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THE IMMIGRATION ATTORNEYS

# Navigating Employment Changes for Foreign Employees During COVID-19

## A Quick Reference Guide for HR Professionals

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In addition to its significant public health impacts, the **Coronavirus (COVID-19) pandemic** has caused an unprecedented level of disruption in the workplace.

- As employers take all necessary measures to keep their employees safe, **remote work** has become the norm.
- Essential employers are often required to **move critical employees between locations on short notice** to meet urgent demands.
- The economic impact of "shelter in place" orders and mandatory business closures are forcing employers to consider difficult workforce decisions, including **temporary reductions in hours and pay, furloughs and layoffs**.

If you have questions about how these types of COVID-19 employment changes impact your foreign national employees, this guide is for you.

For HR professionals who support foreign national employees, employment changes resulting from COVID-19 can raise tricky **immigration compliance issues** for your company, and confusing **immigration status issues** for your employees on work visas.

Since we know you're dealing with an overflowing plate of COVID-19 issues right now, we created this guide to help you navigate these challenging immigration issues successfully.

# Changes in Worksite Location

Employers are permitted to move foreign national employees to different worksite locations, including remote work from home. However, **employers may be required to notify USCIS and/or take other steps to remain compliant.**

## H-1B Employees

***Scenario 1:*** *What are an employer's obligations when moving an H-1B employee to a new worksite location that is* ***within*** *the same Metropolitan Statistical Area (MSA) listed in the LCA?*

- The employer **must** physically or electronically post a copy of the LCA at the new worksite location on or before the date of the location change (***Note:*** *Due to COVID-19, DOL is temporarily allowing employers to post within 30 days of the location change*)
- The employer **does not** need to file a new LCA or H-1B amendment petition

***Scenario 2:*** *What are an employer's obligations when moving an H-1B employee to a new worksite location that is* ***outside*** *the same Metropolitan Statistical Area (MSA) listed in the LCA?*

- If the move is for 30-60 days or less, and all DOL short-term placement requirements are met:
  - The employer **must** post a copy of the LCA at the new worksite location
  - The employer **does not** need to file a new LCA or H-1B amendment petition
- If the DOL short-term placement rules do not apply:
  - The employer **must** file a new LCA
  - The employer **must** file H-1B amendment petition

### What is an LCA?

*A Labor Condition Application (LCA) must be filed in support of work visa requests for* ***H-1B*** *or* ***E-3*** *employees.*

*When filing an LCA, employers must make specific attestations about the pay and working conditions of the employee. Employers must also publicly post LCAs* ***either physically or electronically.***

### The DOL Short-Term Placement Rules:

*Employers can make short-term placements of H-1B workers,* ***without filing a new LCA****, only if:*

- *No strike/lockout at the short-term location*
- *No LCA already on file for the location; and*
- *Placement is less than 30 days (additional 30 days allowed if employee keeps ties to home worksite and spends substantial amount of time there)*

# Changes in Worksite Location

## E-3 Employees

***Scenario 1:*** *What are an employer's obligations when moving an E-3 employee to a new worksite location that is* ***within*** *the same Metropolitan Statistical Area (MSA) listed in the LCA?*

- The employer **must** physically or electronically post a copy of the LCA at the new worksite location on or before the date of the location change (**Note:** Due to COVID-19, DOL is temporarily allowing employers to post within 30 days of the location change)
- The employer **does not** need to file a new LCA or E-3 amendment petition

***Scenario 2:*** *What are an employer's obligations when moving an E-3 employee to a new worksite location that is* ***outside*** *the same Metropolitan Statistical Area (MSA) listed in the LCA?*

- The employer **must** file a new LCA
- The employer **must** file E-3 amendment petition

## E-1, E-2, L-1, O-1 & TN Employees

For employees in E-1, E-2, L-1, O-1 or TN status, a change in worksite location (including remote work from home) is typically **not considered** a material change in the terms and conditions of employment. Thus, employers are typically **not required** to file an amended petition with USCIS in most situations.

## F-1/OPT Employees

Employers should instruct F-1 students working in Optional Practical Training (OPT) to notify their Designated School Official (DSO) of any changes in the worksite location listed on their Form I-20. The DSO is responsible for determining if any changes must be made to the student's SEVIS record. **Employers should also modify the F-1/OPT employee's Form I-983 Training Plan, as necessary.**

### Common Work Visa Categories:

- **E-1:** Treaty Trader
- **E-2:** Treaty Investor
- **E-3:** Australian Professional
- **F-1:** Student
- **H-1B:** Specialty Occupation
- **L-1:** Intracompany Transfer
- **O-1:** Extraordinary Ability
- **TN:** NAFTA Professional

# Reduction in Pay

In response to the economic impacts of COVID-19, employers may seek to implement a temporary pay reduction for its foreign national employees.

Depending on the foreign national employee's immigration status, **the employer may be required to notify USCIS of the pay reduction**, even if temporary.

