Morgan Lewis

together

Wage and Hour and Immigration Compliance for Oil and Gas Companies

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Employee Versus Independent Contractor Analysis Under the Fair Labor Standards Act (FLSA)

- Under the FLSA, analysis is based on a multi-factor, fact- intensive inquiry based on "economic realities," including:
  - The degree of control exercised by the alleged employer over the workers
  - The workers' opportunity for profit or loss
  - The workers' investment in the business
  - The degree of skill and independent initiative required to perform the work
  - The permanence or duration of the working relationship
  - The extent to which the work is an integral part of the alleged employer's business

Employee Versus Independent Contractor

- Essentially looking to see "whether the individual is economically dependent on the business to which he renders service . . . or is, as a matter of economic fact, in business for himself." *Baker v. Flint Eng'r & Constr. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998) (internal quotation marks omitted)

Same Position – Rig Welder – Different Outcomes

- *Compare Robincheaux v. Radcliff Materials, Inc.*, 697 F.2d 662 (5th Cir. 1983) and *Baker*, 137 F.3d at 1436 (affirming decision that rig welders on natural gas pipeline were employees and not independent contractors under the FLSA) with *Carrell v. Sunland Constr.*, 998 F.2d 330 (5th Cir. 1993) (holding that rig welders were independent contractors and not employees under the FLSA)

Same Position – Different Outcomes
Facts in All Cases

- *Degree of control* – Pipe welding requires skills under control of welders, but company required welding workers to work the same days and hours as the rest of the crew.
- *Profit and loss* – Welders did not solicit bids and were paid a fixed hourly rate plus fee for rental of the equipment.
- *Relative investment* – Welders supplied their own trucks, welding machines, and specialized tools, and had to repair and maintain equipment. But the company's investment was more significant.
- *Skill and initiative* – Welders had special skills.
- *Permanency* – None of the rig welders worked exclusively for the company but moved from job to job.

So What Made the Difference?

- *Carrell* focused on the fact that the welders moved frequently from job to job, and some jobs lasted only a few days, and on average only 6 weeks, so profit/loss depending on their ability to find consistent work.
- In *Robicheaux* welders worked with the company exclusively for longer periods of time – from 10 months to 3 years.
- In *Baker* the average was closer to 2 months, and usually not more than 3 months in a year, but the court focused on the fact that the welders had to work permanently and exclusively for the company for the duration of the job for which they were hired (like agricultural workers).

So What Made the Difference? (cont.)

- *Carrell* further distinguished *Robicheaux* on the basis that welders in that case were only required to have "moderate" skills, and only spent 50% of their time welding and the remaining time cleaning and performing semiskilled mechanical work
- In *Robicheaux* rig welders were told how much time the welding assignment should take, as opposed to *Carrell*, where the company did not specify the total amount of time the welders could spend on the assignment and where the customers, not the company, dictated the types of welding rods to be used and tested the welders

Fact-Intensive Inquiry Means That Issues Can't Be Resolved Early in Litigation

- *Stewart v. Project Consulting Servs., Inc.*, No. 99-3595, 2001 WL 1334995 (E.D. La. Oct. 26, 2001) (denying motion to dismiss claims of oil and gas pipeline inspector claiming to be employee rather than independent contractor)
- *Colendra v. Horizon Offshore Contractors, Inc.*, No. 04-625, 2005 WL 3359343 (S.D. Tex. Dec. 9, 2005) (denying defendant's motion for summary judgment and concluding that workers on an American vessel, which was a pipe-laying barge, may have been employees rather than independent contractors)

Individuals Are Employees Under the FLSA – Now What?

- Day Rate Overtime Requirement
- Motor Carrier Exemption
- Other Exemptions if Paid on a Salaried Basis

Day Rate Overtime Requirement

- "If the employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and if he receives no other form of compensation for services, his regular rate is determined by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. **He is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek**." 29 C.F.R. § 778.112
  - So you MUST track the hours of day-rate employees and calculate the half-time overtime rate, unless otherwise exempt.

An Additional Flat Lump Sum Premium Does Not Address the OT Requirement

- 29 C.F.R. § 778.310: “A premium in the form of a lump sum which is paid for work performed during overtime hours without regard to the number of overtime hours worked **does not qualify as an overtime premium** even though the amount of money may be equal to or greater than the sum owed on a per hour basis.”
  - “For example, an agreement that provides for the payment of a flat sum of $75 to employees who work on Sunday does not provide a premium which will qualify as an overtime premium, even though the employee’s straight time rate is $5 an hour and the employee always works less than 10 hours on Sunday.”

