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Employers Facing Labor Shortages Should Consider The H-2B Foreign Worker Program

By Greg Dorrington, Carina Wilmot, and Kelsey Sabol

Since businesses started ramping up operations after the height of the COVID-19 pandemic, there has been an ongoing labor shortage across the country. Montana, in particular, has been hard hit. The state has experienced a 62% increase in job openings over the last 18 months, which is higher than any other state. The trend is most noticeable in entry-level and seasonal employment positions. In the absence of available U.S. workers, employers have increasingly turned to foreign workers to help meet their labor needs. For some, this means participating in the H-2B visa program, which regulates the hiring of temporary, nonagricultural workers. This article summarizes the H-2B process so interested employers can act now to hire the workers they need to operate and grow their businesses.

H-2B Visas

The H-2B program allows employers to hire foreign nationals to work in the United States and fill temporary nonagricultural jobs for a limited period of seasonal, peak load, intermittent, or one-time employment. Most H-2B workers are employed in food services, construction, or landscaping sectors. Our firm routinely assists employers in obtaining H-2B visas for foreign workers in various industries, including hospitality, food services, winter sports, meat-processing, and others. Congress has permitted a total of 66,000 H-2B visas to be made available each year. Of these, 33,000 visas are available for workers to begin employment each year on or after April 1, and 33,000 are available for workers to begin employment on or after October 1. Employer demand far outstrips the number of H-2B visas available, especially for the summer season. To manage this demand, the federal government utilizes a lottery system for H-2B applicants who start work on April 1 or after (the lottery is held in January). So far, a lottery for winter H-2B applicants—those with start dates of October 1 or later—has not been necessary, but visa numbers are typically exhausted in advance of

the start date. The process to hire H-2B workers takes several months to complete and employers considering hiring foreign workers to begin employment on October 1, 2022 should consult an immigration attorney as soon as possible.

Prevailing Wage Determination

H-2B employers must pay H-2B workers and equivalent U.S. workers in corresponding positions the same prevailing wage rate, or the applicable Federal, State, or local minimum wage, whichever is higher. Therefore, the first step for an employer seeking to hire foreign workers is to obtain a Prevailing Wage Determination (PWD) from the U.S. Department of Labor (DOL). The employer must apply for a PWD and include a description of the job duties and required worker qualifications. We recommend applying for a PWD 150 days before the worker's start date. For an October 1 start date, the PWD application should be submitted in early May. DOL processes the PWD applications in approximately 30 days.

H-2B Application and Job Order

After obtaining the PWD, the employer submits an H-2B application to the DOL and also submits a job order concurrently to the State Workforce Agency (SWA). The H-2B application should contain supporting documents establishing the employer's need for the position, the number of vacancies for that position, and the nature of the work (seasonal, peak load, intermittent, or one-time occurrence). Supporting documents often include payroll reports and an employer statement of temporary need, with supporting exhibits. The application must also include, among other things, the PWD, copies of all contracts and agreements with recruiters, and a copy of the job order concurrently submitted to the SWA. The job order is then used to recruit qualified U.S. workers. It summarizes the material terms and conditions of employment relating to wages, hours, working conditions, worksites, and benefits. The H-2B application and job order may be submitted no earlier than 90 days before the worker's start date and must be submitted no later than 75 days before the start date. For an October 1 start date, the application and job order should be submitted in early to mid-July.

Recruitment

As part of the H-2B process, the employer first must attempt to recruit qualified U.S. workers for the position. The process begins with the employer filing an H-2B application. If DOL finds the application is complete and complies with federal regulations, it will send the employer a Notice of Acceptance (NOA). Within 14 days of receiving the NOA, the employer must engage in specific efforts to recruit U.S. workers. At a minimum, the required recruitment efforts include posting an internal notice of the job opportunity at the employer's worksite for 15 consecutive business days, contacting former U.S. workers and offering an opportunity for them to return to employment, and responding to any referrals, inquiries, or applications by U.S. applicants until 21 days before the employment start date. The SWA will also post the job order to its electronic job registry so it is publicly available and searchable via the internet. In order to obtain certification from DOL to hire foreign workers under the H-2B program, the employer must track its recruitment efforts and provide a recruitment report to DOL showing compliance with federal regulations and establishing that there is not a sufficient number of qualified U.S. workers to fill all available vacancies for the applicable position.

USCIS Petition and Visa Application

After the employer obtains certification from DOL, it can petition the U.S. Citizenship and Immigration Services (USCIS) for approval to hire eligible foreign workers. These petitions are generally submitted approximately six weeks before the October 1 start date. USCIS petitions can be processed in as little as 15 days if the employer pays an extra fee. Depending on the circumstances, the employer may hire foreign workers who are currently living abroad, or it may hire foreign workers who are located in the United States and have maintained lawful nonimmigrant status. Separate petitions must be filed for foreign workers living abroad and foreign workers currently

working in the U.S. Once the petition is approved, foreign workers living abroad must apply for a visa at the U.S. Embassy or Consulate in their home country. Upon receipt of a visa, they may travel to the U.S. and seek admission with an H-2B nonimmigrant status. Employers are required to comply with all travel, subsistence, hiring, discipline, and end of employment procedures, as set forth in federal law, and they are required to maintain careful payroll and other records, which may be audited by DOL.

