IMPORTANT H-1B ACTION ALERT

H-1B Changes Effective on January 19, 2001

On December 20, 2000, the U.S. Department of Labor ("DOL") published interim final regulations which changed many aspects of the H-1B visa program. These regulations implement statutory changes to the H-1B program that were included in the American Competitiveness and Workforce Improvement Act of 1998 ("ACWIA"), as well as the American Competitiveness in the 21st Century Act of 2000 ("AC21"). These regulations are extensive and complex. This alert is intended to highlight the most significant changes taking place on **January 19, 2001**. If you have specific questions or concerns, please contact us directly.

H-1B Dependent Employers

The regulations create a new class of employer known as an "H-1B Dependent Employer" and subject this new class of employer to additional attestation requirements regarding recruitment and layoffs which are designed to protect the U.S. labor market. The first inquiry in determining H-1B dependency is the "snapshot test." The snapshot test generally defines an H-1B Dependent employer as one who has: 1) 25 or fewer FTE employees and more than 7 H-1B employees; 2) between 26 and 50 FTE employees and more than 12 H-1B employees; or 3) at least 51 FTE employees and a number of H-1B employees equal to at least 15% of the employer's FTE employees. ***If you believe that your company could be considered an H-1B Dependent Employer, please contact us immediately to review the details of your specific situation.***

Changes to Labor Condition Application ("LCA")

There is a new three-page LCA form which must be used as of 1/19/01. The new form can either be filed via faxback system using a new 800 number (individual regions will no longer process LCAs), or it can be mailed to the Philadelphia DOL Regional Office's post office box. **The LCA faxback system will not be available from 1/19/01 to 2/5/01**. During this period the new LCA form can only be filed by mail.

H-1B Portability Only Available when Certified LCA is Filed

The new H-1B portability provision, which allows H-1B employees to start employment with a new employer as soon as the new H-1B petition is filed at the INS, cannot be used unless the new H-1B petition is filed with a DOL-certified LCA.

LCA Process Simplified in Corporate Restructurings

In a corporate restructuring, the new entity will not need to file new LCAs for H-1B employees as long as the new entity expressly assumes the liabilities and obligations of the existing LCAs. This assumption of liability statement must be kept in the public access file along with a list of the H-1B employees transferred to the new entity, a list of the transferred LCA numbers and their dates of certification, an explanation of the new entity's actual wage system, and the new entity's Employer Identification Number.

Restrictions on Employees Working in Multiple Locations

The regulations define a place of employment by stating what it is not. A site is not a "place of employment" if the "nature and duration" of the employee's job functions necessitate frequent changes of location with little time at any one place. If an employee is working at a new site that is not a "place of employment", then the LCA obligations of the employer are tied to the regular work location, and no new postings or LCAs are needed.

However, if the employee is working at a new site that meets the definition of a "place of employment", then one of two obligations arise. If the "place of employment" is within the same area of intended employment as the original LCA worksite, then new postings must be posted at the "place of employment" on or before the employee commences work at the site.* If the "place of employment" is outside the area of intended employment, then either a new LCA must be filed before the travel can take place, or complex "short-term placement" rules must be followed which limit the amount of time an H-1B employee can spend at a "place of new employment" in any one calendar year.

*Please note that the new regulations specifically allow for "electronic posting" of notices within the area of intended employment on or before the date the H-1B alien commences employment at that site. Electronic notice can include a one-time e-mail notice to all employees at the site in the same occupational classification or by making the notice available for 10 days by electronic means such as a company intranet or bulletin board. This notice is required even when the alien's new "place of employment" is a third-party worksite.

Possible Ramifications of Obtaining New Prevailing Wage

On the LCA, the employer attests that it will pay the higher of the prevailing wage or the actual wage paid to other employees in the same occupation with the same education and experience. The new regulations state that the prevailing wage for a particular H-1B employee is governed by the LCA filed in support of that person's petition, and that a higher prevailing wage obtained for a later-filed LCA does not operate as an "update" of the earlier prevailing wage. However, in the same breath, the DOL states that it views the actual wage as a "dynamic matter". This leaves open the possibility that an increase in actual wage for new employees because of an increase in the prevailing wage, triggered by a later-filed LCA, could cause the actual wage to rise and create an obligation to increase the wages of the H-1B employees under earlier LCAs.

Explanation of Actual Wage Determination can Include Subjective Factors

No longer is an employer restricted to using only objective factors in calculating wages for H-1B employees. The new regulations state that the explanation of the actual wage determination contained in the public access file. The new regulations recognize subjective factors, such as an evaluation of performance levels, as legitimate business factors which can be used in the calculation of wages. The explanation and documentation in the public access file must be detailed enough so that a third party can understand how the employer applied its pay system to arrive at the actual wage.

