Ogletree Deakins | CORONAVIRUS (COVID-19) Resource Center

Immigration Strategies for COVID-19

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NOTE: The COVID-19 (coronavirus) situation is developing very rapidly. Employers should continue to monitor the U.S. Centers for Disease Control and Prevention COVID-19 website, the World Health Organization COVID-19 website, and Ogletree Deakins' Coronavirus (COVID-19) Resource Center for the latest developments. This document is intended as a draft starting point for further discussion, and it is intended for use in only the United States. Immigrant and nonimmigrant visa information typically varies, and the related regulations are evolving; regional, country-specific, and local laws differ; and nothing herein should be interpreted as medical or epidemiological characterizations or advice, and government agencies are likely to issue further guidance that should be considered. Employers should carefully review and discuss these materials with their Ogletree counsel to tailor the materials and guidance to their particular situation.

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1. Immigration Compliance for a Remote Workforce

Employers are facing numerous issues in light of the novel coronavirus (COVID-19) pandemic, including remote work, temporary office closures, furloughs, and layoffs. Many companies have instituted remote work policies so that employees can avoid physical contact and thereby "flatten the curve." These issues and solutions will have particular implications for U.S. employees holding H-1B specialty occupation visas, as they are typically required to remain productive in order to maintain their legal status.

i. H-1B Compliance: Labor Condition Applications

The U.S. Department of Labor's (DOL) Office of Foreign Labor Certification released frequently asked questions on March 20, 2020, regarding its operations during the COVID-19 pandemic. In this document, the DOL confirms that if an H-1B worker is moving to a new job location within the same area of intended employment (such as a home office within commuting distance), a new ETA Form 9035 labor condition application (LCA) generally is not required. Movement of H-1B workers to unintended worksite locations outside the area(s) of intended employment listed on the LCA (i.e., outside of commuting distance) may also be allowed pursuant to certain short-term placement provisions specified in the regulations. Such short-term placement provisions are subject to a number of strict regulatory requirements – if a placement exceeds the limitations outlined in the regulations, then the employer must file an amended H-1B petition.

The employer must provide either electronic or hard-copy notice at a new worksite location(s) for 10 days. Under normal circumstances, this notice must be posted within the 30 days prior to the employee beginning work at the new worksite. In the context of the pandemic, the DOL states that the notice will be considered timely when placed "as soon as practical and no later than 30 calendar days after the worker begins work at the new worksite locations."

FAQ for Employers of Foreign Nationals

Question: Our company has implemented a temporary remote work policy for employees. Does this present any issues for our H-1B, H-1B1, and E-3 employees?

Generally speaking, a specialty occupation worker (H-1B, H-1B1, and E-3) can move to a new worksite within the same area of employment (within normal commuting distance) as long as the terms and conditions of employment remain the same. For immigration purposes, an area within normal commuting distance is typically considered to be within the same geographic area of employment. To authorize this employment, the employer normally must: 1) provide either electronic notice or a hard-copy of the Labor Condition Application (LCA) corresponding to the most recent H-1B, H-1B1, or E-3 filing; 2) at the new worksite location(s); 3) for 10 days on or before the employee's first day of employment at the new location; and 4) update the public access file. In the context of the COVID-19 pandemic, the DOL states that the notice will be considered timely when placed "*as soon as practical and no later than 30 calendar days after the worker begins work at the new worksite locations*."

Question: Our company would like to move workers between worksites to continue operations. Does this present any issues for our H-1B, H-1B1, and E-3 employees?

If the worksites are in the same area of employment, an employee can report to work at the new worksite once the LCA has been posted (see above question). If an employee will work at a new location *outside* the area of employment (i.e. commuting distance), then an employer may need to file an amendment to authorize employment.

In limited circumstances, H-1B employers may be able to utilize the DOL's short-term placement provision that allows H-1B employees to work outside of the area of employment without requiring an H-1B amendment petition. This provision requires the employer to pay certain incidentals in addition to the employee's salary and is time-limited.

Importantly, an employer may not utilize the short-term placement option if it already employs H-1B workers in the same occupation at the new location. Employers should carefully consider the availability of the short-term placement option (discussed in the next section), as usage of this provision requires a fact-specific analysis.

Question: How might a company handle DOL posting requirements if the applicable worksite is closed?

Other than PERM, employers can use electronic notification if they are unable to post hard copies of the LCA at worksites. Employers may post to a company intranet - if all employees are able to access the portal - or directly through email or electronic distribution.

Question: Will a temporary work-from-home policy present issues for F-1 employees?

The Student and Exchange Visitor Program has encouraged F-1 students to utilize telework options provided by employers. F-1 workers may want to consider discussing any changes to employment conditions with their universities, including worksite changes and derivation of hours. F-1 workers are able to document adaptations to their work conditions through their universities to the Department of Homeland Security.

Question: May foreign students remain in the United States and enroll in degree programs if their universities closes their campuses and/or cease in-person instruction?

DHS has implemented temporary measures that allow foreign students to remain in status in the U.S. and actively enrolled even if their universities close or move to online instruction. Foreign students should remain in close conversation with their Designated School Official regarding their ability to participate in temporary online instruction. Additionally, foreign students who have departed the United States may be able to participate in online classes and keep their SEVIS record active. Students should discuss these accommodations directly with their universities.

Question: What are some options for remote employment of other foreign employees?

Generally, remote work and changes in worksites are allowed for other foreign national employees, whose visas (E-1/2, L-1, O-1, TN, etc.) are not location specific; so there is some flexibility with regard to the physical work location for these employees. Employers are only required to file a new petition for these employees when there is a *material* change to the job. If the employees are still in the same position and performing the same job duties from home rather than at a worksite, an amended petition is not likely required. Employers may want to carefully consider proposed changes to ensure compliance with immigration regulations.

Question: What are our options if a foreign national employee is outside the United States and unable to return at this time?

Remote work options may be available. Employers will want to confirm that the laws of the host country allow this employment arrangement, and review any tax implications.

➢ Template: BCC Message to Employees

To Employees by BCC

Hello,

I am reaching out because our records indicate you are employed pursuant to H-1B, H-1B1, or E-3 visa status. As you know, for business continuity reasons, our employees have shifted from working at your normal office location to working from home remotely.

At this time, please review below, and take the appropriate action item as needed. Your engagement on this request is essential to ensuring our compliance with U.S. immigration law.

Scenario: I am employed pursuant to **H-1B, H-1B1, or E-3** visa status at this time. The work location listed on my visa petition is the office address, but I am now working from home for the foreseeable future. What should I do to make sure there is no impact on my work authorization?

- **Response:** Generally, it is permissible to work from home if your home office is within *normal commuting distance* from the office that was listed on your U.S. visa petition. Please refer to the Labor Condition Application in your immigration file to confirm the work location that was listed on your U.S. visa petition. (A copy of your specific certified LCA will be in your full petition copy filed with USCIS.)

- **Action item:** Even though an amended petition is not needed, regulations require employees to post their previously certified Labor Condition Application (LCA) at their home (on a wall or refrigerator) for 10 consecutive days. In order to record that this posting was completed, employees should note the dates that the LCA was posted and the physical address where the LCA was posted. After the LCA has been posted at home for 10 days, please confirm the dates and address of posting to **[HR contact at company maintaining the public access files]**.

Thank you for your assistance in this matter.

ii. Short Term Placements

An employer may temporarily place an H-1B employee at a new worksite outside of the intended area of employment without filing a new LCA if **all** of the below conditions are met during the entire short-term placement:

- The employer must pay the required wage that was listed on the original LCA;
- The employer must pay the cost of housing, travel expenses, meals, and other incidental or miscellaneous expenses for every day the H-1B employee is placed outside of the area of employment;
- There is no strike or lockout in progress for the H-1B employee's occupation at the new worksite; and
- The employer does not have a certified LCA for the H-1B employee's occupation in the new intended area of employment.

If all conditions are met, the employer may place the H-1B employee at the new worksite for at least 30 workdays (consecutive or non-consecutive) within a one-year period. A workday is defined as any day in which the H-1B employee performs any work at any worksite within the new intended area of employment. An employee may be placed at the new worksite for an additional 30 workdays, but no more than 60 workdays, if the employer is able to show that:

- The H-1B employee continues to maintain a dedicated work station at the worksite listed on the LCA;
- The H-1B employee spends a substantial amount of time at the worksite listed on the LCA in a one-year period; and
- The H-1B employee's place of residence is located in the area of the worksite listed on the LCA.

Once an H-1B employee's short-term placement has reached the maximum number of workdays, the employer must either have a certified LCA for the new worksite or immediately terminate the short-term placement.

Due to COVID-19, employers may be looking to see if the short-term placement option is a feasible option to cover employees that may be temporarily placed at a new worksite that is located outside the area of intended employment. However, the short-term placement option is applicable only in limited circumstances because all of the above conditions must be met. Also, the short-term placement option is also unavailable for E-3 and H-1B1 employees.

iii. PERM Labor Certification ("Green Card") Considerations

Green Card Process

There will be minimal impacts to ongoing green card processes if foreign national employees (or entire offices) must temporarily move to a remote work arrangement due to COVID-19 precautions. The PERM labor market test is meant to test the labor market in a specific geographic area. As long as the sponsored employee intends to return to the work location listed on the application once normal operations resume, there will be no impact to the process. The government has announced few concessions related to the PERM process, with the exception of those listed below.

a. PERM Labor Certifications

Understanding that it is becoming more difficult to receive and send signed documents through the postal service, the Office of Foreign Labor Certification (OFLC) announced that it will begin issuing certified ETA 9089 Forms via email instead of in hard copy. ETA-9089s issued **between March 25, 2020 and June 30, 2020** will be sent to employers and authorized representatives via email. In circumstances where employers or authorized attorneys or agents are not able to receive the certified Form ETA-9089 documents by email, OFLC will send the original using UPS regular delivery.

Upon email receipt of an electronic copy of the certified Form ETA-9089, the form must be printed, and then signed and dated by the foreign worker, employer, and attorney (if applicable). USCIS may consider this printed Form ETA-9089, containing all signatures, as satisfying the requirement that petitioners provide evidence of an original labor certification issued by DOL.

As per USCIS' announcement on March 21st, USCIS will accept electronically reproduced original signatures in lieu of "wet" signatures on all benefit forms and documents. USCIS implemented the temporary change as a result of the COVID-19 national emergency, and the change only applies to signatures.

b. Recruitment Procedures

Unlike the posting notifications for LCAs, which may be done electronically, the PERM process requires that a physical notice be posted at the work location during the recruitment period. To date, DOL has not made any concessions waiving the physical posting requirement. However, on March 20th, DOL released an FAQ that provides a filing extension for employers who are not able to satisfy the physical posting requirement due to office closures. This extension only applies to applications where **the recruitment started on or after September 15, 2019 – the filing must occur by May 12, 2020.**

If an office is closed, employers may want to consider pausing recruitment on cases where it has not yet already started until further guidance is issued (although the expiration of the prevailing wage determination will also need to be considered in this analysis).

