Q&A: Immigration Concerns for Businesses and Foreign Nationals During the COVID-19 Crisis

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We have been receiving multiple inquiries about the new CARES Act, and how it and other legislation and government policies related to the COVID-19 crisis impact both foreign nationals and those employing foreign nationals. Here is a Q&A responding to some of the main issues we've come across in the last several weeks:

Q: I employ foreign nationals with valid work authorization. I'm trying to calculate payroll costs for my application for relief under the CARES Act, but it says that my business should only be counting compensation of employees "whose principal place of residence is in the United States." Can I (or should I) count compensation paid to my foreign national nonimmigrant workers who are currently residing in the U.S.?

This is a difficult question without a clear-cut answer, as there is no definition of who counts as someone whose principal place of residence is the U.S. As there is no such concept defined in the Small Business Act, we believe that this could reasonably be interpreted as the IRS definition of "principal place of residence." This means one of two things:

- If your worker holds a Green Card, his or her principal place of residence is considered the U.S. and the worker's compensation should be counted toward payroll costs.
- If your foreign national worker has, in the last three years (including the current year), been in the U.S. for 183 days, counting: (1) All days he/she was present in the current year; (2) 1/3 of the days he/she was present in the year before the current year; and (3) 1/6 of the days he/she was present in the year two years before the current year, then he or she will likely qualify as having his or her "principal place of residence" in the U.S., and the worker's compensation can reasonably be counted toward payroll costs.

Employers may want to also speak with their qualified tax or accounting professional about whether to account for compensation of foreign national workers in terms of information provided for the CARES Act's Payroll Tax Credit. The language in the section of the Act regarding the payroll tax credit appears to include all employees. The Act specifically indicates that in terms of wages taken into account for the Payroll Tax Credit, "The total qualified wages with respect to any employee may be taken into account." Please speak with your qualified CPA or other accounting professional regarding what compensation to take into account for the Payroll Tax Credit.

Q: Can an employer furlough, bench, or otherwise render an H-1B or E-3 employee non-productive and stop offering the required wage if the employee is not able to work from home during a COVID-19 pandemic initiated shelter-in-place order from federal, state, or municipal government authorities?

No, this is not permissible given that the conditions are not created by the employee. In this situation, an employer must continue to offer the required wage. Otherwise, an employer could be exposed to liability including fines, back wage obligations, and in serious cases debarment from the U.S. Department of Labor's (DOL's) temporary and permanent immigration programs for a period of time. Per 20 CFR 655.810(d), debarment prohibits U.S. Citizenship and Immigration Services (USCIS) from approving immigrant and nonimmigrant petitions filed by the employer.

If an employer wishes to terminate a worker in H-1B or E-3 status, they must notify the government (USCIS) of the termination, or they remain obligated to pay the offered wage throughout the term of approval or until such time as they notify the government—whichever comes first. Employers terminating workers in H-1B status must offer the employee the costs of reasonable transportation (generally a one-way, non-refundable coach class airfare ticket) to return the employee to his or her home country or last known foreign residence. In cases where the H-1B employee elects to remain in the U.S. and refuses the employer's offer of return transportation, the employer should ask the employee to sign a statement confirming that the employer made such an offer.

Q: Can an employer furlough or bench individuals in other nonimmigrant statuses?

F-1 STUDENTS WORK AUTHORIZED ON OPTIONAL PRACTICAL TRAINING: Another grouping of individuals is those in F-1 status working on Optional Practical Training (OPT). F-1 students in Optional Practical Training (OPT) employed based on an Employment Authorization Document (EAD) must report any material changes to their Designated School Official (DSO). Normally, they must work at least 20 hours per week to be considered employed. *However, for the duration of the COVID-19 emergency, students working in their OPT opportunities for fewer than 20 hours a week are considered to be "engaged in OPT."* They continue to be granted an allowance of either 90 or 150 days of unemployment (depending on if they are in the initial 12 month OPT period or an additional 24 month STEM OPT period), but if they go over that amount that will invalidate their F-1 status and OPT. They are allowed to remain in the U.S. not working as long as they do not go over their total time of unemployment of either 90 or 150 days. Foreign nationals in this situation should confer with their DSO regarding any furlough or other change to their work.

Intracompany transferees (L-1s) and Trade National (TN) workers: These individuals should, arguably, still be considered in status if they are still employed but placed on furlough. They do not have the DOL and LCA considerations like an H-1B or E-3, and they do not have the specific rules of an F-1 on OPT. If an L-1 or TN worker is furloughed but still employed, employers may reasonably take the position that they are still maintaining their status during this temporary, defined period.

Q: If I am laid off because my employer closes or doesn't have enough work for me, can I collect unemployment?

This depends. Generally, if a worker is lawfully present and work authorized in the U.S., he or she may qualify for unemployment benefits. Undocumented non-U.S. workers generally cannot collect benefits. If you're a non-U.S. citizen filing for unemployment benefits, the state organization to which you apply must verify that you are legally authorized to work in the United States, as required by the Immigration Reform and Control Act of 1986. Your legal authorization to work will most frequently be verified through a computer match with USCIS databases, and the information received from USCIS may affect your eligibility for unemployment benefits.

To be eligible for unemployment insurance, foreign national workers must satisfy the same basic requirements as other workers—they must (1) be unemployed through no fault of their own; (2) have enough wages earned or hours

worked in their “base period” to establish a claim, and (3) be able and available to work.

The biggest issue here is for nonimmigrants whose employment is tied to specific employer (as in, they cannot work for any other employer without specifically requesting permission from the U.S. government). Since states generally require that you be able and available to work, but your work authorization is tied to a specific employer, the state may either decide:

- that you are not able and available to work for a different employer, and therefore deny benefits; or
- that so long as you are in status and able to port your visa to a new employer (should that employer choose to file for status for you), you meet the state’s threshold for being “able and available to work.”

