



Immigration Fraud Whistleblower Likely to receive a \$5M Bounty from Infosys's \$34M False Claims Act Settlement: Is Your Business Immigration Program Prepared for a Similar Whistleblower Attack?

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On October 30, 2013, Infosys Limited ("Infosys"), an Indian IT company, signed a settlement agreement with the United States in the Eastern District of Texas to resolve allegations that Infosys knowingly presented to employees of the United States false and fraudulent claims for property or approval in violation of the federal False Claims Act (FCA) by engaging in systemic visa fraud and abuse, and that Infosys otherwise failed to comply with the employment verification provisions of the Immigration Reform and Control Act of 1986. The complaint alleges that company officials engaged in a pattern of immigration fraud and abuse including:

- Providing falsified documents to foreign national employees supporting the issuance of B-1 business visitor visas and coaching employees to deceive U.S. consular and border officials into believing that such employees were coming to the United States for legitimate business visitation purposes and not to engage in local employment;
- Writing and revising contracts for the purpose of concealing that B-1 visa holders would be performing work intended to be performed only by United States citizens and authorized H-1B temporary professional workers; and
- Instructing foreign national employees who were applying for H-1B visas to lie to U.S. consular officials about where they would be working in the U.S. if the worksites differed from the authorized worksites stated in their Labor Condition Applications.

The theory of the government's case is that, as a condition of payment for services rendered to the United States, Infosys made an implied certification that the services were performed by individuals who were legally eligible to provide such services in the United States. The government's complaint alleges that Infosys defrauded the government regarding the legal status of its workforce and otherwise engaged in immigration fraud in order to increase profits, minimize the cost of securing visas, maximize flexibility in deploying workers, obtain unfair advantage over competitors, and avoid tax liabilities. Infosys has denied all allegations except for those relating to I-9 violations.

Impetus for Investigating Infosys

A former Infosys human resources employee, Jack Palmer, Jr., reported allegations of alleged B-1 fraud and abuse to Infosys management. He later quit and sued the company in Alabama for retaliation and constructive discharge, alleging that he was demoted and harassed as a result of his whistleblower activity. His suit was dismissed at the pleading stage on the ground that Alabama does not recognize a public policy exception to the at-will employment doctrine. Mr. Palmer's whistleblower activities came to the attention of Senator Charles Grassley (R – IA), a whistleblower advocate and a staunch proponent of reforms to the H-1B and L-1 visa programs, who urged federal authorities to investigate. In 2011, the U.S. Attorney for the Eastern District of Texas (Dallas) convened a grand jury to hear evidence and to consider criminal charges against Infosys and company officials and executives targeted by the probe.

Why the Government Agreed to Settle

In press reports, the U.S. Attorney for the Eastern District of Texas and agency officials stated that the government elected to resolve the matter through a civil settlement rather than by bringing criminal charges because Infosys had fully cooperated during the investigation and had implemented compliance policies and internal controls to deter future violations. In response to the investigation, Infosys implemented a new electronic I-9 system to replace its existing hard copy system; conducted extensive I-9 compliance training; promulgated a new I-9 compliance policy; enrolled in the U.S. E-Verify Program; adopted enhancements to its H-1B compliance systems to ensure that accurate and up-to-date information regarding H-1B work locations was provided at all steps in the H-1B petition and visa approval process; modified its B-1 visa policy and internal procedures to strengthen compliance with applicable regulations, including requiring managers and travelers to certify the qualifying purpose of a proposed B-1 trip prior to applying for the visa; and adopted disciplinary procedures to punish employees who violate applicable laws or company policies.

