GLOBAL IMMIGRATION PARTNERS

# COVID-19 AND IMMIGRATION

During these challenging times where the landscape is changing day-to-day, Global Immigration Partners will continue to support our clients in any way possible. We have created this FAQ to help guide our clients and their employees through these unpredictable and sudden changes to everyday life and work. Many clients have reached out with questions regarding changes to salary, hours, remote worksites, furloughs, layoffs, terminations and more. We have compiled this list of commonly asked questions to serve as a reference and we will continue to add more information as it becomes available. The Department of Labor and the Department of Homeland Security have been providing updated information including accommodations that are being made to ease the impact on the various processes and we will continue to update this document based on those changes. We also would ask that you please provide us with feedback so that we can incorporate that into the document.

We would like to emphasize that this is not a substitute for legal advice. We strongly advise you to reach out to our firm to discuss any specific situations you may have as each circumstance is unique and given how important and sensitive immigration is to your employees and company, we would want to make sure that you are making an informed decision based on your specific situation. We understand that employees are family and as employers, you want to keep your family together and we will do our absolute best to assist you and your employees through these challenging times.

## COVID FAQ

### Maintenance of Status

- **What is generally required in order to maintain valid nonimmigrant status?**

Maintaining status is of utmost importance and can be challenging during these times but must stay a priority. It is absolutely critical that the foreign national's I-94 does not expire. Generally speaking, in order to qualify for an employment-based visa classification, the petitioning employer will make specific attestations regarding the terms of employment (job title, salary and worksite) and in order to maintain status, those attestations must continue to be met. Moreover, if changes occur to the terms of employment, it is important to consult our firm before they are implemented. Many times, those types of changes require notifying the USCIS prior to them taking effect.

- **I am in F-1 status and my school closed completely without offering online classes. Will I still maintain student status?**

According to an ICE memo, dated March 9th, "if a school closes temporarily without online instruction or other alternative learning procedures, the students should remain in active status in SEVIS so long as the students intend to resume their course of study when classes resume. This is similar to short-term breaks in the school calendar when classes are not in session. Schools must notify SEVP of COVID-19 procedural changes within 10 business days."

- **I am in F-1 and my school suspended in-person classes but is providing online classes. Am I maintaining status by attending online classes?**

The rules have similarly been relaxed somewhat in this regard too. The same ICE memo noted above states: "If a school closes temporarily but offers online instruction or another alternative learning procedure, nonimmigrant students should participate in online or other alternate learning procedures and remain in active status in SEVIS. Schools must notify SEVP of COVID-19 procedural changes within 10 business days. Given the extraordinary nature of the COVID-19 emergency, SEVP will allow F-1 and/or M-1 students to temporarily count online classes towards a full course of study in excess of the limits stated in 8 CFR 214.2(f)(6)(i)(G) and 8 CFR 214.2(m)(9)(v). This temporary provision is only in effect for the duration of the emergency and in accordance with the procedural change documents filed in a timely manner to SEVP.."

- **ICE has a FAQ that provides significant information for students with respect to this issue. See** https://www.ice.gov/sites/default/files/documents/Document/2020/COVID-19FAQ.pdf
- **I am in the US in visitor status but cannot depart. Can I extend my visitor status?**

If you are currently in the U.S. in B1 or B2 visitor status and are unable to leave the U.S. due to travel restrictions, safety or health concerns, and you are currently maintaining status, please reach out to us and we can file an application to extend your visitor status. Assuming that the extension application is timely filed prior to the expiration of your visitor status as shown on your I-94 online, you may then remain in the U.S. while that application is pending, through the time requested or if the application is adjudicated and approved, then through the end date on the Approval Notice.

- **I am presently in the US as a visitor pursuant to the Visa Waiver Program (ESTA) and I will be unable to depart within the 90 days allotted due to travel restrictions. What should I do?**