Flat Lump Sum Actually Raises the Overtime Due

- . . . For this reason, where extra compensation is paid in the form of a lump sum for work performed in overtime hours, it must be included in the regular rate and may not be credited against statutory overtime compensation due. “

How Are Meal/Lodging Per Diems Factored Into the Regular Rate Calculation?

- A meal/lodging per diem is not included in the regular rate for overtime calculations if the expenses are incurred because an employee is "traveling 'over the road'" and living away from home on the employer's business, and the employee's reimbursement reasonably approximates the expenses incurred. 29 C.F.R. § 778.217(a), (b)(3).

Are Meal/Lodging Reimbursements Included In the Regular Rate?

- On the other hand, “if the amount paid as ‘reimbursement’ is disproportionately large, the excess amount will be included in the regular rate.” 29 C.F.R. § 778.217(c).
  - *See* Government Services Agency website – www.gsa.gov – for what the federal government considers reasonable per diem rates by city or Zip Code.
- Also note that payment for normal personal expenses such as rent or lunch cannot be excluded from the regular rate, so this per diem is only excluded based on the assumption that the employees are working in a different state than their states of residence.

Sum Paid for Days on the Jobsite but not Working Excluded From Regular Rate

- Also note that the employer does not have to include in the regular rate any payments for "failure of the employer to provide sufficient work" – so to the extent employees are paid for days they are on the jobsite but not working due to machinery breakdown, weather conditions, and similar unpredictable obstacles beyond the control of the employer, this can be excluded from the regular rate. 29 C.F.R. § 778.218.

But No Overtime Needs to Be Paid if Workers Fall within the Federal (and Applicable State) Motor Carrier Exemption

- 29 U.S.C. § 213(b)(1) exempts those who the Secretary of Transportation has the power to qualify for maximum hours of service pursuant to section 31502 of Title 49. To be exempt and not covered by the FLSA:
  - must be employed by a motor carrier or motor private carrier operating in interstate commerce;
  - work must be that of a driver, driver's helper, loader, or mechanic;
  - work must affect the safety of operation of motor vehicles in transportation on public highways in interstate or foreign commerce; and
  - must perform duties on motor vehicles weighing 10,001 pounds or more.

Motor Private Carrier

- A motor private carrier provides transportation of property by motor vehicle where the person is the owner, lessee or bailee of the property being transported and the property is being transported for sale, lease, rent, or bailment, or to further a commercial enterprise.
  - This means that parts or products of the business are transported across state lines in furtherance of business – for example, purchasing portable toilet parts from vendors in Michigan and Minnesota and transporting them to yards in Alabama and Texas for rent to customers. *Butcher v. TWSW, Inc. d/b/a Pot of Gold*, 2011 Wl 3794687, at *3 (S.D. Tex. Aug. 25, 2011).

Definition of Drivers, Driver's Helpers, Loaders and Mechanics

- 29 C.F.R. § 782.3 – Drivers
- 29 C.F.R. § 782.4 – Driver's Helpers
  - ride with driver and expected to do things like (1) help direct truck at a railroad crossing or turning around on a busy highway, (2) in the case of a breakdown, place the flags, flares, and fuses as required by the safety regulations and go for assistance while the driver protects the vehicle on the highway, or vice versa, or (3) assist the driver in changing tires or making minor repairs and assist in putting on or removing chains.
- 29 C.F.R. § 782.5: Loaders – Must be loading and securing the materials to ensure safety PRIOR to interstate travel.

Loaders

- Furnishing physical assistance when necessary in loading heavy pieces of freight, or depositing pieces of freight in the vehicle for someone else to distribute and hold in place, is not securing the material to ensure safety and so is not exempt.
- Coal trucks loaded from stockpiles by the use of an electric bridge crane and a mechanical conveyor, employees operating such a crane or conveyor in the loading process are not loaders. *Barrick* v. *South Chicago Coal & Dock Co.* (N.D. Ill.), 8 Labor Cases, par. 62,242, *affirmed on other grounds*,149 F.2d 960 (7th 1945)

Affecting Safety

- Drivers are likely "engaged in activities that directly affect the operation safety of motor vehicles in the transport of property" if they have some of the following:
  - (1) drivers must meet DOT and Federal Motor Carrier Safety Regulations (FMCSR) requirements prior to assuming their driving duties,
  - (2) drivers must have valid commercial driver's licenses and meet the driver qualification requirements of FMCSR Parts 382 and 391 (this includes submitting to a background check and character investigation and submitting to a road test),
  - (3) drivers receive a compilation of relevant regulations and participate in a safety orientation to review the FMCSR and the difference between interstate and intrastate hours-of-service regulations,

Affecting Safety (Cont.)

