Legal Update Article

Manufacturing, Other Employers' Compliance With Immigration Rules During Strikes

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After the United Auto Workers' (UAW) labor contracts with the "Detroit Three" automakers expired on September 14, 2023, and the parties were not able to agree on new contract terms, the UAW began striking at targeted plants at midnight on September 15, 2023. Manufacturing and other companies within the automotive supplier network bracing for a resulting downturn in orders may be looking to implement potentially long-term loss mitigation strategies such as furlough, pay cuts, altered schedules, and even layoffs. Employers of foreign workers must consider how these actions affect their compliance with federal immigration rules.

While jobs covered under the UAW labor contracts with the Detroit Three are not ones supporting visa sponsorship, the ancillary effects of the strike can present compliance issues for vendors and other affected employers. Generally, any material change in the conditions of a foreign national's employment can affect the validity of the underlying legal status and work authorization, depending on the nature of the change and specific nonimmigrant work visa category. Blanket cost-reduction actions that touch employee compensation and working conditions are precarious because the employer is then exposed to potential immigration violations.

Federal immigration regulations strictly prohibit the involuntary benching of employees holding H-1B, H-1B1, or E-3 (collectively referred to here as "H-1B") work visa status. This rule was implemented to combat the occurrence of employers placing H-1B workers in unpaid, non-productive status (aka, on the "bench") upon the end of a project or if there was not sufficient work available. By definition, "furlough" is a temporary pause in the employee's work and pay. Therefore, the involuntary furlough of an H-1B employee is not permitted and subjects an employer to sanctions, including back wages, civil fines, and, potentially, even debarment from the H-1B program. This leaves the employer with the difficult choice (and potential employee-relations challenge) of continuing regular salary distribution to its H-1B employees during the period of non-productive time, while their U.S. worker counterparts are furloughed, or terminating the H-1B employment outright.

The immigration rules also prohibit salary reductions or any alteration in the H-1B employee's work schedule that would constitute a pay cut. The employer is required to pay the H-1B worker the higher of the actual wage or the prevailing wage under the Labor Condition Application (LCA) certified by the Department of Labor (DOL). The prevailing wage is not the same as minimum wage but is the wage rate that DOL considers to be the "normal" salary for the particular occupation, based on the location of employment and required skill level. The employer is not permitted to reduce the salary of H-1B employees below the applicable prevailing wage for that employee. Again, the employer is put in a very difficult position, potentially exacerbating employee-relations challenges.

Further, if the wage reduction or altered work schedule does not bring the H-1B worker's salary below prevailing wage level but, nonetheless, is considered a material change in the

conditions of employment, then the employer must notify DOL and U.S. Citizenship and Immigration Services (USCIS) of a change in working conditions through a new LCA and amended H-1B petition. Depending on the number of H-1B workers requiring amendment, this can be cost-prohibitive, and employers may be forced to evaluate terminations. If the employer opts to involuntarily terminate the employment of the H-1B worker, the employer has an affirmative obligation to notify DOL and USCIS and to provide the separated H-1B worker the reasonable cost of return transportation to the worker's home country.

There are other categories of employer-sponsored work visas that do not have the restrictions on benching and wage reductions as the H-1B, including E-1, E-2, L-1, O-1, and TN. In most cases, employees holding these other work visas may be included in an employer's mitigation actions, including furlough and temporary wage reduction. Generally, furloughed employees are eligible for supplemental unemployment benefits during the period of furlough under state law. However, a foreign worker who has been furloughed is not automatically eligible to collect unemployment benefits. Unemployment benefits vary by state, and each state has its own rules pertaining to a foreign national's eligibility for benefits. Most states require that the claimant be available to work, able to work, and resident in the state. Many states further define eligibility of foreign nationals based on the definition of "resident alien" in IRS tax rules. The unemployment rules are very complicated when dealing with non-citizen employees. Eligibility varies depending on the state, the employee's visa status, and the employee's individual circumstances.

If a strike is prolonged, then employers likely will start to evaluate the need for more definitive action, such as permanent layoffs or a reduction in force. A reduction in force can make it difficult for the employer to continue employment of certain sponsored employees on a long-term basis, delaying the foreign worker's pursuit of permanent residence under labor certification. The employer's inability to sponsor for labor certification then puts the foreign worker in jeopardy of maxing out of available work authorization, leading to termination of employment and the worker's departure from the United States, and the employer loses a valuable resource in moving its business forward.

Please contact a Jackson Lewis attorney with any questions.