Seyfarth

**LEGAL UPDATE** Mar 13, 2020

# Essential COVID-19 Immigration Planning for US Employers

***[Note to readers: Immigration challenges and government responses triggered by the spread of COVID-19 are developing rapidly. Not all questions can be addressed fully in this Alert. Employers seeking updated guidance should regularly check Coronavirus (COVID-19), and may reach out to Seyfarth's business immigration lawyers or attorneys in our Government Relations & Policy group for guidance in specific situations.]***

***Seyfarth Synopsis:*** *COVID-19 has upended the world. Governments and businesses are racing to respond. The US legal immigration system for sponsoring and employing noncitizens is no exception. American employers must plan around existing, inflexible and outdated immigration laws so that immigration compliance can still be maintained, and current noncitizen employees may continue working in the US without interruption. This Employer Alert provides the latest information, analysis and recommendations that US businesses should consider as they restructure operations in the wake of the virus.*

**Key Employer Takeaways:**

- The COVID-19 pandemic will substantially disrupt the functioning of the legal immigration system in the United States, and thus will harm the business operations of companies relying on lawfully employed noncitizens.
- Government offices will be closed and services will be drastically reduced because in-person interviews, biometrics appointments and decisions on visas and immigration benefits requests that must be made by officers at US Citizenship

and Immigration Services (USCIS) and other immigration agencies will be long delayed.

- If employers close their offices and adopt work-from-home policies to avoid spreading the coronavirus, they must act quickly to ensure continuing immigration compliance and preserve the ability to maintain and extend the immigration status and employment eligibility of their noncitizen workers.

- Maintenance of status may be futher complicated should USCIS restrict its Premium Processing Service. Other requests for expedited adjudication that seek extraordinary immigration relief based on humanitarian or national-interest grounds are likely to be denied.

- A substantial number of noncitizen workers and business visitors may find that their nonimmigrant visa status cannot be extended, with the result that workers must be terminated from employment, and persons who are out of status or unlawfully present, if they remain in the US, do so in violation of the immigration laws.

- Business visitors may need to file extensions or apply for an additional 30-day period for "satisfactory departure" based on on a showing of inability to travel.

- Businesses that instruct their H-1B (specialty occupation) employees to work from home must still comply with US Department of Labor (DOL) rules on the geographic scope of existing LCAs (Labor Condition Applications).

- H-1B compliance will be simpler if the H-1B employee working from a home office lives within "normal" commuting distance from the employer facility listed on the LCA. Normal commutes are usually within 50 miles, but greater distances of up to 70 miles or more may be possible. The US Department of Labor's LCA exemptions for short-term placements are not likely to be available or useful.

- If a new LCA and the filing of a new or amended H-1B petition with USCIS are required, special arrangements must be made for hard-copy worksite posting or electronic notification of the terms of the LCA to affected employees.

- Employers of intracompany L-1 managers, executives and staff with specialized knowledge must maintain an office from which to continue doing business.

- While nothing prohibits L-1 employers from adopting a work-from-home policy, they should be aware that USCIS, through its FDNS (Fraud Detection and National Security) unit, may conduct unannounced site visits to investigate activities at the office listed on the L-1 employer's visa petitions.

- FDNS site visits may trigger the revocation of visa petitions for existing L-1 workers, thus requiring termination of L-1 employment. Employers should be prepared to vigorously oppose any notices of intent to revoke L-1 visa petitions. (These same FDNS site-visit risks apply to employers of H-1B workers.)

- L-1 employers with approved blanket petitions should expect to file more burdensome "individual" L-1 petition extension requests with USCIS, since consular adjudication of blanket L-1 visa applications are likely to be unavailable due to travel constraints and consular post closings or reductions in visa services.

- Early reports from US Consulates in Western Europe confirm that visa appointments currently scheduled for the months of March and April have been cancelled and will be rescheduled for the second half of May, at the earliest. Businesses should instruct their nonimmigrant workers in the US to refrain from foreign travel for visa stamping, and expect to file more work visa petitions requesting status extensions with USCIS.

- Many F-1 students who are currently completing their academic programs are moving to virtual/online classes for the rest of the semester. We are hearing reports of universities advising these students to return to their home countries to complete the semester. We strongly recommend that these students apply for Optional Practical Training (OPT) and file their I-765 Application for Employment Authorization before they depart the US,

- Employers sponsoring noncitizen employees for PERM labor certification as a preliminary step to an employment-based green card must deal with DOL's hard-copy notice posting requirement at the worksite – a challenge if COVID-19 precautions have triggered an office closure. Employers must also address the delays in PERM recruitment efforts if the virus leads to reductions in force and layoffs, and the resulting challenge of extending H-1B visa status beyond the standard six-year visa-maxout period.