- (4) drivers are required to record their hours driving, and
- (5) drivers are required to complete driver vehicle inspection reports pursuant to the FMCSR.

- *Songer v. Dillon Resources, Inc.*, 618 F.3d 467, 469-70, 473-74 (5th Cir. 2010)
- *Barefoot v. Mid-America Dairymen, Inc.*, 826 F. Supp. 1046, 1050 (N.D. Tex. 1993) (granting defendants' motion for summary judgment on motor-carrier exemption and holding that truck drivers affect safety of motor vehicles based on the fact that they were required to pass written and driving tests, record their time driving on DOT logs, and complete various DOT forms and pass a DOT physical and drug test)

Interstate on a Public Highway

- Transportation involved in the employee's duties must be in interstate commerce (across state or international lines) or connect with an intrastate terminal (rail, air, water, or land) to continue an interstate journey of goods that have not come to rest at a final destination.
- Safety affecting employees who have not made an actual interstate trip may still meet the duties requirement if:
  - a) The employer is shown to have an involvement in interstate commerce; and
  - b) The employees could, in the regular course of employment, **reasonably have been expected** to make an interstate journey or could have worked on the motor vehicle in such a way as to be affecting safety.

Interstate Commerce

- In *Pot-O-Gold*, the drivers were assigned intrastate routes (to unload toilets) so it was a factual issue whether they could reasonably be expected to make interstate routes, where infrequent disaster relief efforts were interstate but relied on volunteers. *Butcher v. TWSW, Inc. d/b/a Pot of Gold*, 2011 Wl 3794687, at *4 (S.D. Tex. Aug. 25, 2011).
- Where routes are assigned indiscriminately and any driver could be called upon at any time to make an interstate trip, that would be sufficient. *Songer*, 618 F.3d at 470.

All Trucks Driven Must Weigh More Than 10,000 Pounds

- A driver who in a single week drives trucks weighing 10,001 pounds or less is owed overtime in that week.
  - *Mayan v. Rydbom Express, Inc.*, No. 07-2558, 2009 WL 3152136, at *9 (E.D. Pa. Sept. 30, 2009) ("an employee working on a 10,001 pound vehicle two days a week and a 5000 pound vehicle the remaining days of the week appears to satisfy this [covered employee] requirement [entitling the driver to overtime]")
  - *Hernandez v. Alpine Logistics, LLC*, No. 08-6254, 2011 WL 3800031, at *5 (W.D.N.Y. Aug. 29, 2011) (even in weeks where employees worked on vehicles weighing more than 10,000 pounds, those employees would still be entitled to overtime if they worked on vehicles weighing less than 10,000 pounds)

Trucks Must Weigh More Than 10,000 Pounds (cont.)

- DOL Field Assistance Bulletin No. 2012-2 (Nov. 2010) (stating that employee drivers are entitled to overtime compensation, provided that they worked for at least part of the week on vehicles weighing less than 10,001 pounds).
- UNLESS – all trucks under 10,001 pounds driven in that week were used in transporting hazardous material, requiring placarding under regulations prescribed by the Secretary of Transportation.

Executive, Administrative, or Professional Exemptions Employees Cannot Be Paid on Day Rate

- Executive Exemption - employees can be paid only on a salary basis.
  - "Salary basis" means that compensation is not reduced for any absence that is less than a full day off.
    - *Can only deduct full days off taken for personal reasons, as unpaid leave, or for disciplinary suspensions as a result of infractions of workplace rules. 29 C.F.R. § 541.602.*
- Administrative and Professional Exemptions permit compensation on a salary OR fee basis.
  - Fee basis is defined as being "paid an agreed sum for a single job regardless of the time required for its completion" and "payments based on the number of . . . days worked and not on the accomplishments of a given single task are not considered payments on a fee basis." 29 C.F.R. § 541.605(a).

Executive Exemptions

- Primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
- Who customarily and regularly directs the work of two or more other employees; and
- Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight.
- 29 C.F.R. § 541.100

Professional Exemption

- Applies to an employee whose primary duty is the performance of work:
  - (i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or
  - (ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.
- 29 C.F.R. § 541.300

Administrative Exemption

- Applies to an employee whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.
- 29 C.F.R. § 541.200.

Examples of Administrative Exemption Application – Inspectors

- Public sector inspectors or investigators" such as "safety . . . specialists," generally do not fall under the Administrative Exemption because their duties are "typically . . . not . . . directly related to the management or general business operations of the employer" and because their work involves "the use of skills and technical abilities" as opposed to the exercise of discretion.
- 29 C.F.R. § 541.203(j).

Examples of Administrative Exemption Application – Inspectors (cont.)

