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LAYOFFS CLOUD STATUS OF H-1B VISA HOLDERS

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MARGARET STEEN, column

Memo: Valley at Work

For most workers, a layoff brings financial insecurity and career worries. But for foreign workers in the United States on H-1B visas, being laid off means even more upheaval.

Workers on H-1B visas, which allow professional workers from other countries to work in the United States for up to six years, face complicated questions about their future if they're laid off. None of the workers I spoke with wanted their names in the newspaper, for fear of attracting the attention of government authorities. But two immigration attorneys, Anja Freudenthal of San Francisco and **Cary Pham** of San Jose, helped me sort out the answers to some common questions.

Q

When companies lay off workers, do they have to let H-1B workers go first?

A

There's no law that specifically says H-1B workers must be let go before U.S. citizens and permanent residents, and many companies say they don't consider visa status when they're deciding who gets laid off and who stays.

The way the visa program works, however, suggests that all other things being equal, in some cases companies should let the H-1B visa workers go first. Some applications for H-1B visas require the employer to say that it cannot find a U.S. worker for the job. If the company lays off a U.S. worker doing exactly the same job as an H-1B worker, it would no longer be true that the company couldn't find a U.S. worker.

In practice, though, layoffs are not usually this simple. After managers consider skills, performance and precise job descriptions, it's rare for them to have to choose between two workers who are equal in every respect except their visa status.

Q

I'm here on an H-1B visa. What happens if I get laid off?

A

This is a very complicated issue, and H-1B workers who have been laid off or are about to be would be well advised to consult an immigration attorney. Here are the basic outlines of the law:

You are officially "out of status" -- no longer legally allowed in the country -- as soon as your employment ends. This means you need to leave the country in a "reasonable" amount of time. How long is reasonable? The law doesn't say, but one attorney I talked to said 30 days would probably be considered reasonable, perhaps longer if you had complicated affairs to wrap up such as a house to sell. Keep in mind, though, that if you were questioned about this -- for example, if you applied for a green card sometime in the future and were asked if you had maintained your status -- you would need to be able to show that you were in fact making preparations to leave the country during this time.

If you find another job and want to get your visa transferred, you may be able to do this if it's within 180 days of when your employment ended. You might have to leave the country to process some of the paperwork.

If you remain in the country for more than 180 days while you're out of status, you may be barred from the United States for three years. If you do so for longer than a year, you may be barred for 10 years.

Q

I'm here on an H-1B visa but also have a green card application in progress. Now I've been laid off. What happens?

A

In most cases, you're out of luck. Your green card application is attached to the employer who filed the documents for you, and if you're no longer employed there, your application ends.

There is one exception, based on a recent change to immigration law. If you're in the final stage of a green card application, adjustment of status, and that adjustment has

been pending for 180 days or more, the application may continue if you find a similar job with a new employer.

Q

Are new H-1B visas still being approved?

A

In order to get an H-1B visa, some employers have to certify to the Labor Department that they can't find a U.S. worker willing and able to take the job. With tens of thousands of people unemployed in Santa Clara County alone, that's a more difficult assertion to make than it used to be. But attorneys say that for certain specialized positions, companies are still asking for the visas, and the visas are still being approved.

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