- Employers must be sensitive and adapt procedures to comply to the extent possible with the prohibitions against unauthorized employment and the timing and deadline constraints imposed under the Form I-9 (Employment Eligibility Verification) and E-Verify programs. Full compliance may not always be possible. To the extent that required I-9 procedures are either omitted or delayed, employers should note the event and provide an explanation in a separate memorandum which may be helpful if the government later investigates.

- Employers should immediately engage in government advocacy, directly and through business and trade organizations, to urge Congress, the Executive Branch, and federal immigration agencies to relax or excuse the harsh immigration compliance and maintenance of status deadlines and penalties that exist under current law. COVID-19 fallout has simply made full compliance unattainable in many instances.

- In appropriate cases, employers should consider pursuing civil litigation against federal immigration agencies for any agency's decisions that can be shown to be arbitrary, capricious, an abuse of discretion or otherwise unlawful.

Not since the 1918 Spanish Flu have nations of the world witnessed anything even close to the monumental threats to public health and business continuity spawned by the COVID-19 pandemic.

Prudent employers are responding by announcing measures to limit the spread of the coronavirus, adopting work-from-home policies, recommending 14-day quarantines of persons facing suspected exposure to the virus, cancelling conferences and large meetings, reducing or eliminating domestic and foreign travel, moving as much work as possible online, and applying other on-the-fly mitigation strategies.

As governmental authorities likewise scurry to devise and implement measures to mitigate foreseeable harm, US businesses with active programs for the sponsorship of foreign workers under current immigration laws, regulations and agency practices cannot wait for immediate guidance from federal authorities. Employers must make decisions in real time, exercising their best business judgment, while hoping that federal authorities, going forward, will acknowledge employer actions taken in good faith to comply with immigration laws and regulations that were promulgated on the now-inapplicable premise that the world is functioning in an orderly way.

**Impact on the US Government.** Already, COVID-19's impact is apparent with the issuance of Presidential proclamations banning entry to the US of specified classes of travelers from China on January 31, and from Europe on March 11. In addition, US Citizenship and Immigration Services (USCIS), the component agency of the Department of Homeland Security (DHS) charged with administering the legal immigration system and deciding on requests for immigration benefits, has responded.

The agency has temporarily closed its field office operations and cancelled naturalization oath ceremonies in the state of Washington, the first area identified as

a COVID-19 hot spot (the Seattle Immigration Court has also been closed temporarily).

In addition, USCIS has issued a March 9 letter to the federal employee union representing its immigration officers that it will be offering "remote work" agreements to multiple employees. Although the letter does not mention COVID-19, remote work agreements could allow USCIS to more quickly adopt virus-mitigation strategies. This is because they "[enable] employees to work at an approved official duty station (for example, the employee's residence) outside the local commuting area (generally, 50 miles or more)," as long as in each employee's case the "agreement is in the best interest of the agency, and there is no negative impact on mission accomplishment."

Notwithstanding the stated concern to avoid a negative impact on the agency's mission, USCIS remote work agreements, office closures, and staff reductions portend more and more interview cancellations, appointment reschedulings, adjudication delays and backlog buildups that will likely become worse over time.

The obvious results:

- The adjudication of all requests for visas and immigration benefits will take longer, leaving in limbo the underlying visa status, ability to depart and reenter the US, and employment authorization of numerous current and prospective noncitizen employees on working visas; and
- US employers will be required to help these employees maintain and preserve employment authorization, immigration status and eligibility for green card benefits as best they can.

To be sure, federal immigration authorities are likely to announce relief measures in due course, as USCIS did for F-1 students adversely affected by Hurricane Katrina. Congress may also act, as it did in the aftermath of September 11, by automatically extending deadlines for submission of applications to extend nonimmigrant visa status for noncitizens affected by the terrorist attacks, under § 422 of the USA PATRIOT Act (Pub. L. 107-56).

**Employers must plan and act.** While the government considers its next steps, employers must continue making requests for employment-based immigration benefits and decisions on strategies for ongoing immigration compliance.

Given COVID-19's foreseeable consequences to USCIS of office closures and on-site staff reductions, employers and their noncitizen workers may find to their regret that their employees' continued permission to work will be interrupted, and some employees will need to be terminated. If the effects of the virus severely disrupt USCIS's operations, the agency will likely not be able to decide requests to extend or renew work visa status or temporary employment authorization (for persons in the employment-based green card queue filing for adjustment of status) within an acceptable turnaround time.

