

**Final Version of Stimulus Bill Drops Mandatory E-Verify
But Imposes New Obligations for TARP Recipients Hiring H-1B Workers**

February 17, 2009

The American Recovery and Reinvestment Act of 2009 (the stimulus bill) that President Obama signed into law today dropped a previously planned, immigration-related provision requiring that all U.S. employers use e-Verify—but added a new provision for recipients of funding through the Troubled Asset Relief Program (TARP) that wish to hire H-1B workers.

The Sanders-Grassley Amendment/“Employ American Workers Act”

The new provision, put forth by Senators Sanders (I-Vt.) and Grassley (R-Iowa), will be called the Employ American Workers Act once the stimulus package becomes law. It provides that it will be unlawful for any recipient of funding under title I of the Emergency Economic Stabilization Act of 2008 (Public Law 110-343) or section 13 of the Federal Reserve Act (12 U.S.C. § 342 *et seq.*) to “hire” an H-1B nonimmigrant unless the recipient has met the definition of an “H-1B dependent employer.” The term “hire” is defined in the statute as permitting “a new employee to commence a period of employment.”

What Is an “H-1B Dependent Employer”?

H-1B dependency is a concept that generally applies to an employer with a high percentage of H-1B workers relative to the employer’s total U.S. workforce. Under the Employ American Workers Act, employers that are TARP recipients will be considered “H-1B dependent” with respect to new H-1B petitions filed within the next two years, irrespective of the number of H-1B workers in their U.S. workforce.

Employers that are considered H-1B dependent have additional obligations when preparing and filing H-1B applications. The two major obligations that will now be imposed on TARP recipients are:

- An obligation to attest to the Department of Labor (DOL) in a Labor Condition Application (LCA) that the employer has, prior to filing the H-1B petition, taken good-faith steps to recruit U.S. workers for the position for which the H-1B worker is sought, offering a wage that is at least as high as that required under law to be offered to the H-1B worker. The employer must also attest that, in connection with this recruitment, it has offered the job to any U.S. worker who applies and is equally or better qualified for the position.
- An obligation to attest to the DOL in an LCA that the employer has not laid off, and will not lay off, any U.S. worker in a job that is essentially equivalent to the H-1B position in the area of intended employment of the H-1B worker within the period beginning 90 days prior to the filing of the H-1B petition and ending 90 days after its filing.

There is an exemption in the H-1B dependency rules for H-1B workers who possess master’s degrees or receive wages of at least \$60,000. In other words, an employer need not comply with the H-1B dependency obligations

for such workers. However, the Employ American Workers Act makes this exemption **unavailable** to TARP recipients.

Which H-1B Petitions Are Affected by the New Law?

TARP recipients that hire individuals needing H-1B sponsorship in order to begin work will face these new restrictions. This would appear to include new cap-subject H-1B petitions and transfers of H-1B workers from other employers. Under the plain language of the statute, it would appear that H-1B extensions of stay would not be affected because such extensions would not be considered new “hires” according to the statutory definition of that term. A similar argument could be applied to the change to H-1B status of employees of TARP recipients who are in a different visa category, such as TN or F-1/OPT, as the change of status to H-1B would not be for the purpose of permitting a “new employee to commence a period of employment.” In other words, an individual already working for a TARP recipient in F-1/OPT, TN, or other nonimmigrant status at the time the H-1B change-of-status petition is filed is not a “new employee” and therefore would not render the employer subject to the dependency obligations imposed for new hires in H1-B status.

Which Employers Are Affected by the New Law?

The law encompasses “any recipient of funding under title I of the Emergency Economic Stabilization Act of 2008 (Public Law 110-343) or section 13 of the Federal Reserve Act (12 U.S.C. § 342 *et seq.*.)” By its terms, the law appears to apply to companies that have already accepted such funding.

When Does the Law Go into Effect, and How Long Is It Effective?

The Employ American Workers Act will become effective upon the stimulus bill’s enactment. It is important to note that the law will remain effective for two years after its enactment. Thus, it will affect cap-subject H-1B petitions for fiscal years 2010 and 2011, as well as H-1B transfers to TARP recipients until the provision’s sunset date.

We will continue to monitor these changes and will update you with any new information. If you have any questions about any of the issues raised in this Morgan Lewis Alert, please contact:

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