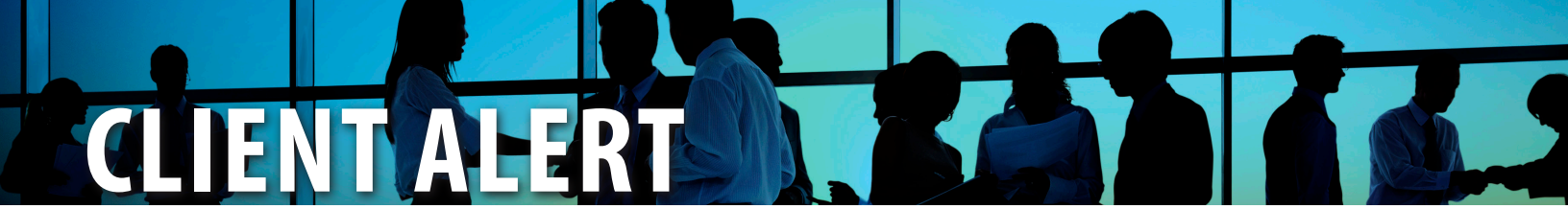


IMMIGRATION

CRITICAL COVID-19 GUIDANCE FOR CERTAIN FOREIGN WORKERS

by Christian S. Allen

The ever-changing impact of the evolving COVID-19 pandemic is making it extremely difficult for employers to plan what to do with their foreign worker populations right now. DW Immigration stands ready to help! Here below we summarize some critical pieces of immigration information from the various government agencies and our related guidance, as it stands today.

US Department of State:

- Immigrant and Nonimmigrant Visa Processing

With very limited, "emergency" exceptions, all immigrant (greencard) and nonimmigrant visa interview appointments at US embassies and consulates around the world are cancelled temporarily. Applicants should log into the consulate's visa appointment services website and monitor the interview appointment calendar regularly, as it is unclear when new appointments will be available, and that is varying from location-to-location. Note that applicant's "MRV" filing fee payment will remain valid and can be used for a visa application in the country where it was purchased for one year from the date of payment.

US Customs & Border Protection:

- Canadian and Mexican Border Closures

  The US borders with Canada and Mexico are now closed for all general visitor and tourism purposes. However, temporary workers with otherwise valid visas/status should still be allowed to cross the border, if necessary, under the theory that their work is "essential". Employers may want to provide such workers with a letter clearly explaining their critical need for travel, as it relates to "essential industries and supply chains".

- TN and L-1 Border Processing

  While not specifically prohibited, even in states with "stay at home" orders, many US ports-of-entry are either declining on health and security grounds to allow people to appear for TN and L-1 processing/renewals, or are implementing rules about when that can be attempted and by how many people. If travel and border appearance cannot be postponed, the particular port-of-entry should be contacted directly for guidance, if possible.

US Citizenship & Immigration Services:

- Local Office Closures

  All local ("field") offices of the USCIS are now closed temporarily, and all interview and biometrics capture appointments have been cancelled (or will be cancelled shortly). Those appointments will be rescheduled automatically for later dates, after the USCIS offices reopen. Note that we do not anticipate USCIS Regional Service Center closures at this time, since these offices do not interface with the public.

- Premium Processing Suspension

  Premium Processing service for all I-129 and I-140 petitions has been suspended at the USCIS Regional Service Centers, both for H-1B cap lottery petitions starting next month, as well as for other types of filings using these two forms. It is unclear when Premium Processing service will be made available again. Regular requests for emergency expedites are still possible, but will obviously only be granted by the USCIS in extremely rare circumstances.

- Electronic Signatures

  On a more positive note, the USCIS is temporarily allowing for the submission of applications and petitions with scanned/emailed or faxed signatures. Although, final applications and petition must still be filed in hard copy, allowing for non-original signatures on forms will make package preparation significantly easier for employers working remotely.