- Oil and gas pipeline inspectors (paid on a salary basis) can fall within the Administrative Exemption only if they are exercising **discretion and independent judgment**
  - *O'Dell v. Alyeska Pipeline Service Co*., 856 F.2d 1452, 1453 (9th Cir. 1988) (pipeline field inspector qualified for administrative exemption), *called into question by Bothel v. Phase Metrics, Inc.*, 299 F.3d 1120, 1129 (9th Cir. 2002).
    - *Alyeska inspectors represent the company in contacts with state inspectors, offer assistance to contractors in interpreting codes, negotiate with field supervisors to correct discrepancies on-site, work "without supervision at remote field locations," were authorized to "review and override the decisions of quality control inspectors," and had the power to "ma[ke] recommendations for waivers of specifications."*

Administrative Exemption Application

- *Brock v. On Shore Quality Control Specialists, Inc*., No. 84-603, 1987 WL 31308, at *7 (W.D. Tex. 1987) (field inspector qualified for Administrative Exemption).
- In *Brock*, the welding inspector had the power to shut down a pipeline construction site if the weather did not permit good welds to be made, as well as to test welders and fire bad welders. The inspector also did not have to receive the approval of his superiors to deviate from the contract specifications or to implement such significant decisions as shutting down a job. So not just applying prescribed written welding specifications.

Administrative Exemption Applied

- *But see Zuber v. APC Natchiq, Inc.*, 144 F. App'x 657 (9th Cir. 2005) (holding that safety specialist for an oilfield services contractor was not an administratively exempt employee because the job required the application of detailed procedures to specific situations, so he was not exercising his own discretion and independent judgment).
  - Unlike in *O'Dell*, Zuber was usually supervised on-site; his recommendations — such as whether to issue a permit — were always subject to a further level of review and he had no discretion to depart from established standards.

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Immigration Issues Impacting Oil and Gas Industry Employers

- Form I-9 Employment Eligibility Verification
- Dealing with a DHS/ICE/HSI Notice of Inspection
- H-1B compliance issues for employees and contractors
- Cross-border workers and visitors
- Immigration due diligence

Who Must Conduct Employment Eligibility Verification (EEV)?

- All U.S. employers must conduct EEV
- An employer's agent may conduct EEV
  - Useful for employees starting in remote locations
  - Anyone authorized by an employer may be an agent
  - Remote hires present challenges
    - *There's nothing special about notaries*
    - *Tip: Memorialize the agency in writing; attach to I-9 Form*

For Whom Must an I-9 Be Completed?

- All newly hired U.S. employees
  - Even if paid from a company abroad
- Full-time or part-time employees
- Employees hired since November 6, 1986
- NOT independent contractors
- NOT contract agency employees

For Whom Must an I-9 Be Completed?

- Corporate Transaction/Reorganization
  - New Forms I-9 are needed only for “new hires.”
  - No new I-9 Form is needed for continuing employment with a related, successor, or reorganized employer, provided that the employer obtains and maintains, from the previous employer, records and Forms I-9 where applicable.
- A related, successor, or reorganized employer includes:
  - The same employer at another location.
  - An employer that continues to employ some or all of a previous employer’s workforce in cases involving a corporate reorganization, a merger, or sale of stock or assets.
- New owners have the option of obtaining new Forms I-9 from all employees.
  - Timing is a challenge given the 3-day rule.

Conducting EEV

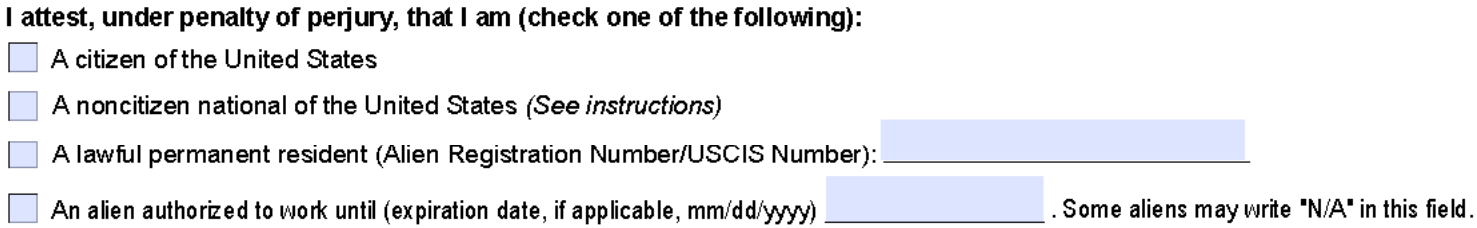
- First phase of EEV should begin on or before the first day of employment
- ***Employee*** must complete and sign Section 1 of I-9 Form
- ***Employer*** should ensure that Section 1 is completed correctly

Within Three Business Days

- ***Employee*** must present acceptable original documents
- ***Employer*** must inspect original documents presented
- ***Employer*** must complete and sign Section 2 of I-9 Form
  - If hired on Monday, then employer must complete EEV by COB Thursday.

