PLI Chronicle

January 2022

Immigration Changes and Considerations in a Nearing Post-Covid-19 World

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As employers navigate return to the office after being forced into remote operations by the COVID-19 pandemic, a number of immigration and compliance issues must be considered. To be sure, return to office continues to be a matter of complex planning. It requires organizations to track all applicable procedural requirements and flexibilities, as well as to keep pace with constant changes with respect to the pandemic. Some employers are considering maintaining hybrid or full-time remote operations post-COVID-19. In addition to compliance-related changes and considerations, COVID-19 has had widespread effects on U.S. employers' nonimmigrant workforce, ranging from travel limitations to Consular closures and extensive delays. As employers plan return to on-site operations, business travel, etc. for their employees, including those in nonimmigrant status, it is important to stay up to date with related agency procedural updates and requirements.

When COVID-19 initially forced most employers into remote operations, a number of agencies implemented flexibilities and provided instructions relating to immigration compliance and procedures. Specifically, U.S. Immigration and Customs Enforcement (ICE) exempted remote employers from the physical inspection requirements of Form I-9 documents. Furthermore, U.S. Department of Labor (DOL) provided guidance regarding requirements for filing and posting Labor Condition Applications (LCAs) relating to worksite changes. As employers are

potentially once again changing location of operations and considering a structured return-to-office schedule, they must keep in mind steps to take in connection with these instructions and flexibilities as changes occur. Finally, U.S. Citizenship and Immigration Services (USCIS) has likewise announced a number of flexibilities which have eased continuing filings to this agency.

Specifically, in March of 2020, ICE announced that it was allowing employers operating remotely to forego physical inspections of Form I-9 supporting documents from its newly hired employees. For background, all U.S. employers are required by law to complete a Form I-9 for each individual hired for employment in the U.S. in order to verify their identity and employment authorization. Generally, employees are required to present original acceptable documents evidencing identity and employment authorization, and employers are required to examine physically the original documents—to determine whether they reasonably appear to be genuine and relate to the employee—and record the document information in Section 2 of the Form I-9. With remote operations, however, ICE waived the physical examination requirement, allowing employers to instead review copies of acceptable documents, notating that this procedure was used within the form. This is set to terminate as soon as on-site employment resumes on a "regular, consistent, or predictable basis" or ICE announces its termination, whichever date is earlier. Importantly, employers are required to complete the physical inspection for all Forms I-9 prepared remotely within 3 business days of the date of the termination of this flexibility, which ICE recently extended through April 30, 2022. As ICE conducts its audits on an ongoing basis, auditors will be looking to whether or not the use of this flexibility was terminated timely with respect to employers' operations and whether or not physical inspection of all remotely completed Forms I-9 was timely completed.

Similar to ICE, USCIS allowed a number of flexibilities to employers due to operational difficulties presented by COVID-19. Specifically, in March of 2020, USCIS announced that it would accept all benefit forms and documents with copies of original signatures, waiving its original signature requirement. USCIS tasked employers with retaining original signed documents in the event USCIS requires them at a later date. Additionally, USCIS has allowed a 60-day extension for responses to all of its Requests for Evidence and Notices of Intent to Deny, Revoke, Rescind, or Terminate a Regional Center, as well as its Motions to Reopen and Notices of Appeal or Motion. USCIS has continued these flexibilities for employers which have been greatly helpful for ensuring timely responses to government requests and timely filings to the agency.

In April of 2020, DOL published its COVID-19 Frequently Asked Questions, where it discussed the impact of remote work on LCA requirements. Specifically,

