



IMMIGRATION UPDATE - OCTOBER 30, 2020

Posted on October 30, 2020 by Cyrus Mehta

Headlines:

[Two More Lawsuits Challenge New DOL, DHS Rules](#) – Two more lawsuits have been filed challenging recent interim final rules that change how prevailing wages are calculated and redefine "specialty occupation" and the employer-employee relationship for H-1B temporary visa purposes.

[State Dept. Proposes to Eliminate 'B-1 in Lieu of H' Policy Unless Nonimmigrant Otherwise Qualifies](#) – DOS said it would no longer authorize issuance of B-1 visas for certain aliens classifiable as H-1B or H-3 nonimmigrants, commonly referred to as the "B-1 in lieu of H" policy unless the foreign national independently qualifies for a B-1 visa for a reason other than the B-1 in lieu of H policy.

[DHS Cracks Down on Alleged Optional Practical Training Fraud](#) – USCIS plans to revoke or fail to renew 1,100 OPT work permits of international students, and ICE arrested 15 nonimmigrant students for claiming they were employed by nonexistent companies, among other measures.

[E-Verify Releases Do's and Don'ts When Creating Cases](#) – E-Verify released a list of "do's and don'ts" for employers.

Details:

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Two More Lawsuits Challenge New DOL, DHS Rules

Two more lawsuits have been filed challenging recent Department of Labor (DOL) and Homeland Security (DHS) interim final rules that change how prevailing wages are calculated and redefine "specialty occupation" and the employer-employee relationship, respectively, for

H-1B temporary worker purposes:

- *Purdue University et al. v. Scalia et al.* argues that a DOL interim final H-1B rule was posted "unnecessarily and without regard to the disastrous consequences to the public" and was made effective less than 48 hours later without following the legal requirement for advance public notice or providing an opportunity for comment before the rule was made effective. The lawsuit states that the rule was "unlawfully and intentionally meant to upset the U.S. labor market and disrupt the way businesses operate." The plaintiffs represent a cross-section of affected academic institutions, businesses, organizations and trade associations.
- *Chamber of Commerce et al. v. DHS et al.* alleges that DHS and DOL interim final H-1B rules were promulgated without following the notice-and-comment requirements or rulemaking under the Administrative Procedure Act, also exceed the agencies' statutory authority, and are arbitrary and capricious. U.S. Chamber CEO Thomas J. Donohue said that the rules being implemented by DHS and DOL "undermine high-skilled immigration in the U.S. and a company's ability to retain and recruit the very best talent. If these rules are allowed to stand, they will devastate companies across various industries. The Chamber is proud to join our partners in fighting against these measures that will discourage investment, diminish economic growth, and impede job creation in the U.S."

These lawsuits follow on the heels of a complaint filed October 16, 2020, by a group of technology consulting firms, *ITServe Alliance Inc. et al. v. Scalia et al.*, which is challenging the DOL's interim final rule on prevailing wages for H-1B workers. The plaintiffs seek a preliminary and permanent injunction to stop DOL from imposing the new wage rates.

Details:

- *Purdue University et al. v. Scalia et al.*,
https://www.pacermonitor.com/public/case/36755981/PURDUE_UNIVERSITY_et_al_v_SCALIA_et_al
- "Purdue Joins Universities, Others in Suit Against Department of Labor,"
The Exponent,
https://www.purdueexponent.org/campus/money/article_f120a302-12df-11eb-a047-879cdcf2d8f1.html

- *Chamber et al. v. DHS et al.*,
<https://www.nam.org/wp-content/uploads/2020/10/NAM-US-Chamber-v.-DHS-10192020.pdf>
- "U.S. Chamber Leads Coalition in Filing Motion for Preliminary Injunction and Partial Summary Judgment Against DHS and DOL Rules That Would Fundamentally Undermine the H-1B Visa Program for Employers," U.S. Chamber Litigation Center,
<https://www.chamberlitigation.com/cases/chamber-commerce-v-us-department-homeland-security>
- "Lawsuit Challenging H-1B Wage Increase Filed in the U.S.," Economic Times,
<https://economictimes.indiatimes.com/nri/visa-and-immigration/lawsuit-challenging-h-1b-wage-increase-filed-in-the-us/articleshow/78715971.cms>
- "Two More Major Lawsuits Filed Against Trump H-1B Visa Restrictions," Forbes,
<https://www.forbes.com/sites/stuartanderson/2020/10/20/two-more-major-lawsuits-filed-against-trump-h-1b-visa-restrictions/#3f2c0539175e>
- "New Lawsuit and Glaring Problems Threaten DOL H-1B Visa Rule," Forbes,
<https://www.forbes.com/sites/stuartanderson/2020/10/19/new-lawsuit-and-glaring-problems-threaten-dol-h-1b-visa-rule/#94b19005be59>
- DOL interim final rule,
<https://www.govinfo.gov/content/pkg/FR-2020-10-08/pdf/2020-22132.pdf>
- DHS interim final rule,
<https://www.govinfo.gov/content/pkg/FR-2020-10-08/pdf/2020-22347.pdf>