Section 3 Reverification

- Temporary employment authorization
  - Refer to Section 1 of I-9 Form for period of temporary employment eligibility



I attest, under penalty of perjury, that I am (check one of the following):

☐ A citizen of the United States

☐ A noncitizen national of the United States *(See instructions)*

☐ A lawful permanent resident (Alien Registration Number/USCIS Number): _____

☐ An alien authorized to work until (expiration date, if applicable, mm/dd/yyyy) _____ . Some aliens may write "N/A" in this field.

  - Must reverify on or before expiration
  - May use Section 3 of I-9 Form or a new I-9 Form
  - Also used for rehiring within three years of initial hire date, but better just to treat as a new hire
  - Keep a tickler system in order to alert employees with expiring work authorization documents four to six months prior to expirations

Antidiscrimination

- Immigration laws prohibit discrimination based on national origin or citizenship status
- Employers should not
  - Request or refuse specific documents for I-9 purposes, or refuse to accept permissible documents
  - Ask for more evidence if an employee has shown acceptable I-9 documents
  - Single out individuals or groups for special verification procedures based upon a characteristic
  - Discriminate in favor of U.S. citizens unless required to comply with law, regulation, or executive order, or required by federal, state, or local government contract
- Never request or require specific documents for I-9 purposes

Immigration Compliance and E-Verify

- Use of E-Verify is not a substitute for I-9 completion
- E-Verify does not insulate employers from allegations of unfair immigration-related practices
- E-Verify Monitoring & Compliance data sharing with Office of Special Counsel
  - Charges based on improper use of E-Verify
- E-Verify changes to notices related to non-confirmation
  - TNC notice will be replaced with a Further Action Notice (FAN).
  - More information than contained on the current TNC notice will be on the FAN.
  - If an employee chooses to "contest" an E-Verify TNC notification to an employer, the employer will also now be required to print a Referral Date Confirmation and give it to the employee.
  - E-Verify Monitoring and Compliance Department will be checking to confirm that these documents are properly printed as and when needed.
  - Web-based server providers must update in 6 months

Immigration Compliance

- ICE/HSI issuing regular “waves” of inspections
- Penalties for paperwork violations are common, even where entire workforce is appropriately authorized to work
- USCIS continues to conduct H-1B “site visits” to ensure that H-1B workers are employed as stated in their petitions
- The Department of Labor (DOL) undertakes enforcement actions with respect to violations of wage, benefits, and employment condition obligations in connection with H-1B workers
- DOL also has authority over PERM recordkeeping requirements

Dealing with a Notice of Inspection

- Typically delivered in-person
- Has a protocol in place that includes
  - No conversations
  - Immediate internal escalation
  - Prompt outreach to in-house or outside counsel
- Requires production of documents within three days
  - See sample NOI in supplemental materials
  - Reasonable extensions of 1-2 weeks are sometimes granted

Dealing with a Notice of Inspection (cont.)

- Response team typically includes
  - Human Resources
  - Payroll
  - Counsel
- Typically try to maintain a constructive and cooperative relationship with ICE/HSI without losing sight that this is an adversarial process.

Penalties for Noncompliance

- Civil monetary penalties
  - Paperwork violations: $110 to $1,100 per employee (even if authorized to work)
- Termination of any workers identified as unauthorized
  - No sanctions if employment was unknowing
- Egregious situations:
  - Criminal penalties: six months in prison for “pattern and practice” violations, and criminal monetary penalties for each unauthorized worker (in addition to civil penalties)
  - Asset forfeiture
  - Debarment from government contracts
- Collateral damage
  - Bad publicity
  - Potential SOX material adverse impact exposure

When and How to Conduct an Internal Audit

- Consider engaging outside counsel
  - Privileged
- Confirm that you have I-9s for all active employees by comparing them to current payroll
  - Obtain new I-9s if they are missing
- Confirm that you have I-9s for all departed employees for whom the retention obligation applies
- Identify forms with deficiencies and correct those that are amendable to correction
  - Follow rules for proper correction
- Periodic self-audits are evidence of good faith

Policies for Avoiding Trouble in the Starting Gate

- Strengthen your initial point of contact: Recruitment
- Require that all new position requisitions indicate whether immigration sponsorship will be offered for an open position
  - If applicable, then you may indicate in the recruitment that "immigration sponsorship is not offered for this opening."
    - *Pointer: you can also use this language in PERM recruitment to filter out non-U.S. applicants*
- Limiting opportunities based on citizenship status is permitted only when required by a government contract or regulation
  - Recruitment with citizenship limitations invites OSC/DOJ scrutiny

