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Return to Work: Key Immigration Issues for Employers

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As federal, state, and local government authorities pave the pathway to re-opening America in the ever-changing COVID-19 environment, employers should be prepared to address key immigration issues likely to arise. To ensure continuity of business operations and alleviate disruptions in the workforce due to immigration noncompliance, employers should develop a plan now to carefully transition non-U.S. citizen employees back into the workplace.

I-9 Compliance for U.S. and Foreign National Employees Returning to Work After Furlough, Temporary Layoff or Termination

Employers that have furloughed, laid off, or terminated employees must determine whether they are required to reverify each employee's work authorization on Form I-9 if/when the employees return to work, regardless of the employees' immigration status. In general, employers must complete a new Form I-9 whenever a hire takes place, unless a rehire occurs within three years of the execution date of the employee's previous Form I-9. In certain situations, an employee's return to work after an interruption in employment is not considered a hire and would not require the employer to reverify the employee's employment eligibility on Form I-9. If an interruption in employment occurs, such as a furlough or

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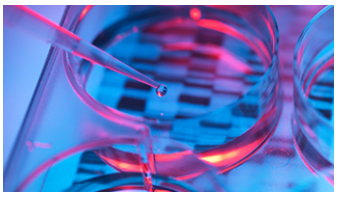
temporary layoff, employers must determine whether the employee is continuing in his or her employment and had a reasonable expectation of employment at all times throughout the hiatus.



Employees returning to work following a furlough or temporary layoff for lack of work, approved paid or unpaid leave on account of the employee's illness or a family member's illness or disability or other temporary leave approved by the employer are considered to be "continuing their employment" despite the interruption. Employers must consider several different factors to determine if these employees had a reasonable expectation of employment at all times throughout their break and, subsequently, whether reverification on Form I-9 is required when such employees resume employment. This determination, and the employer's obligations with respect to employment eligibility verification, will vary depending on whether the employee is returning to work after a furlough, temporary lay-off, or termination.

Employers without sufficient work or business operations to continue employing foreign temporary workers should be aware that placing H-1B employees on unpaid furlough due to lack of work is known as "benching" and is specifically prohibited by the U.S. Department of Labor (DOL) and federal immigration laws. Employers also should be aware that the majority of temporary foreign workers on employment-based visas, including (but not limited to) E-1, E-2, E-3, H-2B, J-1, L-1A, L-1B, O-1, and TN, are in violation of their immigration status upon termination of employment, which can lead to adverse immigration consequences for the employee.

Maintenance and Extension of Work-Authorized Status for Foreign National Employees Returning to Work

If an employer has terminated, laid off, or otherwise placed a temporary nonimmigrant worker on unpaid

furlough, a foreign national in E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1, and TN status will have a grace period of up to 60 consecutive days, or until the end of their authorized validity period, whichever is shorter, to change status, find a new employer for sponsorship, or depart the United States. If the sponsoring employer rehires a furloughed or terminated foreign worker within the 60-day grace period, the foreign national employee may resume employment with the sponsoring employer without the need to file a new visa petition so long as the employee's petition approval period has not expired and the employer has not withdrawn or revoked the approved visa petition. Employers should be aware that foreign workers in E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1, and TN status can only use the 60-day grace period once per petition validity period. Conversely, if the foreign national employee seeks employment with a different employer, the new employer must file a change of employer petition with USCIS before the end of the foreign national's 60-day grace period.

Placement of Foreign National Workers in Different (Remote) Worksite Locations

Employers that have shut down business operations in specific locations due to the impact of COVID-19 and need to relocate foreign workers to a different worksite should consider this: If an H-1B employee is transferred to a remote worksite location that is separate from the place of employment designated in the Labor Condition Application (LCA) and H-1B petition, the employer first must determine if the geographical location of the transfer is considered a "material change in the terms and conditions of employment" that would require the filing of a new LCA with the DOL, along with an amended I-129 petition with USCIS. On March 20, 2020, the DOL's Office of Foreign Labor Certification confirmed that an employer with an approved LCA may move H-1B workers to worksite locations that were unintended at the time of filing the original LCA *without the need to file a new LCA*, so long as the worksite locations are within the same area of intended employment

covered by the approved LCA. In this situation, employer notice to workers still must be posted at each such worksite, either by hard copy notice or by electronic notice. The DOL confirmed that employers affected by service disruption due to COVID-19 may post the LCA notice "*as soon as practical and no later than 30 calendar days after the worker begins work at the new worksite locations"* to be considered timely.

If an employer places an H-1B worker outside of the geographic area of intended employment because of service disruptions caused by COVID-19, the employer should contact an immigration attorney to discuss whether the relocation falls under the "short-term placement" exception. Regardless, employers should contact experienced immigration counsel before relocating any foreign national to a new worksite location that was not contemplated in the visa petition.

