COVID-19 and Employer Responsibilities to Workers on Visas

Article By
Forrest G. Read IV
Jackson Lewis P.C.
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As employers respond to workplace issues pertaining to COVID-19 (Coronavirus), it is important not to forget about foreign nationals working pursuant to temporary non-immigrant visas. Employers must avoid discriminatory policies and remember that there are additional rules and regulations that apply to employees on visas.

Here are a few things to keep in mind:

- **Working Remotely** – If a foreign national on an H-1B visa starts working remotely, the remote location was not on the original H-1B visa, and the remote work will continue for more than 30 days, a Labor Condition Application (LCA) posting or a new LCA and an amended petition may be required.

- **Material Changes in Terms and Conditions of Employment** – Generally, foreign nationals working on temporary visas are expected to be working in the geographic locations in their visa petitions. Whether USCIS should be notified about a change in location depends on the type of visa and whether the change would be considered a “material” change in the terms and conditions of
employment.

- **Changes in Pay** – Other “material” changes that might have to be reported could include changes in pay, e.g., as triggered by moving from full-time to part-time employment. This would be particularly significant for those in H-1B status. If H-1B workers are not being paid the salary in the LCA filed with their H-1B petitions, employers can be found liable and be obligated to provide back pay.

- **Out of Status** – Individuals on nonimmigrant visas (including students on OPT or STEM OPT) can find themselves “out of status” if there is a company shutdown and they are not working and not being paid. If a foreign national is out of status, the individual must change to another status or leave the country. For personal reasons or due to the COVID-19 outbreak, it may not be feasible or safe for them to return to their home countries.

- **Students and Exchange Visitors** – Students on F-1 visas can fall out of status if they are taking all “online” courses during a campus shutdown. DHS has reported that it is prepared to be flexible. The Department of State has indicated that it is prepared to be flexible with individuals working in J-1 status as exchange visitors who cannot leave the United States at the conclusion of their programs.

- **Form I-9 and E-Verify** – All employers must decide how they will handle Form I-9 and E-Verify obligations during a company shutdown or when individuals are working remotely. Under USCIS and ICE policies, this may mean establishing a process and designating “agents” to review forms and fill in Section 2 of the Form I-9.

- **COVID-19 Travel Bans** – For now, because foreign nationals from many countries are banned from entering the United States, employers may want to reconsider hiring approaches. The banned countries include China, Iran, and the 26 Schengen countries – Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland. On March 13, 2020, President Donald Trump noted that other countries, such as the United Kingdom, may be added to this list and some countries already on the list may be removed.

- **Cancellation of Consular Operations** – There have been recent reports and news of various U.S. Consulates closing and/or cancelling immigrant and nonimmigrant visa appointments, and that trend may well continue. Employers and employees should be mindful of the availability of visa services at consular locations, check consular websites frequently, and plan accordingly.

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