

# Immigration Challenges and Compliance in a COVID-19 World

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CLE SEMINAR FOR IN-HOUSE COUNSEL  
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## Introduction

The COVID-19 Pandemic has resulted in many changes to employment practices over the past eighteen plus months. As some employers begin to return to pre-COVID operations, or some semblance of it, it is important for employers to reevaluate immigration related compliance practices to ensure they are in line with all legal requirements.

## Agenda

- LCA and PERM Compliance Issues
- I-9 Compliance Issues
- Consular Operations and Visa Processing Challenges

## LCA Compliance: Requirements

- Before an H-1B, H-1B1, or E-3 petition can be filed, an employer must file a Labor Condition Application (LCA) and obtain certification from the Department of Labor.
- Notification of filing of the LCA must be made to all workers at the work site. Notice may be posted by: (1) hard copy posting in at least two conspicuous locations at each place of employment where the foreign national will be employed for a total of 10 days; or (2) electronic notification via employer intranet or via email.
- The LCA requirement is rooted in ensuring protections for U.S. workers and requires attestations regarding the offered working conditions for the foreign national:
  - Wage-must offer the higher of the actual or the prevailing wage-foreign workers cannot be paid less than US workers nor benched;
  - Location(s) of worksite(s)-all anticipated work sites must be listed on the LCA;
  - Position classification and wage level, see OOH and O-Net;
  - Various attestations relating to U.S. and foreign worker protections.

## LCA Compliance: Requirements, cont'd

- If there are any *material* changes to the employment details listed on the LCA, a new LCA must be obtained, and an amended visa petition must be filed with USCIS to reflect the changes.
- Material changes include:
  - Salary reductions-must review if new wage meets prevailing wage-no benching provisions
  - Substantive changes in the position/occupation (including substantial promotions with salary increases)
  - Increase/decrease in hours worked-e.g. full time to part time
  - Permanent change in work location-some limited applicability of Short Term Placement rule
  - Change in work location that is outside the Metropolitan Statistical Area (MSA) or beyond normal commuting distance
- Where worksite changed but remains within the MSA, or within normal commuting distance, regulations permit posting of LCA in two conspicuous places for ten business days at the new worksite, including a home office location.

## LCA Compliance: During and Post COVID-19

- During COVID-19, social-distancing and closures resulted in remote work for most employers
- Employees working from home within MSA-no amended petition required if LCA posting within 30 days of moving to at home location
- Employees relocating outside MSA
  - Regardless of temporary nature of relocation, a new LCA and amended petition with USCIS are required. Work authorization is not interrupted
- Employees relocating outside U.S.
  - Immigration laws only applicable to those inside the U.S.-no H-1B or LCA requirement, however, must withdraw if employment relationship is terminated
  - H-1B termination requirements-how to effectuate a termination
- LCA posting-evaluate whether electronic postings are preferable
  - Rather than physical posting in two conspicuous places, regulations also allow intranet and e-mail postings
- In considering post-COVID-19 operations and related compliance, creating a comprehensive policy:
  - Will employees work from home on full time basis permanently (i.e., after COVID emergency ends) or on particular days per week? Hybrid model? Telecommuting? Is this a change from what was recorded on the LCA?
  - How will company comply with H-1B regulations if there are furloughs?

## PERM Compliance During and Post COVID-19

- The Labor Certification (PERM) process also requires that employers provide notice of filing (NOF) to its employees by physically posting the NOF for 10 consecutive business days in a conspicuous location at the work location.
- Job offer for PERM is based on the prospective future position offered to the employee when the green card is granted.
- The DOL confirmed the physical posting requirement during COVID-19 and employers must continue to post at the physical work location regardless of in-office operations. How to post when no one is at the work site? DOL confirmed can post on front door and front entry way, even if no workers at the work site.

## **PERM Compliance During and Post COVID-19, cont'd**

- Looking ahead to long-term and post-COVID planning for the PERM process:
  - If the foreign national will be allowed to work remotely from anywhere in the U.S., within reasonable commuting distance, or with a hybrid remote/in-office schedule:
    - Recruitment must clearly indicate the specifics of what is allowed and expected of the candidates;
    - Notice of Filing should be posted in all required locations and similarly indicate all requirements
  - Where an employee holds an approved I-140 that did not reflect a remote work option, an examination must be made to determine if a new PERM/I-140 process is required.

## I-9 Compliance: Requirements

- All U.S. employers must properly complete Form I-9 for each individual they hire for employment in the U.S. to verify their identity and employment authorization
- Employee must present original, acceptable documents evidencing identity and employment authorization
- Employer must physically examine the original employment eligibility and identity documents to determine whether these reasonably appear to be genuine and relate to the employee and record the document information on the Form I-9

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## I-9 Compliance: Flexibilities During COVID-19

- In March 2020, DHS and ICE announced flexibility in complying with I-9 in-person verification requirements, which have now been extended through December 31, 2021
- Employers who are operating remotely may obtain, remotely inspect, and retain copies of the identity and employment eligibility documents for new hires until they undertake non-remote employment on a regular, consistent, or predictable basis, or the extension of the flexibilities related to such requirements is terminated, whichever is earlier
- Requirement to inspect identity and employment eligibility documentation in-person applies only to those employees who physically report to work at a company location on any regular, consistent, or predictable basis