If you are in the U.S. presently under Visa Waiver and cannot depart due to Covid-19 travel restrictions, you may be able to apply for temporary extension of stay for up to 30 days. While there is an exception to the mandatory requirement of departing within 90 days of arrival in Visa Waiver, this has traditionally only been used for emergencies such as cancelled flights due to inclement weather and hospitalizations. This involves you submitting a request for "Satisfactory Departure" to the U.S. Customs and Border Protection (CBP) Deferred Inspection office that oversees the Port of Entry (most commonly the airport you arrived at in the United States). A list of CBP offices is provided here: https://www.cbp.gov/contact/ports/deferred-inspection-

sites. At present, it appears that currently only the CBP offices at JFK and Newark airports are accepting such requests. We have been made aware that JFK will accept such requests for individuals whose periods of stay will expire in 14 days or less from the day that the individual contacts JFK Deferred Inspections. The best approach, at this time, would be to call deferred inspection at JFK or EWR and request the 30-day Satisfactory Departure extension. If you wish for us to represent you in this matter, please provide us with your name, date of birth, passport information, and the original departure flight itinerary along with the new flight itinerary. As noted above, this request needs to occur within 14 days of the date of expiration of your allotted 90-day stay, but please notify us at the earliest if you would like us to reach out to CBP on your behalf. If your 90-day period of Visa Waiver/ESTA admission has expired, the decision to grant satisfactory departure will be considered, by CBP, on a case by case basis.

## 60-day Grace Period

- **What is the purpose of the 60-day grace period?**

The 60-day grace period allows individuals that are presently in the United States pursuant to E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1 or TN status to remain in the United States in the event that they are subject to a Reduction in Force, termination or otherwise have resigned from their employment position. The 60 day grace period starts immediately following their last day of work, and will allow the individual to remain in the United States to ostensibly find another employer to file a nonimmigrant visa petition to allow them to "change employers", change to another nonimmigrant visa status or otherwise settle their affairs in the United States before they will be required to leave the country. A critical aspect to this 60 day grace period is that the individual must have at least 60 days remaining on their I-94 status and if they were to have less than 60 days, their grace period would match the time that they have left on their I-94. Individuals seeking to benefit from this grace period are allowed one 60-day grace period per approval period.

- **What visa types does the 60 day grace period apply to?**

E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1 or TN visa classifications that have 60 days or more remaining on their I-94s.

- **When does the grace period start?**

The USCIS has been looking at the last day of the stated pay period on the last pay statement of the visa holder as the beginning of the grace period.

- **If an employer terminates an employee and they fall into the 60 day grace period, can that same employer hire that employee back?**

For individuals holding E-1, E-2, L-1, O-1 and TN status, we do not see this as an issue and the employer may hire the employee back again. However, for individuals holding either H-1B, H-1B1 or E-3 status, there is a potential concern as to whether or not the DOL could treat the period when the employee was terminated as an unlawful benching and require the employer to repay these workers the wages as set forth in the underlying case filing. If the H-1B petition and underlying certified Labor Condition Application (LCA) have not been withdrawn and are still

valid, the same employer can utilize this to hire the employee back within the 60-day grace period, however, to perfect this, it may be recommended to file a new H-1B petition to the USCIS. However, if the H-1B petition and/or the LCA have been withdrawn it would definitely require the Petitioner to file a new petition with the USCIS.

## Unemployment Benefits

- **Are unemployment benefits considered a public charge?**

No, the USCIS has specifically stated that unemployment benefits are not considered subject to public charge consideration.

- **Can an H-1B or E-3 receive unemployment benefits?**

No, because these individuals require sponsorship, they are not available for employment anytime, anywhere for anyone and therefore are not eligible for unemployment benefits.

- **Can a TN receive unemployment benefits?**

Some TN holders have successfully argued that they are able and available but more likely than not, they will not receive US unemployment. Canadians can apply for unemployment in Canada upon their return.

https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/outside-canada.html

- **Can an EAD holder receive unemployment benefits?'**

Yes, EAD holders can apply for EAD benefits because they do not require sponsorship and therefore, they are able and available. OPT holders need to be careful as there are limitations on unemployment that they cannot exceed. We would suggest the OPT holder reach out to their university for updated guidance.

## Unpaid Leave of Absence and Non-Productive Employment

- **Can an H-1B/H-1B1/E-3 employee request an unpaid leave of absence?**

Yes, the USCIS and DOL do allow for unpaid leaves of absence so long as two conditions are met: The employee initiated/requested the LOA, thus creating the condition of non-productive employment and that they have an intent to return to work. The employee should make an official written request for the LOA and provide an estimated return date in that request and that should be kept in the employee's records. With that said, the USCIS is extremely skeptical of unpaid LOAs for extended periods and assume that the person may be getting benched without pay. A long LOA that extends weeks or months will likely draw the attention of the USCIS and the H-1B may be required to provide evidence of the reason for their extended LOA. With this current economic climate, the USCIS will see a lot of people using this option which may cause them to be more critical than normal when evaluating whether it was justified or simply an

excuse to get around benching. Many times, this is used when people do not have vacation or PTO days to use.

