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COVID-19 Immigration Considerations for Employers

In an uncertain economic environment and with a changing immigration law landscape, it is critical for employers to be aware of shifting legal requirements and their implications, and to remain compliant.

By Kate Kalmykov | July 30, 2020 | New Jersey Law Journal

With the spread of the Coronavirus Disease 2019 (COVID-19) in the U.S., employers have had to face unprecedented issues impacting continued business operations. As time passes, some employers in those states have returned to the office, while others have continued remote work. COVID-19 has also posed challenges to the profitability and continued operations of many businesses, resulting in furloughs, reduced work hours, reduced wages, or layoffs. Employers should be aware that the decisions they make regarding their continued business operations may have an impact on their foreign national workforce, as well as their corresponding obligations with various government agencies including the Department of Labor (DOL), United States Citizenship and Immigration Services (USCIS), and Immigration and Customs Enforcement (ICE).

Remote Work Considerations

• *Worksite Location*. H-1Bs, H-1B1s, or E-3s are required to work at identified worksites listed on a labor condition application (LCA) certified by the DOL and included in an H-1B or E-3 USCIS petition or, in the case of E-3 and H-1B1, in a visa application at a U.S. Consulate. Working at the identified worksite is part of the terms and conditions of employment for the H-1B or E-3. In response to COVID-19, the DOL issued an **FAQ** confirming if an H-1B or E-3 moves to a new worksite (including their home) that is within commuting distance of the worksite, the employer is *not* required to file a new LCA, provided there is no material change to the terms and conditions of employment. Nevertheless, the employer must provide an

electronic or hard-copy posting notice at the new location for 10 days "no later than 30 calendar days after the worker begins work at the new worksite locations." This arguably means the employee would have to post the LCA in their home. If the new location is outside the area of intended employment, the employer may use short-term placement provisions, which allow placement of H-1B workers up to 30 days, or possibly 60 days provided other conditions are met. If, as a result of the remote work policies, an H-1B was working at the new location outside of the area of the intended employment for more than 30 or 60 days, the employer has a duty to file a new LCA and an amended H-1B petition with USCIS before the 30- or 60-day period expired. Failure to file an amended H-1B petition may result in a DOL investigation and/or penalties. Finally, employers are urged to ensure that any amended petitions add a new worksite, rather than simply change the worksite to the employee's remote work location. If the latter is the case, employers must ensure they file another amendment to change the work location, rather than add a new location at the time of return to the office. This will ensure no further filing will be needed should employees work remotely again.

• *Form I-9s*. In light of the pandemic, the DHS announced flexibility in requirements related to **Form I-9 compliance**. Employers with employees working remotely have not been required to review the employee's identity and employment authorization documents in their presence. Instead, DHS instructed employers to inspect Section 2 documents remotely (e.g., over video link, fax or email, etc.) and obtain, inspect, and retain copies of the documents, within the three business days to complete Section 2. DHS instructed Employers to enter "COVID-19" as the reason for the physical inspection delay in Section 2. Upon employees' return to the worksite, the physical inspection of the identity and employment eligibility documentation must occur. Once the documents have been physically inspected, ICE instructs to add "documents physically examined" with the date of inspection to the Section 2 additional information field, or to Section 3. ICE extended this measure until June 18, 2020.

• *E-Verify Extended Timeframe to Resolve Tentative Non-Confirmations (TNCs)*. **E-Verify extended the timeframe** to resolve Social Security Administration (SSA) TNCs due to office closures, as well as for resolving Department of Homeland Security (DHS) TNCs in limited circumstances when an employee cannot resolve a TNC due to public or private office closures. Employers are required to notify employees about their TNC results immediately. After notification by the employer, they should acknowledge the decision on the Further Action Notice, and the employer should notify E-Verify of their employee's decision. Employees who choose to take action to resolve a TNC are referred to SSA and/or DHS. Employers are prohibited from taking any adverse action against an employee while the case is in an interim or an extended case status. As employers return to the office, it is important to review the status of all TNCs received during remote operations.