The FAQ states:

Will OFLC permit requests for extensions to deadlines or make other reasonable accommodations for employers and/or their authorized attorneys or agents impacted by the COVID-19 pandemic?

Yes. OFLC recognizes that the COVID-19 pandemic may have a significant impact on businesses and understands that some employers and/or their authorized attorneys or agents may not be able to timely respond to requests for information and other correspondence regarding the processing of applications for prevailing wage determinations and labor certification (e.g., Requests for Information, Notices of Deficiency, Notices of Audit Examination). Accordingly, OFLC will grant extensions of time and deadlines for employers and/or their authorized attorneys or agents affected by the COVID-19 pandemic, including for delays caused by the COVID-19 pandemic and those that occurred as a result of businesses preparing to adjust their normal operations due to the COVID-19 pandemic.

Under 20 CFR 656.17(e), employers are required to begin their recruitment efforts no more than 180 days before filing an *Application for Permanent Labor Certification* (Form ETA- 9089), and to complete most recruitment measures at least 30 days before filing. Due to service disruptions and other business operations temporarily affected by the COVID-19 pandemic, some employers may be prevented from completing these requirements within the 180-day time frame. Therefore, OFLC will accept recruitment completed within 60 days after the regulatory deadlines have passed to provide employers with sufficient time to complete the mandatory recruitment and file their PERM application; provided that the employer initiated its recruitment within the 180 days preceding the President's emergency declaration on March 13, 2020.

Important Note: Employers who have already completed the recruitment steps during the required 180-day timeframe should continue to file their application(s) under existing regulatory requirements.

For COVID-19: Delayed recruitment conducted in conjunction with the filing of an application for permanent labor certification must have started on or after September 15, 2019, and the filing must occur by May 12, 2020.

2. Onboarding: I-9 Compliance and E-Verify Check

In light of COVID-19 social distancing precautions, DHS announced on March 20th that it is temporarily easing the requirement that employers physically examine original documents to confirm identity and work authorization during the I-9 verification and re-verification process. With these flexible rules, DHS is temporarily suspending the "in-person" verification requirement until May 19, 2020 (unless extended by DHS) or until 3 business days after the termination of the National Emergency (whichever comes first).

If employees are working remotely from home, the company will not be required to review the employee's identity and employment authorization documents in the employee's physical presence. Instead, **employers have two options for I-9 verification during the COVID-19 pandemic**:

1. Have an authorized representative conduct I-9 verification in the company's behalf; or

2. Inspect the I-9 documents remotely (e.g., over video conference, fax, or email, etc.), complete Section 2, and obtain, inspect, and retain copies of the employee's documents within three business days.

However, all other requirements for I-9 verification, including timing of the initial verification and the re-verification of expiring work authorization, remain in effect.

i. Option 1 – Using an Authorized Representative

The company can designate any person to act as the company's authorized representative so long as that person meets with the employee in person, reviews the employee's original document(s), and completes and signs Section 2 (or Section 3 in re-verification cases). A few points to consider:

- It is ultimately the company's decision who it feels comfortable designating as its agent.
- While DHS does not require the authorized representative to have specific agreements or other documentation for I-9 purposes, it is highly recommended that companies provide detailed instructions on how to conduct I-9 verification and complete the I-9 form - the employer remains liable for any compliance violations, including any compliance mistakes that the agent makes on the form or in the verification process.
- In an ideal scenario, the authorized representative would be an individual over whom the employer has some control, or who is generally understood to be a person of trustworthiness and diligence.
- Although it is permissible for the employee's family member or friend to serve as the authorized representative, if an employer is not comfortable with assuming the risk of liability for that authorized representative acting in bad faith, the employer may restrict authorized representatives to individuals that are unrelated to the employee.

- The normal timing requirements for completing the I-9 form still apply: Section 1 must be completed by the employee by the end of the first day or work; Section 2 must be completed within 3 business days from the start of employment; and a Section 3 re-verification must completed no later than the expiration date of the temporary work authorization.
- The use of authorized representatives to complete Form I-9 is a well-established and compliant method, but the primary disadvantages are: 1) the employer has limited control over the way in which the I-9 form is completed; 2) the employer retains liability for errors or bad faith acts by an authorized representative; and 3) it does not serve the goal of maintaining social distancing during this COVID-19 pandemic.

ii. Option 2 – Conduct "Virtual" I-9 Verification

For employees working remotely, the company may use the temporarily relaxed verification approach approved by DHS. Employers who use this option must ultimately be able to provide to DHS (upon request) written documentation of their remote onboarding and telework policy for each employee (see sample policy below). DHS clarified in a recent Q&A news release that this "virtual" I-9 verification option is available for any employee working remotely, even if other employees (such as some essential workers, security guards, janitors, etc.) are still working on the company's premises. However, the virtual I-9 verification / re-verification is not available for employees who work *both* from home and at the company's premises; in those cases, the company must still conduct I-9 verification in-person.

To conduct virtual I-9 verification, employers should follow the below process:

Section 1

- Instruct the employee to complete Section 1 no later than the end of the first day of employment.
- Either send a paper I-9 form with the official instructions to the employee, email a PDF version of the form and instructions, or direct the employee to download the form at the USCIS website (see: https://www.uscis.gov/i-9).
- Employee is to complete Section 1 of the form as usual and send a picture or scan of Section 1 to the company. HR can then identify any corrections that the employee may need to make in Section 1. A properly completed Section 1 will also be needed for the E-Verify check (for companies using the E-Verify system).
- Section 1 contains personally identifiable information, and employers should take appropriate steps to safeguard that data.
- Once normal operations resume, the employee needs to provide the original Section 1 to the company for recordkeeping.
- Alternatively, if the company uses an electronic I-9 platform, it may continue to use that system to have the employee complete Section 1 electronically from their own computer.

Section 2

- By the third business days after the employment begins, the company must obtain, inspect, and retain copies of acceptable document(s) to confirm the individual's identity and work authorization.
- Employee is instructed to send a legible copy of the document(s) to the company.
- The company remotely examines a clear and legible copy of the document(s), using a virtual process such as video conference link, fax, e-mail, or similar means.
- Because documents typically contain an employees' personal identifiable information, the company should implement appropriate safeguards to prevent unauthorized access during the transmittal and storage of those documents.
- When completing Section 2 based on the copy of the document(s), the company must also enter "COVID-19" in the Additional Information field in Section 2.
- Once normal operations resume, the employee must present to HR the original document(s) used for I-9 verification within three business days.
- HR must update the Additional Information field in Section 2 with the notation "Original Documents Examined on [date of the physical inspection]" and the name of the person who conducted the in-person verification.
- For employers using electronic I-9 systems, they can attach a signed/dated note to the I-9 form with the information that would be written into the Additional Information field.

Section 3

- By the expiration date of the employee's temporary work authorization, the company must conduct I-9 re-verification.
- Using a virtual process (video conference, fax, e-mail, or similar) the company obtains, inspects, and retains a copy of acceptable documentation to confirm the individual's continued work authorization.
- Employee is instructed to send a legible copy of that document to the company.
- Company completes Section 3 based on that copy.
- Company writes "COVID-19 EXT" in the margin of Section 3, or annotates in the Additional Information field.
- Once normal operations resume, the employee must present to HR the original document used for I-9 re-verification within three business days.
- HR must update the Additional Information field in Section 2 with the date of the physical inspection and the name of the person who conducted the in-person verification.

E-Verify Compliance

Despite the option to now conduct virtual I-9 verification during the COVID-19 pandemic, the E-Verify timing rules have not been relaxed. DHS announced on March 23rd that E-Verify participants who choose the remote inspection option will still need to follow current rules and create E-Verify cases for new hires within three business days from the date of hire. If an E-Verify case is delayed due to COVID-19 precautions, the employer needs to select "Other" from drop-down list of delay reasons and enter "COVID-19."

If the E-Verify system returns a Tentative Non-Confirmation (TNC) result, employers must still timely notify the employee of the TNC. Due to the closure of all Social Security offices (effective Tuesday March 17th), DHS is automatically extending the timeframe for employees to take action to resolve SSA TNCs, and DHS is also extending the timeframe to resolve DHS TNCs in limited circumstances when an employee cannot resolve the TNC due to local DHS office closures.

From a practical standpoint, companies should take reasonable steps to alert remote employees of the E-Verify TNC:

- Contact the employee directly through email or phone call to inform them of the TNC.
- Send the employee a copy of their Further Action Notice (FAN) and have the employee print the FAN.
- Schedule a call with the employee to walk them through the options and have them sign and date.
- Have the employee scan or take a picture of the FAN and email back to HR.
- Monitor the E-Verify case in the system and periodically follow up with the employee about the TNC resolution.

If the E-Verify system returns a Case Incomplete result:

- Contact the employee (preferably by phone) and ask the employee to provide the correct or missing information.
- Correct the incomplete data or mistake in the E-Verify system.
- If TNC, follow remote TNC process above.

Accepting Expired List B Documents

DHS confirmed that if an employee's state ID or driver's license expired on or after March 1, 2020, and the state has extended the document expiration date due to COVID-19, that expired document may be accepted as a List B document. The company needs to enter the document's actual expiration date in Section 2 and enter "COVID-19 EXT" in the Additional Information field. Employers may also attach a copy of the state motor vehicle department's webpage or other notice indicating that their documents have been extended.

➢ Template: Policy for Remote Verification of Form I-9 During COVID-19 National Emergency

[COMPANY NAME]
Policy for Remote Verification of Form I-9
During COVID-19 National Emergency

A. Background

The Immigration Reform and Control Act (IRCA) requires all U.S. employers to verify the identity and employment authorization of all employees hired to work after November 6, 1986 by completing and retaining Form I-9.

Effective [Date], [Company Name] (hereafter, the "Company") instituted a remote working protocol in response to social distancing guidance from state and federal authorities [, including (list any local/state shelter in place/quarantine/limited travel directives)] to limit the spread of the COVID-19 virus. The Company has adopted a remote verification procedure, outlined below, in order to comply with federal Form I-9 verification requirements while maintaining the remote working protocol and social distancing necessary to mitigate the spread of COVID-19.

