

## Three Steps To Compliance When Terminating H-1B Employees

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An employer planning to terminate an employee on H-1B visa status needs to ensure that the termination is undertaken in compliance with not only the employment contract and applicable state and federal law, but also in compliance with Federal regulations unique to H-1B employees. If an employer terminates an H-1B employee prior to conclusion of his/her authorized period of stay, the U.S. Department of Labor (DOL) may consider the employer liable for payment of the employee's wages and other penalties until the employer effectuates a three-step process known as a "bona fide termination." Penalties for failing to comply with all three steps may include back wages plus pre- and post-judgment interest, as well as monetary penalties, and/or debarment from the H-1B program. Thus, compliance with the DOL's requirements is essential to limiting ongoing liability following the bona fide termination of an employee in H-1B status.

### Bona Fide Termination Requirements

#### Step One - Notify the Employee that the Employment Relationship has Terminated

First, the employer must notify the employee that the employment relationship has terminated. The notice should be in writing and the employer should keep a complete paper trail of all correspondence with the employee, including dates of communication. It should be clear and unequivocal in stating that the employment relationship is terminated and that the employer will notify U.S. Citizenship and Immigration Services ("USCIS") of the termination as required by applicable regulations.

#### Step Two - Notify USCIS in Writing

Next, the employer must notify USCIS that the employment relationship has ended. In doing so, the employer also ensures compliance with H-1B regulations, which impose an affirmative obligation on employers to notify USCIS when there is "any material change in the terms and conditions" of H-1B employment.

The employer should notify USCIS in writing of the termination via U.S. Postal Service certified mail with return receipt or other traceable means of delivery. As the DOL reminded an employer found liable for back wages in Matter of Limanseto, "for the price of a postage stamp" an employer could have absolved itself of significant liability.

#### Step Three - Offer to Pay the Employee's Reasonable Cost of Return Transportation

Finally, the employer must offer to pay the employee the reasonable cost of transportation to the employee's country of last residence abroad. The employer should make this offer in writing and provide the employee with a reasonable deadline to accept. If the employer purchases return transportation directly, it should keep a copy of the itinerary and/or ticket along with proof of payment. If the employer provides the employee with payment for the cost of return transportation, it should document how it determined the payment amount (e.g. a screenshot of the proposed itinerary) and keep a copy of the check. The H-1B employee should also sign a statement acknowledging receipt and/or the employer should send payment via U.S. postal service certified mail with return receipt or other traceable means of delivery. The DOL has not required employers to pay the costs of return transportation for the employee's family

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members or shipment of the employee's possessions.

An employer must perfect all three steps of the bona fide termination process to end its wage obligation under the Labor Condition Application ("LCA"). If a complaint is brought against an employer for alleged wage violations, the employer has the burden to produce clear documentation showing compliance. For this reason, retention of accurate and contemporaneous records of the bona fide termination is essential.

The employer's obligation to effectuate a bona fide termination does not attach if the H-1B employee voluntarily resigns, or his/her employment authorization ceases. In such cases, the employer should keep a signed, dated copy of the employee's resignation notice and all related correspondence in case it needs to show compliance at a later date.

### **Potential Exposure for Violations**

The DOL has the authority to investigate and prosecute H-1B violations, including LCA wage violations. The DOL may initiate H-1B-related investigations in four situations:

1. Upon complaint from an aggrieved person or organization;
2. Upon receipt of specific, credible information from a reliable source that an employer has, within the last five years, failed to meet certain LCA conditions, has engaged in a pattern or practice of failures to meet such conditions, or has committed a substantial failure to meet such conditions that affects multiple employees;
3. Upon finding by the Secretary of Labor that an employer has, within the last five years, committed a willful failure to meet a condition specified in the LCA or willfully misrepresented a material fact in the LCA; or
4. Upon establishment by the Secretary of Labor of reasonable cause to believe the employer is non-compliant.

When an employer fails to effectuate a bona fide termination and ceases payment of the terminated H-1B employee's wages, a DOL investigation most frequently stems from a complaint filed by the terminated H-1B employee for non-payment of wages.

If the DOL, upon investigation, determines the employer committed a wage violation, it may order the employer to pay back wages to the H-1B employee for the entire term of the LCA supporting the H-1B petition, calculated at the higher of the actual or prevailing wage. The H-1B employee may also be entitled to pre- and post-judgment interest on all back wages due.

The DOL may also impose civil monetary penalties on the employer up to \$1,000 per violation and up to \$5,000 per violation if the DOL finds there was a "willful" failure to comply with the regulations, a "willful" misrepresentation of a material fact on the LCA, or discrimination against an employee. If the DOL finds a "willful" failure to comply and the violation resulted in the displacement of a U.S. worker(s), additional penalties up to \$35,000 may be imposed. The employer may also be temporarily disbarred from future use of the H-1B program.

Generally, mitigation of damages does not apply to reduce the employer's liability. Even if the H-1B employee finds new employment following termination, the employer may still be liable for back wages and interest for the duration of the LCA term if it did not effectuate a bona fide termination.

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### **Additional Considerations**

The DOL has found that lack of knowledge regarding the bona fide termination process is not an excuse for failure to comply. While it is possible to terminate H-1B employees when necessary, employers should carefully complete and document all three steps required to effectuate a bona fide termination immediately following the date of termination. The DOL does not afford the employer any grace period following the date an H-1B employee is terminated in which to effectuate a bona fide termination; thus, an employer should continue paying the H-1B employee's wages up until the date the bona fide termination is complete. Potential liability for non-compliance is significant, but can be readily avoided if proper procedures are followed.