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Immigration and the Modern Workforce – A Match Not Quite Made in Heaven

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The Economic Paradox

Employers are facing an economic paradox. On one hand, employers are fighting incessant labor shortages. This has triggered a war for talent, which employers have waged against each other by offering ever-increasing and creative incentives to prospective employees. On the other hand, the chorus of warnings about a coming recession are growing louder and more frequent. The recognition of these contradictory pressures causes employers to wonder whether it is possible that the same economic incentives they were offering to attract available workers would ultimately prevent employers from being able to keep those same workers through the duration of a recession.[i]

Employers are forced to consider three questions:

Should they be evaluating the affordability of the hiring incentives based on today's demand or future demand?

Should employers continue to engage in the war for talent at all?

Is there potential for hiring foreign talent to fill key positions?

Many employers that have evaluated those questions have answered the same way. The gist of their response goes something like this:

> "One problem at a time. Today's problem is high demand and low labor supply. A recession (yet to be realized) is tomorrow's problem. I will deal with today's problem today and tomorrow's problem tomorrow."

Indeed, many employers argue that if there really is a recession coming, they should do everything they can to satisfy as much demand now. Doing so will allow them to be as financially liquid as possible and have as little inventory as possible (assuming anyone still has inventory anymore) before the foretold recession hits. This requires labor, which right now means enhanced compensation incentives and a strong employer brand.

That all makes perfectly rational economic sense – with one caveat. If employees are savvy enough to leverage the labor shortage to secure ever-increasing incentives (which they are), the employees are also savvy enough to have those incentives memorialized in a contract (which they should). Meaning, the risk this presents is not a problem a future reduction-in-force can resolve. All the financial liquidity accumulated through this additional labor could be exhausted after demand slows. So, the real concern is that financial liquidity secured now minus economic incentives paid throughout a contract term is ultimately significantly net negative (for what it is worth – law firms will likely be some of the biggest offenders/victims of this). One of the positives to hiring foreign employees as an alternative is that their employment is generally going to be for a fixed time, thus reducing or eliminating the need to worry about how to navigate a tricky separation.

What all this means is that it is not tomorrow's problem. It is today's. As employers enter into incentive

agreements, the labor shortage and recession risks are simultaneous problems, just realized at different times. With this in mind, some employers will nevertheless stay the course and continue to offer increasing incentives for various reasons that are specific to them (*e.g.*, cashflow needs in the short term). However, many employers will start considering incentives that are not based on today's demand but instead based on historical, normalized demand and revenue. Some particularly risk-averse employers may only consider incentives based on historical recession demand and revenue. Employers who are willing to hire foreign labor need to plan ahead as well, since employer sponsored visas can have long processing times. Each employer must undergo this cost-benefit analysis for themselves.

The employers taking a more cautious approach may find themselves leaving the battlefield altogether (either by strategic choice or because their new incentive calculation will not yield new hires). This will leave those employers waiting it out to fight another day from a better vantage point. Just because it may be strategically wise for their particular circumstance, does not mean it will be painless. Without increases in labor, the employees that they do have will continue to work long hours, and all the problems that come with that will compound and threaten further labor shortage brought on by still more attrition. This is all occurring while demand goes unfilled and revenue unrealized.

Finally, there is another category of employer for whom the entire debate is a luxury. No matter what they do and no matter the incentives offered, they cannot find applicants (let alone employees). For these employers, it is not through strategic choice but through no choice at all that they simply wait. Depending on the severity and length, a recession and corresponding increase in labor supply may feel like a return to quasi-normalcy for these employers. An opportunity to reset, so to speak.

Employers who are finding themselves on the sideline of the war for talent are starting to plan for that future opportunity to secure talent, whenever it may present itself. Planning for the future means using new, advanced tools to best position themselves going forward. For example, employers are looking to ensure that the applicant review process is fast and efficient, and there are more tools than ever to help streamline applicant intake, screening, and onboarding. A number of these tools employ Artificial Intelligence, AI, in the applicant screening process. AI can also assist with record keeping in terms of tracking work visas and required reverifications of a person's authorization to work, something that still seems to confound employers.

When considering the employment of foreign workers, employers should know the basic methods that a foreign worker may use to obtain employment authorization in the United States and familiarize themselves with the level of employer involvement required to obtain these work authorizations. We will discuss a few of the more common work visas here so that employers in need of talent may begin to consider if foreign talent is the right move for them. We will review Student visas that allow for work in the US, agricultural worker visas, non-agricultural work visas and special skills visas.