B. Authority

This remote verification policy is adopted pursuant to guidance from the U.S. Department of Homeland Security (DHS), which announced on March 20, 2020, that it will relax the in-person verification requirements of the I-9 verification for employees working remotely due to COVID-19. Specifically, beginning March 20, 2020, employers will not be required to review an employee's identity and/or employment authorization documents while in the employee's physical presence. A copy of this DHS guidance is attached to this policy at Appendix A.

C. Effective Dates

This policy is effective March 20, 2020, and unless otherwise extended by DHS, will remain in effect until May 19, 2020 or three business days after the termination of the National Emergency, whichever comes first.

D. Scope of Policy

This policy applies only to completing Form I-9 initial verifications and re-verifications for the following types of employees:

1) All employees at Company workplaces that are operating remotely.

2) For Company workplaces that are operating under partial remote procedures, only those employees who are working remotely pursuant to COVID-19 remote working protocol.

For any employees physically reporting to their assigned Company workplace, this policy does not apply to their I-9 verifications and re-verifications, and the Form I-9 must be completed in accordance with the Company's standard I-9 procedure in the physical presence of the employee.

E. Verification of All New Employees

Newly-hired employees must complete Form I-9 on the most recent version of the form. I-9 verification procedures should adhere to the rules detailed in the U.S. Citizenship and Immigration Services (CIS) Publication M-274, ‘‘Handbook for Employers: Instructions for Completing Form I-9” available at *https://www.uscis.gov/i-9-central/handbook-employers-m-274*. In addition, the Company’s personnel responsible for completing the I-9 (hereafter, “Company Representatives”) are reminded of the following key I-9 compliance issues:

a. Section 1 must be FULLY completed and signed by the **employee**. The deadline is no later than the first day of employment.

b. Section 2 must be FULLY completed and signed by the **Company Representative**. The deadline is no later than the third business day following the start of employment.

   i. To complete Section 2, Company Representatives must examine documentation that establish the identity and employment authorization of the hired employee. Documents that may be used for this purpose are listed on the Form I-9 Lists of Acceptable Documents. For the period described in Section C of this policy, such examination may occur pursuant to remote verification methods authorized by DHS, as described in Section G below.

   ii. Company Representatives may not specify which document from the Lists of Acceptable Documents that an employee must present.

   iii. Any document from List A establishes BOTH **identity and employment authorization.** If an employee presents an acceptable List A document, no other documents are needed.

   iv. Any document from List B establishes **identity** ONLY. If an employee presents an acceptable document from List B, the employee must still provide further documentation to establish employment authorization.

   v. Any document from List C establishes **employment authorization** ONLY. If an employee presents an acceptable document from List C, the employee must still provide further documentation to establish identity.

c. When completing Section 2, the Company Representative should be aware that an employee may present a receipt for one of the acceptable documents, PROVIDED THAT the receipt is a receipt for an application to replace a document that was previously issued but has been lost or stolen. A receipt to obtain an initial document or to renew a document is not acceptable; only a receipt for a replacement document is acceptable. The Company Representative must examine the receipt to ensure that it complies with the four rules of number 2 above. The Company Representative must ensure that the employee presents the actual document represented by the receipt within 90 days.

[The Following Applies to E-Verify Companies Only - if your company does not participate in E-Verify, remove these sections]

d. **Any List B document that is presented MUST contain a photo.** If an employee objects to photo document requirements for religious reasons, Company Representatives should call E-Verify (888.464.4218) for further guidance.

e. All newly-hired employees, including seasonal, temporary, and rehires MUST have a Social Security number (a case cannot be created in E-Verify without a Social Security number). If a newly-hired employee has applied for but has not yet received a Social Security number (and has otherwise supplied acceptable documentation for I-9 purposes), make a note on the employee's I-9 form and set it aside. The employee should be allowed to continue to work. An E-Verify case must be created as soon as the Social Security number is available. **Please note that E-Verify requires a Social Security number, and not necessarily a Social Security card – Company Representatives should NOT ask that an employee specifically present a Social Security card as a List C document for I-9 purposes.**

f. E-Verify rules require the Company Representative to retain photocopies of the following documents with Form I-9 if they are presented by the employee for Section 2 purposes:

   i. Employment Authorization Document (Form I-766)

   ii. Permanent Residence Card (Form I-551)

   iii. U.S. Passport

   iv. U.S. Passport Card

g. Notwithstanding the current COVID-19 National Emergency, an E-Verify case must be created for each new hire no later than the third business day of employment.

F. Re-verification of Expiring Work Authorization

Employees whose work authorization has expired as indicated in Section 1 of Form I-9, or who provided a work authorization document in Section 2 that has since expired must undergo I-9 re-verification no later than the date of expiration of such work authorization.

Note: Form I-9 re-verification is never required for U.S. citizens and non-citizen nationals. Likewise, the following documents should not be re-verified following expiration: U.S. passports, U.S. passport cards, alien registration receipt cards/permanent resident cards, and List B documents.

Re-verification may be completed by completing Section 3 of Form I-9. If Section 3 has already been used for a previous reverification or update, Section 3 of a new Form I-9 may be completed and attached to the original Form I-9.

a. Section 3 must be FULLY completed and signed by the **Company's representative**.

b. To complete Section 3, Company Representatives must examine a document from the Lists of Acceptable Documents that confirms the continued employment authorization of the employee. For the duration of this policy, such examination may occur pursuant to remote verification methods authorized by DHS, as described in Section G below.

c. The employee may choose to present any document from List A, **or** any document from List C. Both List A and List C documents establish employment authorization.

d. Company Representatives may not specify which documents from the Lists of Acceptable Documents that an employee must present.

If any questions arise, or if there is any doubt as to the appropriate procedure in a given scenario, Company Representatives should contact the I-9 Compliance Officer listed at the bottom of each page of this policy.

G. Remote Verification Procedures

Under normal I-9 procedures, the Company must physically inspect the documents presented by the employee to prove identity and/or employment authorization, and such inspection must occur in the physical presence of the employee.

This physical examination requirement is suspended for employees described under Section D of this policy for the period described in Section C of this policy. The Company will conduct a remote verification of the employees' documents as follows:

1) The employee will complete Section 1 of Form I-9 no later than the first day of employment, and send Section 1 to the Company Representative. Within three business days of the first day of employment, the employee must also send a legible copy of the Section 2 supporting document(s) of the employee's choice to the Company Representative.

2) The Company Representative will review Section 1 of Form I-9 for accuracy and completeness and notify the employee of any corrections that must be made.

3) The Company Representative will review the copy of Section 2 supporting document(s) provided by the employee to confirm each of the following:

    a. Each document provided is an acceptable document (or combination of documents) appearing on the I-9 Lists of Acceptable Documents.

    b. The document is unexpired, reasonably appears genuine, and relates to the employee to the best of the Company Representative's ability to assess without having the physical document in hand.

4) The Company Representative will record the document information and otherwise fully complete Section 2.

5) The Company Representative will annotate "COVID-19" in the Section 2 "Additional Information" field.

6) Within three business days of the Company resuming normal operations and this policy expires, the Company Representative must conduct a physical inspection of the document(s) presented in the employee's presence.

7) Once the physical inspection of documents takes place, the Company Representative must also annotate "Documents physically examined" and the date of the physical inspection in the Additional Information field in Section 2.

A description of the procedure employees will be required to follow is attached to this policy as Appendix B. A description of the procedure Company Representatives will be required to follow is attached to this policy as Appendix C.

H. Nondiscrimination

In completing Form I-9, Company Representatives should be aware of the following I-9 related anti-discrimination rules:

1. **Discrimination:** federal laws provide that an employer may not discriminate on the basis of citizenship status or national origin.

    a. The Company maintains an anti-discrimination policy prohibiting such discrimination. All policies related to hiring, employment, and I-9 completion are applied equally to every employee without regard to citizenship status or national origin. No special verification rules apply simply because an applicant/employee appears to be foreign.

2. **Document Abuse:** I-9 regulations provide that an employer may not request more or different documents than required by law, and an employer must accept documents presented if they reasonably appear to be genuine.

    a. Company Representatives may not specify which document an employee must provide for completing Form I-9 – the employee chooses which document to present.

    b. Only one of the following combinations of documents should be accepted:

        - One document from List A; **or**
        - One document from List B **and** One document from List C.

    c. If a List A document is provided, Company Representatives may not require any additional documentation including other List A documents or List B or List C documents.

    d. Company Representatives may not require employees to produce documents other than those on List A, B, or C.

    e. Company Representatives may not require employees to produce Immigration Service-issued documents simply because the employee appears to be foreign. Identity and employment eligibility are established through List A, B, and C documents as described above for **all** applicants/employees.

f. If an employee presents a document that appears to be genuine on its face, then the Company Representatives must accept the document.

3. **Retaliation:** I-9 laws prohibit an employer from retaliating against an employee for exercising any I-9 related rights and privileges.

a. Company Representatives may not take adverse employment actions against an employee because the employee has filed (or threatens to file) a discrimination charge.

b. Company Representatives may not take adverse employment actions against an employee because the employee exercises any legal rights (such as the right to choose which document to provide for I-9 purposes).

c. The Company maintains an anti-retaliation policy prohibiting such discrimination.

APPENDIX A

Official Website of the Department of Homeland Security

ICE

Report Crimes: Email or Call 1-866-DHS-2-ICE

NOTICE

Click here for the latest ICE guidance on COVID-19

ICE Newsroom

News Releases

News Releases

Worksite Enforcement
03/20/2020

DHS announces flexibility in requirements related to Form I-9 compliance

Due to precautions being implemented by employers and employees related to physical proximity associated with COVID-19, the Department of Homeland Security (DHS) announced today that it will exercise discretion to defer the physical presence requirements associated with Employment Eligibility Verification (Form I-9) under Section 274A of the Immigration and Nationality Act (INA). Employers with employees taking physical proximity precautions due to COVID-19 will not be required to review the employee's identity and employment authorization documents in the employee's physical presence. However, employers must inspect the Section 2 documents remotely (e.g., over video link, fax or email, etc.) and obtain, inspect, and retain copies of the documents, within three business days for purposes of completing Section 2. Employers also should enter "COVID-19" as the reason for the physical inspection delay in the Section 2 Additional Information field **once physical inspection takes place after normal operations resume**. Once the documents have been physically inspected, the employer should add "documents physically examined" with the date of inspection to the Section 2 additional information field on the Form I-9, or to section 3 as appropriate. These provisions may be implemented by employers for a period of 60 days from the date of this notice OR within 3 business days after the termination of the National Emergency, whichever comes first.

Employers who avail themselves of this option must provide written documentation of their remote onboarding and telework policy for each employee. This burden rests solely with the employers.

