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H-1B questions for employers and employees during COVID-19

The H-1B visa is a well-known visa that allows foreign workers with special skills to work in the United States. There are many specific rules regarding this process, and many employers and employees are unsure how to proceed during COVID-19. This is especially true because the United States immigration system can often be nit-picky and one false move can lead to lasting consequences.

As we all know, almost everybody is transitioning to working from home if possible. Only essential workers are kept at job sites, and everybody else is working from home or in a state of flux. One question that many employers and H-1B employees have is whether they are allowed to work from home. According to 20 C.F.R. §655.732(a), employers must provide H-1B employees with working conditions “on the same basis and in accordance with the same criteria as it affords to its U.S. employees.” This means that if a U.S. employee is allowed the option to work from home, then an H-1B employee must be given that same option. As employers will know, they are required to post Labor Condition Application (“LCA”) notices at their job sites. If an H-1B employee is working from home, then the employer is required to send the employee the LCA notice to be posted in their home until they can return to work. Further, employers will know that generally a new Labor Condition Application must be filed if an H-1B worker is changing job sites unless the new job site remains in the same Metropolitan Statistical Area. If the H-1B employee works from home and lives within the same Metropolitan Statistical Area, then no new LCA needs to be filed. If the H-1B employee’s home is outside the Metropolitan Statistical Area, then the employee may work for up to 30 days a year at this “temporary jobsite”. As the quarantine certainly looks set to last for the foreseeable future, an amended H-1B petition should be filed, which includes the new LCA for the home office location.

While many of us are fortunate enough to continue working, some employees are not so lucky. Many companies are struggling during this pandemic and are considering furloughs or unpaid time off. The H-1B petition guidelines provide that an employer must pay an H-1B employee if the employer initiates the furlough. If the employee asks to take time off from work, then the employer does not need to pay them and the employee risks losing status. Therefore, any period of furlough or other unpaid time off may cause the H-1B employee to become out of status and should be analysed. This is especially problematic because it can cause hurdles and potential bars to future immigration benefits including future work visas, permanent resident applications, etc. Before accepting or volunteering for any furlough or unpaid time off, an employee should know the consequences. Employers should seek guidance before placing any H-1B employee on furlough or unpaid leave.

There are also companies who cannot continue to operate in the same manner and have to engage in layoffs. Some of these layoffs are permanent, others may be made with the promise of rehiring in the future. Unfortunately, the immigration system does not give much leeway on this matter. The H-1B employee is granted permission to be in the United States for the purpose of performing a specific type of work for a specific

employee. If they no longer work for the employee, then they are out of status. The government requires the employee to provide transportation for the H-1B employer back to the last country of residence once they notify USCIS that the employee is no longer employed with them. Employers should be aware that they are still responsible for any wages until they notify USCIS. Of course, right now travel costs are of little value as there are very few ways to safely travel out of the country. It is not clear how the government will treat this situation, but the worst case scenario would be that any day over the 60-day grace period would count as time out of status. During that 60-day grace period, the H-1B employee is permitted to find a new job and file a new H-1B petition, or change their status in some other manner, which can be difficult to accomplish. If you find yourself in this situation, you should seek legal advice about how to maintain status, or keep yourself from taking action that will hurt your chances of obtaining future immigration benefits.

Many companies are in situations that they have never experienced before and are asking employees to pitch in any way that they can. H-1B employees should remember that they are permitted to work in this country for a specific company, doing a specific type of work. If their role or responsibility materially changes, then they could risk being out of status. If this is a concern for an H-1B employee or an employer, they should seek advice about how to keep their H-1B employee in status.

There are many programs in the United States that provide benefits to the public. H-1B employees and employers will remember that they had to certify that the employee was not currently a public charge and would not likely become a public charge. This showing will also need to be made in future work related visa petitions and other immigration applications such as applications for lawful permanent residence (green cards). Under the public charge rule, a person is a public charge if he or she has received one or more public benefits for more than 12 months within any 36-month period. The government construes this to mean that if you received two benefits in one month, it is considered to be two months out of the 36-month period. These benefits generally are federal benefits and thus any relief provided by state governments are not included. However, if an H-1B employee accepts government benefits, they should keep all documentation and be prepared to provide an explanation of why they were prevented from working and needed to rely on the benefits. The USCIS will take this into consideration and will view all evidence in the totality of the circumstances. Further, benefits conferred for the purpose of receiving medical treatment or prevention related to COVID-19 will not be considered as a benefit for the purpose of the public charge analysis.

Many H-1B employees have spouses who live with them in the United States and have work authorization. If the H-1B spouse loses his or her job, there is likely no reason that seeking government benefits will harm their immigration status, as long as the H-1B employee retains his or her job.

For any questions or concerns about specific situations, please feel free to contact **Adam Kanji** at akanji@mdmc-law.com.

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