At the Dawn of Immigration Reform, Compliance Pitfalls to Avoid in Employing Foreign Nationals in Healthcare Settings

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Immigration reform is undoubtedly upon us. After decades of stability, immigration laws and Department of Labor regulations applicable to U.S. companies employing foreign nationals are soon to get a makeover. The Trump administration has announced sweeping reform and bolstered enforcement to better protect American workers. As the physician shortage worsens, hospitals and health systems will face unprecedented challenges to recruit and retain physician talent.

Recruiting foreign nationals has to be and has to remain part of a comprehensive strategy to build and maintain a qualified, diversified, and engaged physician workforce. Lack of familiarity with immigration law and procedures should not deter employers from tapping into the skills of International Medical Graduates (IMGs), provided organizations exercise planned caution in navigating the complexities of immigration law and its interdependence with labor and employment laws at the state and federal level. In the wake of the upcoming overhaul of the immigration system, employers should assess internal compliance with the current laws and regulations. In doing so, taking into account the following key issues and best practices is paramount because they not only impact immigration counsel but also effectively affect health care and labor and employment attorneys alike.

• The Association of American Medical Colleges predicts that the effects of the physician shortage will be most acute in surgical specialties and rural areas. There are currently more than 6,000 primary care Health Professional Shortage Areas (HPSAs) and 4,000 mental health HPSAs. IMGs, who already represent more than 20% of first-year residents and nearly 25% of practicing physicians, are more valuable than ever in the midst of this worsening physician shortage because they are more likely to pursue a career in primary care services and seek work in rural areas than their American-born counterparts.

• IMGs depend on residency programs and U.S. employers to sponsor their temporary work visa and lawful permanent residence (LPR) status, the proverbial “green card,” in order to stay in the United States. The most two common types of visas for foreign residents are J-1 and H-1B. The latter is the most prevalent for physicians post-residency or fellowship. Employers must understand a few concepts regarding these visas before recruiting foreign nationals to ensure that they do not influence immigration counsel but also effectively affect health care and labor and employment attorneys alike.

• A J-1 visa holder must technically return to his or her home country for two years upon completion of training and will therefore require a J-1 visa waiver. State-based J-1 visa waivers are available but they are very competitive, as each state only grants 30 waivers each year. Employers must therefore assess the likelihood of obtaining such a waiver and whether they can fulfill all the requirements before courting an otherwise very attractive candidate.

• H-1B visa holders need not return home for two years upon completion of residency or fellowship but they can only stay in H-1B status for a period of six years maximum, unless one of three narrow exceptions applies and the employer is willing to sponsor the foreign national’s green card. Employers are therefore best advised to evaluate this six-year ticking clock and the potential paths to LPR status during the early stages of the recruitment process.

• Compliance with the Department of Labor and the United States Citizenship and Immigration Services immigration regulations requires meticulous documentation, including petition-specific document retention guidelines. Employers should establish initial and periodic training for personnel involved in recruiting and hiring foreign nationals, including the proper processing of Form I-9 for employment verification eligibility and non-discrimination laws based on national origin or citizenship status. For example, an employer is not allowed to ask a candidate whether he or she is a U.S. citizen or a green card holder. On the other hand, asking whether a candidate will require sponsorship for an employment visa now or in the future is permissible.

• Financial and administrative penalties for the employer can accrue exponentially, particularly since the scope of an investigation is not limited to the allegations underlying the original complaint of an aggrieved party. Fines range from $1,000 to $35,000 per violation and other penalties encompass debarment from approvals of any immigration petitions for at least one year, which can be catastrophic for certain employers. Thus, being flagged as a “willful violator” may hinder the employer’s recruitment efforts for years. Foreign nationals and their families may themselves face dramatic consequences, up to deportation.

As illustrated by the above key points, healthcare executives and in-house lawyers that understand the interplay between staffing, employee retention, immigration regulations, and labor and employment laws can best further the goals of their organizations to enhance access to quality patient care. To learn

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more about immigration strategies within healthcare settings and compliance, you may contact Isabelle Bibet-Kalinyak.

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For more information, contact Pam Durget at pdurget@vendomegrp.com or Lisa Van Dyne at lvandyne@vendomegrp.com.

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