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Immigration Q&A for the COVID-19 Pandemic

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The novel coronavirus, which causes the disease COVID-19, is a pandemic threatening populations around the world. As the result of various government orders and in an attempt to flatten the curve of the pandemic progression, many employers have been forced to shut down or modify their businesses. For employers with foreign national employees, an additional layer of challenge is added to an already complex situation. This Q&A is designed to assist employers and their foreign national employees as they face tough decisions concerning the status of such employees.

Express guidance from the relevant government agencies has been limited, except where noted. The answers below are intended as a resource guide – you should consult a Vedder Price attorney with respect to any specific questions you have regarding the topics discussed in this article.

Can foreign national employees in H-1B status be furloughed?

Special rules apply to employees in H-1B status. Under the H-1B program, an employer must file and secure a certified Labor Condition Application (LCA) before filing for H-1B status. By filing an LCA, the employer attests that it will pay the H-1B employee the higher of the "actual wage" paid by the employer to similarly situated employees, and the "prevailing wage" for that occupation within the geographic area of intended employment—known as the required wage. Employers must pay the required wage for the duration of the approved H-1B petition or until there is a bona fide termination of the H-1B worker's employment. The required wage level can be determined by referencing the Rate of Pay Statement in the Public Access File for the individual H-1B worker as required to be retained by the H-1B employer. Thus, an H-1B employee placed on furlough must be paid at least the required wage for the duration of the furlough. Reducing the amount paid to the H-1B worker below the required wage would result in a violation of the employer's obligations under the LCA; thus, unpaid leave is generally not an option for such employees.

Further, guarantees of future bonuses, stock options or the like will usually not be considered wages by the Department of Labor (DOL) in the H-1B context. Thus, promises to "make up" reduced wages could still result in liability for the employer.

What obligations does an employer have to foreign national employees following termination?

The permanent layoff or other bona fide termination of an employee in H-1B status places certain obligations on the employer to: (1) withdraw the approval of the visa with the United States Citizenship and Immigration Services (USCIS); (2) withdraw the approved LCA with the Department of Labor; and, (3) tender the H-1B worker return transportation home. Failure to complete these steps within a reasonable time may result in the employer owing back wages and additional compensation to the employee.

The three listed obligations do not apply to other common nonimmigrant visa statuses, including TN and L-1. Employers of individuals in O-1 visa status are obligated to tender return transportation home to a terminated employee.

Foreign national employees in nonimmigrant status (H, L, O, TN, etc.) should be instructed to leave the United States as soon as practical following termination to avoid potential future immigration consequences.

What happens to foreign national workers if they are terminated?

Federal regulations allow E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1 or TN nonimmigrant workers a grace period of up to 60 days based upon a cessation of their employment. The length of the grace period is either 60 consecutive days or until the end of the worker's current authorized validity period, whichever is shorter. The grace period not only gives the worker more time to leave the United States, but it also provides a window of opportunity to potentially find other employment with an employer who can file an extension or change of status within the 60-day period. Similarly, the worker could also potentially change to some other status on his or her own during the grace period, such as to F-1, after enrolling in a school.

An employer would be able to rehire a foreign national employee before the grace period expires. If the employee is still within the original validity period, a new petition is not required. However, as discussed above, the employer should have withdrawn the petition from USCIS upon termination to avoid wage liability. Thus, a new petition would be required and the employee would not be able to begin employment until the new petition is approved.

Can the H-1B employment be changed from full-time to part-time employment?

Yes, though this would require the employer to file an amended petition with USCIS before the change could occur. Changing from full- to part-time employment is considered a material change triggering the requirement for a new LCA and an amended petition.

Can H-1B workers work remotely?

In response to the COVID-19 pandemic, many employers are having their employees work from home, if possible, to encourage social distancing and to comply with various state- and city-wide "shelter-in-place" orders. For employees in H-1B status, it is important to ensure that the employers maintain compliance with federal regulations governing notice and eligible worksite locations for H-1B employment. Based upon limited guidance from the USCIS or the DOL, Vedder Price's Business Immigration Practice group provides the following best practices for employers during this novel situation:

The H-1B program is jointly regulated by USCIS and DOL. DOL regulations require that, with an H-1B Petition, employers must submit a certified LCA for each location at which the H-1B employee will be working. A key DOL requirement is the provision of notice to U.S. workers that an H-1B worker is being hired. Pursuant to the federal regulations, the notice can be provided either through a hard-copy posting at the actual worksite(s) where the H-1B worker will be employed, or through electronic notice. The electronic notice may be on the company's website, intranet or in its newsletter, or failing that, via direct e-mail to affected employees. An electronic posting to the company's intranet or newsletter must be posted for 10 calendar days; if direct individual notice is provided, notification is only required once and does not have to be provided for 10 calendar days.

