Attorney Advertising

Employment Law Monthly

August 2016

AN ALIEN CONCEPT CREATES LIMITS ON EMPLOYEE PAY REDUCTIONS

By: Janelle Edwards-Stewart

During bad financial times, such as the 2008 recession, it is only natural for employers to seek to cut costs. For most employers, the greatest business expense is employee salaries. Layoffs, reductions in force, and even re-categorizing employees into lower paying positions are common means to reduce overall salary expenses. However, employers should be warned that, if the employee is a H-1B employee, re-categorizing may not be an option. Last month, Valero learned this lesson the hard way.

THE BACKGROUND AND FACTS

Prior to the 2008 recession, an operator of two Valero gas stations hired a financial analyst, an electrical engineer, and an electrical engineering manager under the H-1B provision of the Immigration Nationality Act (INA). The H-1B Reform Act of 2004, which amended the INA, permits employers to hire nonimmigrant aliens (persons with permanent residence outside of the U.S. but who wish to work in the U.S. temporarily) as workers in "specialty occupations" (occupations that require application of highly specialized knowledge and attainment of a bachelor's degree or its equivalent). Under this arrangement, a Labor Condition Application (LCA) governs the employer-employee relationship and, among other things, requires employers to pay their nonimmigrant alien employees the greater of the actual or prevailing wage rate.

During the economic downturn, Valero advised its H-1B employees that, due to the economic conditions, which had been exacerbated by a minimum supply contract for gas purchases that it could not fulfill, it could no longer

EDITOR-IN-CHIEF

Vito A. Gagliardi, Jr.
973.889.4151
vagagliardi@pbnlaw.com

EMPLOYMENT LAW ATTORNEYS

David L. Disler
Janelle Edwards-Stewart
Marie-Laurence Fabian
Vito A. Gagliardi, Jr.
Emre M. Polat
Eliyahu S. Scheiman
Deborah H. Share
Kerri A. Wright

James H. Coleman, Jr.
Retired Justice, New Jersey Supreme Court

Maurice J. Gallipoli
Retired Judge, Superior Court of New Jersey

Alvin Weiss
Retired Judge, Superior Court of New Jersey

STAY CONNECTED

More on Us

support them in full-time positions at the prevailing wage rate. To avoid terminating them, Valero then made new agreements to continue their employment on a part-time basis at the prevailing *hourly* wage. This new arrangement resulted in each employee receiving $520 bi-weekly -- far less than the prevailing wage specified in their original LCAs. Indeed, a later investigation by the Department of Labor (DOL) Wage and Hour Division revealed that Valero's formerly full-time electrical engineer was paid $30,953 over the period covered by his original LCA, but should have been paid $116,473; its formerly full-time financial analyst received $58,890, but should have been paid $181,642; and its formerly full-time electrical engineering manager received $29,455, but should have been paid $51,015.

Eventually, an employee filed a DOL complaint, alleging violations of the H-1B provisions of the INA, including a failure to pay H-1B employees the prevailing wage specified in their LCAs.

THE DECISION

The DOL reviewed the matter in June 2016. It accepted the differences in the sums paid and the prevailing wages specified in the original LCAs as undisputed facts in the record and promptly concluded that Valero had violated the wage payment provision of the H-1B Reform Act.

The DOL then evaluated, in the nature of an affirmative defense, Valero's economic hardship argument. Valero averred that, due to the recession and the minimum supply contract that had caused it to become grossly in debt, its only alternative to terminating its full-time H-1B employees was reducing them to part-time employment at the prevailing hourly wage. Since it could not afford to pay the prevailing wage, continuing their employment on a part-time basis demonstrated its good faith effort to maintain its employees employment and comply substantially with their LCAs.

Notwithstanding the evidence of Valero's financial hardship, the DOL opted for a strict application of the federal regulations. Under 20 C.F.R. § 655.731(c)(7)(i), an H-1B worker in a "nonproductive status due to a decision by the employer," must still be compensated at "the full pro-rata amount due . . . at the required wage for the occupation listed on the LCA." An employer would only be excused from its salary payment obligations for conditions "unrelated to employment," which take the worker away from the workplace for reasons voluntarily requested by the worker, or for cases of bona fide termination. 20 C.F.R. §655.731(c)(7)(ii). In other words, in order for the H-1B employer to be relieved from paying wages for nonproductive periods, the employer must prove (1) the existence of conditions unrelated to the employee's employment that (2) took the employee away from his/her duties at his or her request and convenience, or (3) otherwise rendered the employee unable to work. The DOL found nothing in the record to establish an excuse on any of the aforementioned bases. As such, the DOL concluded that "the LCAs at issue were

approved for full-time positions, and thus [Valero] -- despite the flagging economy -- was legally obligated to pay the wage rates for a full-time schedule."

The DOL granted the three H-1B employees a total of $229,833 in back wages.

THE BOTTOM LINE

Hard economic times do not provide an excuse to reduce full-time H-1B workers' hours to part-time levels. The LCA, which governs the employer-employee relationship, guarantees employees the actual or prevailing wage.

The Porzio Employment Law Monthly is a summary of recent developments in employment law. It provides employers with an overview of the various legal issues confronting them as well as practical tips for ensuring compliance with the law and sound business practices. This newsletter, however, should not be relied upon for legal advice in any particular matter.

© Copyright 2016 Porzio, Bromberg Newman, P.C. All Rights Reserved | 973-538-4006