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

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


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-1B 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-

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\(^3\) (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.


\(^9\) Letter from Alberto Ruisanchez, Deputy Special Counsel, OSC, to Bruce A. Morrison, Chairman, Morrison Public Affairs Group (Dec. 22, 2015).
lection of employees for discharge or rehire; (2) circum-
stances 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 sta-
tistics 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 replace-
ment workers are all (or mostly) non-citizens. This type
of eyeball comparison is very typical of the kind of “sta-
tistical” evidence relied upon by DOJ in its citizenship
discrimination pattern or practice cases.

Putting aside the numbers, employers may have de-
fenses to rebut any inference of discrimination. For ex-
ample, 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 discrimi-
nated against them when the employer also laid off
many workers who were not American citizens.

The employer may also rebut an inference of dis-
tribution by providing a non-discriminatory explana-
tion “for the apparently discriminatory results.” Here,
companies are using H-1B workers oftentimes because
they need employees with a higher-level skillset to per-
form the work. There can be no intentional discrimina-
tion 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.

Alternatively, companies are outsourcing to lower adminis-
trative and healthcare costs. Although it may be politi-
cally unpopular, there is nothing illegal about compa-

cies 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.

As to proving that the company and staffing firm are
“joint employers,” much will depend upon whether the

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 ex-
planations 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 differ-
ences 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 See May v. Shuttle, Inc., 129 F.3d 165, 173 (D.C. Cir.
1997).

14 In that case, the NLRB

found that it was not necessary to show that the com-
pany exercised direct control over the terms and condi-
tions of staffing firm workers to de-


terminate whether those entities are “joint employers”
(12 DLR C-1, 1/20/16).

Avoiding Outsourcing Citizenship
Discrimination Claims

Employers contemplating laying off workers and hir-
ing 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 likeli-
hood of litigation:

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

■ Ensure that the criteria for layoff decisions are ap-
plied 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 com-
pany 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 legiti-

crate 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 replace-
ments. 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.

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.