Jones Waldo Legal Alert

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Continuing Wage Obligations for H-1B Workers During COVID-19

DOL regulations require employers to continue to abide by the labor conditions to which they agreed when filing the H-1B petition. These are set forth in the underlying ETA Form 9035, Labor Condition Application (LCA). In particular, these concern payment of the required wage, full vs. part-time status, and notice to employees in the area of intended employment. These requirements also apply to H-1B1 (Chile/Singapore) and E-3 (Australia) nonimmigrants as well.

1. Does the employer have to continue paying the wage stated in the LCA?

DOL regulations require employers to pay the wage set forth in the LCA. Responding to the ongoing COVID-19 outbreak, many local and state governmental authorities are instituting shelter in place orders. This impact has prompted some employers to evaluate and assess their business operations. Employers are asking what happens should they decide to suspend, furlough, layoff, reduce hours, or otherwise render their unproductive employees during the crisis. As these actions also affect foreign national employees, issues arise as to whether employers can place H-1B workers in non-productive status while simultaneously maintaining compliance with the applicable DOL regulations.

The short answer is "no." Non-productive status is defined as any time during the validity of the LCA and H-1B petition where an employee is unable to work. When an employee is in a non-productive status due to a decision of the employer (e.g., due to a lack of work), per 20 CFR 655.731 (c)(7)(i) the employer continues to be obligated to pay the required wage. On the other hand, 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 (e.g., caring for ill relative) or because they are unable to work (e.g., maternity leave) due to a reason which is not directly work related and required by the employer. Of course, per 20 CFR 655.731(c)(7)(ii), the employer would still have 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.).

2. Can the employer furlough, bench, or otherwise render an H-1B employee non-productive and stop offering the required wage if the employee is not able to work from home resulting from a governmental "shelter at home" order?

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 such as fines, back wage obligations, and in serious cases debarment from the DOL's temporary and permanent immigration programs for a period of time. Per 20 CFR 655.810(d), debarment prohibits the USCIS from approving immigrant and non-immigrant petitions filed by the employer.

3. Is an employer required to pay the required wage if the employee is afflicted with COVID-19, therefore unable to work, and placed into quarantine during treatment?

The regulations do not require an employer to pay the required wage if an employee is not able to work due to a reason which is not directly work related and required by the employer. That said, if an employer has policies in place where a COVID-19 positive employee would have to remain in quarantine, there is an argument that it must continue to pay the employee given that the quarantine rule is created and imposed by the employer. An employer should also be aware that it could be subject to required 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.) nonetheless per 20 CFR 655.731(c)(7)(ii). Employers should also watch for additional federal legislation regarding employers' obligations during this national emergency.

4. What steps does an employer have to take to convert an H-1B employee from full-time to part-time status?

An employer seeking to convert a full-time H-1B employee to part-time must file a new LCA to reflect this change. Once a new LCA is required, the employer is required to file an amended H-1B petition. The employee is permitted to commence part-time employment upon the receipt of the H-1B petition by the United States Citizenship and Immigration Services (USCIS).

5. How can the employer terminate its obligation to pay the required wage?

20 CFR 655.731(c)(7)(ii) states that payment of the required wage obligation need not be made if there has been a bona fide termination of the employment relationship. Per 8 CFR 214.2(h)(11), DHS regulations require the employer to notify USCIS that the employment relationship has been terminated so that the petition is canceled. 8 CFR 214.2(h)(4)(iii)(E) requires the employer to provide the employee with payment for transportation home under certain circumstances. Additionally, an employer is responsible for paying for the return transportation cost of the employee if the employer terminates the employee prior to the end of the petition period. If the employee decides to stay in the U.S. and look for another job, they have a 60 day grace period to find a new H-1B employer.

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