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COVID-19 Immigration FAQs for Employers of Foreign Nationals

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The FAQs below are not legal advice; they are intended to provide our readers with information that forms the starting point of a conversation with legal counsel. Please do not take any actions based on the information below without first consulting with counsel, as each situation must be assessed on a case-by-case basis and the advice must be tailored to the specific employer and situation. Moreover, the below FAQs discuss relevant immigration guidance; there may be separate employment law concerns which require consultation with an employment lawyer.

Click on any of the topics below to be taken to the relevant FAQs.

I. CHANGES TO WAGES OR HOURS

A. Salary Reduction

Q. ***May I reduce the compensation of my foreign national employees working for my company on temporary work visas?***

A. The answer will depend on the visa classification held by the foreign national.

Reduction in Compensation Paid to H-1B/H-1B1/E-3 Visa Holders

The regulations are very strict regarding reductions in hours or pay for employees working in H-1B, H-1B1, or E-3 visa status. This is because these three types of visas are supported by an underlying Labor Condition Application (LCA) certified by the U.S. Department of Labor in which the employer attested to the wages and working conditions of the contemplated employment. The employer must promise to pay the H-1B/H-1B1/E-3 worker the higher of (a) the actual wage (what it pays other similarly situated workers) or (b) the prevailing wage. The higher of these two is the "required wage" which the employer must pay. For many visa classifications, U.S. Citizenship and Immigration Services (USCIS) requires employers to file amended visa petitions to reflect material changes in the terms and conditions of the employment on the visa.

The most conservative approach is for the employer to file an amended visa petition with USCIS to reflect the change in the employee's compensation. This involves additional legal fees and costs which many employers can ill afford during this COVID-19 crisis.

Employers who choose not to file an amended petition may be questioned in the event of an audit or investigation either by DOL or by USCIS. To avoid fines or penalties the employer would need to convince the government that they continued paying the "required" wage at all times and that the reduction in the wage was not a "material" change necessitating an amended petition.

If the employer reduces the hours and wages across the board for all similarly situated workers, the employer should be considered to be in compliance with the requirement to pay the required wage if:

- The reduced wage being paid to the foreign national holding H-1B/H-1B1 or E-3 visa status matches the wages paid to the other similarly situated U.S. workers, and
- The reduced wage is still **equal to or above** the prevailing wage that was listed on the LCA supporting the employee's visa classification.

The employer must immediately update the Public Inspection File to reflect the change in compensation both for the foreign national in question, and to the actual wage (the reduced wages being paid to the other employees). It would also be prudent to insert a Memo to the Public Inspection/Access Files (known as the "PIF" or "PAF") about the COVID-19-related impetus for taking this salary reduction action.

Employers who choose not to file an amended petition may be questioned in the event of an audit or investigation either by DOL or by USCIS. To avoid fines or penalties the employer would need to convince the government that they continued paying the "required" wage at all times and that the reduction in the wage was not a "material" change necessitating an amended petition. Employers would be well positioned to argue that there was no material change if the job title and job duties did not change at all, and the only thing that changed was the salary. In the worst case scenario DOL could require the employer to pay back wages based on the original salary; and USCIS could revoke the visa petition. If the employer documents its action as arising from the dire COVID-19 situation, and demonstrates that it has treated its employees equally, this showing of good faith should be a helpful, positive factor in any audit or investigation.

Employers may never pay H-1B/H-1B1/E-3 workers less than the prevailing wage reflected on the LCA underlying the foreign national's visa classification.

Impact of Reduction in Pay to Foreign Nationals Holding Other Temporary Work Visas

The DOL does not have oversight of other employment visa classifications, such as L-1, O-1, TN, E-1, E-2 and F-1 CPT, OPT and STEM OPT.

F-1 Students

Individuals in F-1 student status with OPT work authorization must maintain employment that is related to their field of study. An F-1 student can lose their OPT if they are unemployed for a period of 90 days (OPT) or 150 days (STEM OPT).

The STEM OPT rules require that an employer amend the Form I-983 Training Plan if there is a:

- Reduction in student compensation that is not tied to a reduction in hours worked; or
- A significant decrease in hours per week that a student engages in a STEM training opportunity.

