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PROTECT AND GROW AMERICAN JOBS ACT (H.R. 170)
Issa-Lofgren Substitute

Passed House Judiciary Committee November 15th, 2017

EXECUTIVE SUMMARY

Dependent Company (defined as more than 20 percent H-1B):

- Must pay mean wage if placed at third-party worksite;
- Violates the LCA if it places an H-1B worker at client site and client displaces a U.S. worker;
- Must attest that company:
  - Will not displace a U.S. worker during entire employment period;
  - Will not place an H-1B worker at, within, adjacent to, or close to a client site (if indicia of employment with client are present) unless client provides written assurance that client has not and will not displace a U.S. worker. Client must also agree to provide DOL with "reasonable information" to carry out investigations;
  - If hiring a non-exempt H-1B worker, has recruited and offered job to U.S. workers, and provide recruitment report to DOL with each filing;
- Will be subject to random audits (and DOL will audit 5 percent of dependent employers each year); and
- Must pay a $495 fee with each filing.

Non-Dependent Company:

- No new wage restrictions or obligations;
- If another H-1B dependent company will place H-1Bs onsite or close by and there are indicia of employment relationship:
  - The company must agree to provide reasonable information to DOL to carry out investigations, and
  - The company must provide written assurance to sponsoring H-1B dependent employer that the company did not and will not displace a U.S. worker during period of placement.

Reporting:

- Gov't must publish annual report on H-1B dependent employers listing worksites, occupations, wages and investigations.

Provision	Current Law	Substitute
Wage Levels for H-1B Workers	All H-1B employers must pay the higher of the (i) actual wage (company) level and (ii) prevailing wage (industry) level.	All H-1B employers must pay the higher of the (i) actual wage (company) level and (ii) prevailing wage (industry) level. H-1B dependent employers who place workers at third-party worksites where there are indicia of employment must also pay the mean wage level in the area of employment if it is higher than the actual or prevailing wage. The mean is the sum of all wages divided by number of workers.
Definition of "H-1B Dependent"	"H-1B dependent" means an employer with: • Less than 25 employees, at least 7 H-1Bs; • 26-50 employees, at least 12 H-1Bs; or • >51 employees, at least 15 percent H-1B.	Increases the H-1B dependent employer threshold from 15 percent to 20 percent.
Filing Fees for High Volume Users	Employers who have more than 50 percent H-1B or L-1 workers must pay an additional $4,000 fee.	H-1B dependent employers (more than 20 percent) must also pay a new $495 fee for each beneficiary (principal only).
Employees of H-1B Dependent Companies "Exempt" from Additional Obligations	An H-1B dependent employer does not have to make attestations regarding (i) non-displacement, (ii) secondary displacement, or (iii) recruitment, if the H-1B worker is "exempt," which means he or she will be paid at least $60,000 and/or has a master's or higher degree.	NOTE: although the legislation changes the definition of "exempt" H-1B employees, an H-1B dependent company will always be subject to (i) non-displacement and (ii) secondary displacement obligations. An H-1B dependent company avoids the recruitment attestations if it hires an "exempt" H-1B worker. An H-1B worker is "exempt" if he or she is paid as follows: • Year One: the lesser of $90,000 and the mean wage level for the occupation in the area of employment.

