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New H-1 employee returning -- rights and issues

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Submitted by Chief Editor on Apr 15th 2009

Our employee XYZ has arrived in the US. However, it appears that because of the job market in the US, he is going to return home to his old job. I know you said they are allowed to return back to USA at a later date if they choose to work for us down the road. But my question is how long may he stay without getting paid until he must return home? I know you sent me information about benching, stating: Q. What is the law regarding the benching of H-1 holding employees? A. The law does NOT permit benching without full salary payment by the employer. The only exception is that when an employer first hires an employee on H-1B they are allowed an initial period of 30 or 60 days during which the employee does not have to be paid while on bench. i. If the employee is currently in USA and adjusts status or transfers from one employer to another within USA - the bench-without-pay period is 60 days from the date of approval of the petition by INS. ii. If the employee is entering USA from abroad, the period is 30 days from the date of entry into USA. If I'm interpreting this correctly, we must pay him no later than day 30 of his arrival here in the USA?

ANSWER:

There are a couple of issues I want to clarify. The period of payment begins on the earlier of the two events: when the employee presents himself/herself for the job or 30/60 days. DOL considers it to be irrefutable evidence of having reported when a consulting company starts "marketing" the resume (Note also that to bring an employee in without a project has been elevated by this administration to be an indictable offense, which I think is unlikely to stand up in courts).

If the employee wishes to continue to stay for tourism, I think they should apply for B status. See this post: <http://forums.immigration.com/blog.p...gcategoryid=36> [2]

As for returning in the future, that can be problematic because the govt. can question whether there truly exists a job for him. If you have a truthful answer for that, return should be possible and can be done any time during the life of this H-1. Note also that you have no obligation to pay him while he is outside USA, but there is a general obligation to withdraw an H-1 if the worker leaves. SO, that makes this a gray area as well.

Unless the context shows otherwise, all answers here were provided by [Rajiv](#) [3] and were compiled and reported by our editorial team from comments and blog on [immigration.com](#) [4]

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