For this reason, an employee in STEM OPT status should notify the university of a reduction in pay or hours, to determine if an amended Form I-983 Training Plan is required.

Other Employment Visa Classifications

Other employment visas do not have regulatory oversight on the rate of pay, although pay should be commensurate with the type of professional work being performed. A short-term reduction in pay would not likely require the filing of an amended petition, and would likely allow the individual to maintain lawful status.

However, USCIS guidance states that a "material change" of the terms of employment on Form I-129 requires the filing of an amended petition. In the event that the employer will pay a lower salary than what is indicated on Form I-129, the most conservative approach would be to consider that a material change and file an amended petition to USCIS.

Since the guidance does not indicate employers must wait for the approval from USCIS, if an employer were to file an amended petition to reflect a reduction in salary, the change in salary can be implemented prior to the approval of the amended petition by USCIS.

B. Reduction in Hours

Q. ***May we reduce the foreign national's position from full-time to part-time?***

A. An employer of a foreign national holding H-1B/H-1B1/E-3 status was required to file an LCA with the DOL in which the employer attested to whether the job was being offered on a full-time or part-time basis. An employer who wishes to reduce the employee's hours from full-time to part-time is required to file an amended visa petition with USCIS to reflect that change. The first step before filing the amended petition is to file a new LCA with DOL and secure the DOL's certification of the new LCA.

An amended petition for part-time employment can use a range of part-time hours such as 15 – 20 hours per week. However, the employer is required to pay for part-time work that is at least the average number of hours normally worked that is within the range.

While there is no LCA governing the wage or working conditions of other temporary visa types such as L-1, O-1, or TN, a change of working conditions from full-time to part-time is also considered a material change requiring an amended petition filing.

USCIS guidance indicates that in the case of a material change, an amended "filing" is required. As noted above, once the employer files an amended petition to reflect a reduction in hours, the change in hours can be implemented prior to the approval of the amended petition by USCIS.

An F-1 student working pursuant to OPT is permitted to work part-time or full-time, but if part-time the student must work at least 20 hours per week. There is no petition filing for this type of work authorization, but the F-1 student's school should be apprised of any change from full-time to part-time.

In addition, an employee in STEM OPT status should notify the university of a reduction in hours, to determine if an amended Form I-983 Training Plan is required. It is likely that an amended I-983 would need to be submitted to the college or university, within five business days of the change.

Q. ***Must the employer wait for USCIS to approve the amended petition before reducing the hours/compensation?***

A. H-1B workers are eligible for H-1B portability if they meet USCIS portability requirements. This means that an employer may file an H-1B visa petition on their behalf, and the employer may put the H-1B worker onto its payroll (or reduce the payroll amount in the case of an existing employee) as soon as the employer has received notification that USCIS has received the employer's H-1B petition on the employee's behalf. A benefit of H-1B portability is that in the case of a change from full-time to part-time H-1B employment (as a response to the economic conditions caused by COVID-19), the employer does not need to wait for USCIS to adjudicate the amended H-1B petition. Of course, ultimately, the amended H-1B petition must be approved by USCIS for the employer to be able to continue to employ the foreign national in H-1B status.

The STEM OPT rules require that an employer amend the Form I-983 Training Plan if there is a:

- Reduction in student compensation that is not tied to a reduction in hours worked; or
- A significant decrease in hours per week that a student engages in a STEM training opportunity.

In these instances, there is no requirement to file with USCIS. The amended Form I-983 is submitted to the F-1 student's university, and should be submitted within five business days of the change in terms of employment.

For other employment visa types where a Form I-129 has been filed, USCIS guidance indicates that in the case of a material change, an amended "filing" is required. Once the employer files an amended petition to reflect a reduction in salary or hours, the change in hours can be implemented prior to the approval of the amended petition by USCIS.

