CARES Act: Foreign National and Immigrant Eligibility for Paid Leave, Unemployment Benefits, and Stimulus Rebates

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On March 27, 2020, President Donald Trump signed into law the Coronavirus Aid, Relief, and Economic Security (CARES) Act, intended to stimulate the national economy in the wake of the COVID-19 pandemic. The Act provides $2 trillion in direct financial assistance, including paid leave, unemployment insurance (UI) benefits, and rebates to eligible individuals. Immigrants and foreign nationals in the United States may be eligible for some or all of the listed benefits, depending on the circumstances.

Paid Leave

On March 18, 2020, the Trump administration signed the Families First Coronavirus Response Act (FFCRA), which temporarily (through December 31, 2020) expanded the Family and Medical Leave Act (FMLA) to provide up to 12 weeks of paid leave for the care of children who are out of school due to COVID-19. The FFCRA also created employer tax credits related to the law's paid leave provisions.

The CARES Act modifies the paid leave provisions of the FFCRA by extending the family leave and sick leave provisions to employees who were laid off after March 1, 2020, and subsequently rehired. It also provides funds to federal agencies to reimburse federal contractors for paid leave provided to employees or subcontractors who were unable to work in person or telework due to the COVID-19 crisis.

The U.S. Department of Labor (DOL) has clarified that no payment is required under the H-1B (specialty occupation visa) program for nonproductive time due to reasons not related to employment, such as a worker's voluntary absence from work; however, employers remain obligated to comply with any statute relating to employment, including the FMLA, and now the FFCRA and CARES Act.

Accordingly, immigrants and foreign nationals holding work authorization are eligible to take paid leave as provided by applicable federal and state laws.

Unemployment Insurance

Unemployment insurance provides cash benefits to eligible workers who have become unemployed through no fault of their own. Each state determines its own eligibility criteria and benefit amounts, while adhering to the federal guidelines. The following provisions of the CARES Act, which expands UI benefits, may impact immigrants and foreign nationals:
The temporary Pandemic Unemployment Assistance (PUA) program provides payment to workers who would not otherwise be eligible for UI. This includes self-employed workers and independent contractors (including gig economy workers) who are unable to work as a direct consequence of the COVID-19 pandemic. The PUA program will run through December 31, 2020.

“Federal Pandemic Unemployment Compensation” of $600 per week is available to each recipient of UI or PUA for up to four months.

An additional 13 weeks of unemployment benefits is available through December 31, 2020.

Full funding of “short-time compensation” programs exists to compensate employees who work reduced hours.

Foreign national employees who have been discharged may want to consult the specific requirements of their states to confirm eligibility for UI benefits. The Immigration Reform and Control Act (IRCA) may also play a role in UI eligibility, as the IRCA requires states to utilize the electronic Systematic Alien Verification for Entitlements (SAVE) program to verify an applicant’s immigration or citizenship status. Accordingly, a foreign national applicant who is eligible to receive UI benefits pursuant to the applicable federal and state guidelines may also be eligible for the additional emergency increase of $600 per week pursuant to the CARES Act.

For the purposes of a public charge analysis, UI benefits are not considered “unearned” benefits and should not impact a foreign national’s ability to extend his or her nonimmigrant status (including work authorized status such as H-1B, L-1, TN, E-3, and related dependent status) in the United States and/or adjust status to lawful permanent residence (“green card” holder).

We also recently addressed employer obligations relating to the payment of H-1B wages certified by the DOL in the LCA, and the impact of across-the-board salary reductions. U.S. Citizenship and Immigration Services (USCIS) consulted with the DOL on this topic in 2003, confirming that in the context of across-the-board salary reductions, “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 [USCIS] in the next H-1B filing.”

Individual Rebates

The CARES Act provides a $1,200 stimulus rebate to each eligible individual with adjusted gross income of up to $75,000 ($150,000 for married couples), plus another $500 per child. Reduced amounts will be issued to individuals making up to $99,000 per year ($198,000 for married couples). The CARES Act specifically excludes “any nonresident alien” from the definition of “eligible individual.” Notably, “nonresident alien” is defined by the Internal Revenue Service (IRS) rather than by immigration statute. The IRS states that a non-U.S. citizen is considered a nonresident alien unless he or she meets one of two tests: the green card test or the substantial presence test. Lawful permanent residents, or “green card” holders, are considered resident aliens unless they voluntarily renounce and abandon their status in writing to USCIS, or their immigrant (permanent residence) status is administratively terminated by USCIS or judicially terminated by a U.S. federal court.
A foreign national is generally considered a resident alien for tax purposes if he or she meets the substantial presence test for the calendar year, having been physically present in the United States for a designated minimum threshold period. The IRS exempts certain types of days (e.g., days spent in the United States for less than 24 hours when in transit between two places outside the United States) and nonimmigrant visa statuses from the physical presence calculation. For instance, a foreign national student typically does not count days spent in F-1 status towards calculation of substantial presence, unless that student has been exempt from the resident alien determination for any part of more than five calendar years. Accordingly, an H-1B professional worker who lives and resides in the United States could be eligible for the stimulus rebate, while an F-1 student might not be eligible for the stimulus rebate if he or she is not otherwise considered a resident alien by the IRS.

The CARES Act further stipulates that an individual seeking to receive a stimulus rebate must include a Social Security number (SSN) in the federal tax return filing for the taxable year. U.S. citizens and lawful permanent residents are eligible to apply for an SSN from the Social Security Administration (SSA). However, only foreign nationals with U.S. work authorization may apply for SSNs; this excludes broad categories of foreign nationals who are otherwise lawfully present in the United States, including but not limited to spouses and children of some H-1B visa holders.

The CARES Act specifically allows an applicant to provide an Adoption Taxpayer Identification Number (ATIN), a type of number issued by the IRS as a temporary taxpayer identification for a child in a domestic adoption where the adopting taxpayers do not have or are unable to obtain the child’s SSN. The CARES Act does not, however, specifically allow an applicant to provide an Individual Taxpayer Identification Number (ITIN), the type of identification number commonly held by foreign nationals who are lawfully present but not specifically authorized to work in the United States.

Ogletree Deakins’ Immigration Practice Group will continue to monitor developments with respect to the policy changes and will post updates on our Immigration blog and in the firm’s Coronavirus (COVID-19) Resource Center, as additional information becomes available.