

CASE STUDY #3

Matter of XCEL Solutions Corporation

Background

XCEL Solutions, Inc., an intermediary IT staffing company, employed 18 H-1B employees from 2006-2008. Each employee was required to report daily to XCEL's Matawa, N.J. office where they took calls from prospective clients and interviewed for temporary work assignments. When employees were not on an assignment, they were "benched" and paid just \$30 per day. "Benching" is a term used to refer to the non-productive status of an employee, usually because the employer does not have enough work to assign to all employees.¹

Under the H1-B visa program, employers are required to certify that the employee will be paid the required Prevailing Wage for a specific job for the duration of the authorized employment period. This includes any time the employee spends in a non-productive status due to the fault of the employer.² If an employee is in a non-productive status through no fault of the employer, then prevailing wages need not be paid, but the employer must begin paying again as soon as the employee becomes available for work.³

Investigation

An investigation of XCEL Corporation was initiated by the Administrator in the Wage and Hour Division of the Department of Labor (DOL) in October of 2009, after several employees complained that XCEL was not paying the Prevailing Wage while they were between assignments.

The Wage and Hour Administrator confirmed that XCEL had been paying H-1B employees who were placed in a non-productive work status \$30 per diem, instead of their appropriate prevailing wage, while requiring those employees to report to the XCEL office each day to speak with clients and attend interviews with potential clients. The \$30 per diem was found to be a violation of the Prevailing Wage regulations because the employees' non-productive state was the fault of the employer.

¹ U.S. Department of Labor, Wage and Hour Division. No. 2011-LCA-00016. 16 May 2012.

² "Temporary Employment of Foreign Workers in the United States." *Code of Federal Regulations* Title 20, Pt. 655.731(c)(7)(i), 2012 ed.

³ "Temporary Employment of Foreign Workers in the United States." *Code of Federal Regulations* Title 20, Pt. 655.731(c)(7)(ii), 2012 ed.

According to the DOL investigation, in 2009, XCEL began allowing employees the option of taking unpaid leave, or being terminated when there was no work assignment. When one employee asked for this request to be made in writing, she was terminated several hours later. Other employees who chose to take unpaid leave were found by the wage and hour investigator to have taken 'involuntarily' leave, and wages for those periods was included in the DOL calculation of back wages owed to each employee. In addition, when employees were "benched", XCEL did not withhold taxes from the per diem pay, and did not report the per diem as wages to the IRS. As a result, the DOL determined that the amount paid to each employee during their periods of being benched would not be deducted from their back wages.

Conclusion

The owners of XCEL were ordered to pay back wages to 16 of the 18 employees totaling \$228,045.39, as well as the following fines:

- \$3,750 for each employee owed back wages (totaling \$67,500);
- \$3,750 for failing to post a Labor Condition Application at each end worksite;
- \$600 for failure to make the required secondary displacement inquiry; and
- \$600 for failing to cooperate with the investigation.

The total fines were \$72,450.

To read the decision [click here](#).