C. Deferring Compensation

Q. ***May we defer compensating our foreign nationals until a later date?***

A. Here again the answers will depend upon the foreign national's visa status.

Impact of Deferring Compensation to H-1B, H-1B1 and E-3 Workers

As noted above, H-1B, H-1B1, and E-3 visas are regulated both by the DOL and USCIS. In the underlying LCA that supported these three types of visas, the employer attested to the wages and working conditions of employment. Although the DOL regulations require employers to pay salaried employees in regular, recurring prorated installments, paid no less frequently than monthly, there is one limited exception. The exception is for employers who will use a non-discretionary payment to supplement the employee's regular salary in order to meet the required wages that the employer is obligated to pay. To qualify for this exception the employer has to document its commitment to making the supplemental payment and how it calculated the amount, relative to the required wage obligation. It also has to have records to prove how it met the required wage obligation in the past (presumably through a supplemental payment) and how it will meet its obligations again in the future, upon payment of the supplemental payment.

Employers that decide to defer compensation for salaried workers and supplement the salary later with a lump sum payment pursuant to the exception noted above should be aware that there is a degree of risk in undertaking this method during the COVID-19 crisis, especially if it turns out to be a one-time only exercise. Upon an audit or investigation, DOL may not agree with the employer's methodology and could impose fines or penalties (especially if the audit or investigation occurs before the lump-sum payment has been made).

While F-1 students in their first 12-months of OPT are not required to be paid (i.e. they may volunteer and still maintain their F-1 OPT status),STEM OPT students must be paid for employment, and the employer must compensate an F-1 student in STEP OPT status in a manner that is commensurate with U.S. workers who perform similar duties. Employers who defer compensation to all similarly situated employees can do the same for F-1 OPT and STEM OPT employees, but STEM OPT employers and employees have a duty to report the change to the student's school, and this may require an amendment to the Form I-983 training plan.

For other employment visa classifications, there is no DOL oversight of wages, and employers must pay employees for work performed in accordance with the terms and conditions set forth in Form I-129. As long as deferred compensation is documented and makes employees whole for the work that they perform, deferred compensation should not be an issue.

Q. ***May we compensate our employees with stock options instead of wages?***

A. Employers of H-1B, H-1B1, and E-3 workers must comply with the DOL requirements governing the LCA that underlies the employment of workers in these three visa classifications. The DOL regulations require the employer to guarantee that it will pay the foreign national the required wage, reported as earnings to the IRS, subject to appropriate IRS and FICA withholding. Since stock options are not guaranteed, as their value fluctuates over time, and as they are not reported as earnings to the IRS, they may not be substituted for required wages.

For other employment visa types where a Form I-129 has been filed, the Form I-129 instructions make clear that the "rate of pay" listed on Form I-129 is "the salary or wages paid to the beneficiary," and does not include non-cash compensation or benefits. Since stock options are not guaranteed, as their value fluctuates over time, and as they are not reported as earnings to the IRS, they may not be substituted for salary or wages.

D. Leaves of Absence

Q. *Are unpaid leaves of absence (LOA) allowed?*

A. As noted above, employers of H-1B, H-1B1 and E-3 workers must abide by the DOL regulations that underlie the LCA that the employer filed with DOL to support the employee's visa status. The regulations require the employer to pay the required wage if the employee is in a non-productive period that is subject to payment under the employer's benefit plan or under other statutes such as the FMLA, the Families First Coronavirus Response Act or similar state or local laws.

DOL regulations do not obligate an employer to pay the employee during a truly voluntary LOA (for example when the employee requests an LOA to care for a sick family member, or to take a maternity/paternity leave or if they are unable to work for an extended period of time for some other reason). However, if an employer chooses not to pay H-1B, H-1B1, or E-3 workers during voluntary LOAs, the employer must be very careful to ensure that the LOA meets the stringent requirements in the regulations; document it in detail in the PIF; and be prepared to defend its decision in the event of a DOL audit or investigation.

E. Furloughs

Q. *Are furloughs allowed?*

A. As noted above, employers of H-1B, H-1B1 and E-3 workers must abide by the DOL regulations that underlie the LCA that the employer filed with DOL to support the employee's visa status. The regulations require the employer to pay the required wage if the employee is in a non-productive period.

As a general rule, if an H-1B, H-1B1 or E-3 is not being paid by the employer, the employer is not complying with its wage obligations as required by DOL. If such an employee is in non-productive status, as a general rule the employer should either continue paying the required wage to that employee; or terminate employment in accordance with the guidance below.

