



March 27, 2020

Immigration FAQ

Q: We have put strict remote work requirements in place during the Covid-19 crisis. Do I still need to review a worker's identity and authorization documents in person in order to complete the Form I-9?

A: The Department of Homeland Security ("DHS") has agreed to relax temporarily the requirement that employers physically review identity documents as part of their I-9 onboarding for employees hired or working remotely during the health crisis. See <https://www.ice.gov/news/releases/dhs-announces-flexibility-requirements-related-form-i-9-compliance>. Employers are still required to inspect the Section 2 documents remotely (e.g., over video link, skype, facetime, fax or email, etc.) and to obtain, inspect, and retain *copies* of the documents within three business days for purposes of completing Section 2. Employers should enter "COVID-19" as the reason for the physical inspection delay in the Section 2 Additional Information field **once physical inspection of the documents takes place after normal operations resume**. Once the documents have been physically inspected, the employer should add "documents physically examined" with the date of inspection to the Section 2 additional information field on the Form I-9.

Q: My Company was served with a Notice of Inspection in March 2020, but we have not yet responded to the audit notice because of the Covid-19 crisis. Will we be fined for failure to timely produce our Form I-9s?

A: No, DHS has agreed to grant companies a 60-day automatic extension to respond to a Notice of Inspection served in March 2020 that has not yet been responded to by the company because of the Covid-19 crisis. At the end of the 60-day extension period, DHS will determine if an additional extension will be granted.

Q: Can I rescind an offer to a prospective employee who requires H1B sponsorship in light of the Covid-19 crisis?

A: Unless an employment agreement or other contract is in place, there is no restriction under the INA or otherwise that prohibits an employer from rescinding on offer of employment that requires H1B visa sponsorship. An employer may generally deny employment to or decide not to hire an applicant on the basis that the applicant requires visa sponsorship.

Q: Are my H-1B and E3 visa workers eligible for unemployment benefits?

A: It depends on your state. Each state adopts its own unemployment policies in compliance with federal guidelines. The federal guidelines provide that individuals must be immediately ready, able, and willing to accept new employment to be eligible for unemployment benefits. In the case of employer-sponsored visas, the employee is generally not immediately able to work for a new employer. Thus, H-1B and E3 workers are generally not eligible for unemployment benefits.

Conversely, employees working on Employment Authorization Documents (EAD cards), or with a green card, are immediately eligible to accept new employment. Thus, these individuals are generally eligible for unemployment benefits.

In light of COVID-19, many states have relaxed their requirements to offer unemployment benefits to a broader range of individuals. Please contact your Kutak Rock attorney to discuss your specific circumstance and current state laws.

Q: May I bench or decrease hours for my H-1B and E-3 visa workers?

A: Employers are generally prohibited from benching H-1B and E-3 workers. As part of the H-1B filing process, the employer represents that it will pay the employee the greater of the “prevailing wage” and the actual wage for the position. Both of these wages are listed on the Labor Condition Application (LCA) filed with the petition, and are not adjustable to address market forces. Thus, federal law requires employers to pay H-1B and E-3 workers full offered wages (listed in the LCA) even during unproductive time or during office closures.

Q: Can my H-1B employees work remotely from home?

A: The H-1B regulations allow H-1B workers to work remotely temporarily if the new worksite is within the normal commuting distance from the worksite listed on the LCA. A new or amended H-1B petition is not required when the employee is at a new worksite for up to 30 workdays and in some cases 60 workdays (where the employee is still based at the permanent worksite). An amended H-1B petition is only required if the employer is required to file a new LCA. Thus, this requirement would come into play following exhaustion of the short-term placement, and only for employees who live outside of the MSA where they work.

Q: As an employer, what are the consequences of laying off an H-1B worker?

A: Federal regulations require an employer offer to pay for travel to the H-1B worker’s country of origin in the event of an employer’s decision to terminate employment. An employee voluntarily terminating their employment does not trigger this requirement. Further, if the employer-terminated worker elects to remain in the United States, the employer is not obligated to remit travel expenses.

In the event of any termination, the employer must withdraw the Labor Condition Application (LCA) filed with the Department of Labor, and must notify USCIS of the termination and request to withdraw the visa application. Failure to do so creates potential liability for future wage and hour claims for the period between the termination and the expiration date on the visa.

Q: What happens to employment-based petitions that are currently pending with USCIS?

A: While U.S. Citizenship and Immigration Services continues to process visa petitions, all face-to-face interviews and biometrics appointments have been canceled and will be rescheduled when normal operations resume. USCIS has terminated premium processing services for all I-140 Immigrant Petitions and all I-129 Non-immigrant Petitions, including H-1B transfers and H-1B cap petitions, which will likely cause delay in the transfers of workers. Keep in mind that for H1-B change-of-employer petitions, an employee may begin working for the new employer upon receipt of the I-797C and is not required to wait for an approval to begin employment.

If you have any questions related to how this guidance affects your enterprise, please contact your Kutak Rock attorney, or any of the attorneys in the [Employment Law Group](#), and we would be happy to discuss this with you.

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