Student Visas

Student visa holders who are attending school or have recently completed school on an F visa may apply for authorization to work through Optional Practical Training (OPT) in their field of study for one year. Those whose degree is in the field of science, technology, engineering or math (STEM) may apply for a

two-year extension to work, learn and obtain practical training in their field of study. The application process does not involve the employer or prospective employer. The student begins the process through his or her school. After obtaining school approval, the student applies for an employment authorization document which he or she may present to any prospective employer. Students who are still in their course of study may request OPT after completing one year of schoolwork. If working during the school year, the student may only work up to twenty hours per week. If the student does work during the school year, their authorization to work upon graduation is reduced by the time worked during the school year. If a student worked twenty hours a week during the school year for a year, he or she would only be able to work for six months after graduation.[ii] Students on OPT often seek employer sponsorship for the H-1B program.

H-1B Visas

H-1B applies to employers seeking non-immigrant aliens as workers in specialty occupations or as fashion models of distinguished merit and ability. A specialty occupation is one that requires the application of a body of highly skilled knowledge and the attainment of at least a Batchelor's degree or its equivalent. [iii] It can sometimes be difficult for F-1 students to qualify for this visa due to the highly skilled knowledge requirement. The intent of the H-1B provision is to help employers who cannot otherwise obtain needed business skills and abilities from the US workforce by authorizing the temporary employment of qualified individuals who are not otherwise authorized to work in the United States. The law establishes standards in order to protect similarly employed US workers from being adversely affected by the employment of non-immigrant workers, as well as to protect the H-1B non-immigrant workers. Employers must attest to the Department of Labor that they will pay wages to the H-1B non-immigration workers that are at least equal to the actual wages paid by the employer to other workers for the job in question, or the prevailing wage for the occupation in the area of intended employment, whichever is greater.

Employers who are seeking to employ H-1B employees must obtain a labor certification application (LCA) showing that they are unable to find US workers to fill the position. They must offer the H-1B workers the same working conditions and fringe benefits offered to similarly employed US workers. H-1B workers may not be employed where there is a strike/lockout in progress in the worker's occupation. If there is a union involved, the employer must notify workers on the bargaining representative of the intent to hire an H-1B worker at any location where other workers are in the same occupation classification for which an H-1B worker is sought or placed. A copy of the LCA must be provided to each H-1B worker and H-1B employers may not transfer the cost of applying for an H-1B visa from the Department of Homeland security to the employee, the petition filing fee must be paid by the employer. The H-1B worker must be paid for all work-related expenses. H-1B's can be obtained for a period of three (3) years with an additional extension of another three (3) years. Once a worker has obtained an H-1B visa, that visa can be transferred to another employer. The employee need only apply for the transfer to be able to begin working for the new employer. For this reason, the H-1B process may not be the best option for employers seeking to hire in a highly competitive field.[iv]

H2-B Visas

The H-2B visa allows for the admission of non-immigrants to the US to perform temporary non-agricultural labor or services. H-2B employers must request and be granted a H-2B registration by the DOL. The

employer must provide the employee with at least the offered wage indicated on the application, which equals to or exceeds the highest of the prevailing wage or federal minimum wage, state minimum wage or local minimum wage for all hours worked during the entire period of the job order. The employer must pay these wages free and clear. If workers are paid based on a piece rate, a commission or bonus or other incentives the employer guarantees a wage earned every work week that equals or exceeds the offered wage. The employer must make all deductions from the worker's paycheck required by law; other deductions must be reasonable and must be disclosed in the job offer. Deductions that are not disclosed are prohibited. The job offer provided to the employee must be a bonified, full-time, temporary position of at least 35 hours per week. The qualifications and requirements for the job must be listed in the job order and must be consistent with the normal and accepted qualifications and requirements imposed on non-H-2B employees in the same occupation and geographic area. The employer must include in the job order any known productivity standard which the worker must meet in order to retain the job. These requirements must not be more stringent than those placed on non-H-2B workers. The employer must also guarantee to offer the workers employment of a total number of hours equal to at least 75% of the workdays in each 12-week period (or 6 week period if the job offer is less than 120 days). This is the "3/4ths guarantee." The guarantee period begins the first workday after the worker arrives at the place of employment or the advertised first day of need whichever is later and ends on the last day of the job order. If during any 12- or 6-week period the employer does not offer H-2B or corresponding workers sufficient hours to make the 3/4ths guarantee the employer must pay such workers the amount they would have made had they worked for the standard number of workdays. If the employee no longer needs employees before the end of a job order, it must either fulfill 3/4ths guarantee or make efforts to transfer the workers to comparable employment consistent with the Immigration Naturalization Act.

