Important documentation requirements exist with respect to maintaining employment of non-U.S. workers. For example, Form I-9's need to be prepared, maintained, and updated for all workers. Likewise, H-1 documentation needs to be maintained on an ongoing basis. It is imperative that employers know their responsibilities in maintaining employment of foreign workers.

I-9 Compliance

With respect to I-9 compliance, in the absence of expert legal advice, the employer must, at a minimum, read and follow the instructions provided on Form I-9. As long as your I-9 conforms to the instructions given on the form, you are not likely to run into any major enforcement problems. Employers must also be cognizant of discrimination whether intended or not. The DOJ guide to fair employment practices (available at http://www.usdoj.gov/crt/osc/pdf/en_guide0507.pdf) is a good place to begin learning about immigration-related discrimination.

H-1 Compliance

H-1 compliance is also a comprehensive and critical matter for employers to take note of. The issues that we see in this area are very complex and almost always require legal assistance. For example, once a job has been described (under penalty of

perjury) to the government while making the H-1 application, employers are not permitted to change the job incidents (salary, description, etc.) without filing an amendment. Thus, there can be no substantial variation from what was described to the government. Additionally, as a general rule, do not assume you can move non-immigrant workers from place to place. There are some fairly intricate laws governing such rules. Information regarding H-1 compliance is available from http://www.dol.gov/dol/allcfr/ETA/Title_20/Part_655/Subpart_H.htm. But this information needs to be understood in the context of laws and policy. Do not assume you know what the government wants you to do just because you have read the regulations. There are several other sources including administrative decisions, policy documents, and agency comments to stakeholders, that contain elaboration on the basic regulatory framework. The interpretations can change on a daily basis.

Be aware also that there are specific regulations governing vacation and benching of H-1 workers. Usually, nonimmigrant workers cannot be placed in non-productive status. DOL jurisprudence covers this issue in great detail. For instance, in *U.S. Dep't. of Labor, Administrator, Wage & Hour Division, Employment Standards Administration v. Pegasus Consulting Group, Inc.*, ARB Case Nos. 03-032, 03-033 ALJ Case No. 01-LCA-29 (ARB June 30, 2005), an employer endeavored to get around the obligation to pay wages by firing workers when no projects were available and then rehiring them when needed. The Administrative Review Board (ARB) of the DOL refused to allow that practice and further rejected employer's arguments that the employer did not authorize the workers to come to the United States and that some workers took voluntary leaves of absence.

Lastly, note that your normal employment contracts may be prohibited in the H-1 world. What a reasonable attorney might consider liquidated damages could be considered an impermissible penalty

by the government. For example, for H-1B workers, liquidated damages provisions could easily be viewed as impermissible early termination penalties. See *Administrator, Wage & Hour Division, U.S. Dep't of Labor v. Novinvest, LLC*, ARB No. 03-060, ALJ No. 2002-LCA-24 (ARB July 30, 2004).

IMMIGRATION RULES IN TERMINATION OF A NON-U.S. WORKER

• The government has formulated rules with respect to the termination of "non-U.S." workers as well. For H-1 workers, the law requires that employer offer to pay a one-way ticket back to the employee's home country, if the employer terminates the employee before the contemplated period of employment. This liability does not arise if the employee voluntarily resigns or changes status to another visa type. The liability covers only the employee, not his or her family.

Inform CIS

Employers should also take note of the liabilities that can occur unexpectedly. For example, for most nonimmigrant workers it is good practice to inform CIS about the termination. In H-1 workers' cases, if you do not inform CIS, the employment is considered never to have been terminated. The employer can be required to pay back wages even though it believes it has terminated the worker. In *Rajan v. International Business Solutions, Ltd.*, an employer terminated the employment of an H-1 worker. However, because it did not formally notify INS (CIS), the employer was required to pay the wages of the worker — despite the fact that the worker was informed of the termination. See *Neeraja Rajan v. International Business Solutions, Ltd.*, ARB Case No. 03-104, ALJ Case No. 2003-LCA-12, (ARB Aug. 31, 2004)

Surprisingly, ARB has held that even those workers who did not testify were entitled to back wages, because the employer's "pattern and practice" of underpayment could be deduced from the

evidence. In fact, two workers who did not even seek or desire back wages were awarded back wages. *See Pegasus Consulting Group*, supra.

LIABILITY, CONSEQUENCES, LITIGATION, AND ENFORCEMENT •

Immigration law may present problematic issues in the least expected arenas. Therefore, employers should be aware of potential liabilities, consequences, and issues pertaining to enforcement. Foremost, with respect to corporate restructuring/M&A, immigration issues should be carefully reviewed as part of other transactional reviews before restructuring, such that an employer does not take upon itself unintentional assumptions of liability with respect to immigration.

