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FAQ ON CHANGES IN SALARY AND OTHER WORKING CONDITIONS FOR H-1B WORKERS DURING THE COVID-19 CRISIS

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The novel coronavirus (SARS-CoV-2), which causes the disease COVID-19, is a pandemic threatening populations in the United States and worldwide. The US economy has virtually shut down. Many employers who have been forced to shut down or modify their businesses have been severely impacted and may no longer be able to afford to pay H-1B workers the required wage. Based on my recent observations, many employers fortunately still view H-1B workers as a vital resource and do not wish to terminate their H-1B workers. They, however, do want to know whether they can temporarily reduce wages or temporarily suspend employment or put them on furlough. Likewise, H-1B workers fearful of termination also have questions about grace periods and unemployment benefits.

Although none of us have seen a pandemic as fast moving and horrific as COVID-19 in our lifetimes, we have experienced the rigidity of DOL rules governing H-1B workers in other disasters such as 9/11, the Great Recession of 2008 and Hurricane Sandy. For instance, an employer is not permitted to bench an H-1B worker for a temporary period due to economic hardships without risking liability for back wages and other draconian sanctions. Correspondingly, the H-1B worker could also be in danger of falling out of status if no longer employed. In prior disasters, the inflexibility of the DOL rules governing the wages and other working conditions of H-1B workers came into sharp focus and caused great hardship to employers and the H-1B workers. These rules have not changed, and the same inflexible rules unfortunately equally apply with equal force today during the COVID-19 crisis, which appears to be far worse than other recent disasters.

Below are frequently asked questions (FAQ), which I will endeavor to answer. Since there are plenty of grey areas with no definitive answers, my interpretations of these rules are based on my experience in advising employers and H-1B workers during past disasters and presently during the COVID-19 crisis. I also refer readers to two excellent AILA practice advisories on this topic, here and here. It is hoped that the DOL and USCIS will provide more flexibility and compassion given that the COVID-19 crisis is worsening. But until that happens, here are my responses.

1. Must I Pay H-1B Workers Even if I Want to Temporarily Suspend Employment During the COVID-19 Crisis?

An employer can incur liability if an H-1B worker is in nonproductive status. According to 20 CFR 655.731(c)(7)(i), if the H-1B worker is in nonproductive status due to a decision of the employer, such as lack of work or lack of a permit or license, the employer must still pay the H-1B worker the required wage. Thus, if the employer decides to temporarily suspend employment, bench or furlough the employee, the required wage must still be paid notwithstanding the sudden economic downturn caused by the COVID-19 pandemic. Failure to pay the required wage can result in fines, back wage obligations, and in some serious cases debarment from the DOL's temporary and permanent immigration programs for a period of time. Pursuant to 20 CFR 655.810(d), DOL can also notify USCIS to no longer approve immigrant and non-immigrant petitions filed by the employer.

2. What if the H-1B worker voluntarily requests leave?

Under 20 CFR 655.731(c)(7)(ii), an employer is not required to pay the required wage to an employee in non-productive status, when the employee is non-productive at the employee's voluntary request and convenience, such as taking an extended holiday or caring for ill relative, or because they are unable to work, as a result of maternity leave or automobile accident which temporarily incapacitates the H-1B worker due to a reason which is not directly work related and required by the employer. 20 CFR 655.731(c)(7)(ii) nevertheless requires the employer to pay the required wage if the employee's non-productive period was subject to payment under the employer's benefit plan or other statutes such as the Family and Medical Leave Act (29 U.S.C. 2601 et seq.) or the Americans with Disabilities Act (42 U.S.C. 12101 et seq.).

While leave based on a COVID-19 illness or related need to quarantine will also

be considered a leave upon the behest of the employee, employers will most likely need to treat H-1B workers in the same way as they would with other employees under their COVID-19 leave policies, and will also be subject to the CARES Act that guarantees extended paid leave to all employees relating to COVID-19 illness or quarantine.

So long as the H-1B worker is employed, being on leave, paid or unpaid, will not undermine their ability to maintain H-1B status.

The DOL will carefully investigate whether the employee's request for leave is genuine. The leave should not be forced upon the employee as a pretext for the employer's inability to pay the required wage due to lack of work. Such contrived leave would be viewed as a decision by the employer to place the worker in unproductive status, thus rendering the employer liable for sanctions.

3. Can the employer temporarily reduce the wage?

The required wage should be the higher of the actual or prevailing wage, which is determined at the time of filing the Labor Condition Application (LCA). The actual wage is the wage paid to similarly situated workers in the employer's organization within the area of intended employment. The prevailing wage is the wage rate for the occupational classification in the area of employment, which is generally based on a wage survey of a cross section of employers.

What if the employer wishes to drop the required wage below what was indicated in the LCA and the I-129 petition for H-1B classification? This supposes that the required wage is still at or above the prevailing wage, although the actual wage paid to similarly situated workers has dropped. Since the employer represented on the forms that it would pay a specific required wage, it may not be prudent to reduce the wage even if it is still meets the definition of the required wage. Under these circumstances, the safest course of action is to file an amendment to the H-1B petition.

