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from 4,833 successful mediations in FY 1999. Mediated cases were resolved in an average of 96 days.

According to Klein, these improvements came despite a decrease in the funding available to the EEOC for the program. "Funding was reduced last year so they had to make some adjustments in terms of the number of outside mediators they use, but they still had a lot of success and employers as well as employees viewed it favorably." He says that the overwhelming majority of participants said they would go through the process again to resolve disputes, should the need arise.

Arbitration: Out

When asked about other trends in alternative dispute resolution, Klein tells *HRWire* that HR professionals can expect tough court scrutiny of mandatory arbitration agreements. While courts are very supportive of ADR efforts, mandatory arbitration clauses are often viewed skeptically, he says. Employers that include such clauses in their employment contracts need to ensure the language is reasonable (see *HRW Sept. 18/00*).

Contact: Steve Adler, partner, employment law department, Cole Schotz Meisel Forman & Leonard, email sadler@coleschotz.com; Jeffrey Klein, partner, employment law group, Weil, Gotshal & Manges LLP, email Jeffrey.klein@weil.com.

Online: EEOC 2000 Accomplishments Report, http://www.eeoc.gov/accomplishments-00.html.

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MANAGING A WORKFORCE

Immigration

Complex H-1B Visa Regulations Take Effect

by Timothy Pajak

Among the rainstorm of regulations issued in the final days of the Clinton administration are complex new regulations geared toward requiring employers to provide equal treatment to U.S. and H-1B workers, as well as protections against abuse of the visa program.

The "interim final" H-1B visa rule, which took effect Jan. 19, implements and clarifies the procedures employers must follow in applying for H-1B visas. Some provisions are not included in the interim final rule, but will be considered when a final rule is promulgated.

Key provisions

The regulations are the incarnation of rules that were struck down by the courts after the National Association of Manufacturers (NAM) sued the Department of Labor over five years ago. NAM vice president of human resources Sandy Boyd tells *HRWire* that NAM is concerned about some parts of the regulations and is contemplating another lawsuit. Issued by the DoL's Employment and Training Administration, the rules implement statutory changes to the Immigration and Nationality Act (INA) enacted through the 1998 American Competitiveness and Workforce Improvement Act (ACWIA). The regulations also reflect more recent amendments to the INA: former President Clinton's October approval of an increase in the H-1B visa quota to 195,000 during the next three fiscal years.

Major regulatory changes to the H-1B program affect all H-1B employers in four primary areas.

Benefits. Employers must offer benefits to H-1B employees on the same basis that they offer benefits to U.S. workers.

Compensation. Businesses must pay H-1B workers when the workers are placed in non-productive status for work-related reasons such as a lack of a license or lack of work. The American Council on International Personnel Inc. (ACIP) is concerned this rule may lead employers to treat H-1B holders more favorably than U.S. workers because of the provision stipulating that employers pay H-1B workers even during periods of downtime. If a company decided to lay off workers for a couple of weeks before a restructuring, U.S. citizens wouldn't get paid during that period, says Lynn Shotwell, director of government relations at ACIP. Yet, the provision implies that H-1B holders would receive payment during that period.

Whistleblowing. H-1B holders are granted "whistleblower protection," allowing them to stay in the U.S. for the duration of their visa if they report visa abuses by their employers. It also provides that the Department of Justice and DoL will develop a procedure under which the DoJ may allow H-1B worker

whistleblowers to stay in the United States for up to six years.

H-1B dependency. Until Oct. 1, 2003, the subset of H-1B employers who are "H-1B dependent" (mostly technology recruiting firms or contractors with a workforce consisting of at least 15 percent H-1B holders) or are willful violators of past H-1B regulations are required to make the following attestations:

- The non-displacement provisions generally prohibit these employers from replacing U.S. workers with H-1B workers and from placing H-1B workers at other employers' work sites where U.S. workers have been displaced; and
- The recruitment provision requires these employers to make good faith efforts to hire qualified U.S. workers before hiring H-1B workers and to hire U.S. workers if they are at least as qualified as the H-1B workers they intend to employ. Employers must preserve documents in the public access file, including places and dates of the advertisements and postings; content of ads or postings; and documentation concerning the consideration of applications of U.S. workers, such as copies of applications, rating forms and job offers.

Are you dependent?

Greg Siskind, an immigration attorney for Siskind, Susser, Haas & Devine suggests that employers read through the 150 pages of regulations carefully. "There are a lot of issues [the DoL has] dealt with through regulation that employers have to stop and really go through a long analysis to figure out which set of rules applies to them," he tells *HRWire*.

"Calculating whether an employer is H-1B dependent is something that they haven't made easy," says Siskind. "So even if you're not H-1B dependent you still have to go through this calculation. It depends on a lot of things: if you've got a combination of part-time and full-time workers, if you have a family of companies that you control, if you have workers spread out over various companies."

The calculation process is complicated in that "there may be some companies that are actually having to comply with both the rules for being dependent and not being dependent, depending on what the snapshot was when they actually filed the labor condition application (LCA)," Siskind tells *HRWire*. "You have to revisit these rules every time you file a LCA for someone," he adds.