For Employers with Additional Questions

For employers with additional questions, Crowley Fleck PLLP has an experienced team of attorneys who can assist with all manner of immigration questions. If you would like more information, please contact Greg Dorrington at (406) 457-2049 or gdorrington@crowleyfleck.com.

New Federal Law Limits Enforceability Of Predispute Arbitration Agreements With Respect To Claims Of Sexual Assault Or Sexual Harassment

By John M. Semmens

Employers should take note of recent changes to laws governing the enforceability of contractual agreements requiring employees to resolve certain claims privately through arbitration, as opposed to publicly in court. On March 3, 2022, President Joe Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the "Act"). The Act amends the Federal Arbitration Act by giving plaintiffs the option to litigate claims alleging sexual assault and/or sexual harassment in state, federal, or tribal courts even if they previously had agreed such claims must be resolved through arbitration. A broad majority of Congress voted for the Act, including 335 members of the House of Representatives. The Act is effective immediately, and may even apply to arbitration agreements signed prior to its enactment, as discussed below.

In relevant part, the Act states:

- [A]t the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.

Undoubtedly, state and federal courts will resolve ambiguities within the Act over time. But for now, employers should consult with their employment counsel on the potential impacts of the Act, including by discussing the following takeaways.

First, the Act is effective immediately and applies to "any dispute or claim that arises or accrues on or after" March 3, 2022. Because the effective date is linked to the accrual of a claim—as opposed to the date on which an arbitration agreement is signed—the Act may render arbitration agreements voidable that were signed prior to March 2022.

Second, any questions regarding the Act's applicability "shall be determined by a court" of competent jurisdiction, and not an arbitrator. This is a notable change from current law, which generally permits parties to allow an arbitrator to resolve such decisions.

Third, the Act still permits employers and employees to resolve sexual assault and sexual harassment claims through arbitration if: (i) the employee voluntarily chooses to adhere to the predispute arbitration agreement; or (ii) the employer and employee voluntarily agree to enter into an arbitration agreement after the dispute arises. In other words, the Act only prohibits defendants in these circumstances from compelling arbitration by enforcing the terms of a predispute arbitration

agreement.

Fourth, the Act renders voidable predispute agreements requiring the arbitration of: (i) individual claims of sexual assault or sexual harassment; and (ii) class/collective action claims of sexual assault or sexual harassment. Thus, plaintiffs not only are afforded the option to choose the venue in which their sexual assault and sexual harassment claims are litigated (arbitration or court), but they also are permitted to choose how their claims are pled (individually, or as part of a class action). This is significant because some predispute arbitration agreements prohibit claimants from joining class/collective actions.

Fifth, it is unclear whether the Act applies only to claims for sexual assault or sexual harassment, or whether the Act also applies to separate claims that are related factually or temporally, and pled in a single cause of action. This is especially significant in the employment context, in which the same operative set of facts alleged could support various claims for relief, including: (i) sexual assault/sexual harassment; (ii) discrimination; (iii) retaliation; and (iv) other employment-related claims. Most defendants will assert the Act only applies to discrete claims of sexual assault or sexual harassment. But the Act states it applies to a plaintiff's "case"; plaintiffs may use this ambiguity by pleading claims for sexual harassment and arguing such claims also void predispute agreements that otherwise would require discrimination, retaliation, and other employment-related claims to be resolved through arbitration. If courts conclude the Act applies to all claims alleged in a plaintiff's "case," plaintiffs may plead claims for sexual harassment to avoid the compelled arbitration of related claims.

Finally, the Act itself does not automatically invalidate existing, signed arbitration agreements. Rather, such agreements now are voidable at the election of the plaintiff in certain circumstances. Nevertheless, it may be advisable for employers to analyze and revise their standard predispute arbitration agreements in response to the Act. Specifically, employers should consider revising their predispute arbitration agreements to clearly identify the different ways in which the arbitration agreement applies to claims for: (i) sexual harassment/assault; and (ii) other employment-related claims. For example, employers may want to include language in their predispute arbitration agreement that claims subjected to the Act must be severed from claims that still are arbitrable under the Act, and stayed pending arbitration of claims not subject to the Act. Employers may also want to adopt additional terms not prohibited by the Act, such as a waiver of trial by jury to the extent permitted by state and federal law.

Ultimately, employers should take a proactive response to the Act, and closely monitor how courts interpret and apply the Act in employment litigation. Employers also should monitor for other similar legislative changes, as the Act may herald additional bipartisan legislation on this topic.

For Employers with Additional Questions

For employers with additional questions, Crowley Fleck PLLP has an experienced team of attorneys who can assist with all manner of employment questions, including questions related to compliance with state and federal employment laws. If you would like more information, please contact Crowley Fleck's Employment Practice Group.

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