

THOUGHT LEADERSHIP

LEGAL UPDATES

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Understanding the H-1B Visa Rules During COVID-19

The H-1B visa program contains a number of employer obligations that may be difficult to meet while undertaking work-from-home policies, layoffs, and other actions as a result of the COVID-19 pandemic. For employers seeking to retain H-1B workers and seeking to stay in compliance with the H-1B program regulations, it is critical to understand what the regulations say and how they apply to various situations.

Work location issues with H-1B worker and work from home policy

Importantly, the H-1B visa is location specific, meaning the H-1B employee is only authorized to work at the worksite(s) listed in the H-1B petition. For most employers, the worksite location listed in the H-1B petition is an office location of the employer. But where employees can no longer work from the office, how can employers ensure compliance with the H-1B regulations?

The H-1B regulations state that when there is a material change in the H-1B employee's employment, such as a work location change or a drop in hours from full-time to part-time, the employer must file an amended H-1B petition with U.S. Citizenship and Immigration Services; however, there are exceptions to this general rule.

The H-1B regulations allow for short-term placements at temporary worksites for up to 60 work days provided the employee continues to be paid the required wage in the H-1B petition and meets the following:

1. The H-1B employee continues to maintain an office or work station at the location(s) listed in the labor condition application filed with the H-1B petition;
2. The H-1B employee spends a substantial amount of time at the permanent worksite in a one-year period; and

3. The H-1B employee's U.S. residence or place of abode is located in the area of the permanent worksite.

However, the intent of this rule is to cover those situations where the employer has a business reason to send an H-1B employee to a new work location. As a result, this regulation adds the additional burden on employers to pay the cost of lodging and meals for the employee for the duration of the time the employee is at the new worksite.

There is another regulatory provision which states that the H-1B employee may be moved to a new worksite location provided that the new worksite is within normal commuting distance of the primary worksite listed on the H-1B petition, and notice is posted at the primary worksite and the new worksite. For employees working from home, this means posting at the home work location.

Should the employee be working from a home work location that is outside of the normal commuting distance, this exception would not apply, and an amended H-1B petition, adding the home work location, may be required.

Hiring an H-1B worker remotely

The requirement that employer must post notice of the sponsorship of an H-1B employee at the work location also becomes an issue for employers seeking to hire H-1B workers remotely until offices open up again. The intent of the notice requirement is to make a good faith effort to notify all employees at the worksite of the terms under which an H-1B employee will be sponsored. But if the office is closed, a physical posting in the office will not meet the good faith requirement. Thus, employers may have to use electronic posting of the notice through an employee intranet accessible to all existing employees, or notification of existing employees in the same or similar occupational classification by email to ensure the notice is visible to employees.

Finally, employers should be sure to review the Form I-9 completion rules for remote hires, requiring physical review of documentation of identity and work authorization. The Department of Homeland Security recently released information regarding a temporary relaxing of this rule only in specific situations.

H-1B non-productive status

Employers are responsible for paying the required wage to their H-1B worker at all times during the validity period of an H-1B. This applies even when a foreign national employee is in nonproductive status unless the nonproductive period arose due to (1) conditions unrelated to the employment and (2) was taken at the employee's voluntary request. Accordingly, without further guidance from the U.S. Department of Labor or an amendment to the current regulations, nonproductive periods should be read to include mandatory, company-wide furloughs. If discussions regarding a company-wide

furlough is taking place at your company, you should consider the following options for your H-1B employees to remain in compliance with the law.

The first option is for an employer to continue paying their regular H-1B employees' salaries through the furlough period. The second option is to terminate the H-1B employee and offer to pay for reasonable costs of return transportation to the employee's home country. Usually, when an H-1B employee is terminated, they are eligible for a grace period of 60 days or until 10 days after the employee's H-1B status expires, whichever comes first. This grace period does not grant work authorization but instead, allows the foreign national to lawfully remain in the United States for 60 days after they are terminated. During this grace period, the H-1B employee may be eligible to change employers pursuant to current immigration provisions.

H-1B reduced hours

As discussed above, employers are responsible for paying the required wage to their H-1B worker at all times during the validity period of an H-1B. If any material changes in the terms and conditions of employment occur, including a reduction of hours from full-time to part time, the employer must file an amended H-1B petition to reflect such changes.

H-1B worker requiring leave for quarantine

In the event that an H-1B employee shows symptoms or tests positive for COVID-19, the employer may require the employee to take vacation or sick leave without affecting his or her status. However, because the quarantine is required by the employer, the regulations contemplate that the employer may still be required to pay the required wage during this time. The employer also should keep in mind that the H-1B employee may be eligible for paid sick leave under certain provisions of the Families First Coronavirus Response Act.

Contact us

If you have further questions regarding immigration challenges related to COVID-19, please contact Kelli Meilink, Christine Fabin or your Husch Blackwell attorney.

COVID-19 resource

Husch Blackwell has launched a COVID-19 response team providing insight to businesses as they address challenges related to the coronavirus outbreak. The page contains programming and content to assist clients and other interested parties across multiple areas of operations, including labor and employment, retailing, and supply chain management, among others.