## H-1B and E-3 Employees

Employers of H-1B and E-3 employees must comply with the LCA rules, which require the employer to pay the employee a wage that is at or above the "required wage" for the occupation.

- If an employer reduces an employee's pay below the wage listed in their H-1B or E-3 petition, but the wage is still above the prevailing wage listed in the LCA, then DOL has provided informal guidance that suggests that **a new LCA does not need to be filed** in this situation.

- If an employer reduces an employee's pay below the prevailing wage listed in the LCA, then the employer **must file a new LCA and an amendment petition**.

## E-1, E-2, L-1, O-1 & TN Employees

There are no specific prevailing wage requirements that apply to employees in E-1, E-2, L-1, O-1 or TN status. Thus, salary reductions for these employees, unless they are substantial and/or permanent, typically do not require the employer to file an amended petition to notify USCIS of the change in pay.

## F-1/OPT Employees

There are also no specific prevailing wage requirements that apply to employees in F-1/OPT status. However, employers should instruct F-1/OPT employees to notify their DSO of any changes in their rate of pay.

### How is the "required wage" determined for LCA purposes?

*Under the LCA regulations, an **H-1B** or **E-3** employee must be paid a wage rate that is **equal to or above** the prevailing wage, or the actual wage, which ever is higher.*

***Prevailing Wage:** The prevailing pay rate for the occupation in the area of intended employment, as determined by a wage survey acceptable to DOL.*

***Actual Wage:** The actual wage rate paid by the employer to all other individuals employed in the same position.*

# Reduction in Hours

Employers may also seek to implement a reduced work schedule for its employees in response to the economic impacts of COVID-19. US immigration laws do allow foreign national employees to work part-time.

However, depending on the employee's immigration status, **the employer may be required to notify USCIS of a reduction in work hour**s, even if temporary.

## H-1B and E-3 Employees

When moving an H-1B or E-3 employee from a full-time to a part-time schedule, the employer **must file a new LCA and H-1B or E-3 amendment petition to notify USCIS of the change,** since USCIS considers this a material change in the terms and conditions of employment.

## E-1, E-2, L-1 & O-1 Employees

When moving an E-1, E-2, L-1 or O-1 employee from a full-time to a part-time schedule, **the employer must file an amendment petition to notify USCIS of the change**, since USCIS considers this a material change in the terms and conditions of employment.

## TN Employees

The TN visa regulations do not specifically address whether a new, or amended, TN petition must be filed when the work hours of a TN employee are reduced. As long as the TN employee continues performing the same duties, **an argument can be made that no new, or amended, TN petition is required.**

## F-1/OPT Employees

Employers should instruct F-1/OPT employees to notify their DSO of any changes in the work hours listed on their Form I-20. **Employers should also modify the F-1/OPT student's Form I-983 Training Plan, as necessary.**

### How is the "required wage" determined for LCA purposes?

*Under the LCA regulations, an **H-1B** or **E-3** employee must be paid a wage rate that is **equal to or above** the prevailing wage, or the actual wage, which ever is higher.*

***Prevailing Wage:** The prevailing pay rate for the occupation in the area of intended employment, as determined by a wage survey acceptable to DOL.*

***Actual Wage:** The actual wage rate paid by the employer to all other individuals employed in the same position.*

# Furloughs & Unpaid Leave

US immigration laws limit an employer's ability to furlough a foreign national employee without pay, even though an employer may be permitted to furlough its US workers.

## H-1B and E-3 Employees

Employers of H-1B and E-3 employees must comply with the LCA rules, which require the employer to pay the employee a wage that is at or above the "required wage" for the occupation, for as long as they remain employed by the employer. As a result:

- An employer **cannot place an H-1B or E-3 employee on a mandatory furlough or unpaid leave** without violating their LCA obligations.
- If an employer is unable to pay an H-1B or E-3 employee during a furlough period, **the employer must terminate the employee**.
- Unless prohibited by state law, employers may require furloughed H-1B or E-3 workers to exhaust accrued paid time off during a furlough.
- The only time an employer is not required to continue paying an H-1B or E-3 employee, without terminating them, is when the employee requests unpaid leave voluntarily for genuine personal reasons.

## E-1, E-2, L-1, O-1 & TN Employees

USCIS will only consider an employee to be maintaining lawful immigration status with their sponsoring employer if they remain actively employed.

In the case of a short furlough, with a clear expectation that the employee will return to work, there may be an argument that the employee remains in lawful status. However, USCIS may interpret this to be the equivalent of a termination of the employment relationship.

### What's the difference between a furlough and a layoff?

***Furlough:*** *A furlough generally refers to an employer's decision to move an employee into a non-productive, unpaid status with an expectation that the employee will be fully reinstated after a temporary period of time.*

*Typically, an employee receives no compensation while on furlough, but may retain certain employee benefits such as health insurance.*

***Layoff:*** *A layoff generally refers to an employer's decision to permanently end its employment relationship with an employee, with no clear expectation of rehiring the employee.*

*Typically, an employee who is laid off is officially terminated and does not receive any pay or benefits after termination (except for possible severance pay and COBRA health insurance benefits).*

# Layoffs

Employers considering layoffs because of the economic impacts of COVID-19 must comply with specific legal obligations when laying off foreign national employees. Employers should also recognize that layoffs have unique immigration status implications for foreign national employees.

