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The H-1B visa program was established in 1990 to allow U.S. employers to employ foreign workers temporarily in specialty occupations, but a trend has been reported of some companies laying off existing workers and replacing them with H-1B visa holders, attorneys Esther G. Lander and Andrew R. Turnbull of Akin Gump say in this Bloomberg BNA Insights article. Particularly given the intense scrutiny of some members of Congress and regulators, employers contemplating laying off workers and hiring or outsourcing the work to staffing firms with H-1B or other visa holders should proceed cautiously, the authors say, offering guidelines for averting litigation.

Defending and Avoiding Citizenship Discrimination Claims When Using Staffing Firms with H-1B Visa Holders

By Esther Lander and Andrew Turnbull

Today's H-1B visa program was established in 1990 to allow U.S. employers to employ foreign workers temporarily in specialty occupations. The program was intended to serve employers that could not find skilled workers in the U.S. for certain positions. According to media reports, a growing trend exists, particularly in the technology sector, of companies laying off existing workers and replacing them with H-1B visa holders.[1] Many of the replaced workers are frustrated because, in addition to losing their jobs, they are being tasked with training their H-1B replacements.[2]

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This reported trend has drawn the ire of some members of Congress and regulators. In April 2015, a bipartisan group of senators led by Senator Dick Durbin (D-Ill.) and Senator Jeff Sessions (R-Ala.) urged the Department of Labor ("DOL"), Department of Justice ("DOJ"), and Department of Homeland Security to investigate alleged abuse of H-1B visas by companies that lay off U.S. workers in favor of H-1B visa holders.

These Senators claim that employers are perverting the H-1B program by replacing U.S. workers in droves

[1] Letter from Jeff Sessions, U.S. Senator, and other U.S. Senators to Eric H. Holder, Jr., U.S. Attorney Gen., Jeh C. Johnson, Sec'y of the U.S. Dep't of Homeland Sec., and Thomas E. Perez, Sec'y of the U.S. Dep't of Labor (Apr. 9, 2015), http://www.sessions.senate.gov/public/index.cfm/2015/4/sessions-durbin-lead-bipartisan-group-of-senators-demanding-federal-investigation-of-socal-edison ("sixty-five percent of H-1B petitions approved in FY 2014 were for workers in computer-related occupations.").

[2] Julia Preston, *Pink Slips at Disney. But First, Training Foreign Replacements*, N.Y. Times, June 3, 2015, http://www.nytimes.com/2015/06/04/us/last-task-after-layoff-at-disney-train-foreign-replacements.html?_r=0.

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with H-1B visa holders in order to obtain lower wages and cheaper benefits rather than using the H-1B program to supplement the U.S. workforce.[3] Late last year, several senators introduced bills to increase enforcement and prevent companies from laying off workers in favor of H-1B visa holders (218 DLR A-5, 11/12/15).

Federal agencies have also increased their scrutiny of companies using H-1B and other visa holders. For example, in June of 2015, the DOL opened an investigation of two Indian staffing firms for alleged abuse of the visa process by assisting companies with replacing certain parts of their U.S. workforce with the firm's H-1B visa holders.[4] The Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices (''OSC'') has also settled discrimination claims with several companies that OSC alleged preferred H-1B and other visa holders over U.S. citizens.[5]

Replaced workers are also taking aim. Federal district courts in Wisconsin and California refused to dismiss class actions against two Indian staffing firms accused of discriminating against Americans and Caucasians in favor of foreign-born H-1B visa holders who were of South Asian race and of Indian, Bangladeshi, and Nepalese national origin.[6]

Despite the apparent risk of being subjected to increased governmental scrutiny and litigation, the practice of laying off employees and outsourcing their functions to H-1 B visa holders at staffing firms, although controversial, continues. This article explores the reasons why companies, particularly in the technology space, are turning to staffing companies that use H-1B visa holders, and whether this practice constitutes illegal citizenship discrimination. The article also provides practical measures employers can take to minimize the risk of claims.

Why Employers Use H-1B Visas

The H-1B program allows employers to hire ''highly skilled'' workers temporarily in specialty occupations. The government issues about 85,000 H-1B visas to employers annually, and recipients can stay up to six years. Nearly every year, employers snatch up the 85,000 H-1B visas within the first week they are available. Although no government agency officially tracks precisely how many H-1B visa holders are in the U.S., experts estimate there are at least 600,000 at any one time.

The H-1B program requires employers to follow certain safeguards to protect U.S. citizens and authorized immigrant workers from being adversely affected by the employment of H-1B visa holders. Specifically, employers must attest to the DOL that they will pay H-1B workers wages equal to the wages paid to other workers with similar experience and qualifications, or the prevailing wage for that occupation—whichever is greater.

