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Attys Prepare Employers For Increased H-2B Visa Audits

By **Nicole Narea**

Law360 (December 18, 2018, 3:41 PM EST) -- As the filing season for H-2B temporary nonagricultural visas approaches, immigration attorneys are refreshing employers on their compliance obligations under the relevant regulations and helping them prepare for increased work site visits from the U.S. Departments of Labor and Homeland Security.

The government will begin accepting H-2B applications for the coming season on Jan. 1, with a projected start date of April 1.

The program has come under increased scrutiny in recent months, with the Department of Homeland Security initiating additional audits to crack down on potential abuse. For employers, the prospect of interacting with immigration enforcement officers can be daunting, attorneys said.

"Any time that an employer has a law enforcement entity knocking on their door, it's very jarring and makes them very nervous," said Loan T. Huynh, an immigration attorney at Fredrikson & Byron PA. "We try to prepare them for these site visits. The employer should absolutely cooperate with what the government needs to do. But they need to understand that they have rights, too."

Chad Blocker, a partner at Fragomen, Del Rey, Bernsen & Loewy LLP, said that H-2B regulations are among the most complex imposed upon employers. Consequently, he said he lays out the obligations of employers at the start of the application process for H-2Bs and again when the workers arrive.

Huynh said that she sends out a compliance checklist to employers before her office starts the H-2B petition, requiring them to read and sign it. Ensuring that employers understand what is expected of them can prevent potential violations from being discovered during an audit, she said.

"The consequences of noncompliance can really harm them in the future," she said.

Leonard D'Arrigo, a partner at Whiteman Osterman & Hanna LLP, said that while H-2B employers have long expected audits from the DOL's Wage and Hour Division, DHS site visits are new to them.

The DOL has been involved in regulating the H-2B visa program since the mid-20th century, and for the past decade, the Wage and Hour Division has been responsible for governing the H-2B employers' wage practices.

But now DHS has jumped into the mix, in what appears to be an expansion of the agency's visa fraud program. Multiple immigration attorneys told Law360 that their clients have recently experienced unannounced site visits and received requests for documentation from DHS regarding the use of H-2B visas.

D'Arrigo said that, consequently, some employers might not have been as forthcoming with DHS as they should have been, especially since some other immigration organizations might have been counseling them not to respond to DHS in light of the agency's recent enforcement activities.

If they had known to expect DHS, they may have received a different outcome in their audit, he said.

"It really came as a shock to employers when DHS showed up at their doorstep," D'Arrigo said. "It benefits employers to be prepared. They should be expecting that audit, whether it comes or not."

D'Arrigo said that DHS is concerned with the basic terms and conditions on the U.S. Citizenship and Immigration Services application form: the location of employment, the prevailing wage rate and the job duties. DHS officers not only want to talk to employers, as is the case in DOL audits, but also the employees to ensure that they are being compensated and treated fairly.

Officials typically ask employees about whether they have had to work overtime, whether they have incurred job expenses and whether they have been reimbursed for those expenses, among other questions, Blocker said. They also verify employees' identities using photos from U.S. Department of State data collected during consular processing and ask to take photos of the work site, D'Arrigo said.

Blocker said that meeting with a U.S. government officer can be "anxiety-inducing" for H-2B workers, which is why he tries to dispel any uncertainty about what to expect.

The DOL, by contrast, tends to examine the "nitty-gritty compliance with the application process," including recruitment and advertising efforts, D'Arrigo said. It examines the prevailing wage rate, looks at the resumes employers received to make sure U.S. workers were not wrongfully rejected for the roles, and checks if employee rights posters are clearly displayed at the work site.

Huynh said she provides employers with a file compiling all the documentation that might be requested in such an audit, such as DOL filings, evidence of the employers' recruitment efforts, newspaper ads for the H-2B jobs, work orders and payroll information. She also provides "know your rights" cards to employers, reminding them that, for example, they have the right to ask for counsel before speaking to law enforcement officers.

But even in spite of educating employers and providing them with audit materials, an audit can still reveal slip-ups.

D'Arrigo said that employers in industries that do not have stable work sites, such as the landscape companies and horse trainers he counsels, may have particular difficulty complying with regulations that require H-2B workers to be based at the location they state on their applications. An immigration officer might show up at a company's headquarters expecting to find the H-2B workers there, when they are, in fact, at another project site.

"They don't necessarily understand the nature of the industry and may give employers a hard time," he said.

To avoid potential violations, D'Arrigo said that on H-2B applications, he lists the address of the employer's main office and the counties in which it is likely to work on a project within normal commuting distance.

Huynh said she recently had a DOL visit to a client that offered feedback noting that the vehicle provided to H-2B employees as required by the regulations did not have a functioning window roll-down mechanism.

While the feedback did not result in any punitive action, Huynh said the incident exemplified that no matter how much attention an employer pays to the regulations, "there's always something."

--Additional reporting by Suzanne Monyak. Editing by Katherine Rautenberg and Aaron Pelc.