It should also be noted that if the DOL were to find that an employer benched an employee without pay, the employer can be ordered to pay the unpaid salary amount as well as fines and penalties.

- **What is considered Non-Productive Employment as it relates to H-1B/H-1B1/E-3 employees and salary obligations?**

The regulations do not require employers to pay H-1B/H-1B1/E-3 employees for non-productive employment in certain situations where the employer **has not** created the non-productive condition. Per the DOL's recent FAQ, "non-productive status is defined as any time during the validity of the LCA and H-1B petition where an employee is unable to work. When an employee is in a non-productive status due to a decision of the employer (e.g., due to a lack of work), per 20 CFR 655.731(c)(7)(i) the employer continues to be obligated to pay the required wage. On the other hand, an employer is not required to pay the required wage to an employee in non-productive status, when the employee is non-productive at the employee's voluntary request and convenience (e.g., touring the U.S. or caring for ill relative) or because they are unable to work (e.g., maternity leave or automobile accident which temporarily incapacitates the nonimmigrant) due to a reason which is not directly work related and required by the employer. Of course, the employer would still have to pay the required wage if the employee's non-productive period was subject to payment under the employer's benefit plan or other statutes such as the Family and Medical Leave Act (29 U.S.C. 2601 et seq.) or the Americans with Disabilities Act (42 U.S.C. 12101 et seq.)."

- **Does an employer have to pay the salary of an employee who becomes non-productive because they have COVID-19 and have been put into isolation/quarantine?**

Per the recent DOL FAQ: "The regulations do not require an employer to pay the required wage if an employee is not able to work due to a reason which is not directly work related and required by the employer. That said, if an employer has policies in place where a COVID-19 positive employee would have to remain in quarantine, there is an argument to be made where the employer must continue to pay the employee given that the quarantine rule is created and imposed by the employer. An employer should also be aware that it could be subject to required payment under the employer's benefit plan or other statutes such as the Family and Medical Leave Act (29 U.S.C. 2601 et seq.) or the Americans with Disabilities Act (42 U.S.C. 12101 et seq.) nonetheless per 20 CFR 655.731(c)(7)(ii). Employers should also keep an eye to any additional federal legislation passed regarding employers' obligations during this national emergency."

- **Our company will be filing an I-140 on behalf of an employee who is running out of H-1B time but Premium Processing is no longer available. What can be done?**

When filing the I-140 or if it has already been filed, the employer can make an expedite request based on financial harm and the USCIS will have the discretion as to whether they want to expedite the filing or not. Please notify our office if you would like us to represent you with respect to submitting the expedite request. Unfortunately, there is no guarantee that they will

approve the expedite request, and you can only make one expedite request every 30 days. If the expedite request is not granted, the Beneficiary should consider other options available to him or her, including departing the United States as soon as practical to avoid violating his or her nonimmigrant status. The USCIS is firm that the employee must be eligible for the post-6th year extension at the time of the filing of the H-1B so an employer cannot file the H-1B with the hope that the I-140 is approved while it is pending. Even if an H-1B visa holder maximizes their H-1B time in the United States, they may still be entitled to the future approval of a H-1B petition if the I-140 is approved and their priority date is subject to backlog.

## Furloughs, RIFs and layoffs

- **Can an employer furlough or bench without pay, an H-1B, H-1B1 or E-3?**

No, employees that are in H-1B, H-1B1 or E-3 status cannot be furloughed or benched without pay because the condition is not created by the employee (like an unpaid leave of absence request). The LCA terms would remain valid and the employer remains obligated to meet them.

- **What are the consequences of a RIF or layoffs as far as PERMs go?**

An employer is obliged to notify and consider any US worker that was subject to a layoff that worked in a related occupation in the area of intended employment within 6 months preceding the intended date of filing of the PERM application. In assessing the US worker(s) that were subject to the layoff, the employer would utilize the same standard of review it would for any potentially qualified US worker. In the event the employer terminates the beneficiary of the PERM case, the employer may still pursue the PERM case if there is a reasonable belief that the company may rehire the individual in the future.

- **Can an F-1 OPT employee get furloughed, laid off or terminated?**

As of yet, the US Immigration and Customs Enforcement (ICE) branch of the Department of Homeland Security has not modified the requirements for maintenance of F-1 OPT status. Students in 12-month OPT programs may not accrue more than 90 days of unemployment. Students granted 24 months of OPT (STEM) may not accrue more than a total of 150 days of unemployment (maximum of 60 days of unemployment within the 2 years of STEM OPT).

