Cos. Should Prepare For Harsher H-1B Program Enforcement

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Major U.S. employers that use the H-1B program are facing the possibility of a long, rough storm of H-1B investigations, the likes of which we have not previously seen.

In our Aug. 26 article, we identified what we saw as storm clouds on the horizon that set conditions for a sweeping change in how the U.S. Department of Labor approaches its enforcement authority over the H-1B program. Based on our analysis, we forecast that the Wage and Hour Division of the DOL was preparing to start using its broadest enforcement authority over the H-1B program, secretary-certified investigations.[1]

The forecast worsened at the end of September when the potential consequences of the rising storm became harsher. On Sept. 30, the DOL's Office of the Inspector General released a new audit report. The report shows the DOL intends to use these broader, sweeping investigations to ensure it catches employers that violate the programs rules, especially where those violations warrant debarment from the immigration programs.

H-1B employers should hunker down and prepare for intensive investigations of their H-1B employment practices and harsher penalties where Wage and Hour Division finds violations.

Employers have, in large part, long viewed Wage and Hour Division H-1B investigations as akin to audits aimed at ensuring that the employer is maintaining all the paperwork required by DOL regulations.[2] The Wage and Hour Division's investigative authority, however, has always been significantly broader, and past investigations have focused on substantive noncompliance with the wage, working conditions, anti-strike and lockout, and notice requirements.

The Wage and Hour Division nonetheless never used its most significant, sweeping investigative authority, secretary-certified investigations, and rarely imposed its harshest sanction, a one- to three-year debarment from participation in the immigration programs.

A report from the DOL Office of Inspector General and the response by the administrator of the Wage and Hour Division show that the DOL is poised to change course and soon.[3] The Office of Inspector General recommended, in relevant part, to the division that it:

- "Utilize the Secretary options to initiate H-1B investigations, including identifying the criteria that would allow the Secretary to initiate an investigation;" and

- "Define a process for assessing willfulness to make it less difficult to determine if an employer should be debarred."[4]

The Wage and Hour Division agreed with both recommendations.[5] It added that the DOL

"is in the process of developing procedures to initiate secretary-certified investigations."[6]

It is worth noting that Office of Inspector General titled its report: "DOL needs to improve debarment processes to ensure foreign labor program violations are held accountable."

This shows the DOL believes proper administration of the H-1B program requires debarment of violators and DOL leadership is likely unhappy with the Wage and Hour Division's implementation of its current enforcement scheme and the levels of debarment coming out of H-1B investigations.

In fiscal years 2015 to 2018, the Wage and Hour Division conducted 825 H-1B investigations.[7] The division identified violations in 649 of those investigations.[8]

This means that nearly four out of five Wage and Hour Division investigations ended with the division issuing a letter, including a summary of violations. However, only a small percentage — 5.9% — of investigations resulted in the most serious penalty, debarment from the immigration programs.

The Office of Inspector General opined that the Wage and Hour Division "increases the risk of overlooking significant violations that may be eligible for debarment" by not using the secretary-certified investigation authority because (1) workers often do not report violations as a debarment could lead to them losing their H-1B status and (2) nonsecretary-certified investigations require that an investigation be initiated within a year of the alleged violation.[9]

Reading the Wage and Hour Division's response, it seems that the division intends to overcome these obstacles by using secretary-certified investigations.[10]

The Office of Inspector General's report and the Wage and Hour Division's response are no fluke. The Trump administration has been moving toward more robust H-1B investigations and harsher penalties for violators for months. Companies should begin preparing for possible secretary-certified investigations.[11]

Recent actions by the Trump administration reveal the DOL positioning itself to begin using its secretary-certified investigation authority to initiate H-1B investigations. Such was a directive buried deep in the president's Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak and his Executive Order on Aligning Federal Contracting and Hiring Practices with the Interests of American Workers.

In addition, the has DOL entered into a new memorandum of agreement with U.S. Citizenship and Immigration Services to provide the DOL with information to support secretary-certified investigations.

Employers should prepare for the possibility of a secretary-certified investigation. They may even consider proactive audits or reviews to test their compliance with the substantive and evidentiary requirements of the H-1B program.

Considering the DOL's emphasis on debarment, such an approach may be warranted, especially where an employer has many employees in H-1B status or uses the program as recruiting tool to entice foreign talent.

Employers that the Wage and Hour Division previously found to have violated one or more

of the program's regulations should be particularly diligent. As we mentioned, nearly 80% of investigations in the past three fiscal years ended with a finding of violations.

In the letter accompanying any finding of a violation, the Wage and Hour Division almost assuredly ordered the employer to comply in the future. The division could come back to those employers, under the guise of a secretary-certified investigation, and investigate whether the employer is now in compliance.

Employers should also keep in mind the additional protections afforded to employers subjected to a secretary-certified investigation. These include, but are not limited to:

- Secretary's personal certification that reasonable cause exists for the investigation;[12]

- Secretary-certified investigation should be limited to the issues certified by the secretary;[13]

- Notice by the Wage and Hour Division to the employer with sufficient detail to allow an opportunity for the employer to respond before the division initiates the investigation;[14] and

- Investigations typically must be into an enumerated violation.[15]

Employers should prepare for the storm. They need to be aware of and prepared for more intensive H-1B investigations. We now know that the DOL has a specific intent to expand its investigations to ensure that employers who can be debarred are debarred.

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[1] See Blake Chisam and Edward Raleigh, Law360, The Blunt H-1B Instrument Hidden In Trump Orders, available at https://www.law360.com/articles/1304459/the-blunt-h-1b-instrument-hidden-in-trump-orders (Aug. 26, 2020).

[2] See 20 C.F.R. § 655.760(a).

[3] DOL OIG, Report to WHD and the Employment Training Administration, DOL Needs to Improve Debarment Process to Ensure Foreign Labor Program Violators Are Held Accountable, available at https://www.oig.dol.gov/public/reports/oa/viewpdf.php?r=06-20-001-03-321&y=2020.

[4] Id. at 8-9. OIG also recommended that WHD work with Congress to obtain less restrictive investigatory authority. OIG made another recommendation to the Employment Training Administration related to H-2A and H-2B application audits.

[5] DOL OIG Report at 18.

[6] Id.

[7] Id. at 13.

[8] Id.

[9] Id. at 5-6.

[10] Id. at 18-19.

[11] See, supra., n. 1.

[12] 8 U.S.C. § 1182(n)(2)(G)(i); 20 C.F.R. § 655.807(h)(1).

[13] DOL WHD Field Operations Handbook 71b03(f).

[14] 8 U.S.C. § 1182(n)(2)(G)(vii); 20 C.F.R. § 655.807(f)(1); DOL WHD FOH 71b03(d), (e). WHD is not required to give notice if doing so will compromise its ability to bring the employer into compliance. 8 U.S.C. § 1182(n)(2)(G)(vii); 20 C.F.R. § 655.807(f)(2).

[15] 20 C.F.R. § 655.805.

[16] Our previous article explained many of these procedural protections in greater detail and offered employers some ways to recognize a Secretary-certified investigation. See, supra., n. 1.