



MANAGING A WORKFORCE

Layoffs & Downsizing

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Downsizing? Be Aware of Immigration Regs Impact

by Timothy Pajak.

Among the industries announcing the most layoffs during the first two months of 2001 were telecommunications, e-commerce, and computers.

Lucent Technologies, Motorola Corp., and Nortel Networks--three companies that have announced layoffs and also happen to employ a large number of H-1B workers--are among the employers that must evaluate how existing immigration regulations could affect the company. But all too often significant immigration-related downsizing issues fall by the wayside.

Give 'em time ...

"The key issue for employers is to realize that layoffs have a different impact on a foreign worker than they do on U.S. workers," Marc Topoleski, partner with Siskind, Susser, Haas & Devine, tells *HRWire*. "You can counsel a U.S. worker on filing for unemployment and give them some career service to help them find a job. But there are some different issues involved for immigrant workers."

Nonimmigrant work visas, including the H-1B, L, E, and TN temporary visas, are issued for the specific purpose of employment with a particular employer. A nonimmigrant residing in the U.S. under one of these visas is legally authorized to remain in the U.S. only as long as they are employed with the particular employer noted in their visa application, says Topoleski. But when an employer lays them off, the employee loses their visa status.

Without a timely notice, these employees must quickly find an alternative visa status to legally remain in the United States. But if the nonimmigrant employee cannot secure an alternative status, they have to choose between staying in the country illegally or returning to their home country to consider seeking a new visa status from abroad. Since his or her dependents legal status is based on the status of the nonimmigrant worker, they must also leave the country.

... plenty of time

"Securing an alternate visa status on short notice is very difficult to do," says Topoleski. "Even if the nonimmigrant is fortunate enough to secure an alternate employment offer, he or she would not be permitted to begin work for the new employer under most nonimmigrant work visa categories until a new visa petition is actually approved." (This can take several months, and Topoleski suggests HR managers should bring the issue to the attention of those making layoff decisions.)

Although H-1B workers can legally start work for a new employer immediately upon filing a new visa petition they can rarely expect to find a new employer willing to sponsor them instantaneously upon being notified of their termination, says Topoleski. Furthermore, nonimmigrants without immediate job prospects may be able to secure a different temporary status such as a tourist visa, but it would not allow them to be employed.

Under most state laws, the nonimmigrant would generally be ineligible for unemployment compensation

because such laws usually require that they must be available to work and authorized to accept work to be eligible for compensation, says Topoleski. "Unlike their U.S. counterparts, these alien workers must get by without any supplemental income during this interim period even though unemployment taxes were deducted from their wages while they were employed," Topoleski adds.

"Do over"

Employers often agree to sponsor immigrant workers for lawful permanent residency status (LPR)--a process which may take several years and consists of three steps: through labor certification, the employer must prove to the DoL that it hasn't been able to find a domestic employee to fill the alien's position; the employer files an immigrant petition with the INS; after this petition is approved, the employee petitions for the adjustment of his or her status to LPR with the INS. "Alien employees who are laid off during the first two steps of the LPR process cannot continue with their application," says Topoleski. Instead, they must restart the entire process with another employer.

Potential consequences

Employers must determine how necessary the following considerations are for their specific situation:

Notify the INS and pay for transportation. Most employment-related visas require the employer to notify the INS when an alien has been fired so that INS can revoke the visa. "Employers are obligated to pay for return travel for that employee back to their home country," Topoleski tells *HRWire*. Employers who do not comply with these responsibilities are risking being subject to continuing wage obligations for the employee. "The employer's payment obligation ends only if there has been a 'bona fide' termination of the employment relationship, which the DoL will deem to have occurred when the employer notifies the INS of the termination, the H-1B petition is canceled, and the return fare obligation is fulfilled," says Topoleski.

Offer the same severance benefits. Under the newly issued immigration regulations, all employers with H-1B workers must provide these workers with fringe benefits equivalent to those of its U.S. workers. Although Topoleski tells *HRWire* that the DoL has not clarified whether severance benefits would fall under the definition of "fringe benefits," he says the DoL could possibly interpret the failure to provide similar severance benefits to both U.S. and H-1B employees as a violation of the regulations.

Calculate H-1B dependency. When an employer fires a significant number of employees, Topoleski says it is important that the employer recalculate if it is an H-1B dependent employer. This is especially important because non-dependent employers that become dependent will become subject to additional legal requirements applicable to H-1B dependent employers, while an H-1B dependant employer that becomes non-dependent after a downsizing relieves itself from those obligations. "If you are an H-1B dependent employer you need to carefully study the issue and determine what your future hiring plans are going to be," Topoleski tells *HRWire*. "The DoL has gone on the record saying it is planning to step up its enforcement efforts in the coming months related to these new regulations."

Keep good records. H-1B dependent employers must keep detailed records relating to all layoffs impacting U.S. workers. Employers that violate some displacement provisions can be subject to monetary penalties as well as possibly being barred from using the H-1B program (see [HRW Jan. 29](#)).

HR strategy

In sum, the following are additional tips Topoleski suggests could prevent the negative consequences an employer might face during downsizing:

- Provide alien employees expected to be laid off with advance notice. "If you can give advance notice to an employee of a layoff, that gives them the opportunity to do a job search and hopefully find new employment thus allowing them to immediately start work for that new employment," Topoleski tells *HRWire*. "Whereas, if you don't give them any notice and just give them a pink slip today, then they are out of status that day."
- Try to fully understand each workers particular immigration situation, and consult with an immigration

attorney if you don't feel like you understand the immigration issues facing your employees.

- Be aware of all of the immigration-related obligations that apply to you based on the types of alien employees you are laying off.
- Continually reassess whether layoffs will impact the H-1B dependency determination.
- H-1B dependent employers should consider how layoffs--including those at other companies where you place your employees- will impact the prohibition against displacing U.S. workers.

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