Once normal operations resume, all employees who were onboarded using remote verification, must report to their employer within **three business days** for in-person verification of identity and employment eligibility documentation for Form I-9, Employment Eligibility Verification. Once the documents have been physically inspected, the employer should add "documents physically examined" with the date of inspection to the Section 2 additional information field on the Form I-9, or to section 3 as appropriate.

Any audit of subsequent Forms I-9 would use the "in-person completed date" as a starting point for these employees only.

This provision only applies to employers and workplaces that are operating remotely. If there are employees physically present at a work location, *no exceptions* are being implemented at this time for in-person verification of identity and employment eligibility documentation for Form I-9, Employment Eligibility Verification. However, if newly hired employees or existing employees are subject to COVID-19 quarantine or lockdown protocols, DHS will evaluate this on a case-by-case basis. Additionally, employers may designate an authorized representative to act on their behalf to complete Section 2. An authorized representative can be any person the employer designates to complete and sign Form I-9 on their behalf. The employer is liable for any violations in connection with the form or the verification process, including any violations in connection with the form or the verification process, including any violations of the employer sanctions laws committed by the person designated to act on the employer's behalf."

Effective March 19, 2020, any employers who were served NOIs by DHS during the month of March 2020 and have not already responded will be granted an automatic extension for 60 days from the effective date. At the end of the 60-day extension period, DHS will determine if an additional extension will be granted.

Going forward DHS will continue to monitor the ongoing National Emergency and provide updated guidance as needed. Employers are required to monitor the DHS and ICE websites for additional updates regarding when the extensions will be terminated, and normal operations will resume.

Share

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Last Reviewed/Updated: 04/03/2020

APPENDIX B

I-9 Process Instructions for Employees Subject to COVID-19 Remote Working Protocol

EMPLOYEE INSTRUCTIONS

As part of the onboarding process you are required to complete an I-9 Form to verify your identity and employment authorization prior to starting work.

Step	What You Need to Do	How to Complete this Step
Step 1	Complete Section 1 of Form I-9	Insert Instructions for: • How the Company completes Section 1 (through electronic portal, print and complete, etc.) • How Section 1 is to be transmitted to the Company for review (electronic portal, secure upload, secure e-mail, etc.)
Step 2	Gather and send proof of Identity and Employment Authorization to Company	Gather ORIGINAL documents from the I-9 Lists of Acceptable Documents. Provide either: One document from List A **OR** One document from List B PLUS one document from List C Insert instructions for how copies of the document(s) should be transmitted to the company (e-mail from photo on phone, fax, electronic portal, secure upload, video conference, etc.) Note that the company will need to retain a legible copy of each document presented.
Step 3	Present Origial Documents to Company	Upon physically reporting to your worksite once the COVID-19 remote working arrangement has ended, you will need to bring the following with you within three business days of reporting to work: 1) Original signed Section 1 from Step 1 above. [If not completed and signed electronically] 2) Original document(s) you provided from Step 2 above.

APPENDIX C

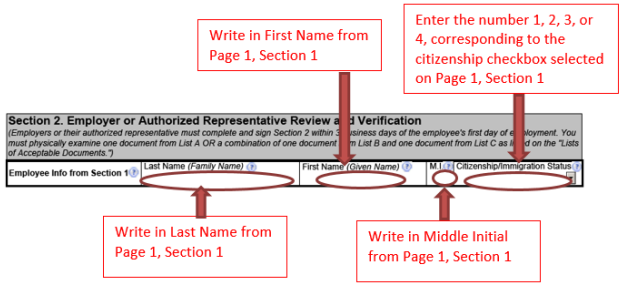
I-9 Process Instructions for Employees Subject to COVID-19 Remote Working Protocol

COMPANY REPRESENTATIVE INSTRUCTIONS

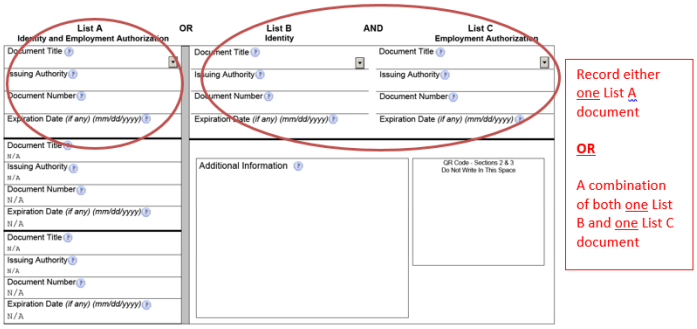
Step	What You Need to Do	How to Complete this Step
Step 1	Send Instructions to Employee	Reach out to the employee and explain the Form I-9 procedures and steps the employee will need to perform. Include a copy of the Employee Instructions to the employee.
Step 2	Instruct the Employee to Complete Section 1	Once Section 1 has been completed, it should be submitted for your review. Please review Section 1 to ensure that the employee has completed all required fields, entered all information in the correct fields, made the appropriate selections, and signed and dated Section 1. If any corrections need to be made, instruct the employee to make such corrections. Any corrections made to paper Forms I-9 must be initialed and dated. Section 1 should be completed no later than the employee's first day of employment.
Step 3	Make Arrangements with Employee to Submit Copy of Document(s)	The employee should provide a legible copy of the supporting document(s) to you for your review no later than the third business day after the employee begins working. Insert instructions for scheduling video conference, accessing secure portals, etc. as may be applicable per your company's procedures.
Step 4	Review the Supporting Document(s) from the Employee	Ensure that each document presented is acceptable for I-9 verification and appears on the Lists of Acceptable Documents (one List A or one List B + one List C), appears to be genuine, and relates to the employee. - You must accept any document(s) presented which reasonably appears on its face to be genuine and to relate to the person presenting it. - The employee must present you with documents as identified on the enclosed List of Acceptable Documents. You may not specify which document(s) must be presented, although you may help the employee review the List.

<table>
<tr><td>Step 5</td><td>Complete Section 2 of Form I-9</td><td>Complete Section 2 of Form I-9 by performing the following steps:

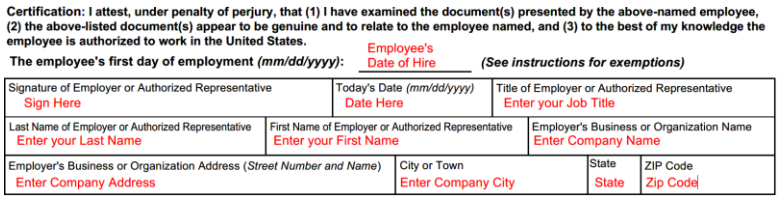
- Complete the top of Section 2.

- Record the document(s) presented by the employee under its respective column in Section 2.

- Complete the employer certification section of Section 2.

- Annotate the Additional Information field of Section 2 indicating “COVID-19”.</td></tr>
<tr><td>Step 6</td><td>Initiate E-Verify Case per Company’s Standard Procedures</td><td>No exception is being made for the timely completion of E-Verify during the COVID-19 National Emergency. Therefore, once Form I-9 has been completed, you should follow normal procedures for initiating a case in E-Verify.
[Delete if Company does not use E-Verify]</td></tr>
<tr><td>Step 6/7</td><td>Review the Supporting Documents from the Employee</td><td>Within three business days of the resumption of normal operations, you will need to physically inspect the document(s) provided by the employee. Make an annotation to the Additional Information field of Section 2 indicating “Documents physically inspected” and add the date the physical inspection occurred.</td></tr>
</table>

3. Travel Considerations (U.S. and Global)

Amid the COVID-19 pandemic, an uncertain work environment with a multitude of immigration-related issues has surfaced. Because of the fluid nature of this epidemic, we are witnessing changes to travel bans, visa processing, and immigration interview suspensions on a daily basis. While the President indicated a 30-day time frame for the European travel ban, the proclamation does not include a specified date for termination. Travel and workplace restrictions, and related suspension of in-person immigration processes, are considered the new normal.

As a recent development, the President proclamation "*Suspending Entry of Immigrants Who Present Risk to the U.S. Labor Market During the Economic Recovery Following the COVID-19 Outbreak*" went into effect at 11:59 pm (ET) on April 23, 2020 and aims to temporarily pause the issuance of new immigrant visas to applicants who apply via a U.S. consulate abroad. Most employment-based visa holders apply for green cards through the adjustment of status process with USCIS, rather than at a consulate, and **this order does not disrupt that process**. Additionally, the proclamation does not impose any changes or restrictions on nonimmigrant visa holders. However, it does direct the various agencies (Department of Labor, Department of Homeland Security, etc.) to propose additional recommendations within 30 days that will stimulate the economy and prioritize U.S. workers. So while this particular proclamation will not disrupt a company's foreign national workforce, additional changes could be forthcoming. Specifically, the suspension and limitation on entry pursuant to section 1 of this proclamation applies to those:

- Who do not have an immigrant visa that is valid on the effective date of this proclamation;
- Who are outside the United States on the effective date of this proclamation; and
- Who do not have an official travel document other than a visa (such as a transportation letter, an appropriate boarding foil, or an advance parole document) that is valid on the effective date of this proclamation or issued on any date thereafter that permits him or her to travel to the United States and seek entry or admission.

The proclamation includes several exemptions, such as H-1B specialty occupation workers, L-1 intra-company executives and specialized knowledge transferees from overseas, treaty visa holders including NAFTA entrants, O-1 extraordinary ability aliens, and F-1 students. In addition, nine categories of aliens also are exempt from the order's suspension and limitations on entry:

1. lawful permanent residents;
2. health care workers, medical research personnel, and other workers deemed essential to combat the spread of COVID-19, and their accompanying spouse and children, seeking to enter on immigrant visas;
3. EB-5 immigrant investor visa candidates;
4. spouses of U.S. citizens;
5. children under 21, including prospective adoptees, of U.S. citizens;
6. individuals whose work is deemed to further law enforcement objectives;
7. U.S. military personnel and their spouse and children;
8. certain holders of Special Immigrant Visas and their spouse and children; and
9. individuals whose work is deemed to further national security interests.

The proclamation signed on March 11, 2020 restricts entry to the U.S. by foreign nationals who have recently traveled to designated European countries. This limitation on entry to the U.S. has been in effect since March 13, 2020. The limitation **does not apply** to U.S. citizens or U.S. permanent residents (Green Card holders). However, it does apply to most foreign nationals who have recently visited any 1 of 26 designated European countries, including the United Kingdom and Ireland, during any portion of the 14-day period prior to their scheduled U.S. arrival. Earlier presidential proclamations, which are still in effect, created similar exclusions for individuals who had traveled to mainland China or Iran.