If, during the H-1B employment, the worksite location changes or an additional worksite location is necessary, a new LCA must be certified only if the new location is outside of the original intended area of employment. These provisions were intended by the Department of Labor (DOL) to allow employers greater flexibility in deploying their H-1B workers in response to business needs and opportunities in new areas. The DOL recognized that an employer could choose to file a new LCA covering the new worksite at which it intended to place H-1B workers. However, the DOL sought to provide a mechanism by which an employer – desiring to move its H-1B worker(s) quickly, or contemplating a temporary operation in a new location – could be accommodated under the program without the delay or obligations involved in filing a new LCA.

DOL guidance indicates that the employer need not file a new LCA for the worksite if it is within the same metropolitan statistical area (MSA). An MSA is defined as "the area within normal commuting distance of the place (address) of employment where the H-1B nonimmigrant is or will be employed. There is no rigid measure of distance which constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., normal commuting distances might be 20, 30, or 50 miles)…." Therefore, if the H-1B worker's home is within the same MSA as the employee's normal worksite location, a new LCA need not be filed for the new worksite location, but the LCA posting notices should be posted at the employee's home for ten consecutive business days, and the posting notices must be added to the Public Access File when taken down. Due to COVID-19, the notice will be considered timely when placed as soon as practical and no later than 30 calendar days after the worker begins work at the new worksite location.

If the employee's home is outside the MSA in which his or her worksite is located, then the following rules apply:

Under Short-Term Placement rules, regulations permit H-1B employers to place H-1B workers at a worksite not listed on its approved LCA for up to 30 workdays each year. Such placement may be for an additional 30 workdays, but for no more than 60 workdays, in a one-year period, where the employer is able to show that the H-1B nonimmigrant maintains ties to the home worksite (e.g., a dedicated workstation at the permanent worksite; the employee's abode is located near that worksite) and the worker spends a substantial amount of time at the permanent worksite. Please be aware that the workday limit is in the aggregate for the calendar year; if some days have already been used under this option, then an employer will not have the full period for COVID-19 purposes.

Importantly, the regulations require the employer to also pay for "the actual cost of lodging (for both workdays and non-workdays)" and require employers to pay "the actual cost of travel, meals and incidental or miscellaneous expenses (for both workdays and non-workdays)." Workdays are days actually worked and do not include weekends and holidays. Short-Term Placement could therefore typically cover at least 6 weeks of work at a temporary location. Please be aware that the workday limit is in the aggregate for the calendar year; if some days have already been used under this option, then an employer will not have the full period available for COVID-19 purposes.

If the temporary assignment lasts longer than the permitted number of workdays, the employer will need to file a new LCA to cover the employee's residence and comply with all of the LCA notice requirements. In addition, an amended H-1B petition must be filed with U.S. Citizenship and Immigration Services to include the new location.

Can terminated foreign national workers seek unemployment benefits?

As unemployment benefits are controlled by the states, one must look to the specific state's rules and regulations for guidance. Generally, foreign national employees employed pursuant to a visa cannot claim unemployment benefits because they will not be considered available for work, as their employment authorization was tied to a specific status.

On the other hand, unemployment benefits may be available for an H-4 spouse with an Employment Authorization Document if the H-1B spouse remains in status. The H-4 spouse's ability to work in the future is linked to the H-1B status of the spouse, not the employer, and if the H-4 spouse is terminated, s/he would be available for work if the H-1B spouse continues to maintain their H-1B status. The same likely holds true for those in F-1 (student) status who possess an Employment Authorization Document. Of course, one has to look at the state rules concerning unemployment insurance regarding how long one will be able to work in the future in order to be eligible to make such a claim.

If H-4 spouses or F-1 students can claim unemployment benefits, they will likely not be impacted by the new public charge definition as unemployment is not a public benefit. The new public charge rule implemented in February 2020 seeks to limit the availability of green cards to individuals that are not likely to become dependent upon certain government benefits. One has earned unemployment insurance by contributing to it while employed, thus it is unlikely to disqualify a green card applicant.

How has international travel been impacted?

Numerous countries, including the United States, have implemented travel advisories and travel bans to and from certain regions of the world as the pandemic has progressed. Certain countries are preventing entry or requiring a quarantine period following entry when returning from COVID-19 hotspots. For example, the United States has implemented bans on nonessential travel into the United States from China, Iran, Ireland and the U.K., and the 26 European Schengen countries. The ban does not apply to U.S. citizens or lawful permanent residents.

