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HOW ONE EMPLOYEE'S COMPLAINT CAN LEAD TO A FULL BLOWN INVESTIGATION OF AN H-1B EMPLOYER'S LCA RECORDS

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A recent U.S. Court of Appeals decision in *Greater Missouri Medical Pro-Care Providers, Inc.*ARB Case No. 12-015, ALJ Case No. 2008-LCA-26 (2014), is worth noting as it addressed the issue of how much latitude the DOL has to investigate an H-1B employer's H-1B documents and records.

As background, an employer seeking to employ a temporary foreign worker in H-1B (also H-1B1 or E-3) nonimmigrant status must, as the first step in the petition process, file a Labor Condition Application (LCA) with the Department of Labor (DOL) and receive certification. The LCA is completed on electronic Form 9035 and submitted through the DOL's iCERT system. The LCA collects information about the occupation including the occupational title, the number of immigrants sought, the gross wage rate to be paid, the starting and ending dates of employment, the place of employment, and the prevailing wage for the occupation in the area of intended employment. The LCA contains special attestation requirements for employers who previously committed willful violations of the law or for employers who are deemed to be H-1B dependent. The employer must also state that its employment of nonimmigrants will not adversely affect the working conditions of workers similarly employed in the area of intended employment. An employer is permitted to file the LCA no more than six months before the initial date of intended employment. *See* 8 U.S.C. § 1182(n)(1)ID); 20 C.F.R. §§ 655.730-733.

Once the LCA is filed, the DOL must approve it within 7 days unless the application is incomplete or obviously inaccurate. 20 C.F.R. §§ 655.740(a)(1)-(2). Within one day of the LCA filing, the employer must maintain a public access file accessible to interested and aggrieved parties. The file must be available at

either the principal employer's place of business or at the employee worksite. 20 C.F.R. § 655.760(a). An aggrieved employee has 12 months after the latest date on which an alleged violation was committed to file a complaint with the DOL Wage and Hour Division (WHD). 20 C.F.R. § 655.806(a)(5).

In *Greater Missouri*, the employer hired numerous physical and occupational therapists from the Philippines on H-1B status. As required, the employer filed LCA applications for the desired workers. One H-1B employee, a physical therapist from the Philippines, filed a complaint alleging that she had personally paid all the fees, including attorney's fees, to file and to extend her H-1B status and that the employer failed to pay her during a nonproductive period of over one year when she was reviewing for her licensing exam. The employee also questioned whether the H-1B employer was legally permitted to charge her a fee for "breach of contract" due to her early termination of her employment.

Upon review of the employee's complaint (forwarded to the DOL by the Missouri state regulators), the DOL treated it as an "aggrieved party" complaint and the DOL investigator concluded that there was "reasonable cause" to investigate the charge that the H-1B employer had attempted to require the employee to pay a penalty for ceasing her employment early. Based only on the determination that this one charge was worth investigating, the DOL investigator launched a full scale investigation and sent a letter to the H-1B employer requesting all of its H-1B documents and records. The DOL investigator also interviewed the aggrieved employee and the employer's other H-1B workers.

Based on its investigations, the DOL found that the employer improperly failed to pay wages to employees who it had placed in nonproductive status (benched); made improper deductions from employee wages for H-1B petition fees; and required or attempted to require improper penalty payments from some employees for early termination. The employer was ordered to pay over $380,000 in back wages to 45 employees.

The employer fought back by requesting a hearing before an Administrative Law Judge (ALJ). The employer argued that the applicable statute and regulations limited the DOL's investigation to the specific issues of the complaint that was filed and only to that aggrieved party's LCA. The employer also argued that the statute and regulations impose a 12 month time limit for

investigating violations. However, the ALJ held that the 12 month time limit only refers to when a complaint can be filed and does not refer to the scope of remedies that can be meted out. The ALJ issued a decision ordering the employer to pay back wages, fees for illegal fee deductions and amounts to employees for illegally withholding paychecks. When the ALJ failed to hold in the employer's favor, the employer petitioned for review before the Administrative Review Board (ARB).

The ARB held that the DOL indeed had the authority to investigate alleged violations involving H-1B workers who did not file complaints but also held that violations that occurred outside of the 12 month period prior to the filing of a complaint are not actionable. However, the ARB affirmed the order for employer to pay awards. The employer took the case up to the District Court which affirmed the ARB's decision and payment of awards. The employer then appealed to the US Court of Appeals. The DOL did not appeal the District Court's ruling that violations that occurred outside the 12 month period are not actionable.

In the end, the Court of Appeals held that the DOL's initial investigatory authority is limited to the complaint that was filed and to those specific allegations and the DOL was not authorized to launch a comprehensive investigation of the employer based only on a single allegation by one employee. The Court of Appeals recognized that additional violations could come to light in the course of the DOL's investigation of a single complaint and that the DOL may need to modify or expand its investigation based on reasonable cause. However, the Court of Appeals found that this was not how the investigation proceeded in the instant case. The Court of Appeals held that the awards cannot stand because the ARB's finding of violations and the resulting awards were based entirely on the DOL's unauthorized investigation of matters other than the allegation in the aggrieved party's complaint. The US Court of Appeals reversed the judgment of the District Court.

While this was ultimately a victory for the H-1B employer and it is good to note that the DOL does not have sweeping authority to investigate allegations of violations that fall outside of the 12-month statute of limitations, this case is nevertheless a cautionary tale for all H-1B employers. Even a single complaint from one disgruntled employee could lead to a comprehensive investigation of the employer's H-1B practices. Even though the Court of Appeals in *Greater Missouri* found that the DOL had overstepped in its initial investigation, the

court also pointed out that the DOL may modify its investigation of a single complaint if other violations come to light. *Greater Missouri* also highlights the fact that once allegations are made, the employer bears the burden of proof to prove that it has complied with the LCA attestations. Therefore, the importance of excellent record keeping cannot be overstated.

Going into 2016, it would be a good idea for any H-1B employer that is not 100% confident in its LCA records, and its ability to withstand a DOL audit of those records, to conduct a self-audit on behalf of the employer and bring to light any issues that the employer can immediately correct and ensure that it is in compliance. Such a self-audit will give the employer the confidence that it needs should the DOL ever launch an investigation and will help the employer to avoid the potential financial and reputation damage that could come from such an investigation. When it comes to DOL investigations, the proactive approach is always best.