



One Minute Memo®

Hospitality Industry Employers of H-2B Workers: *Expect Increased Government Enforcement and Private Litigation*

High ranking officials at the U.S. Department of Labor have recently announced that employers in the hospitality industry will soon be targeted for compliance audits. In recent presentations, including a “stakeholders briefing” in Washington, D.C. in late May, Department officials discussed their regulatory and enforcement plans to focus on what they refer to as “vulnerable” workers in lower wage positions who may be reluctant to report pay violations.

The Department appears to be taking a much more aggressive enforcement posture than it has in recent years when it devoted more resources to cooperative efforts to ensure employers understood their obligations. During one recent presentation, the top law enforcement official of the Department—Solicitor of Labor Patricia Smith—was quoted as saying “the best deterrent is criminal prosecution.” Ms. Smith also indicated the Department would be taking more litigation risks as well as filing more amicus briefs in private litigation (presumably on the side of plaintiffs) because, she noted, some plaintiff’s attorneys’ work is “not up to par.”

These new investigations in the hospitality industry will be carried out by the Department’s Wage and Hour Division (WHD), which has seen dramatic increases in funding and staff. In just the past eighteen months alone, the WHD has added more than 250 new investigators—a more than 30% increase. In addition, WHD plans to hire nearly 100 more investigators this year. The WHD enforces a variety of labor and employment laws relating to overtime, minimum wage, family and medical leave, and the hiring and employment of temporary foreign workers through the H-2B visa program. WHD apparently believes the hospitality industry is likely to have numerous compliance problems in these areas.

In particular, the WHD has been focusing on issues related to temporary foreign workers and contract workers provided by staffing agencies to fill short-term needs. Any hospitality employer utilizing either of these types of workers will likely increase their chance of an audit.

In addition to the increased government scrutiny, hospitality employers have also recently been targeted by plaintiff’s lawyers, as well. For example, in the past few months multiple lawsuits have been filed in different parts of the country with strikingly similar allegations of wrongdoing by H-2B employers. This private litigation also carries additional risks because the attention created by a private lawsuit could result in government agencies launching investigations of the employer.

What Employers in the Hospitality Industry Can Do to Prepare

As recommended in our previous Management Alert, "*Expect Increased Immigration Scrutiny of U.S. Employers and Foreign Employees*," Seyfarth's Immigration Group suggests that hospitality employers consider taking several precautions in order to maintain compliance with immigration and employment laws and regulations.

To help gauge potential liability resulting from government investigations and private lawsuits, hospitality employers may also wish to consult with their in-house counsel or with their Seyfarth hospitality attorney for assistance in auditing pay and recordkeeping practices. The Department of Labor has recently changed its view on important legal issues affecting the H-2B program, including the reimbursement of a worker's travel and visa expenses, and our attorneys can help ensure you are in compliance with those new obligations. In addition, the Department has announced plans to engage in a new H-2B rulemaking this fall, and we expect they will propose additional and significant changes to the structure of the program. Our attorneys can also provide advice and counseling during for employers who wish to submit comments for the rulemaking.

Seyfarth Shaw's hospitality attorneys, working closely with its Immigration Group, are ready and eager to assist employers immediately with strategic evaluation, advice, development and implementation of policies to maintain legal compliance in light of this growing trend in enforcement and private litigation. Our attorneys around the country include seasoned litigators and counselors with decades of experience in labor, employment and immigration laws, as well as former government officials who are intimately familiar with the legal, regulatory and policy issues affecting the H-2B program.

For more information, please contact the Seyfarth attorney with whom you work, or any Immigration attorney on our website (www.seyfarth.com/Immigration).



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