In addition, the following international travel restrictions have been put in place by the United States:

- Trusted Traveler Program Operations Suspended - Effective March 19, 2020, due to the COVID-19 pandemic, all U.S. Customs and Border Protection (CBP) Trusted Traveler Program Enrollment Centers will suspend operations until at least May 1, 2020. This temporary closure includes all public access to Global Entry, NEXUS, SENTRI and FAST enrollment locations.
- Closing of the Northern and Southern U.S. Borders - On Wednesday, March 20, the United States and Canada announced that the border between the two countries would be closed to "Nonessential" travel. Nonessential travel is currently defined as "travel that is considered tourism or recreational in nature." This decision was implemented at midnight, March 21, 2020. It will be reviewed by both countries 30 days after implementation. These United States/Canada restrictions apply only at land ports of entry between both countries, not to air travel.

The Department of Homeland Security said: “The United States and Canada recognize it is critical we preserve supply chains between both countries. These supply chains ensure that food, fuel, and life-saving medicines reach people on both sides of the border. Supply chains, including trucking, will not be impacted by this new measure. Americans and Canadians also cross the land border every day to do essential work or for other urgent or essential reasons, and that travel will not be impacted.” The March 20, 2020, notification states that travel of “Individuals traveling to work in the United States…” is considered “essential.” However, processing of L and TN applications is very limited and denials for work being “nonessential” are occurring.

Similar to the Northern border, a joint United States and Mexico announcement was made on March 20, 2020, closing the Southern land border to nonessential travel. Reports indicate that the United States-Mexico agreement mirrors that of the United States-Canada agreement. This policy took effect at 12:01 am (ET) on March 21, 2020, is in place for 30 days, but may be extended further upon review.

How can I comply with Form I-9 regulations while my workforce is remote?

On March 20, 2020, due to precautions being implemented by employers and employees related to physical proximity associated with COVID-19, the Department of Homeland Security (DHS) announced that it will defer the physical presence requirements associated with Employment Eligibility Verification (Form I-9) under Section 274A of the Immigration and Nationality Act (INA).

Employers with employees taking physical proximity precautions due to COVID-19 will not be required to review the employee’s identity and employment authorization documents in the employee’s physical presence. However, employers must inspect the Section 2 documents remotely (e.g., over video link, fax or email, etc.), and obtain and retain copies of the documents, within three business days for purposes of completing Section 2.

Once normal working activities resume, physical inspection of the documents must take place. Employers also should enter “COVID-19” as the reason for the physical inspection delay in the Section 2 Additional Information field once physical inspection has occurred. Once the documents have been physically inspected, the employer should add “documents physically examined” with the date of inspection to the Section 2 Additional Information field on the Form I-9, or to Section 3 as appropriate. These provisions may be implemented by employers until May 19, 2020 OR within three business days after the termination of the national emergency, whichever comes first.

Employers who avail themselves of this option must provide written documentation of their remote onboarding and telework policy for each employee. A copy of these policies should be retained with the Forms I-9.

Any audit of subsequent Forms I-9 would use the “in-person completed date” as a starting point for these employees only.

This relief provision only applies to employers and workplaces that are operating remotely. If there are employees physically present at a work location, no exceptions are being implemented at this time for in-person verification of identity and employment eligibility documentation for Form I-9, Employment Eligibility Verification. However, if newly hired employees or existing employees are subject to COVID-19 quarantine or lockdown protocols, DHS will evaluate this on a case-by-case basis. Additionally, employers may designate an authorized representative to act on their behalf to complete Section 2. An authorized representative can be any person the employer designates to complete and sign Form I-9 on their behalf. An employer is liable for any violations in connection with the form or the verification process, including any violations of the employer sanctions laws committed by the person designated to act on the employer’s behalf.

Further, effective March 19, 2020, any employers who were served Notices of Inspection by DHS during the month of March 2020 and have not already responded will be granted an automatic extension for 60 days from the effective date. At the end of the 60-day extension period, DHS will determine if an additional extension will be granted.

Finally, E-Verify has extended the time frame for taking action to resolve Tentative Non-Confirmations (TNCs) due to Social Security Administration office closures. E-Verify is also extending the time frame to take action to resolve Department of Homeland Security TNCs “in limited circumstances when an employee cannot resolve a TNC due to public or private office closures. Employers may not take any adverse action against an employee because the E-Verify case is in an interim case status, including while the employee’s case is in an extended interim case status.

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Will employers still be able to use the premium processing service?

No. On March 20, 2020, USCIS announced the immediate and temporary suspension of premium processing service for all Form I-129 and I-140 petitions until further notice, due to the COVID-19 pandemic.

As of March 20, 2020, USCIS will not accept any new requests for premium processing. USCIS will process any petition with a previously accepted Form I-907, Request for Premium Processing Service, in accordance with the premium processing service criteria. Petitioners who have already filed a Form I-129, Petition for a Nonimmigrant Worker, or Form I-140, Immigrant Petition for Alien Workers, using the premium processing service and who receive no agency action on their case within the 15 calendar-day period will receive a refund. USCIS will notify the public with a confirmed date for resuming premium processing.