Reduction in Hours and Wages for Foreign National Employees Returning to Work

Before reducing a foreign national worker's hours or wages, the employer should carefully review and consider the wages and working conditions promised to the employee in the governing visa petition. Employers across the U.S. have implemented reduced hours, salary cuts and other cost-savings measures in response to the COVID-19 pandemic. Importantly, employers should be aware that reducing an H-1B worker's hours from full-time to part-time is considered a material change in the terms and conditions of employment that requires filing a new LCA with the Department of Labor and an amended H-1B petition with USCIS. The DOL defines full-time employment as 35 hours or more per week. Similar to the H-1B context, employers are required to disclose whether a proffered position is part-time or full-time for other temporary worker visa petitions filed on Form I-129, Petition for a Nonimmigrant Worker. As such, a reduction in hours from full-time to part-time for other

nonimmigrant worker categories (including, but not limited to, E-1, E-2, L-1, O-1, and TN) may require the employer to file an amended visa petition with the applicable federal immigration agency.

Furthermore, reducing an H-1B worker's pay also could obligate the employer to file a new LCA and an amended H-1B visa petition with immigration authorities depending on whether the reduced wage is above or below the "required wage." In order to protect United States workers' wages by eliminating economic incentives or advantages in hiring temporary foreign workers, section 212(n)(1)(A)(i) of the Immigration and Nationality Act requires an employer to pay an H-1B worker the required wage, defined as **the higher of either** the prevailing wage for the occupational classification in the "area of employment" or the actual wage paid by the employer to other employees with similar experience and qualifications who are performing the same services. Employers should be aware that a different set of obligations could arise in the context of across-the-board salary reductions implemented throughout the entire business. To avoid adverse immigration consequences, employers should contact an experienced immigration attorney before reducing hours or implementing salary reductions that affect foreign national workers.

Lack of Work Available for Foreign National Employees

Employers who lack sufficient qualifying work for full-time foreign employees in H-1B, L-1, and O-1 status should consider amending the employee's visa petition to undertake part-time employment status. To justify the need for the foreign labor in the United States, sponsoring employers must demonstrate active business operations and sufficient available work for foreign nonimmigrant workers throughout the entire visa validity period. This is of particular importance for nonimmigrant workers in E-1, E-2, E-2, H-1B, L-1, O-1, and TN status. Moreover, H-1B sponsoring employers must

establish that H-1B employees will be performing "specialty occupation" work, consisting of duties that typically require the attainment of a bachelor's level of education in a specific field of study or specialty.

Employers unable to continue employing H-1B workers must complete a three-step "Bona Fide Termination" process to protect itself against a possible claim for back wages, which could cover the entire duration of the visa approval period. In certain cases, employers also may be liable to pay interest on those wages if a Bona Fide Termination does not take place. The employer has the burden of proving compliance with each of the required steps to effectuate a Bona Fide Termination. To limit exposure to any potential liability, employers should consult with an experienced immigration attorney before terminating a foreign national worker.

Unemployment Benefits and Public Charge Determinations

Although ordinarily foreign nonimmigrant workers are excluded from claiming unemployment compensation, there may be circumstances where they can. Unemployment insurance benefits are administered separately by each state in accordance with federal guidelines to provide cash benefits to eligible workers. While eligibility requirements vary from state to state, in general, states require that recipients be "able and available to work" and actively seek employment while claiming benefits. Recipients must be authorized to work at the time of filing for benefits and during the entire period of collecting benefits, in addition to meeting applicable state requirements for wages earned or time worked during an established time period (referred to as a "base period").

The majority of nonimmigrant workers must receive approval from the federal immigration authorities before engaging in employment. Federal immigration laws also limit certain nonimmigrant workers' employment authorization to performing a

specific role with the sponsoring employer. Because of such barriers to accepting employment, nonimmigrants workers whose status is tied to a sponsoring employer (i.e., E-2, E-2, E-3, H-1B, J-1, L-1, O-1, and TN) are unable to satisfy the "able and available to work" and "work search" requirements. However, foreign nationals employed pursuant to an approved Employment Authorization Document, including (but not limited to) asylees, pending asylum applicants, refugees, individuals granted withholding of deportation or removal, Temporary Protected Status beneficiaries, Deferred Action for Childhood Arrivals recipients, spouses of L-2 and E-2 nonimmigrants, and adjustment of status applicants, in addition to Lawful Permanent Residents ("green card" holders), who were work-authorized during the base period are likely eligible to receive unemployment insurance.

Employers should be aware that unemployment benefits will not adversely impact a foreign national employee's application for an immigrant visa or adjustment of status to obtain Lawful Permanent Residence (i.e., a "green card"). Under the public charge rule, unemployment insurance is an earned benefit, not a public benefit, and is therefore exempt from the public charge inadmissibility determination. Tax credits also are exempt from the public charge determination. For foreign national employees, this means that receipt of economic stimulus payments through the federal COVID-19 relief legislation will not be considered a "public charge" during the permanent residence process.

In response to the COVID-19 pandemic, states have begun relaxing eligibility requirements to grant more individuals access to unemployment benefits. States could begin relaxing or waiving certain requirements that prevent nonimmigrants from being immediately available for employment and allow such foreign nationals access to unemployment benefits. Employers should contact an Akerman lawyer for more information about exemptions to the public charge inadmissibility

determination and state eligibility requirements for unemployment insurance.
