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## FOREIGN SERVICE

### FOCUS COLUMN

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As the economic downturn continues, it is important for U.S. employers to be knowledgeable about the required actions and important issues that come up in the context of reductions in workforce, lay-offs and termination of foreign workers.

Immigration practitioners are commonly asked about mythical 10-day or 30-day "grace periods," wherein many believe that the U.S. Citizenship and Immigration Services allows temporary foreign workers who are terminated by their sponsoring employer, to remain in the U.S. legally for a specific period of time before being required to depart. In fact, U.S. immigration regulations do not allow for any grace period for most foreign nonimmigrant workers after employment termination.

The source of the mythical grace periods most likely comes from the actual grace periods allowed under the immigration regulations for foreign nonimmigrant J-1 trainees and interns and F-1 students. For J-1 trainees and interns, the regulations state that there is a 30-day grace period for the J-1 trainee and intern to remain in the U.S. after their training or internship has been completed or terminated, during which time they may legally stay in the U.S. but are not authorized to work or continue their training or internship. The J-1 validity period is usually governed by the dates on Form DS-2019, which the J-1 program sponsor issues to the foreign trainee or foreign intern. The 30-day grace period allowed for the J-1 visa holders is not for employment purposes, but specifically to make personal arrangements for departure.

The regulations state that there is a 60-day grace period for F-1 students to legally remain in the U.S. after their full-time studies have been completed, as stated on the Form I-20, or after optional practical training ends as stated on their employment authorization card. During the 60-day grace period, the F-1 student may legally remain in the U.S., but is not work authorized.

In the nonimmigrant H-1B "specialized" visa context, also known as the visa for "the professionals," the nonimmigrant work status is tied to a specific U.S. employer, and once the foreign worker stops working for that employer, he or she ceases to have U.S. immigration status and must depart the U.S., unless another work visa application is immediately filed.

Employers must be aware of obligations specifically pertaining to terminated H-1B employees. It is extremely important for the employer to fulfill return transportation and proper H-1B petition withdrawal requirements under immigration regulations, or it may find itself liable for back wages to terminated or laid off employees.

The immigration regulations specifically state that the sponsoring U.S. employer is liable for the "reasonable costs of return transportation" to the employee's last country of residence, if the employer terminates the H-1B employee prior to the end of his or her period of authorized stay. This obligation does not extend to the H-1B employee's family members, nor does it extend to providing moving or other incidental costs for the employee to return to his or her last country of residence.

It is important to note that the required payment of return transportation costs also does not apply if the H-1B employee voluntarily resigns. Additionally, if the employee elects not to depart the U.S. because he or she has found another job or for any other reason, the employer is not obligated to pay the costs of the return transportation to the employee. Employers should always obtain a signed release from the employee if this is the case.

When the employer is obligated to pay for the H-1B employee's return transportation, there are many practical ways to fulfill this requirement. An employer may wish to provide the terminated employee with a sum approximating his or her reasonable return costs after the employee provides documentation showing ticket costs. In the alternative, the employer may wish to offer to provide a ticket for the employee within a reasonable period after the date of termination through the company's travel agent. "Reasonable costs" of return transportation should be satisfied by coach airfare for the H-1B employee to return to his or her last country of residence. Whichever way the employer

decides to satisfy the return transportation requirement, it should be clearly documented in order for the employer to retain proof that it has complied with the obligation.

Moreover, under the immigration regulations, U.S. employers of H-1B visa holders must immediately notify the U.S. Citizenship and Immigration Service of any changes in terms and conditions of an H-1B foreign worker's employment. The regulations specifically state that "[i]f the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition."

Recent immigration case law underscores the importance of the employers' fulfillment of the responsibility to maintain clear evidence of a "bona fide" termination, such as a signed termination letter from the employee and employer, clearly stating the last date of employment; and, notify the Citizenship and Immigration Service immediately upon termination or prior to termination of the H-1B employee, and request withdrawal of the H-1B.

In *Mao v. Nasser Engineering & Computing Services*, No. 06-121, decided in November 2008, the Labor Department's Administration Review Board ruled that a Texas technology firm was required to pay a software developer who was on an H-1B visa more than a year of back wages because the employer failed to show that there had been a "bona fide" termination of its employment relationship with Zhaolin Mao under the appropriate immigration regulations. The board found that the employer's failure to report to the government its termination of Mao's employment was the critical element establishing that there was no bona fide termination of the employment relationship, which would have relieved the employer of its liability to pay Mao's full salary during the time he was not working.

In many instances, employers provide foreign visa holders with severance packages during layoffs. Immigration policy and memorandum on the subject take the position that the receipt of pay from severance packages does not extend the lawful status of temporary foreign workers in the U.S. They are considered out of status from the day they stop working, whether or not they are in receipt of a severance package.

In addition, in the context of a strike or lockout or labor dispute, these temporary work visas may be suspended by operation of law or may be withheld and not issued to the foreign worker, even if the visas have been approved.

Finally, with regard to discrimination issues that employers of foreign workers may face, Section 274B of the Immigration and Nationality Act prohibits discrimination based on national origin or citizenship status. The statute states that it is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual with respect to the hiring of the individual for employment or the discharging of the individual because of his or her national origin, or in the case of a protected individual, because of his or her citizenship status. The statute has certain exceptions.

The most important exception in the statute regarding foreign workers, provides employers with the right to prefer equally qualified citizens, stating that "it is not an unfair immigration-related employment practice for a person or other entity to prefer to hire, recruit, or refer an individual who is a citizen or national of the United States over another individual who is an alien if the two individuals are equally qualified."

In the context of discharging employees, Section 274B of the Immigration and Nationality Act still applies.

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