USCIS will reject the I-907 and return the $1,440 filing fee for all petitions requesting premium processing that were mailed before March 20 but not yet accepted.

This temporary suspension includes petitions filed for the following categories:

- I-129: E-1, E-2, H-1B, H-2B, H-3, L-1A, L-1B, LZ, O-1, O-2, P-1, P-1S, P-2, P-2S, P-3, P-3S, Q-1, R-1, TN-1 and TN-2.
- I-140: EB-1, EB-2 and EB-3.

The temporary suspension also includes new premium processing requests for all H-1B petitions, including H-1B cap-subject petitions for fiscal year 2021, petitions from previous fiscal years and all H-1B petitions that are exempt from the cap. USCIS previously announced the temporary suspension of premium processing for FY 2021 cap-subject petitions and tentative dates for resumption of premium processing service. This announcement expands upon and supersedes the previous announcement.

Will USCIS be granting any extensions of deadlines?

The USCIS announced that it is adopting a measure to assist applicants and petitioners who are responding to requests for evidence (RFEs), notices of intent to deny (NOIDs) and notices of intent to revoke/terminate (NOIRs/NOITs) dated between March 1 and May 1, 2020. This date range is for the date the request or notice is issued, not the date it is due. Thus, for RFEs or Notices issued prior to March 1, that are due between March 1 and May 1, remain due on the date indicated.

For applicants and petitioners who receive an RFE, NOID, NOIR or NOIT dated between March 1 and May 1, 2020, any responses submitted within 60 calendar days after the response deadline set forth in the RFE or NOID will be considered by USCIS before any action is taken.

Is there any way around USCIS requirements for “wet” signatures on petitions?

On March 21, 2020, the USCIS announced that, due to the ongoing COVID-19 national emergency announced by President Trump on March 13, 2020, they will accept all benefit forms and documents with reproduced original signatures, including the Form I-129, Petition for Nonimmigrant Worker, for submissions dated March 21, 2020 and later.

This means that a document may be scanned, faxed, photocopied or similarly reproduced provided that the copy must be of an original document containing an original handwritten signature. For forms that require an original “wet” signature, per form instructions, USCIS will accept electronically reproduced original signatures for the duration of the National Emergency. This temporary change only applies to signatures. All other form instructions should be followed when completing a form.

Individuals or entities that submit documents bearing an electronically reproduced original signature must also retain copies of the original documents containing the “wet” signature. USCIS may, at any time, request the original documents, which if not produced, could negatively impact the adjudication of the requested immigration benefit.

Are there any other impacts that the pandemic is having on immigration?

Yes, there are additional impacts resulting from COVID-19 precautions. For example, USCIS has suspended routine in-person services until at least May 3, 2020, to help slow the spread of COVID-19. USCIS staff will continue to perform duties that do not involve contact with the public. The agency said it will provide emergency services in limited situations. To schedule an emergency appointment, contact the USCIS Contact Center (https://www.uscis.gov/contactcenter). USCIS

field offices will send notices to applicants and petitioners with scheduled appointments and naturalization ceremonies affected by this closure.

USCIS offices may begin to reopen on May 4 unless the public closures are extended further. Employees in these offices are continuing to perform mission-essential services that do not require face-to-face contact with the public. USCIS will continue to provide limited emergency services.

USCIS field offices will send notices to applicants and petitioners with scheduled appointments and naturalization ceremonies impacted by the extended temporary closure. USCIS asylum offices will send interview cancellation notices and automatically reschedule asylum interviews. When the interview is rescheduled, asylum applicants will receive a new interview notice with the new time, date and location of the interview. When USCIS resumes normal operations, it will automatically reschedule Application Support Center (ASC) appointments due to the temporary office closure. You will receive a new appointment letter in the mail. Individuals who had InfoPass or other appointments must reschedule through the USCIS Contact Center once field offices are open to the public again. Please check to see if the office in your jurisdiction has been reopened before reaching out to the USCIS Contact Center.

Further, on March 30, 2020, USCIS announced that it will reuse previously submitted biometrics in order to process valid Form I-765, Application for Employment Authorization, extension requests due to the temporary closure of ASCs to the public in response to the coronavirus (COVID-19) pandemic. Applicants who had an appointment scheduled with an ASC on or after the March 18 closure or filed an I-765 extension will have their application processed using previously submitted biometrics. This will remain in effect until ASCs are open for appointments to the public.

If you have questions about specific situations or about any of the topics discussed in this article, please contact, **Sara B. DeBlaze** at +1 (312) 609-7534, **Ryan M. Helgeson** at +1 (312) 609-7729 or any Vedder Price attorney with whom you have worked.

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