New problems?

The H-1B dependency provision primarily affects staffing firms, but it also affects the employers to whom these firms provide workers. Employers must document that they have not had any layoffs in the 90 days before and after an H-1B visa is submitted.

For large businesses, gathering that data can be difficult. For example, Lucent Technologies recently announced plans to eliminate up to 16,000 jobs in a restructuring effort designed to cut costs. "Lucent may decide that if things pick up for them that they want to bring back workers on a contract basis," says Siskind. Recruiting consultants from

H-1B for Breakfast

During January and February, the Society for Human Resource Management (SHRM) is hosting a breakfast briefing on the H-1B regulations in seven cities.

SHRM will discuss the major provisions of the regulations and several other issues the regulations address:

- use of electronic notification as an alternative method of notifying U.S. workers that the employer intends to employ H-1B nonimmigrant workers;
- changes in civil money and other penalties for violations;
- special rules applicable to academic pay, prevailing wage computation, and DOL investigations;
- issues on which the DoL had previously requested comments, including the short-term placement of H-1B workers not covered by an LCA; and
- new LCA (Form ETA 9035) and processing system.

Visit http://www.shrm.org for more details about the programs in Chicago; Southfield, Mich.; Edison, N.J.; Atlanta; Charlotte, N.C.; New York; and Vienna, Va.

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a technology recruiting firm could then pose a problem for Lucent.

Employers dependent on H-1B visas confront this situation when they contract a worker out to a client site (like Lucent). "They now have to be able to document in their public access files that they have attempted to ascertain whether there have been layoffs at the secondary site," Siskind explains to *HRWire*. "It may be that Lucent, by having these kind of layoffs, now is not going to be able to bring independent contractors in to take over any of that work, based on these new regulations. H-1B dependent employers would be barred from placing people at Lucent for three months after the layoffs." Of course, Siskind adds, if a company is gradually laying people off, the 90-day period could actually stretch over a long period.

Not so fast

"The main way to approach this regulation is to try and do it in a real organized fashion, particularly with respect to the public access files, where employers have to be very oriented toward following checklists to make sure that they have declared everything," Siskind says. "In general, I think that the firms that have thought of H-1Bs just as a matter of filing a few simple papers are going to be in for a rude awakening. This is a very complex process and they need to give themselves more time and consult with counsel."

Siskind suggests employers consider outsourcing some of the H-1B work normally done in-house. "A lot of HR people take on full responsibility for working on H-1B visas … but I think the regulations illustrate that there are a lot of legal questions that need to be addressed," says Siskind.

Although the DoL has historically been somewhat lax at enforcing LCA rules, and there haven't been any signals yet as to how the new administration would enforce the regulations, Siskind offers some advice. "If a company chooses to ignore the regulations thinking that the Bush administration is not going to push for enforcement, they may have to pay the price later on," says Siskind. "Don't assume that a lack of enforcement now means you are always going to be protected," he tells *HRWire*. "If the economy tanks and unemployment skyrockets the first thing people want to do is crack down on immigration."

Finally, it's important to note that these regulations are not affected by a White House regulatory review directive intended to stop various regulations from being published in the *Federal Register* and can be reversed only by going through the administrative process again or through the courts.

Contact: Greg Siskind, partner, Siskind, Susser, Haas & Devine, 800/748-3819, email gsiskind@visalaw.com; Sandy Boyd, vice president of human resources, NAM, 202/637-3133.

Online: Text of the H-1B regulations can be found at http://www.dol.gov/dol/eta/public/regs/fedreg/final/2000122001.htm; Law Offices of Carl Shusterman, http://www.shusterman.com; Visit Siskind, Susser, Haas & Devine's summary of the regs at http://www.visalaw.com/00dec4/3dec400.html.

Related Articles: *HRW Oct. 9/00*, "Move Fast to Snap Up Newly Approved H-1B Visas."

National Programs

Don't Worry Phil, You're Not Alone

by Timothy Pajak

For employers wondering if Punxsutawney Phil will see his shadow this year, it is time to stop and answer another question. Will you see your shadow on Groundhog Day?

Employers all over the country will be flooded with students getting an up-close look at the world of work from professional mentors on Friday, Feb. 2. Groundhog Job Shadow Day is a year-long effort to use on-the-job experiences and a carefully crafted school curriculum to tie academics to the workforce. In 2000, more than one million young people and 75,000 businesses participated; in 2001 the number of participating employers is expected to grow to 100,000.

Why shadow?

Groundhog Job Shadow Day was first conducted by the Boston Private Industry Council in 1996 as part of its School-to-Work effort. The event was repeated throughout the Southeast in 1997, when BellSouth sponsored a Job Shadow Day. In 1998, the first national Job Shadow Day was created by America's Promise, Junior Achievement, the Society of Human Resource Management's School-to-Work Committee, and the American Society of Association Executives.

The goal of the job-shadowing program is to get young people into the workplace to find out what skills and education are needed to make it in today's job market. According to the spon-