There may be teleworking options that the individual in F-1 OPT may discuss with their employer in order to maintain F-1 OPT status. In addition, the individual could have their hours reduced provided that they work a minimum of 20 hours per week. They may even volunteer their time to demonstrate their continued ongoing employment provided this does not violate state employment laws.

F-1 OPT holders may also consider finding a new OPT employer and discussing their situation with their Designated School Official. F-1 STEM OPT EAD holders would need to ensure that any new employer is registered as an eVerify employer. Additionally, F-1 students most notify their DSO of any material changes that impact their I-983, including a furlough, layoff or termination within 10 days of such a change.

## Termination obligations and requirements

Employers have a limited duty to provide notice of the termination or layoff of nonimmigrant employees to the USCIS. As set forth above, most foreign national employees fall under the E-1, E-2, E-3, H-1B, H-1B1, J-1, L-1, O-1 or TN visa categories. Generally, this is limited to the withdrawal of the underlying nonimmigrant visa petition for individuals that hold H-1B or H-1B1 status, but may also be extended to individuals that hold other nonimmigrant visa types, but there is no affirmative obligation to do so. F-1 students that are in possession of EAD through Optional Practical Training need to notify the DSO at their school within 10 days of any termination of employment. Employers that have F-1 students holding a STEM OPT EAD must report the termination to the employee's DSO within 5 days of said termination of employment.

- **What termination obligations do I have to my employee if they have an H-1B or O-1?**

For individuals holding H-1B and O-1 visa status, the employer must also offer to pay the reasonable cost for the individual's return to their home country. They do not have to provide this accommodation for any family members of the H-1B or O-1. This could be in the form of a cash payment or an actual 1 way plane ticket back home but we suggest making the offer first before purchasing a non-refundable/non-transferable one-way ticket to the employee. Ultimately, as an employer, you are not obliged to enforce the immigration laws of the United States. You need to comply with the laws related to termination obligations which includes offering to pay for the transportation cost for the employee to return home, but it's ultimately the employee's decision as to what s/he will do given that they have a 60 day grace period to remain in the United States.

- **What further termination obligations do employers have for H-1B employees?**

If the employer is confident that the employee will not return to the company, the employer should notify USCIS of the termination, through certified letter indicating the date of termination and requesting revocation of the H-1B petition, or the employer may continue to be held responsible for the Beneficiary's wages. The Petitioner would also need to withdraw the LCA. By withdrawing the H-1B with USCIS and the LCA with the DOL, the employer would have to file a new H-1B transfer if they later re-hire the H-1B employee.

Naturally, the employer must also notify the H-1B employee of the termination and the termination date.

## Changing to part-time employment or moving to temporary remote work

- **Can an employer temporarily cut the hours of an H-1B/H-1B1/E-3 employee?**

Full-time Employment: Yes, but in order to make a material change to the terms of employment, the regulations require the employer to file an amended H-1B with USCIS that would reflect the change to part-time employment (generally anything less than 35 hours per week, but check state employment laws to confirm this fact). An amended H-1B is similar to a transfer or

extension and requires similar documentation and forms. Upon the USCIS receiving the amended petition, the employer can move the employee to part-time employment.

Part-time Employment: If the employee is already employed on a part-time basis, and their hours are set as a range (eg 20-34 per week), the employer **cannot** reduce hours below the range without first filing a H-1B amendment. However, if the reduced hours remain within the range, no amendment is required.

- **Can an employer temporarily reduce the salary of an H-1B/H-1B1/E-3 employee based on a company-wide reduction?**

Yes, but similar to cutting the hours of the employee, the employer would be required to file an amended H-1B with USCIS. With payroll reductions, the reduced wage must continue to meet the prevailing wage and when it is the same position with the same requirements, the prevailing wage level must remain consistent with the full-time actual wage rate the employer pays similarly situated employees, which can make this extremely difficult in many situations.

- **Can an H-1B employee switch to remote work?**

If the H-1B Beneficiary will be working remotely, and their remote location is 50-70 miles (commutable distance) from the location currently listed on the LCA for their approved petition, then the Beneficiary should post the existing LCA in two conspicuous locations at their new remote work location (i.e. their home). There is no filing fee for this process and you will simply need to post the existing LCA in two conspicuous places for 10 days. If you need another copy of the LCA, please reach out to our office.

