

Business Immigration Considerations During the COVID-19 Pandemic

Companies affected by COVID-19 must carefully consider immigration implications for all foreign national and expat employees, including issues of immigration compliance. Those businesses with employees working in the United States with temporary work authorization or with employees working abroad should evaluate the rapidly evolving restrictions on international travel and the potential impact on employees' immigration status. Furthermore, businesses must consider the effects of lockdowns, closures, and remote work on document verification and case processing, as well as other procedures. If they intend on conducting layoffs, furloughs, or hours reductions, employers should take caution with their H-1B, E-3, and H-1B1 classified employees. Companies must also carefully consider the ramifications of employment termination for their employees' immigration status.

I-9 Verification Process During Closures and Lockdowns

The U.S. Department of Homeland Security (DHS) is allowing certain employers to defer the physical presence requirement of I-9 documentation inspection and is temporarily allowing electronic or remote review of I-9 documentation. The electronic or remote review must be completed within the normal I-9 deadlines established, and the I-9 form must be annotated to document the deviation in the normal review process. Only companies whose employees are working remotely as a result of the COVID-19 pandemic may utilize this I-9 process change; employees who are physically present at their workplace must follow routine I-9 document inspection procedures.

These new provisions apply for 60 days or until the national emergency declaration is terminated, whichever comes first and assuming there is no additional extension by DHS. Upon resumption of normal operations, all employees who underwent remote verification must undergo in-person verification within three business days. Companies should consult with legal counsel to determine if they are eligible for the modified I-9 verification process.

H-1B, E-3, and H-1B1 Employees and Remote Work

Foreign national employees in H-1B, E-3, or H-1B1 status may work remotely under certain circumstances. If an employee's work authorization does not contemplate a work from home option, the employee may work from home without filing a new Labor Condition Application (LCA) or amending their H-1B, E-3, or H-1B1 petition as long as the worker's home is within normal commuting distance of the workplace. For prospective employees in H-1B, E-3, or H-1B1 status, there are new interim rules regarding LCA posting requirements. Employers should carefully consider these interim U.S. Department of Labor (DOL) posting requirements with advice of legal counsel.

Layoffs, Furloughs, or Reductions in Hours or Wages

As DOL requires employers to pay the wages as set forth in an employee's LCA, potential problems could arise if the employer is seeking to lay off, furlough, or reduce an H-1B, E-3, or H-1B1 classified employee's hours or wages. These actions should be carefully considered with advice of legal counsel.

Employment Termination

If employment termination is being considered, employers should also determine whether the immigration status of the employee may be affected. For example, most employees with company-sponsored temporary work authorization may lose their immigration status and/or ability to remain in the United States lawfully after their employment is terminated unless other steps are taken. Additionally, certain immigration statuses require employers to meet certain obligations mandated by law. For example, the H-1B status may require an employer to pay for the employee's return cost of transportation abroad. Whether a company decides to terminate employees and how such an action may affect an employees' immigration status must be examined with legal counsel.

Travel Bans

Generally, foreign nationals are restricted from entering the United States from the Schengen Area (comprising 26 European countries), the United Kingdom, Ireland, China, and Iran. This does not include U.S. citizens and permanent residents or individuals who fall into other categories. Non-U.S. citizen or permanent resident employees may be restricted from traveling to the United States from these countries until the travel ban is lifted.

Closure of Northern and Southern Borders for "Non-Essential" Travel

DHS has suspended all non-essential travel of individuals from Canada and Mexico into the United States until April 20, 2020, but may reopen these borders earlier if circumstances permit or extend the closure of the borders. Essential travel includes, but is not limited to, U.S. citizens returning to the United States, individuals traveling to work in the United States, or certain "essential" individuals engaged in lawful cross-border trade, and individuals traveling for medical purposes. This travel suspension does not apply to air, freight rail, or sea travel between the countries.

Due to the complexity and evolving nature of the closures, and due to reports of inconsistent application of the "non-essential" standard to individuals traveling to work in the United States, all travel for non-U.S. citizen employees should be carefully considered with advice of legal counsel.

Mandatory Quarantine Requirements in Canada

The Canadian government has declared that between March 25, 2020, and June 30, 2020, anyone entering Canada must undergo a 14-day isolation period, which begins on the day the individual enters Canada. There are exceptions for individuals who are providing "essential services."

Immigration Office Closures

Effective March 18, 2020, U.S. Citizenship and Immigration Services (USCIS) has temporarily closed its field offices, asylum offices, and application support centers. Individuals who had application support center appointments will receive new appointment letters in the mail when normal operations resume. Individuals who had interviews at USCIS for immigration benefits have had those interviews cancelled and will likely have the interviews rescheduled when USCIS reopens. All other appointments must be rescheduled by contacting USCIS once the field offices reopen. These USCIS office closures could prevent individuals with expiring work permits from remaining in the United States lawfully.

Premium Processing Suspension

As of March 20, 2020, USCIS stopped accepting new requests for premium processing, including for H-1B petitions.

Depending on the specific situation and facts of a case, the suspension of premium processing can significantly affect an employer's ability to employ a foreign national or a foreign national's ability to remain in the United States. Employers should closely review their roster of foreign national employees and seek the advice of legal counsel on how to navigate the suspension of premium processing and the expected slow rollout of the resumption of premium processing.

U.S. Consulate and Embassy Closures

The U.S. Department of State has suspended routine visa services at its embassies and consulates worldwide. Services to U.S. citizens as well as emergency or urgent visa services will still be provided. This will affect non-U.S. citizen employees' ability to travel to the United States if they require visa services, including obtaining a visa stamp in their passports before being able to travel to the United States.

CARES Act Relief Ineligibility

Foreign nationals may be ineligible for certain forms of aid under the CARES Act relief package. For example, both taxpayers and their spouses are required to have Social Security numbers on their tax return in order to receive direct cash assistance.

Takeaway

These issues are changing frequently; we will continue to monitor them. Please do not hesitate to contact us with any questions on any of these topics.

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