There is an argument to be made that furlough with a defined period of time would be acceptable for an H-1B, H-1B1 and E-3 worker. DOL regulations indicate that if an employee takes a voluntary leave of absence the employer is not obligated to pay the required wage during that period. While a furlough is generally not a voluntary election by an employee, given the option of either terminating employment or allowing the employee to go on furlough, the employee's choice to opt for furloughed status to maintain their standing as an employee may be classified as a voluntary choice.

Employers that want to maintain their workforce and that are not in a position to pay wages for a defined and temporary period of time can consider utilizing this section of the regulations to justify the non-payment of wages. However, employers that choose to do so must be aware that upon audit or investigation, DOL will be the ultimate arbiter of whether the leave was truly the employee's choice. If DOL were to disagree, the employer could be liable for back-wages and other penalties.

II. LAYOFFS AND TERMINATIONS

Q. ***What are the employer's obligations regarding layoffs and terminations?***

A. The answer will depend on the visa classification held by the foreign national.

H-1B Workers

In the H-1B context, DOL guidance requires an employer to take three steps in order to clearly effect a termination and eliminate ongoing obligations to pay wages:

1. Notify the employee of the termination. The employer's own records should clearly show the termination date, and they should follow any normal protocols that they have for termination;
2. The employer must file a withdrawal of the H-1B petition to USCIS; and
3. The employer must offer return transportation.

The most conservative option for payment of return transportation is for the employer to offer to pay the going rate for a return flight home. It is also permissible to make an offer to pay for a one-way ticket with a limit on the duration of time when the former employee must accept. Because these visa categories now have a 60-day grace period of ongoing status after termination, employers should give terminated workers at least 60 days to accept the offer. In addition, in the current coronavirus climate and with limitations on all global travel, employers should provide an additional time period for the employee to decide if they want to depart the U.S. For example, an offer remaining open for 60 days following the resumption of international flights to the home country. Once an employer complies with the above, there is no legal obligation to continue to pay wages to the worker.

Other Temporary Work Visas

Note that this offer of return transportation does not apply to the E-3 or H-1B1 categories even though they are also governed by a required wage on an LCA. The only other visa category where return transportation is required is the O-1 for extraordinary ability foreign nationals. This provision is not governed by DOL since there is no specific wage obligation for O-1s. However, USCIS regulations do require the offer of return transportation to a terminated employee in O-1 status.

There is also no regulatory obligation to withdraw other work visa petitions with USCIS upon termination; however, many employers choose to file a withdrawal to USCIS, in order to document the termination. There is no harm in notifying USCIS of terminations.

Permanent Residence Applications

For permanent residence-based applications and petitions (approved PERM Labor Certifications, I-140 Immigrant Petitions) employers generally do not notify the government of termination or withdrawal after the petition is approved. These applications/petitions do not, on their own, create any US immigration status or wage obligation so withdrawal is not required. And, if economic conditions improve and re-hiring of the foreign national is possible, these green card processes can be resumed with little extra cost.

For pending PERM applications and I-140 petitions, employers often withdraw those pending applications to avoid the need to respond to a PERM Audit Request or a Request for Evidence for the I-140 petition.

Q. ***What immigration protections do our employees have after a layoff or termination?***

A. The majority of commonly used temporary work visa statuses have a 60-day grace period of continuing status after termination. During this 60-day grace period, the foreign national is allowed to stay in the U.S. and look for a new employer to file an extension of status or can change to another nonimmigrant status. This 60-day grace period is considered valid status even though the foreign national is no longer working or being

paid. Note that this 60 days may be reduced if the underlying petition/status expires prior to the full 60-day period. **Employees who work through to the end date of their I-797 approval period have only a 10-day grace period to remain in the U.S. or file extensions or change of status requests.** Click here for more details on these grace periods.

III. CHANGES IN WORKSITE LOCATION

Q. ***What immigration compliance obligations are triggered by an H-1B employee's change in worksite within commuting distance of the office?***

A. In general, H-1B workers are only authorized to work at locations listed on their Form I-129 petition and/or their Labor Condition Application (LCA). However, there are exceptions to this rule if the placement at another work location will be temporary. Under these exceptions, H-1B employees can work at another location on a short-term basis without triggering the need for the employer to file a new LCA or an amended petition to USCIS to reflect the new worksite.