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State Dept. Proposes to Eliminate 'B-1 in Lieu of H' Policy Unless Nonimmigrant Otherwise Qualifies

On October 21, 2020, the Department of State (DOS) proposed to amend its regulation governing nonimmigrant visas for temporary visitors for business—the B-1 nonimmigrant visa classification—by removing two sentences defining the term "business" that DOS said "are outdated due to changes in the INA since 1952, from when the two sentences originate." With removal of these sentences, DOS said it "would no longer authorize issuance of B-1 visas for certain aliens classifiable as H-1B or H-3 nonimmigrants,

commonly referred to as the 'B-1 in lieu of H' policy, unless the alien independently qualifies for a B-1 visa for a reason other than the B-1 in lieu of H policy" and "bring the regulations into conformity with Department practice with respect to athletes, entertainers, and artists."

DOS said that "removing these two sentences, and thus removing any question about whether the referenced employment or labor might be permissible B-1 activity, not only conforms the regulation to the applicable statutory framework, but also furthers the goals" of President Trump's Executive Order 13788, Buy American and Hire American.

Comments are due by December 21, 2020.

Details:

- DOS proposed rule, <https://www.govinfo.gov/content/pkg/FR-2020-10-21/pdf/2020-21975.pdf>

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DHS Cracks Down on Alleged Optional Practical Training Fraud

According to reports, U.S. Citizenship and Immigration Services (USCIS) plans to revoke or fail to renew 1,100 Optional Practical Training (OPT) work permits of international students. OPT allows them to work in a field directly related to their area of study while on F-1 student visas. Of the total, USCIS is alerting 700 that it is revoking their permits, and the agency will not renew another 400 upon expiration.

The Department of Homeland Security (DHS) attributed the action to anti-fraud efforts. DHS officials noted that working in a position unrelated to the field of study can constitute fraud. There were indications that the crackdown is targeting not only international students but also participating employers and universities, such as by terminating designated school officials who approve work placements that do not meet OPT requirements.

Also, U.S. Immigration and Customs Enforcement (ICE) arrested 15 nonimmigrant students for claiming they were employed by nonexistent companies. The 15 arrests took place in and around Boston, MA; Washington, DC; Houston, TX; Ft. Lauderdale, FL; Newark, NJ; Nashville, TN; and Pittsburgh and Harrisburg, PA. Those arrested included 11 Indian nationals, two Libyan

nationals, one Senegalese national, and one Bangladeshi national. ICE said it "will continue to vet students who gained new employment through OPT for compliance with their nonimmigrant status."

There are more than 220,000 international OPT students in the United States. OPT enables nonimmigrant students to work in positions related to their field of study for up to one year, with an additional 24 months if the student graduates with a STEM (science, technology, engineering, and mathematics) degree.

Details:

- "Homeland Security Will Pull 1,100 OPT Permits From International Students," Politico, <https://www.politico.com/news/2020/10/21/dhs-international-students-permits-430909>
- "ICE Arrests 15 Nonimmigrant Students for OPT-Related Fraud," News Release, U.S. Immigration and Customs Enforcement, <https://www.ice.gov/news/releases/ice-arrests-15-nonimmigrant-students-opt-related-fraud>

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E-Verify Releases Do's and Don'ts When Creating Cases

E-Verify released the following "do's and don'ts" for employers:

DO's

- Review acceptable documents from Form I-9 Lists of Acceptable Documents
- Review an identity document with a photo if the employee presented a List B document
- Create a case for each newly hired employee no later than the third business day after the employee starts work for pay

DON'Ts

- Discriminate against workers because of their national origin, citizenship, or immigration status
- Verify employees hired before Nov. 7, 1986
- Request specific documents from employees when they complete their Form I-9

- Enter the employee's email address in E-Verify if they provided one on their Form I-9
 - Notify each employee who receives a Tentative Nonconfirmation (TNC) and give them the opportunity to contest it
 - Give employees their Further Action Notice and discuss it with them privately
 - Close cases timely
 - Safeguard all personally identifiable information
 - Create cases for employees hired before you enrolled in E-Verify*
 - Create duplicate cases for the same employee
 - Terminate or take adverse action against an employee because they received a TNC
 - Share any login information, including user ID and password
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Details:

- E-Verify Quick Reference Guide for Employers, <https://www.e-verify.gov/book/export/html/3625>

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