Current regulations allowing interim employment authorization while an extension or renewal request is pending – up to 240 days to extend status for most work-visa holders and 180 days for adjustment of status applicants under current regulations – could thus prove to be insufficient. Unless USCIS takes action to prolong and expand interim grants of employment authorization for pending immigration benefits requests, or otherwise excuse status violations, the situation for employers, and their noncitizen temporary workers (and families) will become dire.

Complicating matters even more is a distinct possibility that seems quite predictable, namely, the foreseeable decision by USCIS to restrict the categories of cases eligible for a 15-calendar-day response turnaround under its Premium Processing Service. Although the agency takes in substantial user fee revenue from this program, its requirements entail the duty to return the fee (currently $1,440) if the processing deadline is not achieved. USCIS recently proposed to change the turnaround time from 15 calendar days to 15 business days, suggesting that the agency is already encountering difficulties in meeting the existing deadline. With office closures and staff working remotely, and other backlogs building, it thus seems foreseeable that coronavirus fallout will cause USCIS to limit categories of employment-based petitions eligible for premium service.

Theoretically, employers could also seek quick agency action by demonstrating that a particular immigration-benefits request satisfies the USCIS's expedite criteria, which require proof of "[severe] financial loss to a company or person, . . . [urgent] humanitarian reasons . . . [or, compelling] US government interests." Unfortunately, such requests, if made in large numbers, would likely cause the expedite system to break down because USCIS "[considers] all expedite requests on a case-by-case basis."

**Legal Requirements to Maintain Immigration Status and Verify Employment Authorization**

**Maintenance of status and unlawful presence.** A fundamental principle of immigration law is that noncitizens admitted temporarily to the US must comply with the terms and conditions of the nonimmigrant visa category under which they were admitted and granted status. Thus, business visitors must not engage in unauthorized employment and must leave the country by a set deadline, and persons admitted under employment-based visas, in cooperation with their sponsoring employer, must comply with the requirements of the specific work visa they hold, including applicable deadlines for ceasing employment and departing the country.

Moreover, the maintenance of status includes the timely submission of an application or petition requesting an extension of nonimmigrant status before the current status expires. If, however, the extension request is untimely filed, perhaps for reasons related to COVID-19, the employer or noncitizen should explain why the restoration of status ought still be granted based on "extraordinary circumstances" under 8 CFR § 214.1(c)(4), or why a lapse in status should not deprive the individual of eligibility for adjustment of status to receive a green card under the forgiveness clauses (no fault of the individual or technical reasons) of INA § 245(c)(2), and an implementing USCIS regulation, 8 CFR § 245.1(d)(2). Football enthusiasts would call these maneuvers "Hail Mary" passes.

Worse yet, by remaining longer than the period of authorized status granted and then leaving the US after one's status expires, noncitizens who "overstay" face a minimum of three-year "unlawful presence" bar to reentry for overstay periods of more than six but less than twelve months, or ten years for overstays of a year or more, under INA § 212(a)(9)(B)(i). While USCIS has authority to suspend the accrual of unlawful presence, its current policy does not clearly provide that relief for untimely-filed requests for extension of status.

**Employer I-9 and E-Verify obligations.** Correspondingly, as discussed later in this Alert, employers may not hire or continue to employ a noncitizen whom the employer knows or should know is not authorized for employment under the Immigration Reform and Control Act, codified at INA § 274a, and corresponding USCIS regulations at 8 CFR § 274a.1(a)(defining an unauthorized alien as one not "authorized to be so employed") and § 274a.1(l)(defining "constructive knowledge"). Whether a noncitizen is "authorized to be so employed" thus depends on the employer's and individual's compliance with the terms and conditions of the specific work-visa category under which the individual holds his or her status.

**COVID-19 Issues Affecting Nonimmigrants**

**Business visitors.** An unknown number of temporary entrants from foreign countries under the B-1 visa and WB visa-waiver (ESTA) categories for business visitors may now be in the US at the invitation of American companies. Yet because of COVID-19 these individuals may be prevented from departing the country before the period of authorized stay expires, perhaps because of foreign border closures, quarantines, hospitalization, or transportation disruptions.

**B-1 business visitors.** If unable to depart when required, B-1 nonimmigrants should timely submit Form I-539 and request the six-month maximum period of authorized extension allowed. They should also docket and reapply by filing successive "bridge" applications before the six-month period of requested status would expire, even if USCIS has not yet acted on any pending I-539 extension requests, in order to avoid unlawful-presence penalties under current USCIS policy.