		• Year Two and After: the lesser of (i) $135,000, and (ii) the greater of $90,000 and the mean wage level for the occupation in the area of employment. Salary levels will be adjusted each year based on Consumer Price Index (CPI).
H-1B Dependent Employer: Non-Displacement Attestation	A non-H-1B dependent company is not required to make an attestation regarding displacement. An H-1B dependent employer (15 percent or more H-1B) must attest that it did not displace and will not displace an essentially equivalent U.S. worker within the period beginning 90 days before and ending after the filing of the petition. Exception: The employer does not have to attest to this if the H-1B worker is considered "exempt," meaning he or she will be paid at least $60,000 and/or has a master's or higher degree.	An H-1B dependent employer (20 percent or more H-1B) must attest that it did not displace and will not displace an essentially equivalent U.S. worker within the period beginning 90 days before filing the petition and during the entire timeframe of employment (including extensions).
H-1B Dependent Employer: Secondary Displacement/ Outplacement	An H-1B dependent employer may not place an H-1B worker with another employer if the beneficiary performs duties at a worksite owned, operated or controlled by such other employer, and there are indicia of an employment relationship. This provision does not apply if the sponsoring employer has inquired of the other employer as to whether, during the period 90 days before and after the date of placement, the other employer has displaced or intends to displace a U.S. worker.	An H-1B dependent employer may not place an H-1B worker at a worksite (i) owned, operated or controlled by a third-party, or (ii) physically located within, adjacent to, or in close proximity to, such a third-party worksite, if there is an indicia of an employment relationship. This provision does not apply if the H-1B sponsoring employer has received written assurance from the third party that, during the 90-day period before and throughout the conclusion of the placement, the other employer (e.g., client): (i) has not and does not intend to displace a U.S. worker, and (ii) will inform the sponsoring employer if a

		displacement does occur during that period. If displacement does occur at client site, the sponsoring employer must then (i) notify DOL; and (ii)and cease placement at the client site and performance of any services for the client of the H-1B worker and other H-1B workers employed in jobs that are essentially equivalent to that of the H-1B worker. Additionally, the third party employer (e.g., client) must provide written assurance that it will provide DOL with reasonable information as DOL may request to carry out investigations.
H-1B Dependent Employer: Recruitment	An H-1B dependent employer must attest that it has taken good faith steps to recruit U.S. workers using industry-wide standards and is offering compensation that is at least as great as that required to be offered to H-1B workers. An H-1B dependent employer must attest that it has offered the job to any U.S. worker who applies and is equally or better qualified. <u>Exception</u>: The employer does not have to attest to this if the H-1B worker is considered "exempt," meaning he or she will be paid at least $60,000 and/or has a master's or higher degree.	An H-1B dependent employer must comply with existing legal requirements and submit a report with each LCA summarizing recruitment efforts, including the number of U.S. workers that applied, the number of U.S. workers who were offered jobs accepted, and the reason each U.S. worker was not offered the job. An H-1B dependent employer does not have to attest to recruitment if the H-1B worker is considered "exempt" (defined above).
Department of Labor Investigative Authority	The Department of Labor has limited authority to initiate an investigation into H-1B abuses and may not rely on information submitted to U.S. Citizenship and Immigration Services (USCIS) as a basis for conducting an investigation.	An H-1B dependent employer violates the LCA if it places a beneficiary at a third-party worksite and the other employer displaced or displaces a U.S. worker. DOL (i) may subject dependent companies to random audits, and (ii) is required to audit annually at least 5 percent of H-1B dependent companies.

Report on H-1B Dependent Employers	There is currently no reporting requirement.	DOL and DHS must publish a report on H-1B dependent employers, including: 1) The occupational classifications and wages; 2) The worksites at which the beneficiaries will work; and 3) Investigations conducted by DOL.

Is there an indicia of an employment relationship?

Current DOL regulations define "indicia of an employment relationship" very broadly. The relationship between the H-1B-nonimmigrant and the other/secondary need not constitute an "employment" relationship. Relevant indicia of an employment relationship include:

(A) The other/secondary employer has the right to control when, where, and how the nonimmigrant performs the job (the presence of this indicia would suggest that the relationship between the nonimmigrant and the other/secondary employer approaches the relationship which triggers the secondary displacement provision);

(B) The other/secondary employer furnishes the tools, materials, and equipment;

(C) The work is performed on the premises of the other/secondary employer (this indicia alone would not trigger the secondary displacement provision);

(D) There is a continuing relationship between the nonimmigrant and the other/secondary employer;

(E) The other/secondary employer has the right to assign additional projects to the nonimmigrant;

(F) The other/secondary employer sets the hours of work and the duration of the job;

(G) The work performed by the nonimmigrant is part of the regular business (including governmental, educational, and non-profit operations) of the other/secondary employer;

(H) The other/secondary employer is itself in business; and

(I) The other/secondary employer can discharge the nonimmigrant from providing services.

Current: November 15, 2017