

Third Party Payment to H-1Bs

Abstract: Questions have arisen about whether it is permissible for an H-1B employer's salary to be paid by a third party or an entity other than an attesting employer.

In the following letter, James Norris, the new Chief of DOL's Division of Foreign Labor Certification, discusses the Labor Department position (letter dated August 21, 1996).

Dear Ms. _____ :

This is in response to your request for an advisory opinion under the H-1B program for nonimmigrant professionals in specialty occupations.

You request guidance concerning the permissibility of situations where an H-1B nonimmigrant's salary is disbursed, either in whole or in part, by an entity other than the attesting employer. You indicate that in all other respects [] remains the "employer" per Sec. _____.715 of the Department of Labor's (Department's) regulations governing the H-1B program. That is to say, your organization suffers of permits the H-1B nonimmigrant to work in the U.S., and there exists an employer-employee relationship with respect to the H-1B nonimmigrant in that _____ hires, maintains the ability to fire, supervises and otherwise controls the work of such employee.

Pursuant to Sec. _____.713(c)(2) of the Department's H-1B regulations, "wages paid," for purposes of satisfying the H-1B required wage, consist only of those payments to the H-1B nonimmigrant which satisfy each of four criteria. The payments must be shown in the employer's payroll records as earnings for the employee, must be reported to the Internal Revenue Service (IRS) as the employee's earning with appropriate withholding for the employee's tax paid to the IRS, and the employer must be able to document payment of the tax reported and paid to the IRS, and the employer must be able to document payments of the tax reported and paid to the IRS as required by the Federal Insurance Contributions Act. Lastly, the payments must be reported and documented by the employer as the employee's earnings, with appropriate employer and employee taxes paid to all other appropriate Federal, State, and local governments in accordance with any other applicable law. In sum, in determining whether the required wage was been paid, payments by third parties to H-1B nonimmigrants will only be considered "wages paid" if each of the criteria set forth at Sec. _____.731(c)(2) has been met and documented. The regulations do not prohibit payments by third parties to H-1B nonimmigrants but such payments will only be considered to be "wages paid" if the aforementioned criteria are met. It should also be noted that there is

nothing to prevent third parties from reimbursing an attesting employer for payments it made to an H-1B nonimmigrant, nor is there any prohibition on third party payments to an attesting employer which then are paid out to an H-1B nonimmigrant as “wages paid” for purposes of satisfying the Department’s H-1B regulation.

I hope this information is helpful to you.

Sincerely,

JAMES NORRIS
Chief
Division of Foreign Labor Certification