



# Impact of COVID-19 on Immigration Compliance and Employment of Foreign Nationals

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# Immigration and Compliance Policies and Procedures Affected Greatly by Pandemic and National Emergency

- Immigration law and compliance practice spans several federal agencies, such as the U.S. Department of Justice, U.S. Department of Labor, and U.S. Department of Homeland Security
- Policies and procedures within immigration law and compliance practices generally require original signatures, paper submissions, in-person interviews, worksite visits and other extensive interpersonal contact.
- COVID-19 pandemic has affected every corner of the practice:
  - Employers have moved employees off site
  - Some employers have had to close down temporarily
  - Employment-based immigration filing processing has been affected
  - USCIS operations have been affected
  - U.S. Consular Posts around the world have become mostly non-operational
  - The administration has issued a number of proclamations limiting entry of various foreign nationals and ability to obtain immigrant (permanent) visas

# Furloughs, Layoffs, Reductions in Hours

- Different visa types trigger different kinds of considerations with respect to furlough (benching)/layoff considerations:
  - Where employees are working for employers in H-1B, H-1B1, E-3 visa statuses, employer is bound by attestations made to DOL in Labor Condition Applications (LCA's).
  - These obligations mandate that employers pay these employees 100% of prevailing or offered wage (whichever is higher), for working the number of hours indicated in the LCA.
  - DOL regulations specifically prohibit “benching” employees – i.e., continuing to employ them without having them perform work and receive payment as per the terms indicated in the LCA.
  - Therefore, furloughs of these types of employees are prohibited.
  - Reduction in hours for employees on these types of visas is a material change and requires amended filings with USCIS.
  - Offer to cover reasonable return of transportation costs applies to H-1B employees (as well as O-1 employees), in the event of layoffs.

# DOL FAQ Regarding H-1B Worksite Issues

- DOL has issued guidance regarding those employers whose H-1B, H-1B1, and E-3 employees are not working at worksites as indicated on the LCA due to office closures
- Where employees are working at home, within commuting distance, LCA's must be posted at the new worksite for a period of ten (10) business days
- E-mail or intranet posting is acceptable
- Where the new worksite is not within the same MSA, an amended petition must be filed with a new LCA covering the worksite

# Furloughs, Layoffs, Reductions in Hours

- Furlough, layoffs, or reduction in hours for foreign nationals in other visa status has different considerations:
  - Where a petition is filed with USCIS, employer attests to the employment terms within the petition under penalty of perjury
    - E-1 or E-2
    - L-1
    - O-1
    - TN
  - Any changes in employment could cause a break in maintenance of lawful status by foreign national employees, which may affect employers when attempting to extend or change their visa status down the road.

# ICE FAQ for F-1 Visa Holders

- ICE issued an FAQ for SEVP stakeholders that offer following practice and policy changes:
- DSO's can send Forms I-20 electronically rather than mailing them
- Electronic signatures are acceptable rather than wet signatures
- Students are excused from meeting full course load requirements if classes they need are not being offered due to the COVID-19 pandemic
- Students may engage in CPT while abroad if they are enrolled in a program of study in which CPT is integral, DSO authorized it, and either the employer has an office outside of the U.S. or employer can assess student engagement and attainment of learning objectives.
- OPT issues are subject to continuing evaluations
- For those students on OPT working remotely for their employers, they do not need to update their school regarding remote work address. Same applies to those students working on their STEM Extension employment authorization

# Flexibility in Form I-9 Compliance Requirements

- Normally, employers are mandated to examine original documents to complete Section 2 of Form I-9 within the first three (3) days of employment to confirm:
  - New employee's identity; and
  - Work authorization
- On March 20, 2020, USCIS announced that, for employers who are taking physical proximity precautions will not be required to review identity and employment authorization documents in the employee's physical presence.



# Flexibility in Form I-9 Compliance Requirements

- Documents can be inspected remotely (via video link, fax, e-mail, etc.); and copies of proper documents must be obtained and inspected. This must be done within three (3) days of date of start of employment.
- Employers should enter “COVID-19” as the reason for the physical inspection delay in Section 2 additional information field as reason for document inspection delay once normal operations resume and a physical inspection of the original documents does take place
- Once physical examination has taken place, employers should also add “documents physically examined” along with the date of said inspection.
- Employers will have 60 days to inspect original documents in the presence of employees from the date of the notice or within 3 business days after the termination of the National Emergency, whichever comes first.