An H-1B worker is authorized to work from home where the home office location is within the same "Area of Employment" as the company's office location. The DOL defines "Area of Employment" as "normal commuting distance."

When a New LCA Posting Is Required

Please note, although there is no requirement to file a new LCA to DOL, or to file an amended H-1B petition to USCIS, long-term placements at a home office in the same Area of Employment require a new LCA Notice posting.

The most common exemption to the Notice requirement is the "Short-term Placement" rule. In this instance, if an H-1B worker will be working at home within the same Area of Employment, the worker can work for up to 60 workdays (12 weeks, if the employer has a Monday through Friday work week) without necessitating a new LCA posting. In more limited circumstances, the H-1B worker can work for up to 30 workdays at home (6 weeks, if the employer has a Monday through Friday work week). For example, a "roving" H-1B worker who does not have a permanent worksite would be subject to the 30-day rule.

An H-1B worker may work for up to 60 days at their home office without triggering a new LCA Notice requirement if:

- The worker's home office is in the same geographic area of employment (normal commuting distance) as the worksite listed on the I-129/LCA;
- The worker continues to maintain an office at his/her permanent worksite; and
- The worker spends a substantial amount of time at the permanent worksite within a one-year period.

If the worker will be required to work from home for a longer duration than the 30- or 60-day limit, the employer would be required to post an LCA Notice at that worksite (even if it is a home office).

There is no downside or risk to posting the LCA Notice at an employee's home office prior to reaching the 30 or 60 day limit.

Q. ***What immigration compliance obligations are triggered by an H-1B employee's change in worksite outside of the commuting distance of the office?***

A. In the rare instance where the home office location of the H-1B worker is outside the area of employment from the normal company office, the employer must take steps to amend the H-1B petition. Specifically, the employer must provide Notice of a new LCA covering the home office work location; file that LCA to DOL and

obtain DOL certification; and file an amended H-1B petition to USCIS to reflect that home office location. The 60-day short-term placement rule for H-1B workers for locations outside the area of employment cannot be used in this unique work from home situation. Employers are not required to await the USCIS decision on the amended petition and the employee may continue to work from the home office beyond the 60th day, as long as the employer filed the amended H-1B petition before then.

Q. ***What are the obligations for worksite changes for employees with other employment visa statuses?***

A. H-1B and E-3 Workers

Neither DOL nor USCIS provides specific guidance for worksite changes for E-3 and H-1B1 workers, but it would be prudent for employers to follow the same protocols above for remote worksites for E-3 and H-1B employees.

F-1 and J-1 Workers

On April 16, 2020 Immigration and Customs Enforcement (ICE) through its Student and Exchange Visitor Program (SEVP) posted an update on its website regarding F-1 students working on OPT (either the 12-month OPT or STEM OPT). The guidance clarifies that the Designated Student Officers (DSOs) at the students' schools are not required to update the students' SEVIS records to reflect COVID-19-related changes to the F-1 students' work locations. The guidance also clarifies that F-1 students working in STEM OPT status are not required to update their I-983 training plans to reflect their remote work address.

In the absence of guidance regarding changes of worksite location for J-1 students, J-1 interns and J-1 trainees, it would be prudent for J-1 students, interns and trainees toreport a change in worksite to their J-1 Program Sponsor.

Other Employment Visa Classifications

Other employment visas such as an L-1, TN, or O-1 are not location specific, and a change of worksite only does not require any action by the employer.

IV. COMPLETING FORM I-9 IN A REMOTE WORK ENVIRONMENT

Q. ***How do we onboard and complete Form I-9 processing for remote hires?***

A. On March 20, 2020 the Department of Homeland Security (DHS) announced that it is temporarily allowing employers to "defer" the physical presence requirements when completing Form I-9. The announcement includes the following details:

Employers that have gathering bans or restrictions due to COVID-19 are not required to perform an in-person review of the employee's identity and employment authorization documents.

In this case, employers must inspect the employee's "Section 2" I-9 documents remotely, using "video link, fax or email, etc."

Employers must obtain, inspect, and retain copies of the documents within three business days. Employers availing themselves of this option must provide written documentation of their remote onboarding and telework policy for each employee's Form I-9.

This temporary policy will remain in place until May 19, 2020, or within three business days after the termination of the National Emergency, whichever comes first.