As of this writing, the latest U.S. travel restriction development is the announcement of a mutual U.S.-Canada suspension of non-essential cross-border travel. A multitude of other countries have also implemented travel restrictions as a strategy for COVID-19 containment. Employers need to consider what this means for their particular workforce and their staffing needs. And, in parallel with the U.S. Department of State *Level 4: Do Not Travel* Global Health Advisory, multinational companies have initiated transfers of their employees to avoid family separation and facilitate health care access. U.S. employers face having foreign national employees who are unable to return to the U.S. following travel abroad, and many will have foreign national employees that cannot go home. Employees able to enter the U.S. may face periods of voluntary or mandatory quarantine. In many cases, preexisting plans for employee transfers to the U.S. are on hold.

i. General Suspension of Routine Visa Services

The Department of State has suspended routine visa services at all U.S. Embassies and Consulates. On March 20, 2020, travel.state.gov (U.S. Department of State Bureau of Consular Affairs Visa Office) updated the following news alert:

- In response to worldwide challenges related to the outbreak of COVID-19, the Department of State is suspending routine visa services at all U.S. Embassies and Consulates. Embassies and consulates will cancel all routine immigrant and nonimmigrant visa appointments as of March 20, 2020. As resources allow, embassies and consulates will continue to provide emergency and mission critical visa services. Our overseas missions will resume routine visa services as soon as possible but are unable to provide a specific date at this time.
- Services to U.S. citizens continue to be available. More information is available on each Embassy's website.
- This does not affect the visa waiver program. See the ESTA FAQ for more information.
- Although all routine immigrant and nonimmigrant visa appointments are cancelled, the Machine Readable Visa (MRV) fee is valid and may be used for a visa appointment in the country where it was purchased within one year of the date of payment.
- Applicants with an urgent matter and need to travel immediately should follow the guidance provided at the Embassy's website to request an emergency appointment.

To find embassy or consulate websites, go to https://www.usembassy.gov/. The embassy links connect to the embassy's main website, but some searching may be required to find relevant COVID-19 information, as each embassy website is structured a bit differently.

ii. Canada-Mexico "Essential Travel" Restrictions

Two Federal Register notices published on March 24, 2020 announced the decision to temporarily allow entry to the United States through land ports of entry along the U.S.-Canada and U.S. Mexico borders for “essential travel” only.

- U.S.-Canada Border Update Federal Register Notice
- U.S.-Mexico Border Federal Register Notice

Both notices are modeled identically for entry through the respective land borders. The restrictions went into effect at 11:59 p.m. Eastern Daylight Time (EDT) on March 20, 2020 and, after being extended by 30 days, will remain in effect until 11:59 p.m. EDT on ***May 20, 2020***. According to the notices, during the effective dates of the restrictions:

"... travel through the land ports of entry and ferry terminals along the [... United States-Canada and United States-Mexico borders] ... shall be limited to "essential travel," which includes, but is not limited to:

- **U.S. citizens and lawful permanent residents** returning to the United States;
- Individuals traveling for medical purposes (e.g., to receive medical treatment in the United States);
- Individuals traveling to attend educational institutions;
- Individuals traveling to work in the United States (e.g., individuals working in the farming or agriculture industry who must travel between the United States and Canada [or Mexico] in furtherance of such work);
- Individuals traveling for emergency response and public health purposes (e.g., government officials or emergency responders entering the United States to support Federal, state, local, tribal, or territorial government efforts to respond to COVID-19 or other emergencies);
- Individuals engaged in lawful cross-border trade (e.g., truck drivers supporting the movement of cargo between the United States and Canada [or Mexico]);
- Individuals engaged in official government travel or diplomatic travel;
- Members of the U.S. Armed Forces, and the spouses and children of members of the U.S. Armed Forces, returning to the United States; and
- Individuals engaged in military-related travel or operations.

The following travel does not fall within the definition of “essential travel” for purposes of this Notification:

- Individuals traveling for tourism purposes (e.g., sightseeing, recreation, gambling, or attending cultural events).

At this time, this Notification does not apply to air, freight rail, or sea travel between the United States and Canada [or Mexico], but does apply to passenger rail and ferry travel between the United States and Canada [or Mexico]. These restrictions are temporary in nature and shall remain in effect until 11:59 p.m. EDT on April 20, 2020. This Notification may be amended or rescinded prior to that time, based on circumstances associated with the specific threat."

iii. Coronavirus Travel Bans by Presidential Proclamation

There are four COVID-19-related Presidential Proclamations to limit travel to the United States:

1. **China Travel Proclamation**. January 31, 2020 - Proclamation 9984 of January 31, 2020, published at 85 FR 6709, titled *Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Persons who Pose a Risk of Transmitting 2019 Novel Coronavirus*. The proclamation cites INA 212(f) to suspend entry into the United States of all aliens (immigrants, nonimmigrants, and other non U.S. citizens) who were physically present within the People's Republic of China, excluding the Special Autonomous Regions of Hong Kong and Macau, during the 14-day period preceding their entry or attempted entry into the United States. This coronavirus travel ban is effective starting 5 p.m. on Sunday, February 2, 2020.

2. **Iran Travel Proclamation**. February 29, 2020 - Proclamation 9992 of February 29, 2020, published at 85 FR 12855, titled *Proclamation on the Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus*. The proclamation cites INA 212(f) to suspend entry into the United States of all aliens (immigrants, nonimmigrants, and other non U.S. citizens) who were physically present within the Islamic Republic of Iran during the 14-day period preceding their entry or attempted entry into the United States. This coronavirus travel ban is effective starting 5:00 p.m. eastern standard time on March 2, 2020. This proclamation does not apply to persons aboard a flight scheduled to arrive in the United States that departed prior to 5:00 p.m. eastern standard time on March 2, 2020.

3. **European Schengen Area Proclamation**. March 11, 2020 - Proclamation 9993 of March 11, 2020, titled *Proclamation - Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus*. "The entry into the United States, as immigrants or nonimmigrants, of all aliens who were physically present within the Schengen Area during the 14-day period preceding their entry or attempted entry into the United States is hereby suspended and limited subject to section 2 of this proclamation... This proclamation is effective at 11:59 p.m. eastern daylight time on March 13, 2020. This proclamation does not apply to persons aboard a flight scheduled to arrive in the United States that departed prior to 11:59 p.m. eastern daylight time on March 13, 2020." Although in his address, the 45th President reportedly said the ban would last 30 days, the proclamation language itself states that it “shall remain in effect until terminated by the President.”

    - The European Schengen area includes: 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.

4. **Ireland and United Kingdom Proclamation**. March 14, 2020 - Presidential Proclamation of March 14, 2020, titled *Proclamation on the Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus*. "The entry into the United States, as immigrants or

nonimmigrants, of all aliens who were physically present within the United Kingdom, excluding overseas territories outside of Europe, or the Republic of Ireland during the 14-day period preceding their entry or attempted entry into the United States is hereby suspended and limited ... This proclamation is effective at 11:59 p.m. eastern daylight time on March 16, 2020. This proclamation does not apply to persons aboard a flight scheduled to arrive in the United States that departed prior to 11:59 p.m. eastern daylight time on March 16, 2020."

The proclamations do **not** apply to U.S. citizens, or to any alien who is:

- a lawful permanent resident of the United States;
- a spouse of a U.S. citizen or lawful permanent resident;
- a parent or legal guardian of a U.S. citizen or lawful permanent resident, provided that the U.S. citizen or lawful permanent resident is unmarried and under the age of 21;
- a sibling of a U.S. citizen or lawful permanent resident, provided that both are unmarried and under the age of 21;
- a child, foster child, or ward of a U.S. citizen or lawful permanent resident, or who is a prospective adoptee seeking to enter the United States pursuant to the IR-4 or IH-4 visa classifications;
- an alien traveling at the invitation of the United States Government for a purpose related to containment or mitigation of the virus;
- C (transit) or D (air or sea crewmember) nonimmigrants;
- seeking entry into or transiting the United States pursuant to an A-1, A-2, C-2, C-3 (as a foreign government official or immediate family member of an official), G-1, G-2, G-3, G-4, NATO-1 through NATO-4, or NATO-6 visa;
- an alien whose entry would not pose a significant risk of introducing, transmitting, or spreading the virus, as determined by the CDC Director, or his designee;
- an alien whose entry would further important United States law enforcement objectives, as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees based on a recommendation of the Attorney General or his designee; or
- an alien whose entry would be in the national interest, as determined by the Secretary of State, the Secretary of Homeland Security, or their designees.

For aliens not excluded by the ban, the proclamations direct the Secretary of Homeland Security to establish standards and procedures at and between all United States ports of entry to regulate the travel of persons and aircraft to the United States to facilitate the orderly medical screening and, where appropriate, quarantine of persons who enter the United States and who may have been exposed to the virus. "Such steps may include directing air carriers to restrict and regulate the boarding of such passengers on flights to the United States."

iv. COVID-19-related Sanctions Under INA 243(d)

In response to the COVID-19 pandemic, the 45th President issued Presidential Memorandum of April 10, 2020, *Memorandum on Visa Sanctions*, to direct the Secretary of Homeland Security to notify the Secretary of State "if any government of a foreign country denies or unreasonably delays the acceptance of aliens who are citizens, subjects, nationals, or residents of that country after being asked to accept those aliens, and if such denial or delay is impeding operations of the Department of Homeland Security necessary to respond to the ongoing pandemic caused by SARS-CoV-2." The memorandum then directs that - after receiving such notification - the Secretary of State must "as expeditiously as possible, but no later than 7 days after receipt, adopt and initiate a plan to impose the visa sanctions provided for in section 243(d) of the INA." See NAFSA's INA 243(d) page for details on this provision of law. No countries have yet been added to the sanction list pursuant to this Presidential Memorandum, which is based on different legal authority than the recent COVID-19 Presidential Proclamation entry bans currently in effect. The State Department briefed the embassy staff and ambassadors of several countries on the issuance of this memorandum to explain that the memo's application would not extend to their countries if their nationals who were working here find themselves in a precarious situation where they are having a tough time returning home in a timely fashion. As such, it would not appear that this memo is something that the American business community should be worried about at the moment.

v. Designated U.S. Airports

Proclamation 9984 of January 31, 2020 also directed DHS "to regulate the travel of persons and aircraft to the United States to facilitate the orderly medical screening and, where appropriate, quarantine of persons who enter the United States and who may have been exposed to the virus. Such steps may include directing air carriers to restrict and regulate the boarding of such passengers on flights to the United States."