Terms Extracted from Infosys

Monitoring, Reporting and Oversight. As a condition of settlement, Infosys agreed to retain, at its own expense, an independent third-party auditor to review and report on the company's I-9 compliance in the next two years based on an analysis of a random sample of at least 4 percent of the existing U.S. workforce. Further, Infosys agreed to submit annual reports to the U.S. Attorney for the next two years describing whether its B-1 visa use policies, standards of conduct, internal controls and disciplinary procedures have been effective in ensuring compliance with law and regulation. Documents and immigration filings made by Infosys with U.S. consular and immigration officials over the following 24

months will also be audited by government fraud specialists to determine whether Infosys remains in compliance with the settlement agreement.

Monetary Payment. Infosys agreed to pay to the United States an aggregate amount equal to \$34 million prior to November 30, 2013, of which Mr. Palmer is expected to receive a \$5 million bounty for reporting the violations to the government and assisting in the investigation. Under the FCA, whistleblowers such as Mr. Palmer are entitled to receive up to 25% of the amount recovered by the government.

What Infosys Received in Settlement

As consideration for the settlement, the government agreed to dismiss its complaint with prejudice and released the company and its current and former employees, directors, officers, agents and contractors from any civil, administrative or criminal claims. Infosys also received assurances that there were no other pending investigations by the Departments of Justice, State, or Homeland Security concerning compliance with employee verification and H-1B and B-1 laws and regulations. Finally, the government agreed that it would not use the alleged violations as grounds to revoke any existing visas or petitions or deny future visas or petitions or cite such violations as grounds for debarment or suspension proceedings relating to government contracts or participation in any B-1 or H-1B immigration program.

Potential Liability Not Released under the Settlement

Notably, the settlement agreement does not bar the United States Department of Labor Wage and Hour Division (DOL/WHD) from undertaking enforcement proceedings against Infosys based on implied violations of the Labor Condition Application requirements, nor does it bar the Secretary of Labor from sanctioning Infosys for such violations, including debarment from all immigration sponsorship programs. Indeed, publicity surrounding the Infosys settlement may well stimulate the filing of LCA complaints against Infosys by other workers. Currently, Infosys is defending a putative nationwide employment discrimination class action filed in the Western District of Wisconsin by four U.S. workers who allege that Infosys systematically shows preference in hiring to workers of Southeast Asian descent in violation of the race and national origin provisions of Title VII of the Civil Rights Act. The settlement agreement also does not prohibit the DOL Office of Federal Contract Compliance (OFCCP) from investigating race and national origin discrimination claims against Infosys. The OFCCP enforces the affirmative action and equal employment opportunity provisions contained in federal contracts valued at \$50,000 or more.

The Continuing Government Probe of Contractors Implicated in Immigration Fraud

Although the Infosys case has been resolved, a DHS official involved with the case indicated that the government is investigating other federal contractors for evidence of visa and immigration fraud violations similar to those brought against Infosys. Companies that are H-1B dependent (i.e., 15 percent or more of their U.S. workforce is composed of H-1B visa holders) and that process a high volume of visa cases through U.S. consular posts in India are likely at greatest risk for inclusion in the ongoing federal probe.

By law, federal contractors are required to make timely disclosure of credible evidence of violations of

federal criminal law involving fraud, bribery, or conflict of interest in the award or performance of a federal contract in excess of \$5 million and in excess of 120 days' duration. The implementing federal acquisition regulations provide for the suspension or debarment of a contractor whose principals knowingly fail to comply with the disclosure requirements with respect to credible evidence of covered violations. In addition, FAR Clause 52.203-13 requires federal contractors with covered contracts to have in place a written code of business ethics and conduct, an ethics awareness and compliance program and an internal control system.

Any federal contractor or subcontractor utilizing foreign temporary workers on government projects should consider an updated review of its written policies and immigration compliance program. Such a review should include an audit of a random sampling of the company's I-9 and E-Verify records, LCA public access files, and H-1B pay practices to determine the effectiveness of the company's existing compliance controls. If such an audit is conducted by or under the supervision of an attorney for the purpose of rendering legal advice, the results of the audit would be shielded from discovery under the attorney client and work product privileges.

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