Q. *Does this apply to all employers?*

A: No. The DHS announcement clarifies that remote I-9 completion is only an option for employers and workplaces that are completely operating remotely. According to DHS, "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." However, the announcement also adds that if newly hired or existing employees are subject to COVID-19 related lockdown or quarantine, DHS will evaluate the use of remote I-9 completion on a case-by-case basis.

Q: *What are the logistics for completing Form I-9 remotely?*

A: When completing Form I-9 pursuant to this COVID-19 remote work exception, the employer should annotate Section 2 of the Form I-9 by writing "COVID-19" in the "additional information" field of Section 2.

Once normal operations resume, within three business days the employer must perform a physical inspection of the I-9 documentation in the employee's presence.

Once business operations have resumed and the employer has physically inspected the employee's documents, the employer should add the phrase "documents physically examined" and include the date of the inspection. This annotation similarly should appear in the Additional Information field in Section 2 of the Form I-9.

V. CANCELLING PERMANENT RESIDENCE SPONSORSHIP OR WORK VISA SPONSORSHIP

Q. *We commenced the permanent residence ("green card") sponsorship process for our employee, but as a result of the economic consequences of the COVID-19 pandemic, we are no longer in a position to continue the sponsorship. What risks do we have in cancelling the green card process, including withdrawing a pending application with DOL or USCIS?*

A. Most employment in the United States is "at will" and employees' future employment with their employer is not guaranteed. Many employers have an immigration policy that explicitly states that even if the employer commences a green card sponsorship for the employee, commencing the process is not a guarantee that the employer will continue the process to completion. Many employers also enter into a signed permanent residence sponsorship agreement with the employee in which the same caveats and limitations are stated. The best practice for employers that regularly sponsor employees for permanent residence is to have both (a) an immigration policy; and (b) a letter agreement with the sponsored employee, in which the employer's right to stop the process is explicitly stated.

Unless it signed a contract guaranteeing that it would take all steps for completion of the green card process to a final decision by the government (which is extremely rare), an employer always has the right to stop the process and withdraw its application on the employee's behalf, whether or not the employer has an immigration policy and/or a signed green card sponsorship agreement with the employee.

Q. *We would like to cancel our green card sponsorship of our employee, but our PERM application is still pending with DOL. What should we do?*

A. PERM-based green card sponsorship is prospective in nature – the employer must intend to offer the sponsored employee the position that is the subject of the PERM application upon the finalization of the foreign national's green card process. If you are sure that you won't have a future position for the sponsored employee, then you may withdraw the pending PERM application, but you must notify DOL of your request to withdraw. Further, if you choose to withdraw a pending PERM application after receiving an audit letter from

DOL, you must still respond to the PERM audit request. Additionally, if you are undergoing supervised recruitment by DOL and you choose to withdraw the PERM application, DOL could impose supervised recruitment on all future PERM applications. While this is unlikely during the COVID-19 crisis, it is within the authority of DOL.

Q. ***We filed an I-140 Immigrant Petition on behalf of our employee but we are no longer able to offer the employee permanent, full-time future employment. How do we cancel our I-140 sponsorship?***

A. An employer may withdraw a pending or approved I-140 petition if it is no longer able to offer the sponsored employee a permanent, full-time future position.

Q. ***Are we required by law to withdraw our I-140 immigrant petition on behalf of our employee if we know we can no longer offer the employee a future position?***

A. Employers who no longer have a position for the sponsored employee are not required by law to withdraw their I-140 petitions, but withdrawing the petition in writing to USCIS is a clear indication that the employer no longer intends to offer the employee a permanent, full-time future position.

Q. ***Will our withdrawal of our I-140 petition harm our employee's immigration status or options in the future?***

A. As long as withdrawal of the I-140 occurs 6 months after approval, it can still be used by the employee for purposes of transferring the earlier priority date to a later green card application; and can also be used for extensions of H-1B status beyond the 6-year maximum.

Q. ***We would like to recoup the legal fees and expenses that we have incurred in connection with our green card sponsorship. What fees and costs may we recover from our employee?***

A. It is unlawful for employers to recover any PERM-related fees or costs from the sponsored employee. This includes all fees and costs connected with the PERM application and any audit or appeal. It is prudent to consult employment and immigration counsel regarding potential recovery of any other employment-based green card fees or costs (such as I-140, I-485, or immigrant visa processing fees and costs), as each sponsorship must be evaluated on a case-by-case basis.

