

H-1B Compliance: What to Do When You Terminate Your H-1B Employee

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July 10, 2018

Many employers are aware that they are responsible for the reasonable cost of an H-1B worker's return transportation home if they terminate an employee prior to the expiration of their H-1B petition. What many employers do not realize is that this requirement is also an important step in effecting a *bona fide termination* of an H-1B employee with respect to back wage obligations. Employers face a heightened risk of being audited or investigated by U.S. Citizenship and Immigration Service (USCIS) and Department of Labor (DOL). Given that, it is increasingly important to make sure your organization has appropriate compliance protocols that are mandated for specific visa types, like the H-1B visa status.

What Is a Bona Fide Termination Under the H-1B Visa Rules?

Under the H-1B rules, a bona fide termination must meet certain criteria in order for an employer's wage obligation under the Labor Condition Application to cease. First, the employer must expressly terminate the employment relationship with the H-1B worker. Second, the employer must notify USCIS of the termination so that agency can revoke its prior approval of the employer's H-1B petition under 8 CFR 214.2(h)(11). Third, the employer must provide the H-1B worker with an offer for payment of reasonable costs of return transportation home under INA 214(c)(5)(A) and 8 CFR 214.2(h)(4)(iii)(E). These steps are mandated by the DOL.

What are considered "reasonable costs"? Reasonable costs of return transportation typically include the cost of an economy class ticket to the employee's last foreign address and does not include the transportation costs for any of the employee's family members. It is important to note that if the employee voluntarily terminates their employment, then the employer is not obligated to offer return transportation, but must notify USCIS of their last date of employment.

A common misstep is to terminate the H-1B worker and not follow through with steps two and three. If the employer explicitly terminates the employment relationship but fails to follow the second and third steps, the employer may still be obligated to pay the required wage for failure to make a bona fide termination.

The Impact of the 60-Day Grace Period

As of January 18, 2017, USCIS provides a 60-day grace period to H-1B under 8 CFR 214.1(2)). The 60-day grace period is a salutary feature where it not only gives the worker more time to leave the U.S., but it also provides a window of opportunity to find another employer who can file an extension or change of status within the 60-day period. Similarly, the worker could also potentially change to some other status on his or her own, such as to F-1, after enrolling in a school or dependent status of their spouse who may be in the U.S.

The new 60-day grace period may incentivize the H-1B employee to remain in the U.S., and thus enable an employer to escape paying the return transportation costs even when you have terminated the employee. On the other hand, it should not be viewed as a green light to never offer the return transportation costs home. While the 60-day grace period does allow a terminated worker some cushion in finding another employer in the U.S., it also provides a cushion for the worker to leave the U.S. less abruptly if terminated prior to its expiration of stay. In the latter situation, the employer's failure to offer return transportation costs home could still render the employer liable for back wages as a result of not effectuating a bona fide termination. Therefore, you should definitely have a policy in place regarding the offer of return transportation.

Why Is This Important?

It is critical for employers to develop a consistent policy for all terminated H-1B employees given the increase in DOL audits and investigations. The policy to effectuate a bona fide termination of an H-1B employee for immigration purposes must include the following steps:

1. **Employee Termination:** Clearly inform the H-1B employee that they are terminated, preferably in writing
2. **USCIS Notification:** Promptly notify USCIS in writing by requesting a withdrawal of the H-1B petition as of the termination date
3. **Offering to Pay Reasonable Cost of Return Transportation:** As part of the termination process, provide an offer to pay the reasonable transportation costs for the terminated H-1B employee to return to his or her last foreign address in writing

Employers have no obligation to ensure a terminated H-1B employee departed the U.S. However, it is recommended that you have your H-1B employee sign a release upon acceptance/rejection of the above acknowledging that the employer has complied with all 3 steps of the bona fide termination. Without a bona fide termination, the DOL has found that the employer's obligation to pay the former H-1B employee's wages may continue through the date on which the employer's H-1B petition expires. The back wages combined with the interest and fines that the DOL may assess can be significant depending on the circumstances. Therefore, employers should have a consistent practice and procedures in place that evidences they have met all three of the above steps.

Employers who have any questions about their obligations in this regard should contact our immigration law practice.

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