DOL reiterated that a worksite for LCA purposes is a location where nonimmigrants for whom employers are subject to LCA requirements actually perform their work. DOL clarified that it is possible for a location to not be considered a worksite for LCA purposes; however, it would apply only where the workers job duties are performed casually and on a short-term basis for up to 30 days in one calendar year. DOL instructions made it clear that, because the COVID-19 pandemic necessitated remote operations far exceeding 30 days, it is extremely important to track the location of its H-1B nonimmigrant employees, as well as those employees in E-3 and H-1B1 nonimmigrant visa status. If they reside within the same Metropolitan Statistical Area (MSA) as the employer's address as set out on the certified LCA, employers need only to have the employees post the LCA in two conspicuous places in their homes. However, during the extended period of remote operations, numerous employees relocated well outside of the MSA or the area of normal commute distance, with many moving out of state. In those cases, DOL clarified that employers would be required to file a new LCA noting the new worksite location. In addition, any other changes to the terms of employment, such as full-time versus part-time work, as well as changes in offered salary, would likewise result in the new LCA and amendment filing requirement. Consistently with this requirement, as employers bring their employees back for on-site operations, they must take note of worksite changes, as well as any other changes with respect to the terms of employment, assessing where new LCAs and amendment filings would be required. With respect to LCA posting requirements in a remote environment, DOL allows electronic posting via intranet, internal database, e-mail, an electronic employer newsletter, or the like.

Importantly, no COVID-19-related flexibility was provided for notices of filing pertaining to the Permanent Labor Certification (PERM) process. DOL confirmed that physical posting requirements during COVID-19 continued, and electronic posting could be done only in conjunction, and not instead of, the physical posting. As employers plan their post-COVID-19 operations, those considering allowing remote operations from anywhere in the U.S., within reasonable commuting distance, or a hybrid remote/in-office schedule, it's important to consider the PERM-related ramifications. As the DOL regulations necessitate a test of the labor market in connection with the PERM process, this mandated recruitment must be completed as reflecting what is allowed and expected of the candidates and conforming with all of the DOL regulatory and procedural guidance for remote employment, where applicable.

U.S. Consulate and Embassy operations have been some of the most greatly affected by COVID-19. Lengthy closures at the onset of the COVID-19 pandemic worldwide caused extreme delays in operations which have persisted due to staff

shortages, COVID-19 quarantines, and other difficulties. Many consular posts remain open only for emergency appointments and U.S. Citizen services. In September 2021, to allow for differences within each country's COVID-19 conditions, related operational requirements, and post staffing, the Department of State (DOS) delegated posts the discretion to determine prioritization of visa services, clarifying that Embassies and consulates are entrusted with broad discretion to set their own priorities. DOS rescinded its November 2020 guidance setting in place a four-tier prioritization system for immigrant visas. DOS also expanded eligibility for visa interview waiver. Nevertheless, processing delays persist and, as a result, as employers resume regular operations, they are advised to continue to caution their nonimmigrant employees regarding international travel, due to potential visa issuance delays.

DOS announced in October that it was lifting all Presidential Proclamations limiting direct travel to the U.S., instead instituting a vaccination requirement for nonimmigrant international travelers as of November 8, 2021. However, shortly thereafter, the immediate danger of the spread of the COVID-19 omicron variant prompted the Administration to issue a new Presidential Proclamation restricting direct travel from South Africa, Botswana, Eswatini, Lesotho, Malawi, Mozambique, Namibia, and Zimbabwe within the 14-day period prior to entering the U.S., which will be formally lifted as of December 31, 2021. For all other travelers, in addition to the COVID-19 vaccination requirement, all travelers must present a negative COVID-19 test result taken within 1 day of travel.

Since COVID-19 pandemic began, frequent and substantial changes have taken place at a swift pace, including in the field of immigration and compliance. Employers are urged to consider these issues with respect to their workforce and internal compliance processes when planning their post-COVID-19 operational steps, which may include a full-time office return, a hybrid schedule, or a continuation of remote operations.

For more information, check out the authors' Immigration Changes and Considerations for Employers in a COVID-19 World One Hour Briefing, available from PLI Programs On Demand.

Nataliya Rymer and Kate Kalmykov focus their practices on employment-based immigration and compliance. They represent clients in a wide range of employment-based immigrant and non-immigrant matters, including professionals, managers and executives, artists and entertainers, treaty traders and investors, immigrant investors, and persons of extraordinary ability. Nataliya and Kate also have experience working with employers and human resources departments on I-9 employment verification matters as well as H-1B and LCA compliance-related issues. They counsel employers

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