US Department of Labor:

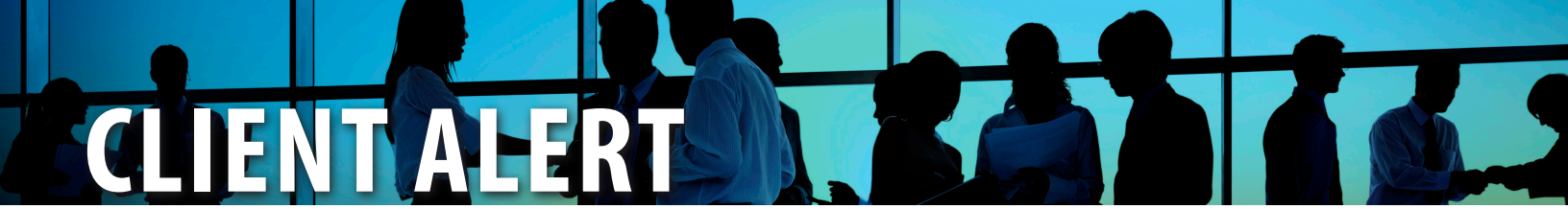
- PERM Labor Certifications
  - *Electronic approvals*

    The DOL announced just today that they will temporarily be providing employers and agents/attorneys with electronic copies of PERM Labor Certification approvals, to avoid the delays and complications of dealing with the usual, blue-paper approvals. Presumably, the USCIS will shortly follow suit and announce that such electronic PERM approvals will be accepted with I-140 Immigrant Petition filings (the next normal step in greencard sponsorship for employees, after PERM approval).

  - *Notice of Filing postings*

    In an attempt to guide employers with remote operations during the pandemic, the DOL issued a new series of answers to Frequently Asked Questions (FAQs) late last week. Included in those FAQs were some suggestions for how employers should notify US workers of job openings and their intention to file PERM Labor Certifications, when the majority of the company's workforce might be working remotely. Unfortunately, their specific accommodation is only to allow employers to post their Notice of Filings up to 60 days later than normal, but it may be possible to follow the DOL's most specific suggestions for H-1B LCA postings (see below), without having to adjust the critical 180-day PERM pre-filing recruitment cadence. This will have to be decided on a case-by-case basis.

    The DOL is also granting employers a short extension of time to respond to PERM Notices of Audit and Requests for Information, as well as a similar 60 extra days to complete all PERM pre-filing recruitment activities, in certain situations.



- Labor Condition Applications
  - *Notice of Filing postings*

    Within its recent round of FAQs, the DOL provided a bit more guidance for how to comply with Labor Condition Application (LCA) posting requirements, in connection with H-1B, H-1B1, and E-3 worker sponsorship. Specifically, the DOL is reminding employers that the requirement to post an LCA for 10 business days in a "conspicuous" location can be met by any means of electronic notification which the employer might ordinarily use to alert employees to job vacancies or other important news. That is, a copy of the LCA could be emailed to all potentially affected workers at the worksite; alternatively, a copy of the LCA could be provided to all affected workers via intranet, its public-facing website, or electronic newsletter. Note that, if done by direct email, only a single email is required, as opposed to the usual 10-day posting elsewhere.

US Immigration & Customs Enforcement:

- I-9 and E-Verify Flexibility

  For approximately 60 days, for companies who have shut down and have new hires who are working remotely, the Department of Homeland Security (DHS) is allowing employers to complete Section 2 of their I-9s using copies of the new employee's documents, instead of the usual in-person inspection. Section 2 must still be completed within the normal three business days, and the original documents must still be inspected in-person, once normal operations resume. See here for details on how to annotate Section 2 of your I-9s, if done temporarily remotely.

  The DHS is allowing a bit less flexibility for users of the E-Verify system. Employees must still be immediately notified of Tentative Nonconfirmations (TNCs), but employers are to give them extra time to attempt to resolve the TNC, if their local Social Security Administration or DHS office is currently closed. Employers must still adhere to the usual, three-day timeframe for entering new hires into E-Verify, although they can note "COVID-19" in the "Other" field, if case creation is delayed due to operational challenges.