In practice, this means that things will very much depend on how your state interprets your being able and available to work, should an employer wish to hire you. While you might be able to apply for unemployment benefits as, for example, an H-1B, L-1, TN, O-1, P-1 or other nonimmigrant worker tied to a specific employer, it’s possible that you might not qualify for lack of meeting the third prong of the eligibility test. It’s critically important that you reach out to your state Department of Labor before filing for unemployment insurance benefits, to determine whether you are permitted to receive benefits under state law.

The question may become quickly moot, though, since you are not permitted to leave the U.S. and collect unemployment insurance benefits—and most nonimmigrant statuses (and more specifically, the ones tied to employment with a specific employer) quickly expire once the individual is no longer employed. Therefore, in order to avoid violating their status and accruing unlawful presence in the U.S., a foreign national worker in this situation may need to leave the U.S. quite soon after they lose their job—at which point, they will not qualify for unemployment benefits. It is highly unlikely that unemployment benefits would be granted in any instance to a foreign national in the U.S. who lacks legal status.

Q: If I collect unemployment insurance, will it limit my ability to qualify for immigration-related benefits in the future because of the recently-enacted Public Charge Rule?

The Public Charge Rule is meant to make clear the factors considered by the Department of Homeland Security (DHS) when determining if a foreign national is likely to become a public charge at any time in the future. If the DHS feels the answer to this is “yes,” the foreign national will be deemed inadmissible and ineligible for admission to the U.S. or adjustment of status to a lawful permanent resident. This rule also applies to nonimmigrants applying for a new visa or nonimmigrant status as well, and nonimmigrants in the U.S. who wish to extend their stay in the same nonimmigrant visa classification or change their status to a different nonimmigrant classification.

The good news is that if you are eligible to collect unemployment insurance as a foreign national, this should not impact you under the Public Charge Rule—at least for benefits sought through the DHS and, specifically, USCIS.

USCIS has confirmed that unemployment insurance and certain other “earned benefits” are not normally taken into consideration for purposes of making a public charge determination. Specifically, DHS stated that it "would not consider federal and state retirement, Social Security retirement benefits, Social Security Disability, post-secondary education, and unemployment benefits as public benefits under the public charge inadmissibility determination, as these are considered to be earned benefits through the person's employment and specific tax deductions." USCIS also indicated in its Policy Manual that unemployment benefits are not considered by the agency in a public charge

inadmissibility determination, since unemployment insurance is considered by USCIS as well to be an "earned" benefit.

The U.S. Department of State has remained silent on the issue of whether it will consider receipt of unemployment benefits in issuing immigrant or nonimmigrant visas at U.S. Embassies and Consulates abroad, but no information currently indicates that they are treating the issue any differently than DHS.

Q: If I need to be tested or treated for COVID-19, or take advantage of preventative care (such as a vaccine, if one becomes available), will this impact my ability to qualify for benefits in the future because of the Public Charge Rule?

No. As stated on USCIS's website (on April 7, 2020), "the Public Charge Rule does not restrict access to testing, screening, or treatment of communicable diseases, including COVID-19. In addition, the rule does not restrict access to vaccines for children or adults to prevent vaccine-preventable diseases…To address the possibility that some aliens impacted by COVID-19 may be hesitant to seek necessary medical treatment or preventive services, USCIS will neither consider testing, treatment, nor preventative care (including vaccines, if a vaccine becomes available) related to COVID-19 as part of a public charge inadmissibility determination, nor as related to the public benefit condition applicable to certain nonimmigrants seeking an extension of stay or change of status, even if such treatment is provided or paid for by one or more public benefits, as defined in the rule (e.g. federally funded Medicaid).

Q: If I am in the U.S. on an employment-related visa or in a status permitting work, and I lose my job or cannot work for other reasons, will I be able to stay in the U.S. and look for work? What if I can't get a flight home, or my home country has closed its borders even to citizens?

Certain statuses permit foreign workers a "grace period" before they are required to leave the U.S. For example, a grace period of up to 10 days is available for individuals in the E-1, E-2, E-3, L-1, and TN nonimmigrant classifications, to provide a reasonable amount of time to depart the United States or take other actions to extend, change, or otherwise maintain lawful status. H-1B workers are also granted a grace period of up to 60 consecutive days during each authorized validity period, when their employment ends before the completion of their authorized validity period, so they may more readily pursue new employment and an extension of their nonimmigrant status in the U.S. Responsibility for understanding the availability and time frame of applicable grace periods falls on the foreign national in the U.S. Employees should reach out to an immigration professional at Lippes Mathias for further information or with questions about how to maintain their status while in the U.S.

The bottom line for travel back to your home country—or any other destination outside the U.S.—is that if you stay in the U.S. once your status has expired or is no longer valid, you are considered out of status, accruing unlawful presence and subject to removal. Even "innocent" violators can be arrested, detained at a federal detention facility and deported from the U.S., if a U.S. Customs and Border Protection or Immigration and Customs Enforcement agent becomes aware that you do not have valid status in the U.S. This has various (and unpleasant) consequences, so should be avoided at all costs. The United States generally takes the stance that you may not be able to return to your home country, but you can't stay here without valid status.

Please check back on this site regularly for ongoing updates related to changes in immigration law and policy, or reach out to one of our seasoned immigration professionals with specific questions regarding your business or personal obligations in light of circumstances created by the COVID-19 pandemic.

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Thank you, Robin Brand, Principal at The Bonadio Group for contributing content regarding the CARES Act's Payroll Tax Credit.

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