**ESTA business visitors.** WB ("waiver business") entrants under the visa waiver permanent program (VWPP) may only be granted an additional 30-day period for "satisfactory departure" on a showing of inability to travel under 8 CFR § 217.3(a) by submission of a request with supporting evidence to the district director of a USCIS field office. They may only do so by calling the USCIS Contact Center to schedule an appointment (expect to be on hold for a prolonged waiting period).

**Nonimmigrants in Work-Visa Status**

**Place-of-employment restrictions.** Some nonimmigrant work visa categories restrict the place where work may or must be performed. Among the most frequently used categories, place-of-employment constraints apply to the H-1B visa (for workers in a specialty occupation), and in limited circumstances, to the L-1 visa (for intracompany transferees). These are most likely to be affected by restrictions on access to, or changes in, previously approved worksite locations triggered by COVID-19 precautions.

**H-1B Workers**

**Effect of office closures and H-1B job-location changes.** The fallout from COVID-19 presents difficult compliance challenges for employers of H-1B workers if the location where the employee provides services must change as a result of a suspected or confirmed exposure, or in response to the need for social distancing to limit community spread of the virus.

The H-1B visa category requires the certification of a Labor Condition Application (LCA) by the US Department of Labor (DOL) covering a specific geographic area *before* USCIS may approve an H-1B petition or grant a noncitizen H-1B status. A USCIS policy memorandum in turn requires the filing of "an amended or new H-1B petition when a new . . . LCA . . . is required due to a change in the H-1B worker's place of employment."

The LCA includes several attestations by the employer that afford these workers basic labor protections, including representations about the payment of the required wage in the specified "place of employment," the provision of suitable employee benefits and working conditions, public-notice posting about basic terms and conditions of H-1B employment, and a commitment to be responsible for the worker's return transportation to the country of nationality or permanent residence if the employee is terminated prematurely (other than for cause) before the approved petition period expires.

While the DOL has approved various exceptions to the rule requiring a new LCA when the place of employment changes, one of these (where the H-1B worker's home is within commuting distance of the employer's office) may offer relief to numerous employers and their H-1B employees. Two other exemption – the non-worksite exemption and the short-term placement provision – are not likely to be available or helpful in most situations.

**Within-commuting-distance exception.** There may be some opportunity, however, if the new work location – the employee's home – is within normal commuting distance of the approved place of work listed in the LCA or in the same listed Metropolitan Statistical Area (typically defined as a county). The DOL regulations noted above define the geographic coverage area for a DOL-certified LCA as the "area of intended employment," i.e., "the area within normal commuting distance of the place (address) of employment where the H-1B nonimmigrant is or will be employed."

DOL regulations suggest that commuting distance is considered normal if it is up to 50 miles one way from the worker's personal residence. Thus, if the H-1B employee lives within a 50-mile commute from the office, no new LCA and no new or amended H-1B petition would be needed. Administrative case law has determined that a commute of about 70 miles may be considered within normal commuting distance (at least for purposes of determining the proper prevailing wage source data for the geographic area). But as long-distance commuters can attest and the US Census Bureau has acknowledged, "normal" one-way commutes are growing ever longer. Indeed, the

USCIS March 9 letter on remote work agreements, noted above, recognizes that "the local commuting area ([is] generally, 50 miles or more)." Thus, longer-range commutes might yet be allowed.

To prove, if later necessary, that the within-commuting-distance exception applies, the employer should document the distance between the permanent office location and the employee's home. The employer should also provide the employee with a notice containing the essential elements of an LCA posting notification for the home office location which should then be posted at the home office for ten business days. As a practical matter, asking the employee to post the notice at the employee's home would seem ritualistic and unnecessary since no other employees would see the posted notice (unless the employee's spouse, live-in partner, or others in the same household are also employed by the H-1B employer).

**Non-worksite exemption.** DOL regulations at 20 CFR § 655.715 define the term "place of employment" and offer examples of situations where new LCA certification requirements apply to "worksites" but do not apply to exempt "non-worksite" locations. Non-worksite situations are limited under DOL regulations, and offer little room for argument that a change of unknown duration where H-1B work is to be performed, prompted by COVID-19 precautions, would cause the non-worksite exemption to apply. The DOL's examples of "non-worksites" include employee development opportunities, jobs requiring frequent travel (peripatetic occupations), and casual, short-term trips (typically limited to 10 consecutive business days in a single visit).

**Short-term placements.** Another potential exemption from the worksite rules and the need to obtain a new LCA (and submit a new or amended H-1B petition to USCIS) involves what the DOL describes as "short-term placements." These are changes in location, away from the employee's principal work location, for periods of 30 days per annum, or up to 60 days in a given year if the employee still maintains a "US residence or place of abode [which] is located in the area of the permanent worksite and not in the area of the short-term worksite(s)."