The employer must provide workers with all tools and supplies and equipment needed to perform the assigned duties without charge or deposit requested from the employee. The employer must either advance all visa border crossing and visa related expenses to H-2B workers, pay them directly, or reimburse all such expenses in the first work week. The employer must disclose how it will provide inbound transportation and subsistence costs (lodging incurred on the employer's behalf and meals) in the job order. The employer will either advance all transportation and subsistence expenses to workers traveling to the employers' work site, pay for them directly, or reimburse the expenses no later than the time the workers have completed 50% of the period covered by the job order. The employer may be obligated under the FSLA to reimburse workers for their inbound transportation during the first work week. Employers must pay for the return transportation and daily subsistence (if the workers have no immediate subsequent H-2B employment) for any workers who work until the end of the job or are dismissed from employment for any reason before that date. All employer provided transportation must comply with applicable federal and local standards.[v]

H2-A Visas

The H-2A program allows US employers or agents (temp agencies) who meet specific or regulatory requirements to appoint foreign nationals to the US to fill temporary or seasonal agricultural jobs. Employers are required to demonstrate that there are not enough US citizen workers able, willing, qualified, or available to do the temporary work. Employers must also show that employing an H-2A worker will not adversely affect wages and working conditions for similarly employed US workers.

Generally, an H-2A classification can and will be established for the period needed for the temporary labor. After this, H-2A employees may be extended for qualifying employment in increments of up to one (1) year each. The employer must obtain a new valid temporary labor certification covering the requested time for each H-2A employee. The maximum period of staying in an H-2A classification is three (3) years. After which, the individual must depart the United States for an uninterrupted three (3) months before seeking readmission as an H-2A non-immigrant. Employers are required to inform United States Citizenship and Immigration Services (USCIS) if the H-2A worker is a no-show, leaves employment without notice, or fails to report to work for five consecutive days. The employer must also notify USCIS if the worker is terminated before completing the H-2A period of services or is there is an early completion of the required work more than thirty (30) days prior to the expected work duration. Employers must include the following information in the notification to USCIS:

1. the reason for verification
2. the reason for untimely verification and evidence of good cause if applicable
3. the USCIS receipt number for the approved H-2A petition
4. the petitioner's information, which includes their name, address, phone number and employer EIN
5. the employer's information
6. The H-2A worker's information, full name, date of birth, place of birth, last known physical address

Failure to notify USCIS can result in a liquidated damages payment of $10 for each instance of non-compliance.

It is possible that one of the options listed above is not the sort of employment an employer is seeking. There is also the option to hire an independent contractor to do work related to a US company while the contractor remains in their home country. In attempting to do so, the employer should determine if the individual is truly an independent contractor, determine what the labor laws are in the country where the individual works, determine whether or not there are tax implications for your hiring of this contractor and create a contractor agreement. Hiring independent contractors overseas is a tricky business and should not be done without the assistance of counsel.

At some point, sooner or later, the world will be recognizable again, and we will find ourselves on familiar terrain (right?). Until then, it is the employers with the best ability to see around corners that will be the strongest when we get there.

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[i] Adam Santucci and Langdon Ramsburg, Employers Must Think 3 Moves Ahead in Their Bid for Talent, LAW360 (June 17, 2022)

[ii] U.S. Citizenship and Immigration Services, Optional Practical Training (OTP) for F-1 Students, (visited January 18, 2024), https://www.uscis.gov/working-in-the-united-states/students-and-exchange-visitors/optional-practical-training-opt-for-f-1-students

[iii] Department of Labor, H-1B Program, (visited January 18, 2024), https://www.dol.gov/agencies/whd/immigration/h1b

[iv] Department of Labor, Fact Sheet #62: What are the requirements to participate in the H-1B program?, (visited January 18,

2024), https://www.dol.gov/agencies/whd/fact-sheets/62-index-h1b

[v] Department of Labor, Fact Sheet #78: General Requirements for Employers Participating in the H-2B Program, (visited January 18, 2024), https://www.dol.gov/agencies/whd/fact-sheets/78-h2b-overview