Asking About Immigration Up Front

- Ask the safe questions, and only the safe questions, preferably on an application.
- The following language is acceptable to OSC/DOJ if asked of all applicants:
  1. Are you legally authorized to work in the United States? ___ Yes ___ No
  2. Will you now or in the future require the company's sponsorship for an immigration-related employment benefit? ___ Yes ___ No
- Hiring decisions based on an applicant's need for immigration sponsorship are not considered discriminatory, provided that the policy is not applied in an inherently discriminatory manner (sponsorship only of certain nationalities).

Contingent Offer of Employment – General

- Make all offers of employment contingent upon the applicants' ability to satisfy the employment eligibility verification requirements
- Sample policy:
  - All offers of employment with [INSERT COMPANY] are contingent upon the employment applicant's ability to provide, within three business days of hire, evidence of identity and employment authorization acceptable for I-9 purposes under federal law. Therefore, all offers of employment regardless of the applicant's nationality should contain the following language:
    - *"This offer of employment is contingent upon your ability to provide original evidence of identity and work authorization acceptable under the immigration and naturalization laws within three business days of hire, in connection with the completion of a Form I-9."*

Contingent Offer of Employment – Visa

- Offers that involve nonimmigrant visa sponsorship should be made contingent on successfully obtaining the required employment authorization.
- Sample Policy:
  - Where [INSERT COMPANY] determines that it will seek nonimmigrant work authorization on behalf of an employment candidate, the offer of employment must be contingent upon the company's ability to obtain the temporary work visa allowing for the employment. Therefore, any written offer provided to an employment candidate for whom [INSERT COMPANY] will pursue nonimmigrant employment authorization should contain the following language:
    - *"This offer of employment is contingent upon [INSERT COMPANY]'s ability, after reasonable efforts, to secure appropriate work authorization on your behalf."*

Contingent Offer of Employment – Visa (cont.)

- Offers that involve nonimmigrant visa sponsorship should not be inadvertently modified as a result of language included in an employer's immigration petition.
- Sample Policy:
  - Where [INSERT COMPANY] determines that it will seek nonimmigrant work authorization on behalf of an employment candidate, no documents prepared in connection with the preparation or filing of a petition or application for an immigration benefit shall modify the underlying nature of the employment relationship. In particular, nothing in a document created in the preparation or filing of a petition or application for an immigration benefit shall alter the at-will nature of the employee's employment, nor may it be relied upon by the employee as a contract or modification of the at-will nature of the employment.
- Useful to include similar language in petition letters of support.

Know the ABCs of Your H-1Bs

- H-1B Wage and Hour Obligations
  - Obligation to pay the prevailing wage
  - Requires proper job classification and prevailing wage survey
  - Potential DOL-WH exposure, including back pay, sanctions, debarment
  - Employee contributions toward H-1B legal fees are problematic
    - *Certain filing fees (Anti-fraud: $1,500 and ACWIA: $500) must be paid by the employer*
    - *Payment of other fees is treated as a reduction in net income for prevailing wage purposes*
- Note: Employee financial contributions toward the PERM labor certification process are strictly prohibited by regulation. This is a frequent area of inquiry during a PERM audit.

Know the ABCs of Your H-1Bs (cont.)

- H-1B Contractor Issues: Letters in support of petitions or visa applications
  - Anti-job-shop provision/policy.
  - Emanates from a USCIS Guidance Memorandum dated January 8, 2010 that imposes enhanced evidence requirements on employers filing H-1B petitions for foreign workers who will be placed at client worksites: http://www.uscis.gov/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf.
  - an employer seeking to sponsor an H-1B worker needs to prove that there is a valid employer-employee relationship.
- It is okay to provide a carefully drafted letter
  - It is presumably in your interest if it will enable a key non-employee resource to continue providing a valuable service to you.
  - The letter should be tightly worded and factually accurate so that it addresses the key substantive issues without making representations that are both unnecessary in terms of satisfying immigration requirements and potentially unhelpful in that they could imply an employer-employee relationship or a co-employment situation.
  - See example in supplementary materials.

Know the ABCs of Your H-1Bs (cont.)

- H-1B Contractor Issues: Physical Posting Notice
  - Contractors that employ H-1B workers are, like all H-1B employers, required to post at the place where the work will be performed a notice of an employer's intent to employ an H-1B worker.
  - It is likely in your best interest to cooperate with the contractor that requests access to your bulletin board or other posting location near where the H-1B worker will be employed.
- Might also include USCIS site visit in connection with H-1B verification.

