U.S. Immigration and Employment Interruption Guidelines

Immigration Alert

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COVID-19 has erased a decade of job growth in less than one month. The pandemic has halted most economic endeavors not only in the United States but throughout most of the world. On a macro level, there is an extraordinary impact on both supply (barriers to production caused by shelter-in-place requirements) and demand (barriers to consumption caused by the same requirements). On a micro level, industries that cannot produce also cannot pay idle workers. This alert examines the evolving impact of furloughs, layoffs, and reductions in hours on a subset of the U.S. workforce.

Changes in Working Conditions of H-1B Employees due to COVID-19

On April 9, 2020, the Office of Foreign Labor Certification released FAQs addressing the placement of H-1B employees at a worksite not listed in the approved Form ETA-9035, Labor Condition Application (LCA) for Nonimmigrant Workers. The FAQs confirm the guidance issued in our March 23 alert regarding H-1B worker relocation, as well as specifications as to when employers must repost LCAs and, in certain cases, amend the H-1B petition. As we then advised, compliance will be substantially easier if the employee lives within a normal commuting distance (50-60 miles) of the regular worksite and is currently working from home.

As COVID-19 continues to impact the economy, many employers are being forced to consider furloughs, layoffs, or reductions in hours of employees. Where the worker is in H-1B status, any such decision will trigger concerns regarding regulatory compliance on the part of H-1B employers who are obliged to pay the worker the wages, as attested to in the H-1B petition. Furthermore, the H-1B employee must continue working for the employer or risk being in violation of nonimmigrant status.

The Decision to Furlough

A furlough will place the H-1B worker in nonproductive status, and since the decision to furlough is made by the employer, its obligation to pay the required H-1B wages continues throughout the duration of the employee’s H-1B status. The only circumstance in which said obligation will not attach is the employee’s election to be nonproductive, e.g., a leave of absence to travel or extended maternity leave. Even when such leave is voluntary, it is valid only insofar as permitted under the employer’s benefit plan or other statutes such as the Family and Medical Leave Act, the Americans with Disabilities Act, and the CARES Act.

Reductions in Hours or Salary

Instead of a placing an H-1B worker on furlough, the employer may choose to reduce the hours of the worker. Doing so will trigger the requirement to file a new LCA, and consequently to amend the H-1B petition. The DOL will view any reduction in hours below full-time as "benching" and will deem the H-1B employee to be in nonproductive status because of a decision of the employer. In such an event, the employer must still pay the salary listed in the LCA.

If the employer chooses instead to reduce the salary of an H-1B worker and apply the pay reduction at the same rate to all employees within the same occupation company-wide (e.g., all software developers), the employer maintains compliance with the DOL's LCA regulations and avoids having to file an amended petition. The foregoing is applicable only where the H-1B employee's salary is not brought below the prevailing wage listed on the LCA. Any accommodation to sustain the H-1B worker's salary at the prevailing wage where an across-the-board pay cut was made may trigger concerns of discrimination against U.S. workers.

If the employer lowers the salaries for H-1B employees below the required wage, future bonuses may be credited toward satisfaction of the required wage obligation if their payment is assured (i.e., the bonuses are not conditional or contingent on some event such as the employer's annual profits). A decision to reduce both hours *and* salary will require the employer to file an amended H-1B petition.

Termination of an H-1B Worker

If an employer decides to terminate an H-1B worker prior to the end date on the H-1B petition, said employer must (1) notify the United States Citizenship and Immigration Services (USCIS) in writing that the employment relationship has been terminated and (2) offer to pay the cost of return transportation home. The latter ought to be memorialized, and proof of discharge of said requirement should be included in the employee file. In some cases, the employee will be entitled to a 60-day grace period, and if the employer is able to, it may rehire the employee at any point prior to the end of the grace period by filing a new H-1B petition, as long as there was a bona fide termination of the previous employment relationship.

Eligibility for Unemployment for Nonimmigrant Workers

Although unemployment insurance eligibility is state specific, most states exclude from eligibility those nonimmigrants whose work authorization is tethered to a specific employer (e.g., TN, H-1B, and L-1 workers). The reason is that unemployment insurance often requires the applicant to demonstrate the ability and availability to accept suitable alternate work, i.e., the "able and available for work" criteria. Since many nonimmigrants are work-authorized solely with a specific employer, they cannot meet the "available for work" requirements since there is a legal barrier to their freely accepting a new role with a new employer — i.e., a new employer must file a nonimmigrant petition on the worker's behalf.

Some nonimmigrants, such as spousal dependents of H-1B, L-1, and E-1/2 principals, have no such legal barriers. Often, these nonimmigrants have standalone employment authorization documents and can meet the "available for work" requirements if suitable alternative work is offered. Similarly, an argument may be made that O-1 artists sponsored by agents could be eligible if suitable alternative engagements were available.

Unemployment Insurance Not Being Considered in Public Charge

The USCIS has confirmed that unemployment insurance is not a factor in public charge determinations. Unemployment benefits are not considered public benefits under the public charge inadmissibility determination, as these are considered to be earned benefits through the person's employment and specific tax deductions.

I-9 and E-Verify

On April 3, 2020, the USCIS released Q&As on Temporary Policies for Form I-9 and E-Verify. Most important among these are (1) that the requirement for original or "wet" signatures has been suspended and (2) that employers and workplaces that are operating remotely are not required to review the employee's identity and employment authorization documents in person and may inspect the Section 2 documents remotely (e.g., over video link, fax, or email). Employers are reminded that a new version of Form I-9 (Employment Eligibility Verification) with a version date of 10/21/2019 is available for use and, after April 30, 2020, is the mandatory version of the form.

H-1B Cap

On April 1, 2020, the USCIS announced that nearly 275,000 applicants registered for the H-1B lottery and approximately 46% of prospective beneficiaries possessed U.S. advanced degrees. This represents a major increase over the roughly 200,000 petitions submitted in the FY 2020 lottery, likely due to the new electronic registration system, which eases the burden on employers to prepare an entire case only to have it rejected in the lottery system. Roughly 80% of all applicants in the FY 2021 lottery were from India (67.7%) and China (13.2%). Employers have 90 days to submit H-1B petitions for those selected.

Flexibility Measures

In the midst of ongoing office closures, USCIS is slowly implementing measures to alleviate the burden on employers and their attorneys to comply with deadlines during the crisis. On March 27, 2020, the USCIS announced that it was adopting measures to extend deadlines associated with requests for evidence (RFEs) dated between March 1 and May 1, 2020. Submission of such RFEs will be considered timely if occurring within 60 calendar days after the response deadline set forth in the RFE. This will give employers and their attorneys much needed additional time to prepare paperwork that typically requires substantial work and hands-on assembly.

On April 3, 2020, the American Immigration Lawyer's Association filed a complaint against USCIS on behalf of its members, seeking the immediate suspension of immigration benefit deadlines and the maintenance of status for nonimmigrants in the United States amid the COVID-19 pandemic.