The short-term placement rule requires that the new worksite destination be one where the employer does not already have a preexisting LCA for the same job (the specific "occupational classification") that the employee presently holds. Thus, even if a work relocation were only to last up to 60 days – something that is unclear until the full effects of COVID-19 are known in the US – it is unlikely that the short-term placement rule would provide prolonged relief in many situations.

**H-1B public notification rules.** If a job location change motivated by COVID-19 concerns does not meet one of the DOL exceptions described above, and a new LCA and the filing of a new or amended petition with USCIS are required, then compliance with the regulations may well be difficult because of the public-notification requirement of the LCA. Under a recent DOL Field Bulletin, public notice "must occur in one of three ways," namely:

- posting of a hard copy notice [at the place of employment],
- electronic notification, or, . . .
- notification to a collective bargaining representative [since most H-1B jobs are not unionized, this option would rarely apply].

It seems doubtful that DOL would find hard-copy notice posting solely in the H-1B worker's home as sufficient (assuming no one remains in the employer's permanent office to post hard-copy notices and no one is there to see them). In DOL's view, the employer "must make the notification *readily available, as a practical matter,* to all affected employees (emphasis in original)." Thus, in non-unionized situations, the only potential option remaining is electronic notification, which may not be practical or even possible if not all employees stationed at their homes have access to the electronic notice.

Approved modes of electronic notification may be by "any of the means [the employer] ordinarily uses to communicate with its workers about job vacancies or promotion opportunities, including through its 'home page' or 'electronic bulletin board' to employees" with access to such resources (although workers without electronic access must still be provided with a "hard copy notice"). The duty to give electronic notification would apply not just to the employer's own workers but also to unrelated employees of corporate customer at a third-party location (assuming the third-party entity, consents that its own employees receive electronic hard-copy notice in the same permitted fashion).

**The H-1B job-change takeaway.** Simply stated, if COVID-19 precautions cause an employer to change the physical location where an H-1B worker will render services, say, from the headquarters office to each H-1B employee's personal residence, then employers and their immigration counsel must carefully parse the DOL regulations and the USCIS policy memorandum on when new or amended petitions are required in order to determine if the change in the place requires further action. Employers should determine whether the place where services are to be rendered will be eligible

for the "within-commuting-distance" exception, or will be a non-worksite location, in which case a new LCA will not be required, or will be a new worksite location (which will require a newly certified LCA, a new public-notice posting, and the submission to USCIS of a new or amended H-1B petition *before* the change in work location takes place). Worse yet, if the worksite changes again, and a new LCA and new or amended petition are required, the employer must repeat the process, even if USCIS has not yet decided and approved the first locational change. (For more on the potential adverse effects of office closures involving H-1B employees, see the L-1 visa discussion of USCIS site visits below.)

**Ongoing H-1B required-wage payment obligations.** Employer responses to COVID-19 may inevitably trigger other undesirable consequences under the H-1B visa category. If the employer announces an unpaid work furlough for all workers, the INA and DOL regulations require that all H-1B employees nonetheless be paid the required wage listed in the LCA under the "no-benching" obligation to pay for nonproductive time. This duty begins when the worker "enters into employment." The required wage must be paid no later than 30 days after an H-1B worker is admitted to the US, or if s/he is already in the country, no later than 60 days after the individual is approved for H-1B employment by USCIS. While the employer's duty to pay does not extend to an H-1B worker's voluntary absence from work or a hospitalization, the employer must still comply with other applicable laws such as the Family and Medical Leave Act.

Moreover, if an employer decides to terminate an H-1B employee – whether attributable to COVID-19 consequences or otherwise – before the USCIS-approved period of the individual's authorized status expires, the termination, according to the DOL, must be "bona fide." A bona-fide termination requires that both the employee and USCIS be notified in writing that the employment relationship has ended, and that the employer has made arrangements to cover the cost of the worker's return transportation to his or her country of citizenship or permanent residence. If a termination of H-1B employment is later determined not to have been bona fide, then the employer may nonetheless have a continuing responsibility to pay back wages and arrange return transportation until a bona-fide termination occurs (although the back-wage obligation may terminate if the H-1B worker finds new H-1B employment during the post-termination 60-day grace period allowed under USCIS regulations).

**L-1 Workers**

Precautions taken by employers in response to COVID-19 may also trigger immigration compliance concerns under the L-1 visa category for persons transferred

from a parent, subsidiary or affiliate abroad to a US employer within the same corporate group, although these are comparatively less troubling than the H-1B classification.

