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Changes during the H-1B Resident's Employment: Hospital Compliance Issues

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The basic rules involving H-1B employment of international medical graduates (IMGs) in training are mostly well understood by GME administrators and program coordinators. However, not every employment relationship progresses as planned from the beginning of the program until the end without a hitch or a change. This article will focus on the hitches and the changes, both from the perspective of the hospital and of the foreign national physician. The following are examples of the types of occurrences that could alter the planned H-1B employment relationship and the required action on the part of the hospital administrator, the foreign national physician, or both:

1. Delay in Commencement of Employment

The hospital must be careful in choosing the commencement date of the H-1B employment. The hospital cannot commence the H-1B's employment before the start date of the labor condition application (LCA) and the H-1B petition. This includes any mandatory orientation programs for which the IMG's presence is required.

Pursuant to Department of Labor (DOL) regulations (20 CFR§ 655.731(c)(6)), if the foreign national is brought from outside of the U.S., he must be put on the payroll on the earlier of the date that he presents himself for employment or 30 days after arrival in the U.S. If the foreign national is in the U.S. and a change of status has been applied for, the employment relationship may not commence until the effective date of the change of status. From that date, the employment must commence on the earlier of the date that the employee presents herself as ready for employment or 60 days after the effective date of the change of status to H-1B.

If the IMG is already in H-1B status with another employer, the employment can commence as soon as the H-1B petition is filed. However, there is no requirement that an employer take advantage of H-1B portability if it does not wish to do so. Rather, at the employer's option, the employer can delay commencement of employment of the H-1B until the effective date of the H-1B approval notice.

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What if the IMG is unable to obtain a social security number on a timely basis? It does not change any of the rules stated above. The employer is still responsible for commencing the H-1B's employment no later than the dates specified above irrespective of whether the employee has a social security number. Pursuant to 26 C.F.R. 31.6011(b)-2(b)(1)(iii), the employment can commence upon presentation of a receipt for a social security number application, and the employer can state "applied for" where a social security number is required. Alternatively, the hospital may issue a "dummy" social security number so that payroll computer systems can process paychecks.

What if there is a delay in obtaining a license? Again, this does not affect the required H-1B commencement date. In any event, this should not occur since the H-1B petition should not be approved without proof that the foreign national physician has obtained all necessary licenses.

What if the foreign national is delayed in obtaining a visa overseas? If the delay occurs before commencement of employment, the rule stated above regarding the necessity of employment within 30 days of arrival in the U.S. applies. If the delay occurs after the physician travels during the middle of a residency program, no action is required since rules regarding H-1B compliance only apply during periods that the H-1B is in the U.S.

2. Change in Anticipated Timeframe of Employment

Various events could occur in the life of the IMG that could impact the ability of the IMG to commence a program on July 1 and conclude the program on June 30. Such events could include delays in USCIS adjudication of the H-1B petition, delays in overseas visa issuance, delays in obtaining a license or other delays personal to the resident. Within the past year, CIS has more frequently limited the length of H-1B approval to one year or the length of the license (whichever is longer), which creates a gap between the expiration date of the approval notice and the end of the PGY year. See 8 CFR §214.2 (h)(4)(v)(E). Assuming the six year limit in H-1B status is not impacted, the biggest issue involves the need for short-term H-1B extensions to cover the unanticipated extended completion date of the residency year.

The extent of, and solution to, this problem depends on the hospital's policy regarding length of H-1B timeframe requested. Some hospitals treat each PGY year as separate one year H-1Bs; some hospitals treat the PGY1 internship year as a one year H-1B and the "upper year residency" years as two or three year H-1Bs; some hospitals apply initially for three year H-1Bs. While it is beyond the scope of this article to discuss the advantages and disadvantages of each policy, the issues that can develop with any of these scenarios are somewhat similar. For example, if the hospital has applied for a one year H-1B for the PGY1 intern valid from July 1 through June 30, and for whatever reasons the internship will not be completed until August 15, what is the proper action on the part of the hospital? There are two options. The hospital can apply for H-1B extension for the completion of the PGY1 from July 1 through August 15, followed by a separate H-1B extension for the upper year residency. Alternatively, the hospital can apply for one H-1B to cover the remainder of the internship program as well as the upper year residency years. This latter strategy is problematic for those hospitals which, as a matter of policy, wish to treat the internship year as a separate position, which is consistent with the policy of the DOL. In some cases, the H-1B extension may be filed for the position of "upper year resident," but the H-1B support letter could explain that the employment will include not only the upper year residency but also the completion of the internship year. This may be acceptable as long as the hospital pays more than the prevailing wage for the upper year residency years. Otherwise, if the

employer pays exactly the prevailing wage for the upper year residency years, the salary paid during the July 1 to August 15 period for the PGY1 year will be below required wage.