Another argument that can be made against amending the H-1B petition when there is a reduction in the required wage from what was stated on the forms is that when the required wage increases during the validity period of the H-1B, an employer is not required to file an amendment to the H-1B petition and so the same argument can be made against an amendment when there is a reduction in the wage, so long as it still is the required wage. This argument

would have greater force if the H-1B worker's salary went up after the LCA was filed and it is now being reduced to the wage that was stated on the LCA and Form I-129.

4. Can the employer convert the employment of the H-1B worker from full time to part time employment?

Yes, although the employer will be required to file an amended H-1B petition. Converting the employment from full time to part-time employment would be considered a material change as the employer must obtain a new LCA reflecting the part time wage and employment, and thus file an amendment to the H-1B petition under USCIS guidance based on *Matter of Simeio Solutions*. The H-1B worker can commence with the part-time employment upon the filing of the amended H-1B petition.

5. Can the employer reduce the wage during the COVID-19 period, but still guarantee a bonus to the H-1B worker later on to make up the deficit?

If the employer lowers the salaries for H-1B employees below the required wage, according to 20 CFR 655.731(c)(2)(v), an employer can give a guaranteed bonus in the future that may be credited toward satisfaction of the required wage obligation. The bonus cannot be conditional or contingent on some event such as the employer's annual profits. While I would never advise this in normal times, I believe in these unusually hard COVID-19 times, this may be defensible but one cannot tell for sure how DOL will view it if there is an investigation. Once the bonus is paid, it must be paid as a salary and reported as earnings with appropriate taxes and FICA contributions withheld and paid.

6. May the employer reduce the required wage and instead offer the equivalent value of the deficit in stock options?

No. The employer is required to guarantee the required wage, and this must be paid in the form of wages reported to the Internal Revenue Service (IRS) as the employee's earnings, with appropriate withholding for the employee's tax paid to the IRS and as required under the Federal Insurance Contributions Act (FICA). A stock option would not guarantee the required wage as the value of a stock option can go up or down. A stock option also does not comply with the requirement that the compensation must be paid as a wage that is reported to the IRS, and appropriate tax and FICA contributions be withheld.

7. Does the employer's obligations to pay the H-1B worker end when the H-1B worker's employment is terminated?

The H-1B worker need not get paid if there has been a *bona fide* termination of the employment relationship. DHS regulations require the employer to notify the DHS that the employment relationship has been terminated so that the petition is canceled (8 CFR 214.2(h)(11)), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 CFR 214.2(h)(4)(iii)(E)). If the employer does not notify the USCIS about the termination and provide the employee with payment for the return transportation home, the DOL will not consider it as a bona fide termination and may still hold the employer liable for back wages. However, note that in *Vinayagam v. Cronous Solutions, Inc*., ARB Case No. 15-045, ALJ Case No. 2013-LCA-029 (ARB Feb. 14, 2017) the Administrative Review Board held that an employer's failure to pay return transportation costs home of a terminated H-1B employee was not fatal when the worker did not return to her home country on her own volition.

For further details on effectuating a bona fide termination and the exceptions to meeting all the requirements, see "Employer Not Always Obligated to Pay Return Transportation Costs of Terminated Worker", http://blog.cyrusmehta.com/2017/03/employer-not-always-obligated-to-pay-return-transportation-cost-of-terminated-h-1b-worker.html

8. Is the H-1B worker entitled to a grace period upon termination of employment?

8 CFR 214.1(l)(2) allows E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1or TN nonimmigrant workers a grace period of 60 days based upon a cessation of their employment. The 60-day grace period is indeed a salutary feature and was not around during prior disaster episodes. Up until January 17, 2017, whenever workers in nonimmigrant status got terminated, they were immediately considered to be in violation of status. There was also no grace period to depart the United States. Therefore, if a worker got terminated on a Friday, and did not depart on the same day, but only booked the flight home on Sunday, this individual would need to disclose on a future visa application, for all times, that s/he had violated status. Derivative family members, whose fortunes were attached to the principal's, would also be rendered out of status upon the principal falling out status. Thus, the 60-day grace period not only gives the worker more time to

leave the United States, but it also provides a window of opportunity to transition to another employer who can file an extension or change of status within the 60-day period. Similarly, the worker could also potentially change to some other status on his or her own, such as to F-1, after enrolling in a school. Prior to January 17, 2017, nonimmigrant workers who fell out of status upon cessation of their employment, and sought a late extension or change of status had to invoke the USCIS's favorable discretion pursuant to 8 CFR 214 .1(c)(4) and 8 CFR 248(b)(1)-(2) by demonstrating, among other things, extraordinary circumstances.

When an H-1B worker is terminated, it is a common practice for a highly compensated employee to first be put in inactive status, known as "garden leave" but still considered as an employee and paid the full salary. The final termination date occurs at a later point. Although one needs to view these scenarios on a case by case basis, a good argument can be made that the 60 day grace period starts running from the final termination date and not from the date when the H-1B worker was placed on garden leave.

