Avoid the pitfalls

Why template employment contracts don't work with foreign nationals

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The pressure to streamline internal hiring processes and minimize legal costs often leads employers to utilize template employment agreements during the hiring process.

"Although the document may perfectly fit one type of employer and employee, it may be wholly inadequate for another set of parties," says Isabelle Bibet-Kalinyak, an Immigration and Health Care Corporate Attorney at Brouse McDowell. "Additionally, labor and employment law is state-specific."

Employers tend to reuse, tweak and customize the first agreement they obtain in-house, without further consulting legal counsel. Among the many pitfalls of this approach lie the obligations of U.S. employers who employ foreign nationals.

Smart Business spoke with Bibet-Kalinyak about some common traps employers can avoid when drafting employment agreements for aliens.

What is the most common issue with foreign nationals' employment agreements?

The most common and contentious issue is money. Who will pay for the government fees and legal costs associated with filing the immigration petition? Employers should reframe this question as follows: 'Who can or should pay for such costs?' The Department of Labor (DOL) and immigration regulations prevent employers from putting the burden of some costs on the employee at the onset of the hiring process. Employers cannot contract out of these obligations.

Does this apply to all types of immigration petitions or visas?

Unfortunately, the rules differ from one type of petition to the other. For example, employers must pay all costs for H-1B and L-1 nonimmigrant visa petitions, with a narrow exception for premium processing fees, which allow the expediting of a petition in two weeks.

Similarly, employers cannot shift any of the costs of the Program Electronic Review Management (PERM) process, the first step to the permanent residence process also known as the green card process. During that initial phase, the employer obtains a prevailing wage determination from the DOL, undertakes a stringent recruitment process and applies for PERM labor certification with the DOL. While there are no filing fees involved, the recruitment fees (advertising) and legal costs can add up.

The costs of the immigrant petition (Form I-140) and adjustment of status (Form I-485) present unique challenges because the rules provide little to no guidance regarding which party should pay. Nonetheless, some state laws prohibit the shifting of costs considered 'a business necessity.' Whether costs constitute a business necessity depends on the circumstances.

Which costs may employers safely shift to employees?

The most conservative approach is to pay all costs and treat them as an investment in the foreign national. Another safe alternative is to shift only the costs which the law expressly defines as eligible for payment by the employee such as, but not limited to, the premium processing fees, the costs of applying for the Employment Authorization Document and Advance Parole to travel (Form I-765 and Form I-131, the EAD/AP Card), and the costs for the alien's dependents. State law would dictate whether the cost of adjusting status, the last step in the green card process (Form I-485), can safely be added to this list.

What alternatives do employers have?

A pragmatic approach is to pay for the costs upfront and draft a claw-back provision in the employment agreement under which the employee agrees to stay for a reasonable period of time or repay the costs (only costs that can be legally borne by the employee).

The repayment may be pro-rated or payable in full if the alien leaves before the end of the period. What constitutes a reasonable period of time is subjective but generally, a two-year period should not be considered unconscionable. The above examples highlight the complexity and the interrelationship between immigration regulations and state labor laws.

Employers should therefore exercise caution when reusing and customizing employment agreements without legal counsel. ●