Prevailing Wage for Employees in Higher Education, Government or Nonprofit Research Organizations

To qualify to use the separate prevailing wage categories for this grouping, institutions of higher education must be accredited or pre-accredited. Governmental research organizations (which must be U.S. government entities) and nonprofit research entities must have a primary mission of performance or promotion of basic or applied research, which can include sciences, social sciences, or humanities. This provision is effective immediately, and is retroactive as to prevailing wage determinations "that were not final as of October 21, 1998".

Benefits

In a change from prior law, the new regulations state that H-1Bs must be *offered* the same benefit package as U.S. workers. H-1Bs cannot be subjected to stricter eligibility criteria, and cannot be treated as temporary employees for benefits by virtue of their nonimmigrant status. The benefits received by H-1B employees do not have to be identical to those received by U.S. workers, as long as the same benefits package was offered to the H-1B and s/he voluntarily chose different benefits. Documentation of the benefit plans offered by the employer and documentation of the benefit plans offered to and accepted by the H-1B employee must be kept in the public access file. In determining penalties for violations of this provision, the DOL takes authority to assess payment of "back…fringe benefits."

Prohibition on Benching

The regulations dictate that if an employer places an H-1B in nonproductive status, which includes lack of work assignments, lack of a permit or license, and annual plant shutdowns or holidays, the employee must nevertheless be paid the full pro-rata amount due. For part-time employees, they must be paid the minimum number of hours indicated on the H-1B petition, and for employees whose petitions indicated a range of hours to be worked, they must be paid for the average number of hours he or she ordinarily works. Having a part-time employee regularly work more hours than was represented on the petition will be considered a misrepresentation subject to penalty.

If the nonproductive status is due to "conditions unrelated to employment" at the employee's request (such as caring for a sick relative or maternity leave), the employer is not obligated to pay the H-1B employee provided that the period is not subject to pay under other statutes or regulations, or under the employer's benefit plan.

These obligations begin once the H-1B employee "enters into employment", which occurs when the individual first makes himself or herself available. Even if the nonimmigrant has not yet 'entered into employment'", once the petition is approved, the employer must start to pay the required wage 30 days after the nonimmigrant is first admitted to the U.S. If he or she has already been here, such as with a change or extension of status, then 60 days after the nonimmigrant first becomes eligible to work for the employer he or she must be paid. The date when the alien "first becomes eligible to work" is the later of the start date on the petition or the approval date.

Payment obligation ends if there has been a "bona fide" termination of the employment relationship, which is defined in the preamble to the regulations, though not in the regulations, as occurring when the employer notifies the INS of the termination of the

employment relationship, the H-1B petition is canceled, and the return fare obligation is fulfilled.

Alien's Wage Offset by Cost of Attorney's Fees if Fees are Paid by Alien

The regulations now require that if the alien pays the attorney fees for the cost of the preparation of the H-1B visa petition then the higher of the prevailing wage or the actual wage must be offset by the cost of the fees paid by the alien. Therefore, if an employer requires an alien to pay the legal fees associated with the preparation of the H-1B visa petition, the employer must subtract those costs from the alien's salary when calculating whether or not the salary meets the DOL's wage requirements for H-1B employees. This provision does not change the prohibition against the employer requiring the alien to pay the $1000 "training fee" required with all H-1B visa petitions.

H-1B Alien Cannot be Penalized for Ceasing Employment Prior to an Agreed Date

ACWIA forbids an employer from making an H-1B alien pay a penalty fee for ceasing employment prior to an agreed upon date. However, the employer can receive liquidated damages in this case, although they cannot be collected by deduction from the employee's paycheck. The preamble to the regulations states that recoupment of attorneys fees may be included in liquidated damages. Once again, this provision does not change the prohibition against recoupment of the $1,000 "training fee".

Non-Aggrieved Parties Can Trigger DOL Investigation

ACWIA authorized the DOL to conduct investigations based on information received from persons who would not be considered aggrieved parties. The new regulations define the process under which the information can be received by the DOL. The new regulations state that the DOL, when in receipt of such information, must review the information to determine whether the source is likely to possess relevant knowledge, whether the information provided is specific and credible and provides reasonable cause to believe that the employer has committed a violation, and whether the alleged violation is willful, involves a pattern or practice, or involves substantial violations affecting multiple employees.

New Violations and Penalties, and Expanded DOL Authority in Conducting Investigations

The new regulations also create a new rule which states that a violation of other rules which impedes the ability of the DOL to investigate or the ability of the public to obtain information needed to file a compliant can make an employer subject to an additional $1,000 civil penalty. The preamble indicates that the penalty will apply for violations preventing public access or record-keeping violations.

In the new regulations, the DOL also takes the authority to order "make-whole relief", including reinstatement of dismissed employees, as part of its "administrative remedies." In addition, the DOL gives itself the authority to interview complainants and to extend the 30-day period for investigations if due to reasons "outside of the control" of the DOL and if additional time is necessary to obtain information from the employer or other sources.