# E-Verify – Extension for Resolution of TNC

- The national emergency has affected SSA – all offices are closed and limited resources are available for issue resolution
- Because of this, DHS has extended timeframes to address SSA Tentative Nonconfirmations (TNC's) as well as allowing extra time to take action to resolve DHS TNC's in limited circumstances where employee cannot resolve a TNC due to public or private office closures
  - Employers must still inform employees
  - Prohibited from taking adverse action while E-Verify case is interim case status

# E-Verify – List B Identity Documents

- DHS recognizes that many areas are under stay-at-orders and employees may be unable to renew timely documents that are on List B of Acceptable Document list
- Beginning on May 1, 2020, documents set to expire after March 1, 2020 that have not yet been renewed may be accepted in the same way as a valid receipt.
  - Employers should ensure to record the document information under List B; and
  - Notate the “Additional Information Field”; and
  - Upon presentation of an unexpired document, employers should record new document and initial and date the change

# ICE Audits and Worksite Inspections

- ICE has delayed all scheduled audits where Notices of Inspection were issued and worksite inspection-related visits which were scheduled
  - This does not mean that compliance is not required with NOIs, and that the worksite compliance visit will not happen.
  - Counsel for employers must contact ICE and discuss new dates, as well as steps to be taken.
  - Audits and enforcement actions are expected to pick back up once the national emergency is lifted. Employers must be careful about compliance

# DOS and Consular Processing Issues

- Consular Posts are closed for regular operations
  - Nonimmigrant (temporary) or immigrant (permanent) visas are not being processed at this time
  - DOS will announce expected timing for resumed operations
- Those who received their immigrant visa stamps prior to travel limitations and other effects of pandemic may not be able to enter within visa validity
- When Consular Posts reopen delays in visa processing and appointment availability should be expected
- Limited consular operations are available for U.S. citizen services and other emergencies
- National Visa Center (NVC) is operating
  - Immigrant visa processing at NVC is ongoing
  - Processing may be slower due to limited available staff

# Border Closures and Visa Waiver Entry Extension

- U.S. and Canada announced that the Northern Border will be closed to non-essential traffic
  - Non-essential travel is defined as “travel that is considered tourism or recreational in nature”
  - Travel for work in the U.S. is technically considered “essential”, however, reports have varied regarding TN visa application experiences due to limited staff and other circumstances surrounding the national emergency
- Those who are currently in the U.S. and were admitted under ESTA/Visa Waiver program and are unable to depart because of COVID-19, presence in the U.S. may be extended
  - CBP Deferred Inspection office at the airport of entry must be contacted and request *satisfactory departure* for up to 30 days

# DOL FAQ Regarding PERM Recruitment

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- DOL has also issued guidance regarding PERM processes:
- PERM recruitment can be delayed by a period of sixty (60) days
- Certified PERM applications will be e-mailed, rather than mailed, by DOL

# USCIS Practices and Procedures Affected

- USCIS offices are closed, currently through June 4, 2020. Accordingly, all in-person interviews, InfoPass appointments, biometrics, etc., are suspended/cancelled during this time.
- USCIS will be using previously collected biometrics for processing of applications such as employment authorization documents, advance parole, etc.
- Premium processing services are suspended. Expedited processing can be requested and is decided on a case-by-case basis:
  - Severe financial loss to company/person must be shown; or
  - Urgent humanitarian reasons; or
  - Compelling U.S. government interests; or
  - Clear USCIS error



# USCIS Practices and Procedures Affected

- USCIS announced delays in extension/change of status filings:
  - Processing subject to delays
  - For late-filed applications, USCIS may exercise flexibility where it is shown that failure to file timely must have been due to extraordinary circumstance beyond the individual's control. Length of delay must be commensurate with circumstances.
- For those who are permanent residence and require evidence of their status, limited appointments for emergent reasons are available to obtain I-551 stamps
- Responses to Requests for Evidence (RFE); Notice of Intent to Revoke (NOIR), Notices of Intent to Deny (NOID), Notices of Intent to Terminate (NOIT), and AAO appeals of qualifying USCIS denials, issued between March 1 and May 1, 2020 (inclusive), are all subject an additional sixty (60) calendar day extensions
- Issuance of receipts, including for cap-subject H-1B petitions and other filings, is subject to delays


# Policy/Congressional Updates

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- Existing Proclamations
  - Travel Ban (China and parts of Europe)
  - Certain Applicants for Immigrant Visas
  - Ban on certain immigrant visas
- Expected renewal of ban from Presidential Proclamation
- Update on anticipated ban for nonimmigrant visas
- Senators' letter to the White House
- Immigration Coalition support for consideration of nonimmigrant extensions and possible bills

# Overall Takeaway

- Because immigration laws and compliance are spread between a number of agencies, many processes are impacted
- Important to keep in touch with immigration counsel to keep abreast all continuing changes and advise clients timely
- National Emergency is expected to be lifted – employers should follow immigration compliance procedures and keep all records during this temporary period of time
- Enforcement expected to resume once national emergency lifted – employers should work with counsel on audits of records, review expirations, etc.



This presentation outline and the presentation itself are for *general* educational purposes only and are not intended to provide *specific* guidance or legal advice about what to do or not to do in any particular case. You should not rely on this general information to make decisions about specific immigration matters. Thank you.