When Is a Visitor a Visitor?

- As a basic rule, VWP/B-1 business visitors may not engage in productive labor. Situations that are likely to suggest “work” include:
  - an individual U.S. office or workstation;
  - the presence in the United States of individuals whom the person directly supervises or manages;
  - visiting clients on a billable basis;
  - receiving any wages or salary from a U.S. source; or
  - a pending or approved work visa petition (e.g., H-1B, E, L-1).

When Is a Visitor a Visitor? (cont.)

- A person is eligible for VWP/B-1 business visitor status if his/her activities are limited to:
  - engaging in commercial transactions that do not involve gainful employment in the United States;
  - negotiating contracts;
  - consulting with business associates;
  - litigating;
  - participating in scientific, educational, professional, or business conventions, conferences, or seminars; or
  - undertaking independent research.
  - There is also language on the Department of State website indicating that a period of short-term training is also a permissible VWP/B-1 activity.

When Is a Visitor a Visitor? (cont.)

- When in doubt, write it out.
  - For a traveler whose request for admission as a visitor is likely to invite extra scrutiny, it is helpful to travel with a "pocket letter" to do the explaining so that the weary traveler does not have to.
    - *See the sample in the supplementary material.*
- Remember that visa waiver travelers need to be registered with ESTA: http://www.cbp.gov/ESTA
- A new travel authorization via ESTA is required when:
  - The traveler is issued a new passport;
  - The traveler changes his/her name;
  - The traveler changes his/her gender;
  - The traveler's country of citizenship changes; or
  - The circumstances underlying the traveler's previous responses to any of the ESTA application questions requiring a "yes" or "no" response have changed.

Immigration Due Diligence

- Corporate transactions or reorganizations can have significant implications for foreign national employees.
- Engage immigration counsel before any corporate transaction or reorganization.
  - Stock purchases and asset purchases require different strategies
  - Buyers
    - *Protect continuity of status and employment eligibility of acquired workers*
    - *Investigate compliance issues as part of due diligence*
    - *Come up with an I-9 strategy*
  - Sellers
    - *Protect the valuation of your company*
    - *Protect the continuity of the status and employment eligibility of reassigned workers*
    - *Avoid last-minute hiccups*

Immigration Due Diligence (cont.)

I-9 Corporate Compliance – U.S. Operations:

- Does Seller have on file a properly completed and duly executed Form I-9 for every active U.S. employee (full-time and part-time) hired after November 6, 1986?
- Does Seller participate in the E-Verify (formerly known as Basic Pilot) program for electronic verification of employment eligibility? If so, as of what date and for which units/locations?
  - If so, does Seller participate on a voluntary basis or either as a federal government contractor or pursuant to a state law that mandates the use of E-Verify?
- When did Seller last perform a comprehensive Seller-wide audit of I-9 Forms?
  - What prompted or motivated Seller to perform the audit?
  - Describe any remedial or other measures taken in response to the results of any such audit.
- Has Seller ever been subject to an inquiry, inspection, investigation or audit by the Department of Labor, the Immigration and Naturalization Service, the Department of Homeland Security (including USCIS, HSI, and ICE), or the Department of Justice in which the agency asked to view Seller's I-9 forms or other immigration-related or hiring documents? If so, provide copies of any related correspondence along with a description of any action or resolution arising from the government inquiry.

Immigration Due Diligence (cont.)

Foreign National Employees in the United States:

- If Seller currently employs individuals in nonimmigrant visa status, either directly or indirectly as a co-employer with a U.S. or foreign affiliate or subsidiary, please state as to each employee:
  - Name, Position, Name of employer as indicated on visa petition, Location
  - Current nonimmigrant visa classification/status and any expiration date
  - Anticipated date that the individual will reach any maximum limit on nonimmigrant visa classification
- Does Seller maintain a "public access file" for each H-1B worker that includes a Certified Labor Condition Attestation (ETA-9035), and an explanation of relevant employment conditions including wage level, prevailing wage, benefits, and compensation structure?
- If Seller has made any commitment to pursuing permanent residence on behalf of any employee currently working in nonimmigrant visa status, please state as to each employee:
  - Name, Position, Location, Current nonimmigrant visa status and any expiration date
  - Whether (a) a labor certification application has been filed/approved; (b) an I-140 petition has been filed/approved; (c) the individual has filed for adjustment of status.

Immigration Due Diligence (cont.)