What if the “off track” resident requires H-1B extension beyond six years? (This might be the case if the IMG had a period of H-1B employment prior to the commencement of his residency program, if the IMG changes specialization in mid-program or if the resident wants to commence a post-residency fellowship program). In that case, the first choice would be to “recapture” time spent outside of the U.S., which can be added to the end of the six year period. If recapture is not a possibility or does not provide sufficient time, other visa options, such as O-1, or alternative strategies may become necessary.

3. Change in Hours of Employment

Assuming an H-1B petition is filed for full-time employment, the IMG can work as many hours as the hospital wishes. Changes in hours or schedules do not require any action on the part of the hospital unless hours fall below full-time (generally defined as at least 35 hours per week). In that event, a separate part-time H-1B petition would be required.

What if the IMG wishes to moonlight? Assuming the moonlighting would be at the same H-1B hospital, the fact of the additional hours does not create a need for any separate immigration filing. However, the issue that arises is whether the moonlighting is a separate and distinct position from the medical resident position that was approved for the H-1B. (See No. 4 below.)

What about a moonlighting physician on another hospital's H-1B? Since an employee's H-1B authorizes employment only with the petitioning employer, the hospital wishing to use the moonlighting services of another hospital's resident must file its own concurrent H-1B petition in order to be authorized to employ the H-1B physician. The employer must be careful to describe the range of hours per week the moonlighting physician will be employed accurately, as the Department of Labor will require the hospital to pay the lower range of hours per week even if the H-1B did not perform any services that week.

4. Change in Job Duties

An insignificant change in job duties does not trigger a requirement of any immigration filing. On the other hand, a “material” change in job duties does require a new H-1B petition. The definition of “material” is not susceptible to exact definition. However, the author believes that the best definition is whether the change in job duties places the position in a different prevailing wage category. Two examples are instructive:

What if the resident is temporarily suspended from clinical duties due to a malpractice case or grievance hearing? Assuming the resident's employment will continue, the temporary suspension of clinical duties clearly would not increase the prevailing wage and would not affect the classification of the position as a “specialty occupation.” As such, no action should be required.

What about the moonlighting example? This is more problematic. Assuming the prevailing wage was based on a relevant PGY year in the AAMC survey, clearly moonlighting is not part of the residency program encompassed in the AAMC survey. In such event, reference may need to be made to the DOL OES wage figures for physicians, which may require payment of a higher

prevailing wage. As such, moonlighting might well be considered to be a material change in employment that would require a separate H-1B petition. There is no prohibition against an employer having an approved H-1B petition both for a full-time resident and a separate approved H-1B petition for a part-time moonlighting physician.

5. Change of Wage

The hospital must pay the IMG the higher of prevailing wage and actual wage. "Actual wage" is defined as the wage paid by the same hospital to other residents of the same level.

20 CFR§655.731(a)(1). What if, during the approved H-1B period, the hospital reduces wages paid to its residents below the level originally stated in the H-1B petition? The answer depends upon whether the reduced wage is above or below the "required wage," which is the higher of actual or prevailing wage. If wages of all residents are reduced, and even after the reduction the wage is above prevailing wage, no action is required.

6. Change of Location of Employment

The H-1B approval is location-specific. Two examples of change of location of employment serve to highlight the issues of regulatory compliance. One example involves the IMG doing a rotation in a geographical area not anticipated in the original labor condition application/H-1B petition filing. If the location of the rotation is in the same "area of intended employment" (roughly defined as normal commuting distance), only a new posting at the location of the rotation is required. If the rotation will take place at a location outside of the area of intended employment and will be for more than 60 days in a year, a new labor condition application and H-1B petition is required. 20 CFR§655.735.

What if a program closes or a program director transfers to a new location and the resident must transfer? If this results in a new employer, the discussion in No. 7 below should be consulted. If it is the same employer at a different location, the rules stated in the previous paragraph apply.

7. Change of Employer

If, as in the example above, the resident transfers in mid-program to a different employer, the new employer must file a new H-1B petition. The definition of a new employer generally tracks the taxpayer employer identification number -- if it is different, it is a new employer and a new H-1B is required. However, if the change of employer is the result of a corporate reorganization, merger, acquisition or the like, no new H-1B petition is required. Rather, it is sufficient for the new employer to assume the LCA liabilities of the previous employer and for the new employer to update the public examination file with various information required by the DOL regulations. 20CFR§655.730(e) and §655.736(d)(6).