Q. ***We are still willing to sponsor our employee for a temporary work visa, but we would like to pass the costs of the temporary work visa sponsorship onto our employee. Is this permissible?***

A. The answer will depend on the type of temporary work visa you are sponsoring for your employee.

H-1B/H-1B1/E-3 Visa Sponsorship: These three temporary work visas are supported by a Labor Condition Application (LCA) filed with the Department of Labor (DOL) in which the employer has attested to the wages and working conditions of the employment. The DOL regulations strictly regulate the required wages that employers must pay holders of these visas. With one extremely limited exception, the DOL takes the position that the legal fees and filing fees associated with the sponsorship of these visas is the employer's business expense which may never be passed on to or recouped from the H-1B/H-1B1 or E-3 worker. Thus the employer may not pass the legal fees or costs onto the employee at any time in the process.

Q. ***We incurred considerable costs in sponsoring our employee for an H-1B visa, with the expectation that he/she would work for us for three years. Our H-1B employee has given notice. Under this circumstance may we recover/recoup the immigration fees and costs associated with our sponsorship?***

A. The Immigration and Nationality Act ("INA") prohibits H-1B employers from requiring an H-1B worker to pay a penalty for ceasing employment with the employer before an agreed-upon date, whether through payroll deduction or otherwise. It is also a violation, subject to a civil fine, for an employer to receive reimbursement by the H-1B worker for the petition filing fee(s). However an employer is permitted to require an H-1B worker to pay the supplemental Premium Processing filing fee (as this additional fee is not part of the core visa petition filing fee).

Q. ***What about liquidated damages? May we recover liquidated damages from our H-1B employee?***

A. An employer is only permitted to recover *bona fide* liquidated damages from an H-1B employee who ceases employment with the employer prior to an agreed dated if it is determined that the liquidated damages are lawful and are not imposed as a "penalty." In absolutely no circumstances may the liquidated damages deduction from an H-1B worker's salary cause the wages paid by the employer to the H-1B worker to fall below the "required" wage.

In the majority of DOL H-1B enforcement actions where the employer has required the H-1B worker to repay or reimburse H-1B-related fees/costs, the DOL has ruled in favor of the H-1B worker and against the H-1B employer, and the most conservative practice is to avoid seeking reimbursement or withholding payments from an H-1B worker. There are only a few cases that have upheld the H-1B employer's liquidated damages clause or upheld the deduction of H-1B-related fees/costs from the employee's last paycheck. There are also employment law restrictions in most states regarding withholding money from a paycheck.

If an employer wishes to pursue liquidated damages against an H-1B worker it should exercise great caution in doing so, and only upon advice of employment and immigration counsel, as the distinction between the permissible liquidated damages and the impermissible penalty is made on a case-by-case basis in accordance with the applicable state law.

Q. ***We understand we are very limited in our ability to recover legal fees or costs from H-1B, H-1B1, or E-3 workers as those visas are regulated both by the DOL and by USCIS. But may we recover legal fees/filing fees from employees we have sponsored for other types of temporary work visas?***

A. While USCIS regulations are silent on recovery of legal and filing fees from foreign nationals holding F-1, E-2, L-1, O-1, or TN visa status, any decision to seek reimbursement from or withhold payment from an employee in one of these visa statuses must be made in consultation with both employment and immigration counsel. The answer will vary on a case-by-case basis, as each case must be examined on its specific facts, taking into consideration the employer's immigration policy and practice, any agreements entered into between the employer and the sponsored foreign national, and state and federal employment law.

VI. RETURNING TO NORMAL

All are hopeful that things can return to a more normal work pattern in the near future. As salaries return to pre-COVID-19 levels, employers should treat foreign workers on visas in a fashion that is commensurate with how the employer is treating its U.S. workers. Re-hires of termed employees is also possible either through H-1B portability or taking advantage of the 60-day grace periods discussed above. If green card processes were started, they can be resumed. We look forward to adding a discussion of post-COVID-19 FAQs with more detail in the near future!