Past Investigations:

- If Seller or any of its affiliates or subsidiaries has, within the last 5 years, been the subject or target of, or named as a defendant in, any inquiry, investigation, proceeding, administrative action, or judicial action related to compliance with U.S. immigration and nationality law, including but not limited to provisions of 8 U.S.C. § 1324, 8 U.S.C. § 1324a, 8 U.S.C. § 1324b, and 8 U.S.C. § 1324c; the wage and hour regulations related to employment under the H-1B visa program; or any other local, state, or federal provision related to the employment of foreign national workers, then as to each such instance, please provide a brief description of the matter including dates, charges, parties, and resolution, if any.

Immigration Due Diligence (cont.)

- Additional due diligence areas of inquiry:
  - Seller's immigration policies
  - E-Verify
  - Non-U.S. Employees

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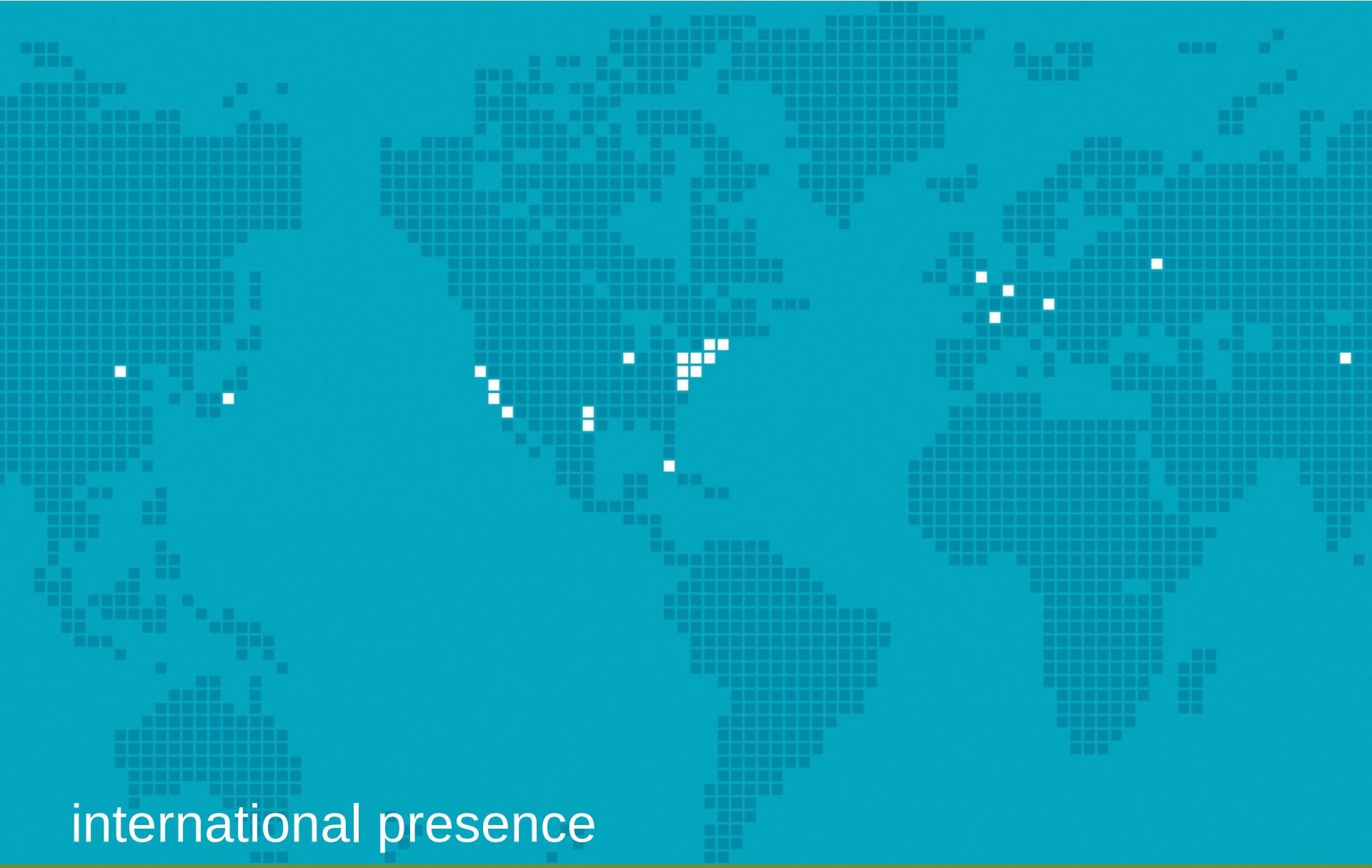

international presence

Almaty Beijing Boston Brussels Chicago Dallas Frankfurt Harrisburg Houston Irvine London Los Angeles Miami Moscow New York Palo Alto Paris Philadelphia Pittsburgh Princeton San Francisco Tokyo Washington Wilmington