For new work locations, the USCIS previously required that the LCA be posted at the two conspicuous locations on or within 30 days before the date of an LCA filing. Due to the pandemic, the DOL will now temporarily allow the LCA to be posted at the new place of employment ***as soon as practical and no later than 30 calendar days after the worker begins work at the new worksite locations.***

If the new, remote work location is more than the 50-70 miles from the current work location on the LCA, and the remote work is expected to last more than 30 days, then a new LCA and amended H-1B petition must be filed before they may begin working remotely.

## Cancellation of Consular and Biometric Appointments

- **My Biometrics Appointment has been cancelled. What should I do?**

On March 18, 2020, USCIS suspended routine in-person services, including biometrics appointments, until at least April 7th. When USCIS again resumes normal operations, USCIS will automatically reschedule Application Support Center appointments due to the office closure. If you do not receive a new appointment notice by mail within 90 days, call 800-375-5283.

- **My employee needs to obtain a visa abroad but their appointment at the US Consulate has been cancelled?**

On March 18, 2020, the US Dept. Of State issued a statement that it would be closing most of the US consulates around the world for routing visa appointments. The statement indicated:

a. "**In response to worldwide challenges related to the outbreak of COVID-19, the Department of State is suspending routine visa services in most countries worldwide**. Embassies and consulates in these countries will cancel all routine immigrant and nonimmigrant visa appointments as of March 18, 2020. Check the website of the embassy or consulate for its current operating status. As resources allow, embassies and consulates will continue to provide urgent and emergency visa services.
b. These Embassies will resume routine visa services as soon as possible but are unable to provide a specific date at this time. Although all routine immigrant and nonimmigrant visa appointments are cancelled, the MRV fee is valid and may be used for a visa appointment in the country where it was paid within one year of the date of payment.
c. This does not affect the visa waiver program.

If individuals are present in the U.S. in a status for which they would normally obtain a new visa abroad, such as E-3 visa status, they will need to extend their status by filing an extension of status petition with USCIS instead.

If they are outside the U.S. and do not have a current, valid visa to enter the US, they will need to wait until the consulates reopen to obtain a visa stamp. Even if they have a current valid visa, such as H-1B or if they are eligible to enter the US on Visa Waiver, there are still travel restrictions that are constantly evolving that may prevent the individual from traveling to the U.S.

## I-140 Filings and Adjustment of Status

Many employers have sponsored their foreign national employees for future permanent residence (green card) status. These cases may be in various stages of process, be they in draft mode, filed or approved.

PERM Labor Certification (Draft Mode): An employer may choose to stop all case processing if there is no future intent to retain the services of the employee, or, if available, continue to process the case if there is a future intent to rehire the employee or use the recruitment on behalf of other foreign national employees.

PERM Labor Certification (Filed to DOL and pending): An employer may choose to retain the case as filed if it believes that there is a future possibility of rehiring the employee that is the beneficiary of the case filing. Alternatively, if the employer does not envision ever rehiring the employee, it may withdraw the case provided it has not been subject to an Audit Notification.

PERM Labor Certification (Approved): An employer could choose to let the validity of the PERM certification expire without filing of the next stage of the green card process. In such instances, if the PERM is allowed to expire and the employer later decides to rehire the employee, it will need to start a new PERM Labor Certification on behalf of the employee.

I-140 Petition (Draft Mode): As above, an employer may choose to stop all processing of a case if there is no future intent to retain the services of the employee. Note however that for PERM based case filings, the underlying PERM case has an expiration date so a decision must be made on this issue before the expiration of the PERM.

I-140 Petition (Pending with the USCIS): The employer may choose to withdraw the case if it has no intent to rehire the employee, or otherwise allow it to remain in process to eventually (hopefully) be approved, thus locking in the Priority Date for the employee/beneficiary of the I-140 petition.

I-140 Petition (Approved): The employer may choose to leave the approval as is, provided that there is some future potential possibility that the company may rehire the employee, or choose to withdraw the I-140 if it is determined that there is absolutely no possibility that the employee would be rehired in the future.

Individuals with pending Adjustment of Status applications may be required to document that they have a continuing offer of employment with the employer that submitted the initial I-140 unless the individual is eligible to benefit from I-140 Portability. To qualify for the benefits of I-140 portability, the individual's I-140 must have been approved (and not revoked for fraud, etc.) and his or her adjustment of status must be pending for more than 180 days. Under these circumstances, if the individual has an offer of employment that is identical to or similar to the original offer of employment set forth in the underlying I-140, the USCIS has the ability to approve the employee's portability request.

## Travel to the United States