H-1B dependent employers have additional requirements, including making good-faith efforts to recruit U.S. workers at the same rate of pay as the H-1B worker before hiring an H-1B visa holder and attesting that they will not displace U.S. workers in similar positions.

Employers dependent on H-1B workers, however, are not required to abide by these standards if they pay the H-1B worker over $60,000 or the worker has attained a Master's degree or higher. Many of the H-1B visa holders who are replacing technology workers reportedly qualify for these exemptions.

Some employers argue they use H-1B visa holders because they cannot find U.S. workers with the skillset necessary to fill their business needs, particularly for positions in the math, science, and technology areas. They claim the H-1B program allows employers to attract the best and brightest talent to fill those gaps without outsourcing jobs overseas.[7] Employers also are increasingly turning to H-1B staffing companies to lower their overhead cost. Several staffing firms in the U.S., which employ a large percentage of H-1B visa holders, hire thousands of mostly lower to mid-level workers on H-1B visas and place them at various U.S. companies, primarily in the technology industry or in technology jobs. In many instances, the staffing companies reportedly pay above the $60,000 exemption, but less than what a company will pay a U.S. worker performing that same position.[8] In addition to lowering compensation costs, employers reduce the administrative and healthcare costs associated with employees by outsourcing the work to these staffing firms.

Outsourcing to H-1B Visa Holders and Illegal Citizenship Discrimination

While it may seem unfair when U.S. workers are replaced by a staffing firm's foreign workers, is it illegal citizenship discrimination? The DOJ, which enforces the Immigration Reform and Control Act (''IRCA'') provisions prohibiting employers from engaging in citizenship discrimination, recently issued a technical assistance letter stating that companies are not absolved from liability when they contract with staffing firms to replace U.S. workers (248 DLR A-6, 12/29/15).[9]

The letter states that whether a company and staffing firm can be held jointly liable for citizenship discrimination depends on a number of factors, including: (1) evidence suggesting intentional discrimination in the se-

[3] (69 DLR A-6, 4/10/15).

[4] Although the DOL reportedly resolved its investigation without finding violations of the visa program rules, OSC is still considering whether this practice is discriminatory (174 DLR A-8, 9/9/15).

[5] For example, International Business Machines Corporation (''IBM'') settled allegations by OSC in 2013 that it discriminated against U.S. citizens by placing online job postings for application and software developers stating a preference for F-1 and H-1B temporary visa holders. As part of the settlement, IBM agreed to pay fines, revise its hiring and recruiting procedures, train its HR personnel, and provide reports to OSC for two years.

[6] *Koehler v. Infosys Tech. Ltd. Inc.*, 107 F. Supp. 3d 940 (E.D. Wis. 2015) (90 DLR A-1, 5/11/15); *Heldt v. Tata Consultancy Servs., Ltd*, 2015 FEP Cases 191318 (N.D. Cal. 2015) (183 DLR A-4, 9/22/15).

[7] Laura Wides-Munoz & Paul Wiseman, *Backlash Stirs Against Foreign Worker Visas*, USA Today, July 6, 2014, http://www.usatoday.com/story/money/business/2014/07/06/backlash-stirs-in-us-against-foreign-worker-visas/12266783/.

[8] Ron Hira, *New Data Show How Firms Like Infosys and Tata Abuse the H-1B Program*, Economic Policy Institute, Feb. 19, 2015, http://www.epi.org/blog/new-data-infosys-tata-abuse-h-1b-program/.

[9] Letter from Alberto Ruisanchez, Deputy Special Counsel, OSC, to Bruce A. Morrison, Chairman, Morrison Public Affairs Group (Dec. 22, 2015).

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lection of employees for discharge or rehire; (2) circumstances surrounding the selection of the staffing firm; and (3) whether the employer and staffing firm could be considered joint employers of the staffing firm workers.

In order to establish intentional discrimination under the first factor, DOJ takes the position that there need not be any showing of hostility or animus—a violation is established if it can be proven that the employer acted ''because of'' citizenship or immigration status.

To make this showing, plaintiffs typically rely on statistics and/or anecdotal evidence to create an inference of discrimination. If the employer replaces only a small number of employees with H-1B visas (e.g., less than twenty employees), then one could argue the sample size is too small to provide meaningful statistical proof.

However, regardless of sample size, an inference of discrimination may arise where the employees selected for layoff are all (or mostly) citizens, and the replacement workers are all (or mostly) non-citizens. This type of eyeball comparison is very typical of the kind of ''statistical'' evidence relied upon by DOJ in its citizenship discrimination pattern or practice cases.

Putting aside the numbers, employers may have defenses to rebut any inference of discrimination. For example, under the IRCA, a number of the workers being laid off may be non-citizens with work authorization, such as lawful permanent residents (i.e., green card holders). In that situation, U.S. citizens would be hard pressed to show an employer intentionally discriminated against them when the employer also laid off many workers who were not American citizens.