## I-9 Compliance: Post COVID-19/Resumption of Operations

- Once normal operations resume, or the COVID-19 flexibilities are terminated, all employees who were onboarded using remote verification, must report to their employer within three business days for in-person verification of identity and employment eligibility documentation for Form I-9
- Employers should keep the I-9s completed during the flexibility period in a separate file for easy access and updating after the flexibility period ends
  - Also applies to I-9 reverifications
- Employers must stay in touch with their immigration counsel and monitor the DHS and ICE websites for updates

## **I-9 Compliance: Verification for Certain Nonimmigrant Spouses**

- Dependent spouses in certain nonimmigrant categories (H-4, L-2, E-1, E-2, E-3) are eligible for employment authorization
- Historically, an Employment Authorization Document (EAD) is required before a qualifying spouse can begin working and EAD must remain valid at all times for employment
  - No automatic extension available for dependent spouses; employment must stop when EAD expires and until new EAD is issued
  - EAD renewal cannot be filed until within 6 months of expiration date on current EAD card
  - USCIS processing times are 9-14 months for EAD applications, resulting in major gaps in employment
  - Very few options and strict standards to expedite the processing time

## **I-9 Compliance: Verification for Certain Nonimmigrant Spouses post *Shergill, et al. v. Mayorkas***

- November 10, 2021: *Shergill, et al. v. Mayorkas* settlement directed USCIS to change Policy Manual to allow for automatic extensions under certain scenarios
  - H-4, L-2, E-1, E-2 and E-3 spouses qualify for 180-day automatic extension when: 1) EAD is expired/expiring; 2) EAD renewal is timely filed and pending; and 3) I-94 record is unexpired
  - Qualifying spouses continue working until the earlier of: 1) 180 days beyond EAD expiration; 2) I-94 expiration, or 3) EAD denial at USCIS
  - Receipt notice for pending EAD and unexpired I-94 required for I-9 verification
- Policy update to allow L-2, E-1, E-2 and E-3 to be authorized for employment *incident to status* (i.e., EAD is no longer required)
  - I-94 entry record will be sufficient for I-9 verification once CBP updates internal process to annotate I-94 for qualifying spouses
  - In the meantime, must have a valid EAD or qualify for a 180-day automatic extension for I-9 verification
- H-4 still requires EAD or automatic extension

## Consular Operations and Processing

- After a long closure in 2020, there was a phased re-opening of U.S. Consulates/Embassies, but operations remain reduced, unpredictable, and backlogged due to the ongoing COVID-19 emergency
- Because Posts are not operating at full capacity, DOS implemented a system of priorities in adjudicating nonimmigrant and immigrant visas. Importantly, highest priority services are always allocated for U.S. citizens abroad. Immigrant visas are prioritized over nonimmigrant visas, via the following tier system:
  - Tiers 1-2: Inter-country adoption visas, age-out cases, special immigrant visas, and emergency cases (including healthcare workers engaged in pandemic response); and immediate relative and fiancé visas as well as returning resident visas
  - Tiers 3-4: Family preference immigrant visas and SE Special Immigrant Visas for certain employees of the US government abroad; and all other immigrant visas including employment preference and diversity
- For nonimmigrant visas, State Department instructed Posts to prioritize diplomatic, student, and exchange visitor visas; then other nonimmigrant employment-based visas; with visitor visas continuing to hold the least priority, with exception of emergencies.
- Processing volumes and types depends on local in-country conditions and resources, but many are still only scheduling emergency cases and few, if any, accept third country nationals

## **Consular Operations and Processing, cont'd: Presidential Proclamations Banning Travel**

- In ensuring the safety of the U.S. population in the face of the spread of COVID-19, the prior and current administrations signed into effect a number of Presidential Proclamations prohibiting direct travel from several countries.
- These Presidential Proclamations were revoked, effective November 8, 2021.
- These Presidential Proclamations applied to foreign nationals who were physically present in any of 33 affected countries during the 14-day period preceding their entry into the U.S.
- These Proclamations affected the following countries and regions:
  - Presidential Proclamation 9984: China
  - Presidential Proclamation 9992: Iran
  - Presidential Proclamation 10143: Schengen Area, United Kingdom, Ireland, Brazil, and South Africa
  - Presidential Proclamation 10199: India

## Consular Operations and Processing, cont'd: Presidential Proclamations Banning Travel

- November 26, 2021, Presidential Proclamation restricts entry to the US for foreign nationals who were physically present within 8 countries during the 14-day period preceding travel to the US:
  - Republic of Botswana, Kingdom of Eswatini, Kingdom of Lesotho, Republic of Malawi, Republic of Mozambique, Republic of Namibia, Republic of South Africa, and Republic of Zimbabwe
  - Limited exceptions apply (e.g., lawful permanent residents, noncitizen nationals of the US, and their spouses and children, etc.)
  - National Interest Exceptions (NIE) as determined by the Secretary of State, the Secretary of Homeland Security, or their designees
    - Approval for NIE travel must be requested through the US Consulates

## Summary

- Extensive compliance issues as a result of COVID-19 remote work and related changes.
- As employers return to the office, it is important to keep vigilant of the existing regulatory compliance requirements as well as new developments, which are common as things change.
- Consular operations remain limited and delays must be expected for visa applications and processes. → Where possible, employees should avoid international travel.

# QUESTIONS?