BusinessManagement DAILY

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Visa sponsorship isn’t an employment contract

Employers sometimes help foreign applicants or employees arrange visas that allow them to work and live in the United States. Employers that file H1-B visa petitions are effectively offering to sponsor a particular foreign worker. Employees who enter the country under an H1-B visa must go to work for an employer that has filed a petition. By sponsoring the visa application, the employer helps secure that right. But doing so doesn’t necessarily create an employment contract to employ the worker for a set period of time.

Recent case: Taryn-Lee, who is not a United States citizen, worked for J.P. Morgan Chase in London. Before taking the job, she had a romantic relationship with a JPMC executive. After she started working there, the relationship took a turn for the worse. Taryn-Lee called London police to report domestic violence. The resulting injuries left her with permanent damage to two fingers, plus post-traumatic stress disorder.

She requested a transfer to New York, and JPMC helped procure an H-1B visa for her. Taryn-Lee's H-1B visa was valid for three years, with possible extensions to a total of six years. She made the move.

After two years, Taryn-Lee was terminated for poor performance. Six years later, she filed a discrimination lawsuit.

JPMC argued that, at most, she had 300 days to file an EEOC complaint, and three years to file a claim under New York state or New York City law. Taryn-Lee argued that the visa created a contract for employment for six years, and that her time limit should begin running after that.

The court tossed out the case. It reasoned that Taryn-Lee was an at-will employee and that the mere fact the employer had helped her get a visa didn’t create an employment contract. The company could have fired her one day after her arrival if it wanted, and the length of the visa was irrelevant. (Andrew v. J.P. Morgan Chase, SD NY, 2018)

Tips on employment contracts

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Remember, courts construe all contracts against the party that wrote up the agreement. What does that mean? If there are any ambiguities, they will be interpreted against the drafting party. That's why it's so important to engage an attorney to draft all employment contracts. It's essential for those agreements to conform with the contract law of each state in which you operate.

But you can start discussing employment contracts as early as the hiring process.

DO ensure that applicants realize your inability to make promises of job security is not personal, but rather legal. Reiterate that this also means they are free to leave whenever they want, but not that you want to see them go, of course.

DON'T guarantee applicants job security, even if they reject another job offer. Instead, explain that you cannot make promises about their employment future because of such factors as market trends and competition.

DO make applicants aware of at-will disclaimers by highlighting them on a regular basis and placing them in a conspicuous place on applications and in handbooks.

Words to the wise when making relocation promises.

Don't operate from the assumption that the end result justifies any path it may take to get there. It doesn't. Just because an employer wants the employee to agree to take the job does not give him/her license to misrepresent the job's responsibilities, potential opportunity, or security.

It's better to make no promises than to make false ones. In a time when structural changes like mergers and reductions-in-force have become routine, employees should be reminded that they are always employed at-will, even if they perform well. One of the best times to remind employees of your at-will policy is when they're promoted or change jobs.

When faced with what you think is a so-so relocation offer, lay out the "good news/bad news" equation for employees in some detail. Explain the possible risks and rewards in terms of the job, salary, staff, career potential, work environment, geographic area, etc., then let them decide.

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