

Draft Summary of Durbin Provisions contained in McCaskill Amendment (Division XII, p. 247)

Summary of MODIFIED Durbin H-1B and L Visa Amendment (starting on p.250)

Note that the revised version of the “clay pigeon” amendment, SA 1934 to the Senate immigration bill, S.1639, has not yet been posted publicly. The modified Durbin provisions that are summarized below therefore are not reflected in the version of the “clay pigeon” currently posted on Infonet:

Limit on Percentage of H-1B and L employees

The provision in the base bill that limits employers of not less than 50 employees to having not more than 50% of the employees be H-1Bs is amended to expand this provision to cover L visas so that the sum total of a company’s H-1B and L employees could not exceed 50%.

Wage Determination for H-1Bs

Requires that the Secretary of Labor make the determination of wage rate pursuant to the filing of an LCA within 14 days. If the determination is not issued within 14 days, employer will make the prevailing wage determination pursuant to the relevant section of the INA and such determination will be treated as an attestation.

Labor Condition Applications

Adds new requirements on employer to make request to Secretary of Labor for determination of appropriate wage rate and indicates that an employer cannot use the H-1B worker for the purpose of entering into a job shop arrangement.

Labor Attestation

Requires employer to make request to Secretary of Labor for a determination of appropriate wage rate. This section also indicates that if the percentage of an employer’s H-1B visa holders who are paid entry-level wages exceeded 30%, DoL would be required to audit the employer.

Prohibition on Outplacement of H-1Bs

Adds to outplacement restrictions indicating that the H-1B worker shall not be placed with another employer where there are indicia of an employment relationship with the other employer unless the worker has been granted a waiver. The process to obtain and requirements for a waiver shall be promulgated by the Secretary of Labor. The Secretary is required to process the waiver in 14 days. Employer must establish that the H-1B, 1) will not displace and does not intend to displace a U.S. worker where he/she will be placed during the period 180 days before and 180 after the placement, 2) will not be controlled and supervised principally by the employer where he/she is placed, and 3) will not be in an arrangement to provide labor for hire.

Posting Available Positions

Requires posting detailed description including wages and other requirements of each position for which a nonimmigrant is sought on a website for 30 days. DoL may work with private companies and nonprofit organizations in the development and operation of this new website.

Wage Determination for Ls

Adds new wage requirements for the employer of an L worker who has been employed by the employer for a cumulative period of time that is greater than one year. The L wage must not be less than the highest of the prevailing wage level for the occupational classification in the area of employment or the actual wage level paid by the employer to all other individuals with similar experience and qualifications for that job. Also, the L worker must not adversely affect the working conditions of workers similarly employed.

Employers who employed one or more L worker previously must provide to DHS W-2s filed by that employer for the L worker(s). Employers cannot require an L worker to pay a penalty for ceasing employment before a date that was mutually agreed to or fail to offer the same employee benefits it offers to its U.S. workers.

In promulgating the regulations under this section the Secretary of Labor is required to take into consideration any special circumstances relating to intracompany transfers.

Prohibition on Outplacement of Ls

Adds to outplacement restrictions indicating that the L worker who has been employed with the employer for a cumulative period greater than one year shall not be placed with another employer where there are indicia of an employment relationship with the other employer unless the worker has been granted a waiver.

The process to obtain and requirements for a waiver shall be promulgated by the Secretary of Labor. The Secretary is required to process the waiver in 14 days. Employer must establish that the L worker, 1) will not displace and does not intend to displace a U.S. worker where he/she will be placed during the period 180 days before and 180 after the placement, 2) will not be controlled and supervised principally by the employer where he/she is placed, and 3) will not be in an arrangement to provide labor for hire. This amendment also prohibits L workers from being placed in job shop arrangements.