The employer may also rebut an inference of discrimination by providing a non-discriminatory explanation ''for the apparently discriminatory results.''[10] Here, companies are using H-1B workers oftentimes because they need employees with a higher-level skillset to perform the work. There can be no intentional discrimination where there is evidence that H-1B visa holders are actually performing different jobs that require a higher or different skillset than the laid-off employees.[11] Alternatively, companies are outsourcing to lower administrative and healthcare costs. Although it may be politically unpopular, there is nothing illegal about companies wishing to outsource jobs to a staffing firm to lower overhead costs, as long as they do not purposefully seek to use firms that are staffed with H-1B visa holders.[12]

As to proving that the company and staffing firm are ''joint employers,'' much will depend upon whether the company and staffing firm share significant control over the essential terms and conditions of employment.

In general, courts look at a variety of factors to assess whether a joint-employment relationship exists, including: (1) the company's authority to hire and fire the staffing firm's workers, promulgate work rules and assignments, and set conditions of employment for the workers; (2) the company's day-to-day supervision, including discipline of staffing firm workers; and (3) the company's control of the workers' records, including payroll and taxes.[13] In addition, recent agency actions have revealed the Obama administration's ongoing efforts to expand the standards for finding that companies are joint employers. Last August, the NLRB took an expansive view of joint employment in *Browning-Ferris Industries of California, Inc.*[14] In that case, the NLRB found that it was not necessary to show that the company exercised direct control over the terms and conditions of employment as long as the mere right exists (166 DLR AA-1, 8/27/15).

Similarly, the Department of Labor's Wage and Hour Division recently issued guidance under the Fair Labor Standards Act emphasizing that it will apply broad standards beyond reviewing the employer's control of the terms and conditions of staffing firm workers to determine whether those entities are ''joint employers'' (12 DLR C-1, 1/20/16).

Avoiding Outsourcing Citizenship Discrimination Claims

Employers contemplating laying off workers and hiring or outsourcing the work to staffing firms with H-1B or other visa holders should proceed cautiously and consider the following guidelines to decrease the likelihood of litigation:

- Before making layoff decisions review and document the legitimate business justifications for using staffing firms to replace employees. Test those reasons to ensure they are valid and defensible before terminating employees.

- Ensure that the criteria for layoff decisions are applied uniformly and that decision makers understand and can articulate the reasons for the decision.

- Do not select staffing firms because they use H1-B visa holders. Any communications between the company and the staffing firm regarding the citizenship of the staffing firm's workers could be viewed as direct evidence of discrimination.

- When comparing staffing firms, document legitimate criteria that are being considered, such as cost, reputation, worker skill and screening, rather than the citizenship of the staffing firm's workers.

- Do not have laid off employees train their replacements. If it is necessary, make sure training only relates to proprietary processes or information that is unique to the company, rather than training H-1B visa holders on general skills for the position.

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[10] *Bolton v. Murray Envelope Corp.*, 493 F.2d 191, 195 (5th Cir. 1974); *see also Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 616 (7th Cir. 2000) (noting that a ''basic problem is that statistics can only show a relationship between an employer's decisions and the affected employee's traits; they do not show causation'') (143 DLR A-3, 7/25/00); *Doan v. Seagate Techs., Inc.*, 82 F.3d 974, 979 (10th Cir. 1996) (''Statistical evidence which fails to properly take into account nondiscriminatory explanations does not permit an inference of pretext.'')

[11] *See Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 261-63 (4th Cir. 2005) (rejecting plaintiffs statistical analysis for failure to compare employees with similar job positions, title, performance, and rank) (88 DLR A-10, 5/9/05); *Martinez v. Wyoming*, 218 F.3d 1133, 1139 (10th Cir. 2000) (statistics not probative where they fail to account for differences in qualifications) (147 DLR A-4, 7/28/00).

[12] *See May v. Shuttle, Inc.*, 129 F.3d 165, 173 (D.C. Cir. 1997).

[13] *Sandoval v. City of Boulder*, 388 F.3d 1312, 1323 (10th Cir. 2004); *EEOC v. Pac. Mar. Ass'n*, 351 F.3d 1270, 1275-77 (9th Cir. 2003).

[14] 362 N.L.R.B. No. 186.

■ Consider offering laid off employees separation packages with properly drafted releases to decrease the likelihood of litigation.

■ Train managers, human resources, and all other decision makers about the risks of outsourcing and the standards applicable to finding joint employment. Have them consult with counsel before implementing any layoff decision.

■ Take measures to reduce the likelihood of becoming a joint employer with a staffing firm, such as: (1) ensuring that the staffing firm establishes separate terms and conditions of employment through its own employment policies; (2) drafting staffing firm agreements that clearly state the company has no authority to hire, fire, or control the terms and conditions of employment; and (3) including broad indemnification provisions in staffing firm agreements.

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