H1B COMPENSATION & BENEFITS COMPLIANCE

H1B Employers often navigate through a variety of complex issues when deciding to sponsor a petition for an H1B Employee. Aside from the documentary requirements involved in the USCIS petition filing itself, H1B Employers must be aware of a number of compliance issues that fall under the jurisdiction of both the Department of Labor and the USCIS. The below is an outline of compensation and benefits obligations that H1B Employers hold when employing H1B workers.

(1) Placement of H1B Employee on Payroll:

The H1B Employer should consider the following when deciding when to place an H1B Employee on payroll:

- The H1B Employer cannot commence the H1B Employee's employment before the start date of the labor condition application (LCA) and the H-1B petition. This includes any mandatory orientation programs for which the employee's presence is required.

- Pursuant to Department of Labor (DOL) regulations (20 CFR 655.731(c)(6)) below are the timeframes in which an H1B Employee must be placed on payroll:

    - If the H1B Employee is coming to the United States from abroad in H1B status, the Employee must be placed on payroll on the date that he presents himself for employment or by the 30th day after entry in the U.S. in H1B status (whichever is earlier).

    - If the H1B Employee is in the U.S. and a change of status has been applied for, the employment relationship may not commence until the effective date of the change of status. From that date, the employment must commence on the date that the employee presents herself as ready for employment or by the 60th day after the effective date of the change of status to H-1B (whichever is earlier).

    - If the H1B Employee is already in H1B status with another employer, the employment can commence as soon as the H1B petition is filed pursuant to H1B portability. However, there is no requirement that an H1B Employer utilize H1B portability if it does not wish to do so. Rather, the H1B Employer can delay commencement of employment of the H1B Employee until the effective date of

the H-1B approval notice on the 60th day after the notice date of the H1B approval notice.

- Social Security Number Issuance: If the H1B Employee is unable to obtain a social security number (SSN) within the timeframes listed above, the H1B Employer is still required to place the H1B Employee on payroll no later than the dates specified above. The H1B Employer may have to consider issuance of a "dummy" social security number so that payroll computer systems can process paychecks for the H1B Employee in the interim.

(2) Wage Obligations:

The H1B Employer must pay the H1B Employee the "**required wage**" which is defined as the higher of "prevailing wage" and "actual wage."

- "**Actual wage**" is defined as the wage paid by the same employer "to all other individuals with similar experience and qualifications for the specific employment in question." 20 CFR 655.731(a)(l).

- H1B Employers can base the "**prevailing wage**" on the best information available as of the time of filing the application. 20 CFR 655.731(a)(2). This could include government wage data provided by the Wage and Hour Division of the Department of Labor, salary surveys accepted by the worksite state's State Workforce Agency or collective bargaining agreements (for unionized positions).

The required wage must be paid to the H1B Employee, cash in hand, free and clear, when due (excluding authorized deductions such as income tax, FICA, collective bargaining agreement deductions). 20 CFR 655.731(c)(1). Future bonuses and similar compensation (unpaid but yet-to-be-paid) may be credited towards satisfaction of the wage obligation, but only if the payment of the same are guaranteed and assured and not based on some conditional or contingent event. Once these bonuses or similar compensation are paid to the employee, they must be recorded and reported as "earnings" with appropriate taxes and FICA contributions withheld and paid. 20 CFR 655.731(c)(2)(v).

Benefits and eligibility for benefits as compensation for services (ie: cash bonuses, stock options, paid vacations and holidays, health insurance and other insurance plans, retirement savings plans, etc.) should be offered to H1B Employees on the same basis and in accordance with the same criteria as the H1B Employer offers to U.S. workers. H1B Employees are not to be denied benefits on the basis that they are temporary employees---in fact, an H1B Employer can offer greater or additional benefits to H1B Employees than offered to similarly employed U.S. workers provided that such differing treatment is consistent with nondiscrimination laws. 20 CFR 655.731(c)(3).

(3) H1B Employees in Nonproductive Status:

An H1B Employee may be in nonproductive status (ie: not rendering productive employment or services to the H1B Employer) for a number of reasons. However there are circumstances where wages must be paid to the H1B Employee and circumstances where wages need not be paid.

- Nonproductive status is due to a **decision by the H1B Employer**: If the H1B Employer is in nonproductive status because of a lack of assigned work, lack of a permit or license, or disciplinary reasons, the H1B Employer is required to continue paying the H1B Employee the required wage during the period of nonproductive status. 20 CFR 655.731(c)(7)(i).

- Nonproductive status is due to conditions unrelated to employment and the **decision of the H1B Employee**: If the H1B Employee voluntarily requests nonproductive status or circumstances exist that render the H1B Employee unable to work (ie: extended sick leave due to a medical condition or incapacity), the employer is NOT obligated to pay the required wage during the period of nonproductive status (unless the nonproductive status is subject to payment under the H1B Employer's benefit plan such as the Family Medical Leave Act or Americans with Disabilities Act.) The employer is also not required to pay the required wage if there has been a bona fide termination of the employment relationship. 20 CFR 655.731(c)(7)(ii).

In addition to the wage obligation of the H1B Employer, the issue of maintenance of H1B status during nonproductive status should also be considered. Although not stated specifically in any regulation or memo, USCIS has previously indicated in opinion letters that the issue of whether the employee maintains H1B status during nonproductive status is dependent upon whether there is an expectation of continuing employment at the conclusion of the leave of absence. If there is -- even if the leave is extended -- the employee is in valid status. If there is no expectation of continuing employment, the employee is not in valid status during the leave period.

USCIS policy places no time limit on the length of the leave; however, both the employee and the employer should be aware that if there is an expectation of continuing employment at the conclusion of the leave, the H1B status and work authorization should be maintained and extended throughout the period of nonproductive status.

(4) Resignation or Termination of H1B Employee

Payment of Return Trip Abroad: If the H1B Employee is terminated from employment by the H1B Employer prior to the expiration of the H1B status, the H1B Employer is liable for the reasonable costs of return transportation of the alien to his last place of foreign residence. If the H1B Employee voluntarily terminates his employment prior to the expiration of the H1B status, there is no such obligation. 8 CFR 214.2(h)(4)(iii)(E).

Notifying Government Agencies:

- With respect to the Department of Labor (DOL) it is advisable, although not required, to withdraw the Labor Condition Application (LCA) filed in support of the H1B petition filed for the terminated H1B Employee. This is because the H1B Employee's liability

under the LCA continues for a period of one year after either the end date of the LCA or the withdrawal of the LCA (whichever is earlier). 20 CFR § 655.760(c).

- With respect to USCIS, while there is no sanction for failure to notify USCIS of a H1B termination, the regulations do require the H1B employer to notify USCIS when the H-1B employment relationship ends, whether by termination or resignation. 8 CFR 214.2(h)(11)(i)(A). H1B Employers should also note that recent case law has held that H1B Employers are obligated to pay salary until the H1B Employer notifies USCIS of the H1B Employee's termination. In those cases, H1B Employers have been ordered to pay back wages in addition to other penalties and assessments.

Some employers may opt to delay notification to the DOL and USCIS while the H1B Employee seeks a new H1B Employer to sponsor a petition on his behalf. The USCIS's revocation of the petition can preclude the H1B Employee's eligibility for H-1B portability with the new employer. Furthermore, once the H1B petition is revoked, USCIS may issue a notice indicating that the employee is out of status.

As of January 17, 2017, following termination of employment, the H1B Employee is given a 60 day grace period during which they are considered in status.