**No L-1 job-change restrictions (except "labor for hire" L-1B workers).** The L-1 category is divided into L-1A (for managers and executives) and L-1B (for persons with specialized knowledge). The INA does not expressly restrict the geographic location where L-1 workers must perform their work, except in limited circumstances affecting a narrow subset of L-1B employees. As stated in INA § 214(c)(2)(F) and explained in a 2015 USCIS policy memorandum, (1) an L-1B worker may not be "controlled and supervised principally" by an unaffiliated employer, and (2) the placement of the individual at the worksite of an unaffiliated employer is not "essentially an arrangement to provide labor for hire for the unaffiliated employer, rather than a placement in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary." These situations are likely to be rare since most L-1B employees typically are employed and controlled by the petitioning employer rather than by a corporate customer or end user.

**L-1 office-closure risks from unannounced USCIS site inspections.** Still, the L-1 visa category raises potential COVID-19 concerns. US-based firms petitioning for L-1 workers must maintain an "office" where it is or will be doing business, and in the case of a startup engaged in business for less than a year, evidence must be provided to USCIS that "[sufficient] physical premises to house the new office have been secured." The requirement of maintaining an office is usually satisfied easily when the L-1 petition is submitted to USCIS and the agency approves it (assuming that COVID-19 has not already led to an office closure when the petition was filed).

Yet many L-1 employers may not realize or recall that the nonimmigrant worker visa petition (Form I-129) includes an authorization signed by a corporate officer of the employer that USCIS may verify the supporting evidence submitted through any means the agency deems appropriate, including "on-site compliance reviews."

This is government-speak for what USCIS calls its "administrative site visit and verification program" – which applies to the H-1B visa category as well as the L-1 and other visas – a program that purports to give the agency's Fraud Detection and National Security (FDNS) directorate the authority to visit an employer's facility and perform a number of investigative and law-enforcement tasks, including the following:

- Verify the information, including supporting documents, submitted with the petition;
- Verify that the petitioning organization exists;
- Conduct unannounced site visits to where the beneficiary [the sponsored noncitizen employee] works;
- Take photographs;
- Review documents;
- Interview personnel to confirm the beneficiary's work location, physical workspace, hours, salary and duties; and
- Speak with the beneficiary.

Office closures in response to COVID-19 concerns may lead an FDNS inspector to conclude (probably incorrectly) that the business has terminated operations, that the L-1 worker is not employed at the facility listed in the petition, or possibly, that the petition contained material misrepresentations of fact or was somehow fraudulent. The usual result when this happens is that the FDNS officer files an adverse report which in turn causes USCIS to issue a notice of its intention to revoke the approved petition unless countervailing evidence is submitted in 30 days.

The risk of such a revocation is significant: An employer may abruptly lose the services of a valued incumbent employee, and the worker and his immediate family may be required to depart the United States quickly. To address these problems, employers receiving a notice of intended revocation should immediately consult with competent immigration counsel. Counsel may seek to prevent the termination of employment by submitting a fulsome response to the notice, and enclosing substantial evidence that the business is still active and operational despite the virus-avoidance measures prompting the office closure. Counsel may also argue that the activities of FDNS as an investigative and law enforcement arm of USCIS violates § 471 of the Homeland Security Act, codified at 6 USC. § 542, which prohibits any restructuring of the law enforcement and adjudicative units of the former Immigration and Naturalization Service, and limits USCIS solely to the adjudication of requests for immigration benefits.

**L-1 "blanket" visa concerns.** COVID-19 may also present challenges for larger employers with approved blanket L-1 petitions. USCIS's approval of an blanket petition allows

noncitizens seeking a blanket L-1 visa (managers, executives, and specialized-knowledge professionals with a relevant university degree) to apply directly to a US consular post or embassy abroad. The L-1 blanket option avoids the usually burdensome requirement that – before a consular official may approve an L-1 visa – an employer must separately submit to USCIS (and the agency must approve) an "individual" (non-blanket) petition and voluminous supporting evidence of corporate qualifying relationships and the beneficiary's past job experience abroad and prospective responsibilities in the US confirming that L-1 eligibility criteria are satisfied. Another advantage is that consular officers are allotted far less time to decide on whether or not to issue a blanket L-1 visa than USCIS adjudicators who decide on individual petitions, and consular refusals thus tend to be far fewer.

Given the spate of COVID-19 travel and entry limitations announced worldwide, L-1 employees now in the US under an approved L-1 blanket may find it difficult or impossible to depart the U.S and apply for a renewal of the blanket visa at a consular post abroad. Moreover, US Embassies and Consulates in Western Europe are effectively canceling visa appointments scheduled in the months of March and April and are advising applicants to look for new appointments in May, at the earliest. This leaves employers with only one administrative option, i.e., to submit individual L-1 petitions, provide extensive supporting evidence in each case, respond if necessary to a USCIS request for additional evidence, and await a final up or down decision.