## H-1B Employees

Key points to consider when laying off an H-1B employee:

- The employer **must withdraw the LCA and H-1B petition** to properly notify DOL and USCIS of the termination.
- The employer **must offer to pay the H-1B employee's reasonable costs of return transportation** to their home country.
- If an employer fails to withdraw the LCA and H-1B petition, or fails to offer return transportation costs, DOL may determine that a "bona fide termination" did not occur.

## E-3 Employees

Key points to consider when laying off an E-3 employee:

- The employer **must withdraw the LCA and notify USCIS of the termination**.
- Failure to withdraw the LCA or notify USCIS could result in DOL determining that a "bona fide termination" did not occur.
- The employer is **not required** to offer to pay the E-3 employee's reasonable costs of return transportation to their home country.

### What happens if an employer does not make a "bona fide termination?"

*DOL takes the position that an employer is obligated to pay the LCA required wage to its H-1B or E-3 employee up until a "bona fide" termination takes place.*

***A "bona fide termination" requires the employer to:***

- *Notify USCIS of the termination (typically by withdrawing the employer's sponsorship petition);*
- *Withdraw the LCA; and*
- *Offer to pay the employee's return transportation costs (this requirement applies to H-1B employees only)*

***IMPORTANT:** If there is no "bona fide termination," **DOL may find the employer liable for back wages** through the date on which the employee's H-1B or E-3 approval expires.*

# Layoffs

## O-1 Employees

Key points to consider when laying off an O-1 employee:

- The employer is **not affirmatively obligated by law to notify USCIS of the termination** by withdrawing the O-1 sponsorship petition. However, an employer may still choose to notify USCIS.
- The employer **must offer to pay the O-1 employee's reasonable costs of return transportation** to their home country.

## E-1, E-2, L-1 & TN Employees

Key points to consider when laying off an employee in E-1, E-2, L-1 or TN status:

- The employer is **not affirmatively obligated by law to notify USCIS of the termination** by withdrawing their sponsorship petition. However, an employer may still choose to notify USCIS.
- The employer is **not required** to offer to pay the employee's reasonable costs of return transportation to their home country.

## F-1/OPT Employees

Key points to consider when laying off an F-1/OPT employee:

- An employer should instruct the F-1/OPT employee to notify their DSO of the employment termination.
- An employer is **not required** to offer to pay the F-1/OPT employee's reasonable costs of return transportation to their home country.

### Understanding the Return Transportation Requirement:

- *When terminating **H-1B** and **O-1** employees, employers are required to offer to pay the "reasonable costs" of return transportation to the employee's home country.*
- *Employers are not required to pay travel costs for family.*
- *Also not required to pay travel costs for employees who remain in the US.*
- *USCIS authority to enforce this obligation is unclear.*
- *DOL considers compliance with this obligation required for a "bona fide termination."*

### Best Practice Tip:

*To comply with this obligation, we recommend employers provide H-1B and O-1 employees with a written offer to pay return travel costs upon termination.*

*The offer should include a reasonable deadline to accept (such as 60 days from date of termination).*

# Layoffs

## Post-Layoff Grace Period

New immigration regulations issued in January 2017 provide foreign national employees in E-1, E-2, E-3, H-1B, L-1, O-1 or TN status with a 60-day immigration status grace period following a layoff.

- This grace period allows the employee to remain in the US lawfully (but not work) **for up to 60 days following the date their employment is terminated** (or until their current I-94 expiration date, if earlier) to try to obtain new employment.
- If the employee finds new employment before the end of the 60-day grace period, they are eligible to have a change of employer petition filed on their behalf.
- **An employer may also re-hire a previously laid off employee within the 60-day grace period.** However, the employer would be required to file a new petition with USCIS.

## Unemployment Benefits for Foreign National Employees

Generally speaking, a foreign national employee who has been laid off is not prevented from applying for unemployment benefits. However, whether or not the employee will be granted unemployment benefits will depend on specific rules of the state in which they live.

Most states require that individuals applying for unemployment benefits must have no barriers to accepting new employment. Since foreign nationals require employer sponsorship to gain work authorization, some states have determined this means they are not readily available to accept new employment, and thus they are ineligible for unemployment benefits.

MORE **QUESTIONS?**

## We're here to help you!

To help employers navigate their immigration challenges during the pandemic, Ellis Porter has launched the **COVID-19 Immigration Support Center for HR Professionals.**

**VISIT:**

ellisporter.com/covid19/hr

- **Free immigration guidance and helpful resources**
- **Free immigration attorney consultations for HR professionals**