To implement this effort, joint U.S. Customs and Border Protection (CBP) and Transportation Security Administration (TSA) Federal Register notices direct all aircraft operators to ensure that all flights carrying persons, including U.S. citizens and permanent residents and others not subject to any of the four Presidential Proclamation coronavirus bans who have recently traveled from, or were otherwise present within, one of the countries designated in the Presidential Proclamations only land at one of the following airports:

1. John F. Kennedy International Airport (JFK), New York
2. Chicago O'Hare International Airport (ORD), Illinois
3. San Francisco International Airport (SFO), California
4. Los Angeles International Airport (LAX), California
5. Seattle-Tacoma International Airport (SEA), Washington
6. Daniel K. Inouye International Airport (HNL), Hawaii
7. Hartsfield-Jackson Atlanta International Airport (ATL), Georgia
8. Washington Dulles International Airport (IAD), Virginia
9. Newark Liberty International Airport (EWR), New Jersey
10. Dallas/Fort Worth International Airport (DFW), Texas

11. Detroit Metropolitan Wayne County Airport (DTW), Michigan
12. Boston Logan International Airport (BOS), Massachusetts
13. Miami International Airport (MIA), Florida

According to the February 4, 2019 Federal Register notice, these are airports "where enhanced public health services and protocols are being implemented... This list of affected airports may be modified by the Secretary of Homeland Security in consultation with the Secretary of Health and Human Services and the Secretary of Transportation. This list of affected airports may be modified by an updated publication in the Federal Register or by posting an advisory to follow at www.cbp.gov. The restrictions will remain in effect until superseded, modified, or revoked by publication in the Federal Register. For purposes of this Federal Register document, "United States" means the States of the United States, the District of Columbia, and territories and possessions of the United States (including Puerto Rico, the Virgin Islands, American Samoa, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and Guam)."

The notices also clarify that a person is considered to have recently traveled from one of the designated countries if that person departed from, or was otherwise present within, one of the designated countries within 14 days of the date of the person's entry or attempted entry into the United States.

The CDC describes the airport and screening protocol as follows:

- *Your travel will be redirected to one of 11 U.S. airports where CDC has quarantine stations.*
- *You will be asked about your health and travel.*
- *Your health will be screened for fever, cough, or trouble breathing.*

Depending on your health and travel history:

- *You will have some restrictions on your movement for a period of 14 days from the time you left China or Iran.*

Read the Federal Register notices:

- 85 FR 6044 (February 4, 2020). **People's Republic of China notice**. Flights departing after 5 p.m. EST on Sunday, February 2, 2020 and covered by the arrival restrictions regarding the People's Republic of China are required to land at one of the designated airports.
- 85 FR 7214 (February 7, 2020). Added additional designated airports.
- 85 FR 12731 (March 4, 2020). **Iran notice**. Flights departing after 5 pm EST on Monday, March 2, 2020, and covered by the arrival restrictions regarding the Islamic Republic of Iran are required to land at one of the designated airports.
- 85 FR 15059 (March 17, 2020). **Schengen countries notice**. "Flights departing after 11:59 p.m. Eastern Daylight Time on Friday, March 13, 2020, and covered by the arrival restrictions regarding the countries of the Schengen Area are required to land at one of

the airports identified in this document. These arrival restrictions will continue until cancelled or modified by the Secretary of DHS and notification is published in the Federal Register of such cancellation or modification." The notice also added two airports to the list of approved airports (Boston Logan International Airport and Miami International Airport), for a total of 13.

- 85 FR 15714 (March 19, 2020). **United Kingdom and Republic of Ireland notice**. "Flights departing after 11:59 p.m. Eastern Daylight Time (EDT) on Monday, March 16, 2020, and covered by the arrival restrictions regarding the United Kingdom, excluding overseas territories outside of Europe, or the Republic of Ireland are required to land at one of the airports identified in this document. These arrival restrictions will continue until cancelled or modified by the Secretary of DHS and notification is published in the Federal Register of such cancellation or modification."

4. Immigration Compliance - Furlough and Pay Reduction

In addition to travel restrictions, the COVID-19 pandemic is causing closures and disruptions throughout the U.S. immigration system. Staying abreast of the changes, including any accommodations for this largely unprecedented situation, may be challenging. Employers must continue to be mindful of their immigration-related obligations while continuing to take reasonable and prudent precautions to protect their staff. These considerations span a variety of issues, including the fact that the H-1B category has strict requirements that prohibit unpaid leave or "benching" due to lack of work. Similarly, this visa category requires that specific steps be taken to document employment termination and, in turn, the termination of the employer's wage obligations to the employee. Employers need to be mindful of the representations made to the U.S. government to secure the necessary visa approvals for their employees. Deviations from the terms set forth in various immigration petitions and applications can cause immigration issues for both the employer and the employee. We provide some examples of issues companies may wish to consider before implementing a layoff, furlough, or salary reduction.

- In the event of a salary reduction or furlough:
    - Determine whether H-1B workers should be exempted. If not, review the salary reduction or furlough plan and each employee's H-1B petition paperwork to determine whether a new LCA and amended H-1B petition filing will be required; and
    - Review the labor certification filings of employees with pending green card applications who have been sponsored through labor certification to determine whether the salary reduction or furlough will drop employee wages below the offered wage.

i. H-1B Non-Productive Status

The regulations governing foreign national employment require that H-1B workers be paid their regular wages, even while in a nonproductive status, unless the nonproductive period arose due to conditions unrelated to the employment and was taken at the employee's voluntary request. For example, an employer is not required to pay an H-1B worker who requests a period of absence to care for sick relatives or to go on parental leave. Therefore, the regulations require employers to pay H-1B workers in periods of mandatory company-wide furloughs. Unless otherwise prohibited by state law or the employer's specific policy, employers may require furloughed H-1B workers to use their accrued paid time off, so long as workers are not required to do so before taking any leave for which they may be eligible under the paid sick leave provisions of the new Families First Coronavirus Response Act. However, if the furlough is prolonged, employers are still expected to pay the regular H-1B salaries through the furlough period. Alternatively, the employer may choose to discharge the H-1B employee, in which case the employer must offer to pay for reasonable costs of return transportation abroad for the discharged worker.

ii. Reduced Hours

The employer is required to pay the wages certified by the DOL in the LCA. An employer must file an amended H-1B petition (Form I-129) to reflect "any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition," including reduction of H-1B work from full-time (35 hours or more per week) to part-time. Such reduction would require the employer to obtain a new LCA from the DOL and file an amended H-1B petition with U.S. Citizenship and Immigration Services (USCIS), setting minimum hours worked and the prevailing hourly wage.

iii. Across-the-Board Salary Reductions

While the regulations do not specifically address across-the-board salary reductions, the American Immigration Lawyers Association (AILA) did raise a related question to USCIS on this topic in 2003. Specifically, AILA asked USCIS to confirm if an amended petition would be required where, due to across-the-board salary cuts, an H-1B beneficiary earned less than the offered salary stated on the H-1B petition filed with USCIS but still above the prevailing wage certified on the LCA. USCIS consulted with the DOL, providing the following answer:

"The DOL is sensitive to the fact that wages can and sometimes do go up and down based on economic conditions. In the circumstance described in your question, there would be no need for a new LCA or a new I-129 petition provided that the employer was still paying the 'required wage' [meaning the higher of the applicable prevailing wage or actual wage]. Any change in the beneficiary's wage rate must be disclosed in the next H-1B petition filing with [USCIS]. It is important that any wage change be documented in the employer's LCA public disclosure file and disclosed to the [USCIS] in the next H-1B filing."

Template "wage change" memo for Public Access File available below.

iv. H-1B Dependent Employers

H-1B dependent employers may be subject to additional requirements. An employer is considered "H-1B dependent" if it has:

- 25 or fewer full-time equivalent employees and at least eight H-1B workers;
- 26 to 50 full-time equivalent employees and at least 13 H-1B workers; or
- 51 or more full-time equivalent employee of whom 15 percent or more are H-1B workers.

H-1B dependent employers are subject to attestation obligations regarding recruitment and displacement of U.S. workers. Specifically, an H-1B dependent employer is prohibited from displacing a U.S. worker in its own workforce within the period beginning 90 days before and ending 90 days after the filing of an H-1B petition, unless the H-1B petition was filed on behalf of an "exempt" beneficiary (an individual holding at least a master's degree or paid at least $60,000 per year). DOL considers a U.S. worker to be displaced if the employer lays off the U.S. worker from an "essentially equivalent job"— one that has the same core responsibilities,

requires workers with substantially equivalent qualifications and experience, and is located within the same commuting area as the H-1B job. DOL excludes from the definition of "layoff" situations involving discharge for inadequate performance, violation of workplace rules, or cause; voluntary departure; voluntary retirement; or the expiration of a grant or contract. A "layoff" does not include a situation in which the U.S. worker is offered alternative employment, defined as a similar employment opportunity with the same employer at equivalent or higher compensation and benefits, regardless of whether the U.S. worker accepts the offer.

v. DOL Investigations and Penalties for Non-Compliance

Employers that fail to comply with H-1B wage requirements may be subject to the following penalties:

- civil penalties of up to $7,846 per violation;
- back wages as stated in the LCA to be paid to H-1B employees;
- debarment from use of the H-1B program; and
- other administrative remedies as appropriate.

These penalties typically result from a DOL investigation triggered by a complaint filed by an employee. The DOL's Wage and Hour Division has stated that investigations may also arise in the following contexts:

- [The DOL] receives specific credible information from a reliable source (other than a complainant) that the employer has failed to meet certain LCA conditions, has engaged in a pattern or practice of failures to meet such conditions, or has committed a substantial failure to meet such conditions that affects multiple employees;
- The secretary of labor has found, on a case-by-case basis, that an employer (within the last five years) has committed a willful failure to meet a condition specified in the LCA or willfully misrepresented a material fact in the LCA. In such cases, a random investigation may be conducted; or
- The secretary of labor has reasonable cause to believe that the employer is not in compliance. In such cases, the secretary may certify that an investigation be conducted.

➢ Template: Wage Change Memo

[INSERT COMPANY CONTACT INFORMATION]

WAGE CHANGE MEMORANDUM

TO: Public Access File

FROM: [Company HR]

RE: [Company] Temporary Pay Reduction

DATE: Effective [date] through [date]

This memorandum serves to document a wage change in the Labor Condition Application public disclosure file. On [date], [name] notified employees of [Company] (the "Company") of an across-the-board temporary pay reduction of actual wages paid beginning with the [date] payroll and continuing through [date].