**F-1 academic must apply for OPT and file their I-765 EAD applications before leaving the US**

F-1 students are eligible for 12 months of work authorization, known as Optional Practical Training (OPT), after the completion of each academic level. This work authorization is critical in the face of a challenging H-1B cap lottery. The process for applying for OPT starts several months before graduation when the student is granted OPT by their college or university and then submits an I-765 Application for Employment Authorization directly with USCIS. The result of this application is an Employment Authorization Document (EAD) which the F-1 student then presents to an employer for confirmation of employment authorization. When submitting the I-765 Application, an F-1 student must demonstrate that he or she is physically in the US at the time of filing. These applications cannot be filed from outside the US

In response to the COVID-19 pandemic, F-1 students across the US are moving to a virtual/online classroom setting for the rest of the semester and we are hearing reports of colleges and universities advising these students to return to their home countries to complete the semester. We advise F-1 students to follow the instructions

that they are receiving from their respective schools but we strongly recommend that they apply for Optional Practical Training (OPT) and file their I-765 Applications before they depart the US  Failure to file these applications before departure could result in a loss of OPT work authorization which in turn will render students ineligible for future STEM OPT extension benefits.

**Employment-Based Immigrant Visa Issues**

Employer responses to COVID-19 also raise challenges that could create impassable obstacles as businesses try to sponsor noncitizen workers for lawful permanent resident (green card) status.  These difficulties primarily involve the DOL's labor-market test known as the PERM labor certification recruitment process – an essential preliminary step to obtaining employment-based residency in most cases.

**DOL's PERM hard-copy posting requirements.** One impediment triggered by COVID-19 involves a DOL requirement that is wholly unrealistic and impossible to fulfill in light of the foreseeable and widespread office closures to stem the spread of the virus. The Labor Department's regulations at 20 CFR § 656.10(d)(1)(ii) make the physical posting of notice to the employer's employees at the facility or location of the employment mandatory in all cases under.  This DOL rule requires the physical posting in the employer's facility of no less than two hard-copy notices for at least 10 consecutive business days so that each notice is "clearly visible and unobstructed while posted and must be posted in conspicuous places where the employer's US workers can readily read the posted notice on their way to or from their place of employment."

Unlike in the H-1B context, publication of an electronic notice is not an acceptable substitute (rather, electronic and hard-copy notification are both required under PERM).

To date, DOL has not relaxed this notice-posting requirement at the place of employment, thus making it impossible for any employer to comply with the PERM regulations and sponsor a noncitizen for labor certification, if no one is stationed at the employer's facility to post the notice. Furthermore, with offices emptied of personnel as precautions against the spread of COVID-19, the regulation makes no sense, since the notice in hard-copy form will never be seen by employees.  Employers and their counsel thus can only advocate to DOL that it relax this illogical requirement.

**Layoffs and RIFs.** Another PERM-related concern could arise if a loss of business resulting from COVID-19 were to force an employer to conduct a reduction in force or layoff involving a PERM-sponsored job (or a related occupation) in the area of intended employment. Under DOL regulations at 20 CFR §656.17(k) if such a layoff has occurred within the six-month period before filing the labor certification application, the employer must document that it has notified all potentially qualified laid-off US workers of the job opportunity, and considered their qualification. The employer must also document the results of the notification and consideration in its recruitment report (which must be turned over to DOL if the labor certification application is audited).

While not always fatal to the success of a PERM application, a layoff of this type will likely lead to a DOL audit of the employer's recruitment efforts and dramatically slow by many months an ultimate decision on the application. In practice, because of the difficulty of demonstrating to DOL's satisfaction that none of the employer's laid off workers were qualified for the sponsored PERM job, most employers simply suspend the recruitment process and wait more than six months before its resumption.

Delaying the initiation of PERM recruitment by six months or more often will jeopardize or entirely cut off an employer's ability to extend the status and employment authorization of H-1B workers. This is because H-1B workers normally face an aggregate visa "maxout" period of six years in the US, at which time they (along with their immediate family) must leave the US and remain abroad for a year before potentially requalifying for a new H-1B visa. Thus, in order for their status to be extended beyond six years, H-1B employees require an approved labor certification by the beginning of their fifth year and the timely filing of an employment-based immigrant visa petition with USCIS.

**Form I-9 (Employment Eligibility Verification) and E-Verify Concerns**

The federal government procedures imposed on employers for verifying the identity and employment eligibility of all workers in the US will also be made more difficult as a result of anticipated office closures prompted by COVID-19.