Liability For Independent Contractors

Normally, employers are responsible for their own workforce and are required to make sure they possess appropriate work authorizations. However, as the infamous Wal-Mart investigation showed, employers can even be held responsible for knowingly employing independent contractors who in turn employ illegal workers. Wal-Mart paid \$11 million in settling immigration violation claims because they allegedly used independent contractors who employed illegal aliens. *Walmart to Pay U.S. \$11 Million in Lawsuit on Illegal Workers*, available at www.nytimes.com/2005/03/19/business/19walmart.html.

Government Contractors Can Be Barred From Federal Contracting

If your client is a government contractor, it may have even more to lose if it is found to have committed immigration violations. Two executive orders declaring a debarment penalty for federal contractors if they are found to be in violation of immigration compliance had existed, despite the fact that they were little known. Initiated by Pres. Clinton in 1996, this executive order was ex-

tended by President Bush. *See* 61 Fed. Reg. 6089, 6091-6093 (Feb. 15, 1996) and 68 Fed. Reg. 10619, 10623 (March 5, 2003). Since the first writing of this article, USCIS has implemented a program for employment verification mandatory for federal contractors. The details of this program (E-Verify) and compliance and investigation issues are available on our Web site at <http://www.immigration.com/investigations-and-compliance>.

Courts Have Limited Jurisdiction And Res Judicata Is Limited

Regarding an employer's ability to litigate against the government in immigration law contexts, immigration law may not always seem to adhere to logic. The Real ID Act prevents courts from looking at CIS discretionary actions unless there is a constitutional issue of question of law. *See* 8 USC §1252(a)(2)(D). Furthermore issues of constitutional law and issues of law may be reviewed only by the courts of appeal. *Id.*

Other Limitations

Employers should be aware of additional important immigration law doctrines. The doctrine of consular non-reviewability provides that decisions made by U.S. consulates are not reviewable by courts. Furthermore, the doctrine of stare decisis does not apply in administrative decisions or even in many appellate decisions. CIS has made it clear that they retain the authority to revisit extensions and amendments in existing cases de novo. (Refer to The April 23, 2003 Memorandum from William R. Yates, *The Significance of a Prior USCIS Approval of a Nonimmigrant Position in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, available at www.uscis.gov/files/pressrelease/Readjud_042304.pdf). Court decisions are also not binding outside that court's jurisdiction. Thus, immigration law and the applicable doctrines are not always practical or within the bounds of common sense.

Investigations And Audits

Lastly, there are a few pointers pertaining to investigations that are worth mentioning. In defending audits and enforcement, the periods of limitation and investigation can range from one year to forever. Theoretically, there is no limitation in Program Electronic Review Management (PERM) and salary under-payment investigations. Additionally, be aware that DOJ investigations for discrimination cases can also lead to debarment and fines. With respect to Department of Homeland Security/ICE investigations, the rule of thumb is to get criminal lawyers involved. Period.

CONCLUSION • The various stakeholders in our immigration system may not be obvious. However,

immigration matters in the daily course of business affect many professionals. It is important for stakeholders to be aware of the governing levels, regulating agencies, and to understand how to access information and how reliable such information might be. Understanding when an employer can be liable, the consequences, and enforcement issues will armor an employer with knowledge to protect itself in an area of the law that does not always seem to be very logical. Immigration governance changes every day and the smallest change in facts can change the results. It is always advisable to go to a competent immigration law practitioner when any questions arise, to get a written opinion, and at a minimum, to take contemporaneous notes.

PRACTICE CHECKLIST FOR Immigration Law In The Workplace

- The U.S. Department of State, <http://travel.state.gov/>, has been given the responsibility to adjudicate and issue visas through the U.S. Embassies and Consulates. Each visa classification A through U (A Visa, B Visa, etc.) allows for a specific purpose but does not grant the alien the right to enter the United States.
- Once an alien receives a visa, he or she then travels to the United States and seeks admission from the Bureau of Customs and Border Protection, <http://www.cbp.gov/>. For most work visas, the conditions and the length of stay are pre-determined. CBP possesses the right only to grant or refuse entry.
- Immigration benefits applications within the United States are adjudicated by United States Citizenship and Immigration Services, <http://www.uscis.gov/portal/site/uscis>.
- The Department of Labor, <http://www.foreignlaborcert.doleta.gov/hiring.cfm>, is responsible for protecting the U.S. workforce and related investigation and enforcement.
- Department of Justice, <http://www.usdoj.gov/crt/osc/>, is responsible for ensuring compliance with immigration related discrimination laws.
- Immigration and Customs Enforcement, <http://www.ice.gov/>, is responsible for investigations and enforcement.
- Whether the employee can pay the legal fees and expenses of the process depends upon the type of benefit being sought. Employers cannot take deductions from employees' salaries for the purpose.
- With respect to I-9 compliance, read and follow the instructions provided on Form I-9. The U.S. DOJ guide to fair employment practices (available at http://www.usdoj.gov/crt/osc/pdf/en_guide0507.pdf) is a good place to begin sensitization to immigration related discrimination.