The Company confirms that it will continue to pay H-1B workers the required wage. This means that the Company will continue to pay the higher of the applicable prevailing wage as stated on the Labor Condition Application or the actual wage, which is the wage rate paid to similarly employed persons at the company. Because the subject wage change is across the board for all the Company's [Business Segment] employees in the United States, the Company has documented its commitment to continue to pay the actual wage to H-1B workers (the wage paid to similarly employed persons). Further, the Company reviewed the adjusted wages for H-1B workers and made exemptions from the subject wage change if/when appropriate to ensure that H-1B workers continue to be paid the higher of the actual wage or the prevailing wage. Accordingly, the Company confirms its commitment to continue paying the required wage to H-1B workers.

[Company HR Name]
HR Consultant, HR Advisory

Date: _____

5. Reductions in Force: Immigration Tools

Due to the economic impact of COVID-19, employers may be considering conducting a layoff. In the event of a reduction in force, employers will need to identify the impacted foreign national population and their immigration status to ensure all proper steps are taken, as well as assess the impact to remaining foreign national employees who are in the green card process.

Liability for Reasonable Transportation Costs

- If an H-1B employee is terminated before the end of their period of authorized stay, the employer will be liable for the reasonable costs of return transportation to the employee's last country of residence.
- Generally, "reasonable costs" of return transportation would include a one-way economy class ticket. This obligation does not extend to the cost of relocating family members or property.
- Additionally, employers will not be liable for the costs of return transportation for an employee who decides not to depart the United States, or for those who port to a new H-1B employer following their termination.

Bona Fide Termination

- H-1B employees in nonproductive status or otherwise temporarily laid off "due to the decision of the employer" are required to continue to receive their normal wages. This requirement ceases once there is a "bona fide termination" of employment.
- A "bona fide termination" of an H-1B worker requires the employer to notify both the H-1B worker and USCIS in writing of the termination, and to offer to pay the H-1B worker for the reasonable costs of return transportation abroad. If an employer fails to fulfill these requirements, the employer may be found liable by the DOL for back wages through the date on which the employee's approved H-1B petition expires.

Options for Laid Off Employees

a. 60-day Grace Period

When employment ends, most visa holders will be eligible for a one-time single grace period of up to 60 days or until the existing validity period ends, whichever is shorter. Although the individual is not authorized for employment during this grace period, they may lawfully remain in the United States. During this grace period, the individual may:

1. Change employers if their visa type allows (e.g. H-1B, E-3, TN);
2. File an application to change to another immigration status (e.g. H-4 dependent status or B-2 visitor); or
3. Depart the United States.

b. B-2 Change of Status

Following a layoff, some impacted employees may not be able to locate another employer to sponsor their visa within the time constraints of their grace period, or they may not be able to depart the United States due to the ongoing risks and travel restrictions associated with COVID-19. These individuals may choose to file an application to change their status to the B-2 visitor classification. An applicant may request to remain in the U.S. for up to 6 months as a B-2 visitor. Although they will not be work authorized during this time, the B-2 filing allows them to remain in the United States in an authorized period of stay, thereby providing additonal time to wrap up their affairs or make plans for the future.

Employers should note that individuals employed in the U.S. on an L-1 visa will have very limited options. Unlike most visa types, the L-1 visa is not transferrable across different employers. When an L-1 visa holder's employment is terminated, they will be required to depart the United States or file an application to change their status prior to the expiration of their grace period. Often times, these individuals may choose to file an application to change to B-2 visitor status.

c. Adjustment-based Employment Authorization Documents (EADs)

If a laid off employee has an I-485, Application to Adjust Status, pending with the USCIS, they are authorized to stay in the United States even without a temporary visa (H-1B, L-1, etc.). If they have received an Employment Authorization Document (EAD) through the I-485 filing, this will serve as a form of unrestricted work authorization.

Additionally, if the employee's I-140 petition has been approved and their I-485 application has been pending with USCIS for more than 180 days, they will be eligible for green card portability. This allows the individual to maintain their existing green card application with another U.S. employer without the new company needing to start the green card process over for them.

Impact to Ongoing Green Card Applications

Layoffs can also impact green card applications for employees who remain with the company. Specifically:

- As part of the PERM labor certification process, employers are required to perform a labor market test to determine if there are any minimally qualified U.S. workers available and willing to assume the role held by the foreign national employee, or workers that can be trained in a reasonable period of time.

- If there has been a layoff in the area of intended employment within 6 months of **filing** a labor certification application for a position at the same location and in the same job family must disclose this information and take additional steps as part of the pre-filing recruitment process – the employer must notify and consider all potentially qualified laid off U.S. workers of the job opportunity and document the results of the notification and consideration. Otherwise, the employer should defer recruitment and file the labor certification at a future date when there will not have been any layoffs in the six months preceding filing.

i. Employer Considerations

Primary Recommended Steps

In the event of a layoff, employers should take the below three steps:

- Identify the affected foreign national population and determine each employee's U.S. immigration status;
- Ensure that a "bona fide termination" of any H-1B employees has occurred to stop the clock on the employer's obligation to pay wages. This is done by offering to cover the reasonble costs of return transportation to laid-off H-1B employees and notifying USCIS of the termination.
- Identify impacted labor certification cases in progress and determine if they can proceed in the six months following the layoff.

Determining Impact to Green Card Applications in Progress

In analyzing the impact of a layoff on green card applications in progress, employers should assess the following:

- Was there a laid off employee in the same or related occupation to the foreign national employee?
- Was it in the same location?
- If yes, the employer is required to notify the laid off U.S. worker of the PERM job opportunity and consider them for the opening.

There are several approaches an employer can take with respect to ongoing green card applications in the wake of a layoff, including but not limited to:

- Proceeding with all PERM cases and notifying/considering potentially qualified laid off U.S. workers as required;
- Pausing PERM cases where there has been a layoff in the same location and same/related occupation; or
- Pausing all PERM cases that are not time-sensitive, regardless of whether there has been a layoff in the same location and same/related occupation.

The best approach for any given employer will depend on a variety of factors, including the size of the reduction in force and volume of ongoing green card applications.

Frequently Asked Questions (FAQ) for Employers

Temporary Work Visas

Question: Are we permitted to consider an individual's immigration status when making decisions about layoffs or severence packages?

No. Employers should not provide preferential treatment to foreign workers with regard to the terms and conditions of a layoff or severance agreement.

Question: Is there a "grace" period for laid off employees?

In most cases, there is a 60-day grace period from date of separation with the Company. Practically speaking, foreign nationals typically utilize their most recent pay statements to demonstrate maintenance of immigration status in the United States. For example, when a foreign national changes employers, the new employer typically submits the foreign national's most recent pay stubs to the USCIS in support of a visa petition requesting a change of employer.

Question: If a laid off employee holds H-1B visa status, are we required to offer to pay for their return transportation to their home country?

Under U.S. immigration law, the Company is required to offer to pay for the reasonable costs of the H-1B employee's return transportation to their home country or last country of foreign residence. If the employee declines the offer or successfully changes employers, the Company is no longer required to pay this cost.

Question: Are we required to notify the U.S. Citizenship and Immigration Service when an individual's H-1B employment has terminated?

Yes. The Company, or its authorized representative, is required to notify the USCIS when H-1B employment is terminated. In general, this is typically done after the H-1B employee ceases any ties with the Company (in other words, after the employee ceases receiving severance, etc. from the Company).

Question: What if a laid off employee holds optional practical training (OPT) work authorization pursuant to an F-1 student visa?

Federal law limits how long F-1 students on post-completion optional practical training (OPT) or science, technology, engineering, and mathematics (STEM) OPT can be unemployed. The limits are 90 days cumulatively during the initial year of post-completion OPT and 150 days cumulatively for the STEM OPT period (including any days accrued while on the initial year of post-completion OPT). F-1 students and graduates are expected to notify the university's designated school official (DSO) upon termination of OPT employment. Employers are also required to notify the DSO upon departure of a STEM OPT employee.

Question: Are we required to offer laid off employees with legal advice and/or to cover the cost of a B-2 visitor change of status filing?

No. Companies will sometimes offer to have its immigration attorneys assist laid off employees via a one-time phone consultation and/or one-time assistance with a B-2 change of status application. However, this is not mandatory and it is each employer's decision on whether to cover the costs of these services.

Question: Are there any other options for a laid off employee to remain in the United States?

If the employee has an I-485, Application to Adjust Status, pending with the USCIS, they are authorized to stay in the United States even without a temporary visa (H-1B, L-1, etc.). However, they may not be work authorized if they have not yet received an Employment Authorization Document (EAD) through the I-485 filing.

Green Card Process

Question: Is there an obligation to continue a laid off employee's green card process?

No. The company may stop work on matters pertaining to employees who have exited.

Question: Do we have any obligation to a laid off employee who has an approved I-140 through our company?

No. However, having an approved I-140 petition will benefit terminated employees, as they typically may retain their priority date from a previous I-140 approval when a new U.S. employer sponsors them for a green card. It also may allow them to receive 3-year extensions of H-1B status with a new U.S. employer. In light of this, many employers will allow terminated employees to have access to a copy of their I-140 approval notice

Question: What is "green card portability" and when is an employee's green card application portable?

Green card portability means that a pending green card application (the I-485 Application to Adjust Status) will continue on and will not be cancelled, voided, or otherwise adversely impacted if/when the individual changes U.S. employers in the future. If the employee's green card is not portable, they will have to start the green card process over from the beginning (starting with a labor certification, in most instances) if/when they change U.S. employers.

- An employee's green card application is portable when:
  - The I-140, Immigrant Visa Petition, is approved; and
  - The I-485, Application to Adjust Status, has been filed and pending for at least 180 days.

- If the employee changes U.S. employers and wants to rely upon the green card being portable, their new U.S. employment must be in a "same or similar" occupation.

- Template: B-2 FAQ

FAQ

Question: I am working with a future employer for an H-1B Change of Employer. Should I still do the B-2 change of status?

First, be sure to speak to your new employer and their attorney about all H-1B considerations. The B-2 Change of Status is for individuals that cannot secure H-1B employment, but can also not leave the U.S. due to the COVID-19 situation. If you have found new employment, the B-2 Change of Status is not applicable to your situation generally speaking.

Question: I am applying for a new job, but have not secured employment yet. Should I still do the B-2 change of status?

The B-2 Change of Status is for individuals that cannot secure H-1B employment, but can also not leave the U.S. due to the COVID-19 situation. If you cannot secure employment, the first recommendation is to timely depart the U.S., if possible. If not possible to depart, please notify us as soon as possible as the Change of Status needs to be filed within 60 days from cessation of employment (or before expiration of your I-94/I-797).