8. Discipline or Suspension

As a result of disciplinary reasons, malpractice reasons, issues of sexual harassment or the like, a hospital may deem it appropriate to remove an IMG from the payroll for a period of time. What are the ramifications and regulatory issues? The DOL position is that the employer who removes an employee from payroll for work-related reasons (i.e., other than because of a condition related to the employee as in the leave of absence scenario discussed below) is in violation of DOL's regulations and subject to sanctions, including a back pay award. The DOL position, which

could be subject to challenge in that it puts the foreign national physician in a better position than a U.S. citizen physician, would require the employer to terminate the H-1B petition if at any point the employer decides not to pay the required salary. See 20CFR§655.731(c)(7)(i).

9. Leave of Absence

Leaves of absence may be based on maternity, FMLA, extended sick leave, program-imposed rehabilitation or simply the IMG's personal needs. The regulatory issues depend completely upon whether the leave is at the instance of the hospital or of the IMG. Also, DOL and CIS have different concerns and requirements.

If the leave is employee-requested, such as maternity, there are no requirements placed upon the hospital. However, if the leave is employer-generated, the rules set forth above under Discipline or Suspension would apply; and the hospital would be required to pay full salary during the leave period. This requirement is imposed by DOL. 20 CFR§655.731(c)(7).

CIS policy, which is not stated in any regulation, is not dependent upon whether the leave is employer or employee-initiated. Rather, the issue of whether the IMG maintains H-1B status during the leave is dependent upon whether there is an expectation of continuing employment at the conclusion of the leave of absence. If there is -- even if the leave is extended -- the resident is in valid status. If there is no expectation of continuing employment, the resident is not in valid status during the leave period. USCIS policy places no time limit on the length of the leaves. However, both the physician and the hospital should be aware that time continues running toward the six-year limit on H-1B status, even though the physician is on leave, unless the physician changes to a different nonimmigrant status for the duration of the leave and then changes status back to H-1B at the end of it.

10. Resignation or Termination

Academic performance or behavior issues lead to a resident's termination; a resident's contract is rescinded due to visa delay or denial; a resident voluntarily resigns. What needs to be done, and what are the ramifications?

Again, there are different issues involving the two different government agencies -- DOL and CIS. With respect to DOL, it is advisable -- although not required -- to notify DOL to terminate the LCA. The reason is that the employer's liability under the LCA continues for a period of one year after the earlier of the end date of the LCA or the termination of the LCA. 20 CFR§ 655.760(c). Also, DOL's position is that the employer is obligated to pay salary unless the LCA is terminated or unless there is some sort of formal written notification of the termination of the employment relationship.

The CIS regulation suggests that an employer "shall" notify CIS when the H-1B employment relationship ends, whether by termination or resignation; however, there is no sanction for failure to do so. However, DOL in one case has taken the position that back pay can be awarded until CIS is notified. 8 CFR § 214.2(h)(11)(i)(A). As a result, depending upon the circumstances of the termination or resignation, the hospital needs to decide whether to delay termination of the LCA and notification to CIS in order to enable the IMG resident to have a new employer file a new H-1B petition before his status expires. Revocation of the petition can preclude the employee's eligibility for H-1B portability with the new employer. Furthermore, once the H-1B

petition is revoked, CIS may issue a notice that the IMG is out of status. Although the IMG is technically out of status immediately after the employment relationship ends, as a practical matter, especially if the petition is not revoked, a new H-1B petition filed by a new employer within 30 days or less after the employment relationship terminates is often approved for the resident's H-1B extension of status. If the resident finds a new position at a later date, it is likely that an extension of status would not be granted. In that case, the new employer's H-1B petition could be approved; but the resident would have to leave the country and apply for a new H-1B visa to return to the U.S. Depending upon the alien's nationality, this could be a minor inconvenience or a major delay in visa issuance.

Finally, upon termination prior to the expiration date of the H-1B status, the hospital is required to pay the resident's return costs of transportation to her home country. 8 CFR § 214.2 (h)(4)(iii)(E). However, if the resident chooses not to leave the country, there is no such obligation. Neither DOL nor CIS has jurisdiction to enforce this obligation.

As is readily obvious from the above analysis, any variance from the normal routine of a resident's employment can generate complicated legal and regulatory compliance issues. The author hopes that the analysis contained in this article will assist in avoiding the mine fields and determining when advice from outside counsel is prudent.