For further details on the 60 day grace period, see "Analysis of the 60 Day Grace Period for Nonimmigrant Workers", http://blog.cyrusmehta.com/2017/07/analysis-of-the-60-day-grace-period-for-nonimmigrant-workers.html

9. Can the employer rehire the H-1B employee within 60 days of the termination?

If the H-1B worker is still within the validity period under H-1B classification, then arguably this worker can resume employment with the same employer. The worker never lost status during that 60-day grace period, and if joining the same employer, may not need to file an extension with the same employer. This is also a situation where the worker would most likely not be able to get a second 60-day grace period within the validity period of the same petition or admission. Legacy INS has indicated that when an H-1B worker returns to the former employer after a new extension of status has been filed through the new employer, the first company need not file a new H-1B petition upon the H-1B worker's return as the first petition remains valid. See Letter, LaFluer, Chief, Business and Trade Branch, Benefits Division, INS, HQ 70/6.2.8 (Apr. 29, 1996); Letter, Hernandez, Director, Business and Trade Services, INS (April. 24, 2002).

Note, however, that if the employer laid off the H-1B worker, and did not notify USCIS regarding the termination, the employer could still potentially be liable for back wages under its obligation to pay the required wage under the Labor Condition Application for failing to effectuate a bona fide termination. See *Amtel Group of Fla., Inc. v. Yongmahapakorn, ARB No. 04-087,* ALJ No. 2004-LCA-0006 (ARB Sept. 29, 2006). Therefore, if the employer notified the USCIS, which resulted in the withdrawal of the H-1B petition, the same employer would need to file a new H-1B petition within the 60-day grace period.

10. Since most H-1B workers are required to work from home, what rules govern and what actions does the employer need to take?

Employers who have instructed their employees to work from home must ensure they still comply with Department of Labor rules about the geographic scope of positions; for example, as specified for H-1B (specialty occupation) employees on the labor condition application.

If an employee works from a home which is within commuting distance of the workplace, then there is no need to file an amendment. However, a copy of the original posting should be posted again in two places in the employee's home, although it does not make sense to do so since the posting cannot be seen by other employees. Until the DOL provides clarification, following this procedure would be in compliance. Alternatively, the employer may provide electronic notification to affected workers in the area of intended employment.

If an employee works from a home which is NOT within commuting distance from the workplace, the employer should obtain a new LCA for that location and file an H-1B amendment. Since there is a 30 working day short term placement exception (per year), the employer can file the amendment within 30 working days of the move to a home location that is not within commuting distance.

On how to effectuate a compliant electronic notification, see the "Nuts and Bolts of Complying with the H-1B Notice Requirements", http://blog.cyrusmehta.com/2019/03/the-nuts-and-bolts-of-complying-with-the-h-1b-notice-requirements.html . An employer can post notice on its own website or on a web portal of an LCA hosting service, but must still inform affected workers of the existence of this web posting through notification via e mail, the company intranet, through Slack channels or by providing hard copy notification of the existence of the notice on the website.

Although notice must be provided before the H-1B worker begins work at the new location, the DOL has allowed to a 30 day extended period to provide such notice. For further details see # 4 of DOL's recently issued COVID-19 guidance at https://www.foreignlaborcert.doleta.gov/pdf/DOL-OFLC_COVID-19_FAQs_Round%201_03.20.2020.pdf

11. Do these regulations apply to other workers in nonimmigrant statuses who may be employed?

They would apply to any nonimmigrant visa statuses that require an underlying LCA such as the E-3 for Australians and the H-1B1 for nationals of Singapore and Chile. The same rules governing wages and other working conditions for H-1B workers would apply to workers in E-3 or H-1B1 status.

There is more flexibility with respect to workers in nonimmigrant statuses. For example, if an intracompany transferee's in L-1A or L-1B status is reduced, it may not have an adverse impact so long as the L-1 worker is still working under the appropriate L-1 classification as an executive or manager, or as a specialized knowledge employee.

However, if there is cessation of employment, other nonimmigrant workers will fall out of status after the 60 day grace period.

12. Can Terminated H-1B Workers Claim Unemployment Benefits?

Although one must look at state rules, generally speaking, H-1B visa holders cannot claim unemployment benefits because they will not be able to work in the future due to the loss of their status as a result of the loss of the job. The legal status of an H-1B workers is based on employment, and once the H-1B worker is terminated, they are not able to work in the future due to lack of that status.

On the other hand, unemployment benefits may work for an H-4 spouse with an EAD if the H-1B spouse is in status. The H-4 spouse's ability to work in the future is linked to the H-1B status of the spouse, and if the H-4 spouse is terminated, s/he can work in the future if the H-1B spouse continues to maintain that H-1B status. Of course, one has to look at the state rules concerning unemployment insurance regarding how long one will be able to

work in the future in order to be eligible to make such a claim.

If an H-4 spouses can claim unemployment benefits, they will likely not be impacted by the new public charge definition as unemployment is not a public benefit. One has earned the unemployment insurance by contributing to it while employed.

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