Question: How long will the Change of Status take?

The Change of Status is expected to be pending for 4-9 months, on average. Please note, the overall benefit is not for you to remain in the U.S. indefinitely, but rather so you can schedule a departing flight from the U.S. once flights are available again. This is merely a measure to provide you with additional time to depart the U.S., if not able to secure other H-1B employment.

Question: I am working with a future employer for an H-1B Change of Employer. Can you answer questions about my new H-1B?

No, we cannot. Please note that we represent [COMPANY] and they have agreed to sponsor this specific B-2 Change of Status process only. We cannot advise on additional immigration questions. Specifically, if you are working on an H-1B Change of Employer, all of those questions needs to be directed to your future employer and their attorney.

Question: How long do I have to file the B-2 Change of Status?

As an H-1B, you have 60 days from the cessation of employment (or before expiration of your I-94/I-797) to either find a new H-1B employer, depart the U.S., or apply for a Change of Status. For that reason it is important to notify us as soon as possible if a Change of Status will be required to ensure there is sufficient time to prepare the application, obtain signatures, and file with USCIS.

Question: If I hold H-1B visa status, will the Company offer to pay for my return transportation to my home country?

Yes. Under U.S. immigration law, the Company is required to offer to pay for your return transportation to your home country. If you decide to return to your home country, the Company will pay the reasonable cost of return transportation to the home country. To arrange for the Company to pay for your return transportation, please sign and return the related letter from Human Resources pertaining to this offer.

➢ Template: Offer of Return Transportation to Home Country

DATE

NAME
ADDRESS

Re: H-1B Employment with COMPANY

Dear NAME:

As you know, your position was selected for elimination in our recent reduction-in-force. Your employment with the Company will end effective **DATE**, to the extent that you have not accepted the separation agreement by that date. On the date of your termination, we will be required to notify the U.S. Citizenship and Immigration Services ("USCIS") that you are no longer employed, and that we are requesting to withdraw the H-1B visa petition.

Please notify us of the date that you intend to depart the United States and return to your home country. The company will pay for the reasonable cost of non-cancelable, one-way return transportation for you to your home country, provided that you notify us by DATE, so that we can make the appropriate travel arrangements.

Please indicate below whether you wish to accept or decline the company's offer of return transportation. We ask you to check the appropriate box on the bottom of the enclosed copy of this letter, then sign and date the copy and return it to me in the enclosed return envelope.

Failure to notify us as requested in the preceding paragraph will be viewed as you declining our offer to pay your return transportation.

Sincerely,

COMPANY

_____
NAME
TITLE

☐ I accept your offer of return transportation to my home country set forth above, and I will notify you by the above-referenced deadline to confirm the date of my planned return trip to my home country.

☐ I decline your offer of return transportation to my home country set forth above.

Signature: _____ Date: _____

➢ Template: H-1B Withdrawals

If Form I-797 receipt number begins with WAC:

U.S. Citizenship and Immigration Services
California Service Center
24000 Avila Road
2nd Floor, Room 2312
Laguna Niguel, CA 92677

If Form I-797 receipt number begins with EAC:

U.S. Citizenship and Immigration Services
Vermont Service Center
75 Lower Welden Street
St. Albans, VT 05479-0001

If Form I-797 receipt number begins with LIN:

U.S. Citizenship and Immigration Services
Nebraska Service Center
850 S. Street
Lincoln, NE 68508

If Form I-797 receipt number begins with SRC:

U.S. Citizenship and Immigration Services
Texas Service Center
4141 N. St. Augustine Drive
Dallas, TX 75227

RE: NOTICE OF WITHDRAWAL

Form:	I-129, Petition for Nonimmigrant Worker, H-1B Classification
Petitioner:	COMPANY NAME
Beneficiary:	EMPLOYEE NAME
File Number:	EAC-16-123-45678
DOB:	1/1/1980

Dear Sir or Madam:

The Petitioner in the above-referenced matter would like to withdraw the I-129 (H-1B) petition previously submitted regarding the above stated Beneficiary. *Enclosed please find a copy of Form I-797 Approval Notice*. If you have any questions or concerns, please do not hesitate to contact me. Thank you for your attention to this matter.

Sincerely,

Name
Title
Company

Date:_____

- Template: FAQs for Impacted Employee

FAQs for Impacted Employee: Departure from the Company

General Comments

This information is intended to help answer practical questions and does not constitute legal advice. COMPANY (hereinafter "the Company") and its immigration lawyers do not provide legal advice regarding departure from any COMPANY legal entity. Further, the Company's immigration lawyers do not represent employees of the company in connection with immigration matters. This Question & Answer is opinion only and does not create an attorney-client relationship between the Company or its immigration lawyers and any existing or former employee of the Company.

Question: Can the Company and/or the Company's immigration lawyers give me legal advice?

The Company is not able to provide you with legal advice on immigration matters. The Company's immigration lawyers represent the company and are unable to provide legal advice to you. Former employees sometimes ask the Company's immigration lawyers to represent them as individuals. While our immigration lawyers enjoy meeting and working with Company employees, in order to avoid any actual or perceived conflict of interest, the Company's immigration lawyers typically do not represent former employees of the Company in immigration matters.

Question: Should I seek legal advice from an immigration attorney?

Yes. The Company and our immigration lawyers both recommend that you seek legal advice regarding immigration matters. There is an organization called American Immigration Lawyers Association (AILA). AILA's website (www.aila.org) has a search feature called "find a lawyer" that you may wish to visit. The Company is providing this website to you as a resource and is not making any guarantees or representations regarding any lawyers that you may locate via www.aila.org.

Temporary Work Visas

Question: If I have exited from the Company, what does this mean for my temporary work authorized (H-1B, L-1, TN, E-3, O-1) visa status?

These temporary work visas are employer specific. Upon termination from the Company, you no longer hold a valid immigration status in the United States. You are "out of status" until you either depart the United States or secure another immigration sponsor or status. A common way to secure immigration status again is to join a different company that will sponsor you for a work visa. If you have an I-485, Application to Adjust Status, pending with the USCIS, then you might be authorized to stay in the United States even without a temporary visa (H-1B, L-1, etc.) Immigration status. If you think you fall in this category, please see the questions and answers below *regarding green card portability* and related issues.

Question: Is there a "grace" period?

In most cases, there is a 60-day grace period from date of separation with the Company. Practically speaking, foreign nationals typically utilize their most recent pay statements to demonstrate maintenance of immigration status in the United States. For example, when a foreign national changes employers, the new employer typically submits the foreign national's most recent pay stubs to the USCIS in support of a visa petition requesting a change of employer. Please consult your own immigration lawyer for further and more specific advice relating to your particular situation.

Question: If I will be departing the United States, how long do I have to wrap up my affairs in the United States?

It will obviously take some time to wrap up affairs and depart. The goal should be to depart the United States as quickly as possible. Foreign nationals typically wish to ensure that any "out of status" time period in the United States would be brief and considered reasonable (*e.g.,* a few weeks) by a consular officer in the event he/she ever applies for another U.S. visa or seeks entry to the United States.

Question: If I hold H-1B visa status, will the Company offer to pay for my return transportation to my home country?

Yes. Under U.S. immigration law, the Company is required to offer to pay for your return transportation to your home country. If you decide to return to your home country, the Company will pay the reasonable cost of return transportation to the home country.

Question: I am on an H-1B visa. Will the Company notify the U.S. Citizenship and Immigration Service that my H-1B employment has terminated?

Yes. The Company is required to notify the USCIS when H-1B employment is terminated. In general, this is typically done after the H-1B employee ceases any ties with the Company (in other words, after the employee ceases receiving severance, etc. from the Company).

Question: What if I hold optional practical training (OPT) work authorization pursuant to my F-1 student visa?

Federal law limits how long F-1 students on post-completion optional practical training (OPT) or science, technology, engineering, and mathematics (STEM) OPT can be unemployed. The limits are 90 days cumulatively during the initial year of post-completion OPT and 150 days cumulatively for the STEM OPT period (including any days accrued while on the initial year of post-completion OPT). F-1 students and graduates are expected to notify the university's designated school official (DSO) upon termination of OPT employment. Employers are required to notify the DSO upon departure of a STEM OPT employee.

The Green Card Process

Question: I recently sent in my PERM Questionnaire to begin the green card process. Is the Company continuing work on my green card process?

The Company will stop work on matters pertaining to employees who have exited the company.

Question: I have a Company-sponsored PERM labor certification that has been filed and is currently pending or was recently approved. What does this mean for my green card process?

The Company will stop work on any pending PERM labor certifications that relate to employees who have exited the company. You will need to start the green card process over with a different U.S. employer.

Question: What if the Company filed an I-140, Immigrant Visa Petition, on my behalf and it is approved?

As the beneficiary of an approved I-140, Immigrant Visa Petition, you benefit from the following:

- With limited exceptions, if you have a copy of the I-140 approval notice and the I-140 was not withdrawn, you will be able to keep the priority date, even if you start the green card process over with a different company/different employer. If you do not have a copy of your I-140 approval notice, we will be happy to provide a copy to you from your immigration file. Please submit your request through NAME.
- If your I-140 is approved and an immigrant visa is not available to you based on the visa bulletin, you will be eligible for H-1B extensions beyond the six year limit. The extensions will be in three year increments.

Question: What is "green card" portability and when will my "green card" application be portable?

If your green card application is portable, that means that your pending green card application (the I-485 Application to Adjust Status) will continue on and will not be cancelled or voided or otherwise adversely impacted if/when you change U.S. employers in the future. Determining whether the green card is portable is important because if your green card is NOT portable, then you have to start the green card process over from the beginning (starting with a labor certification, in most instances) if/when you change U.S. employers.

Your green card application is portable when:

I. The I-140, Immigrant Visa Petition, is APPROVED; and
II. The I-485, Application to Adjust Status, has been filed and pending for at least 180 days.
III. Additionally, if you change U.S. employers and want to rely upon the green card being portable, your new U.S. employment must be in a "same or similar" occupation. For example, you need to stay in the same occupational field. If you are a Mechanical Engineer at the Company, you need to be in the Mechanical Engineering field at the next company. Your duties do not have to be identical.

Question: I have an I-485, Application to Adjust Status, pending with USCIS. How long will it take for my green card application to be approved?

There are only about 140,000 employment-based immigrant visas ("green cards") available each fiscal year. Currently, there are many more I-485 applications pending then there are immigrant visas available. It could take a number of years before your case is approved – depending on your immigrant visa preference category, country of birth, and priority date. Visa availability is announced on a monthly basis by a Department of State visa bulletin which is available on their website at http://travel.state.gov.