Issues Relating to Furloughs, Salary Reductions, and Reduced Hours

H-1B, H-1B1, and E-3 visas require the filing and certification of an LCA. The LCA, and any petition and/or visa application filed with USCIS or Consular Post, require employer attestation to: 1) the terms of the visa holder's employment, including the prevailing wage rate of similarly employed individuals in the region; 2) the salary to be paid; and 3) the specific worksite in which the individual will be employed. Layoffs or furloughs can change these terms and conditions resulting in liability for employers.

• *Salary Reductions*. USCIS has publicly responded to a question posed by stakeholders with respect to whether an amended H-1B petition would be required if, due to across-the-board salary reductions, an H-1B worker earned less than the proffered salary stated on the H-1B petition but continued to be paid above the prevailing wage certified on the LCA. USCIS responded: "DOL is sensitive to the fact that wages can and sometimes do go up and down based on economic conditions. In the circumstances described in your question, there would be no need for a new LCA or a new [H-1B petition] provided the employer was still

paying the 'required wage.'" (The "required wage" is the higher of the applicable prevailing wage in the area of intended employment or the actual wage to be paid to the employee, reflected on the LCA.) USCIS further stated that any change in the H-1B's wage must be disclosed in the subsequent petition filed with USCIS and it is important to document any wage change in the employer's LCA Public Access File. If the employer lowers the salaries of the H-1B employees below the required wage, it may be permissible for the employer to give a guaranteed bonus in the future that may be credited toward satisfaction of the required wage requirement, according to 20 CFR 655.731(c)(2)(v). The bonus must be guaranteed (not conditional or contingent) so that the total annual income would meet the required wage.

• *Reduction of Work Hours***.** Any reduction in hours is considered a material change to the terms of employment specified in the original petition. The employer will need to file a new LCA reflecting the part-time wage with DOL, and an amended H-1B petition with USCIS.

• *Furlough*. A furlough is a mandatory temporary leave of absence where the employee is expected to return to work or to be restored from a reduced work schedule. Regulations require employers to pay furloughed H-1Bs the required salary indicated in the LCA and the H-1B petition. Unless otherwise prohibited by state law or the employer's specific policy, employers may require furloughed H-1Bs to use their accrued paid time off, so long as workers are not required to do so before taking any leave for which they may be eligible under the paid sick leave provisions of the Families First Coronavirus Response Act. If the furlough is prolonged, employers are still expected to pay the regular H-1B salaries. Alternatively, employers may choose to lay-off/terminate the H-1B, in which case the employer must offer to pay for reasonable costs of return transportation abroad for the worker. When an H-1B is laid off/terminated, their status effectively ends because it is tied to employment and the laid-off/terminated employee has a grace period of 60 days to depart or secure a new status.

• *Other Visa Classifications*. For temporary visa types such as L-1s, E-2s, O-1s, or TNs, a change in hours to part-time is considered material, requiring an amended petition to be filed with USCIS. The change in hours can be implemented before receipt of the USCIS approval. F-1 students working on OPT can work part-time (at least 20 hours per week) or full-time. Although no USCIS filing is required, an F-1 student's school should be notified of changes to work hours. A student in STEM OPT status should notify their school of a reduction in hours, to determine if an amended I-983 Training Plan must be filed.

Presidential Proclamations

Effective April 23, 2020, a new Presidential Proclamation announced the U.S. was suspending entry of new immigrants from overseas for 60 days. The Proclamation does not apply to physicians, nurses, or health-care professionals fighting COVID-19, EB-5 applicants, spouses or minor children of U.S. citizens, persons who further law enforcement objectives, U.S. Armed forces, their dependents or national interest admissions.

On June 22, the President extended the Proclamation through Dec. 31, 2020, and further suspended H-1B, H-2B, L-1, certain J-1s and J-2s (interns, trainees, teachers, camp counselors, au pairs, or summer work travel program) entries. It *does not* apply to spouses and children of U.S. citizens, U.S. food supply chain workers or national interest admissions. Those with valid visa stamps in their passport as of June 24 and those already in the U.S. in the above-mentioned statuses are exempted.

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