Under current law, employers (or their authorized agents) must initiate and complete the I-9 verification process in a face-to-face meeting with each newly-hired employee during a three-day window of time starting on the date of hire. Employers enrolled in E-Verify must then also promptly process a query to confirm employment eligibility through this DHS-maintained online verification system. Employers must also must

update the I-9 to reverify the employment eligibility of workers with temporary employment authorization before the individual's work permission expires.

In-person encounters of this sort were often challenging or impractical before the advent of the coronavirus. With the office closures prompted by COVID-19, however, they have become unsafe and all but impossible. Officials at USCIS and another DHS agency responsible for I-9 enforcement, US Immigration and Customs Enforcement (ICE), have long refused to allow live, video-based conferences of the employer and the employee to substitute for the in-person I-9 verification of identity and employment eligibility. COVID-19, and the resulting office closures, have increased the pressure on these agencies to relent and permit I-9 employment verification by video. To date, the position of these agencies remains unchanged.

What this means is that employers whose offices are closed because of COVID-19 face difficult choices: (1) postpone the start date of employment and deal with the ensuing business disruption or loss of the employee; (2) delay the completion of I-9 forms beyond the three-day limit until an in-person encounter can be arranged, and face late-completion civil fines; (3) expend funds to hire remote agents to conduct in-person I-9 verification (while remaining responsible for any errors or omissions of the agents); or (4) conduct an as-yet unapproved video-based I-9 verification process, while also explaining the business exigency for doing so in a memorandum (and nonetheless face the prospect of civil fines for late I-9 completions).

None of these options are attractive. Employers should still pressure DHS, USCIS, ICE and others in the Executive Branch to change the requirement, or urge Congress to enact remedial legislation

* * *

As can be seen, the employer takeaways from this Legal Update are troubling. Unless Executive Branch officials or the Congress are pushed to act, an employer's reasonable and prudent responses to the dangers of COVID-19 will likely lead to significant disruptions in noncitizen employee hiring and retention, and result in business losses.

**Time for government advocacy.** Employers must also engage with the Executive Branch, Congress, and federal immigration authorities, directly or through business and trade organizations, to advocate strenuously for the immediate announcement of blanket relief policies, perhaps by executive order under the President's national emergency

powers, to ameliorate as many as possible of the clearly foreseeable adverse immigration consequences threatened by COVID-19.

**Time to sue, if necessary.** In appropriate cases, employers should also be prepared to request review from the federal courts by applying for a temporary restraining order or preliminary injunction, or requesting review under the Administrative Procedure Act, 5 USC. § 706(2)(A), which is available when a federal immigration agency's decision can be shown to be "arbitrary, capricious, an abuse of discretion [or otherwise unlawful]." Recently, for example, a number of federal court decisions (here, here, and here) have overruled USCIS adjudications involving what the courts found to be the agency's untenable interpretation of its own regulations under the H-1B visa category.

## Authors

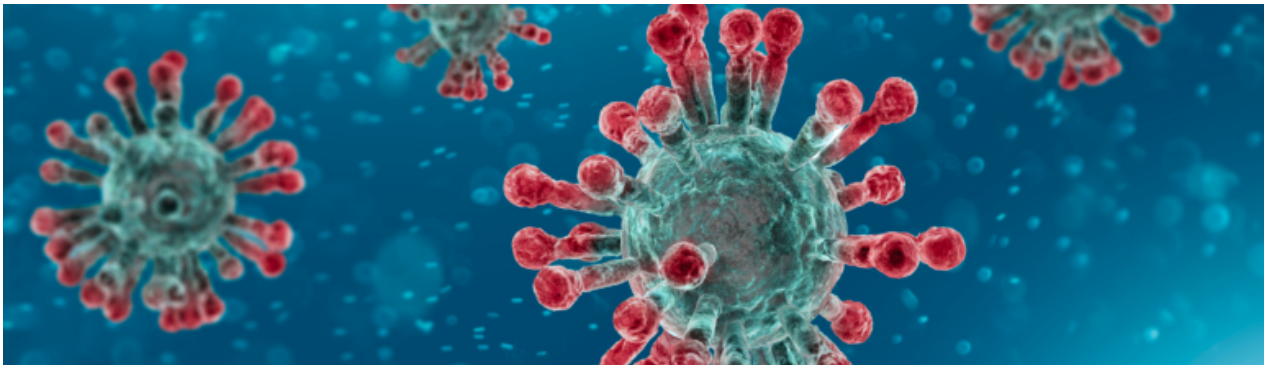
Meet the Team

## Related Practices

Immigration

Employment

## Related Trends



**Coronavirus (COVID-19)**