For H-1B Workers Specifically:

- LCA Re-Posting for Remote Workers

  If an H-1B worker is temporarily forced to work from home, and their home address is very near to the normal worksite location on your underlying LCA, the DOL is allowing an extra 30-day flexibility for re-posting the LCA at the new "worksite" (i.e. home address). Whenever an LCA is reposted pursuant to these rules, a memo should be placed in the associated Public Access File.

  If an H-1B worker is forced to work remotely from a location which is a significant distance from the LCA worksite, then a full H-1B Amendment petition may be required. Those situations will need to be carefully analyzed on a case-by-case basis.

- Wage Continuity During Furloughs and Lay-Offs

  Generally speaking, H-1B workers must be paid at least the full salary offered on the underlying I-129 sponsorship petition (not the DOL's Prevailing Wage, but the company's offered wage), at all times. Unpaid "benching" for lack of work, even during the COVID-19 pandemic is still strictly illegal. Similarly, forcing H-1B workers to use unpaid vacation or unpaid leave of absence days during a furlough or layoff is also not allowed. However, if an H-1B worker happens to be currently paid significantly more than the wage offered on the I-129 petition, then it may be possible to temporarily reduce their salary back down to the I-129 offered wage.

- Termination and Rehire/Re-Sponsorship?

  If wage continuity is not possible for an H-1B worker, employers should remember that immediate notification to the USCIS of formal termination is critical. That notification is the one and only thing which will halt your full salary obligation to that worker, in the event of an audit. As usual, DW Immigration can submit notification of termination to the USCIS for you, once you alert us. Also remember that terminated H-1B workers should be offered a one-way plane ticket back to their home country (although most such workers will likely not elect to fly home at this time).

  If an H-1B worker is formally terminated, also keep in mind that they now have an automatic up to 60-day grace period in which to remain in the US legally and seek alternate employment and sponsorship. During those 60 days, if you are able to rehire the employee, you can simply file another H-1B petition to bring the employee back onboard. And, the H-1B Portability rules would normally allow that person to begin/resume working for you immediately after your petition is filed with the USCIS, during the subsequent few months until it is processed and hopefully approved. It may even be possible to do this for H-1B workers who accept employment with another company, successful change to another immigration status in the US, and/or return home (although without the option for Premium Processing, the timing of those may be unworkable?).

For TN, E-1/2, and L-1 Workers Specifically:

- Wage Continuity for Furloughs and Lay-Offs

  TN, E-1/2, and L-1 workers in the US are not subject to the same, strict payroll rules as H-1B workers. Instead, they have a bit more wage continuity flexibility. As long as there are other clear indicia of an ongoing, uninterrupted, employer-employee relationship, these workers will generally be considered to have maintained their lawful status in the US. Examples of an ongoing employer-employee relationship could be a clear, written, description of the temporariness of the furlough; continuity of benefits and seniority; a reduced but still active regular payroll, etc.

- Termination and Rehire/Re-Sponsorship

  On the other hand, just like H-1B workers, TN, E-1/2, and L-1

workers in the US do benefit from the same, automatic, 60-day grace period between jobs. But, it can be logistically more tricky to bring them back onboard quickly after rehire, than with an H-1B worker. Hence, those situations will need to be analyzed on a case-by-case basis.

We hope that the above will help you to begin to navigate the current and upcoming challenges for your foreign worker populations, triggered by the COVID-19 pandemic. We urge you to please stay in close contact with your DW Immigration attorney/paralegal teams, and alert us as early as possible to unusual situations. Although we are also struggling to remain fully functional while working remotely, we stand ready to help, in any way that we can!

DW Immigration
Global Mobility With a Personal Touch

FOR MORE INFORMATION CONTACT:

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