**Portfolio Media. Inc.** | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

# H-1B Visa Considerations Amid The Coronavirus Shutdown

By **Matthew Kolodziej** (April 10, 2020, 4:21 PM EDT)

Matthew Kolodziej

The COVID-19 health emergency has severely impacted U.S. employers who are considering layoffs, unpaid leave, work-from-home arrangements or reductions in hours for employees, including foreign nationals on work visas.

For H-1B visa holders in particular, who are subject to additional compliance requirements specified in the labor condition application, or LCA, filed with their visa application, employers must understand the visa compliance requirements while counseling their employees on their options in order to reduce costs and legal liability while also retaining essential employees and workforce continuity whenever possible.

With proper planning and compassion, harm to the company's workforce and competitiveness can be reduced and goodwill maintained at this difficult time when team spirit and morale are more important than ever.

**Layoffs of H-1B Employees**

Most foreign workers, including H-1B visa holders, who are not lawful permanent residents, or green card holders, or other workers with work authorization not tied to their sponsoring employer, will lose their legal immigration status as soon as they lose their job with the employer who sponsored their visa.

Layoffs will also usually terminate eligibility for lawful permanent residence for employees with pending green card processes sponsored by the employer. However, H-1B visa workers have a 60-day grace period after the layoff during which they may change to another status, such as visitor or student status, or renew and extend their H-1B visa, if they find another employer to sponsor them.

Generally speaking, H-1B visa holders may change employer sponsors within this 60-day period without having to leave the U.S., if their new employer files an H-1B application during this grace period. The H-1B worker may begin working for the new employer upon filing of the H-1B petition (though it may be safest to wait for the approval, depending on the strength of the case).

Note that when terminating an H-1B worker, employers must follow a three-step process for the termination to be effective. The immigration service must be notified of the termination in writing, the LCA must be withdrawn, and the employee must be offered payment for transportation to their home country, if applicable.

Payment of costs of return to the home country do not apply if the employee leaves employment of their own accord. If these steps are not followed the termination may not be considered bona fide and the employer may be liable for back pay.

**Unpaid Leave and Wage Obligations for H-1B Workers**

Generally speaking, as noted above, most foreign employees on work visas, including H-1B workers, lose their legal status in the U.S. upon termination of employment by the sponsoring employer.

Employees with work visas may take unpaid leave in specific situations, if it is their decision and permitted under applicable laws.

However, H-1B workers who are subject to the LCA wage requirements mentioned above may not be placed on unpaid leave — furloughed — by the employer due to a lack of work. This is called benching and is specifically prohibited for H-1B workers.

But, the H-1B employees may choose to take unpaid leave at their request for reasons unrelated to the employment — family leave, illness, injury, maternity leave — if such unpaid leave is permitted pursuant to the employer's benefit plan and applicable laws, such as the Family Medical Leave Act and the Americans with Disabilities Act.

**H-1B Employees Working from Home**

During the current health crisis many employers are requiring their employees to work from home. For those visa types which are subject to LCA requirements, such as H-1B workers, the employer must continue to comply with the LCA wage and notice requirements for the work location.

If H-1B workers continue to work within the same metropolitan area as specified in the original H-1B petition and LCA, generally, no new LCA or H-1B application is needed provided the LCA is reposted at the home office location according to the notice regulations.

However, if the new work location is outside normal commuting distance and the change in location lasts more than 30 days, a new LCA and an amended H-1B petition may need to be filed with the U.S. Citizenship and Immigration Services for the new work location.

**Unemployment Insurance and H-1B Workers**

Unemployment insurance is a benefit that is administered by the states. Generally, to be eligible the unemployed individual must be immediately willing and available to work.

Generally speaking, as explained above, foreign nationals usually must first have an employer sponsor them for a work visa, such as an H-1B, before they can obtain work authorization. Therefore they are generally not considered immediately eligible and available to work.

Though certain states (such as California) are implementing policies to make unemployment benefits more accessible during the COVID-19 crisis, this rule generally means H-1B workers that have been laid off are not eligible for unemployment benefits as they are not available to work. Furthermore, as explained above, H-1B workers are also only given a 60-day grace period during which they may stay in the U.S. after a layoff, unless they timely apply to change status, or renew and extend their H-1B status.

**Reductions in Wages and Hours Via Visa Amendments**

For employees in visa categories subject to LCA wage requirements, such as H-1B workers, the employer cannot pay the worker less than specified in the LCA and in the corresponding visa petition, the form I-129. This means that if the employee will receive a pay cut that lowers the wage below the wage in the LCA, an amended petition may need to be filed with the USCIS and a new LCA posted at the work location.

This also applies if the employer wants to reduce the hours of the H-1B worker further than permitted by the LCA by changing a full-time employee to part-time. Note the LCA regulations also forbid offering less favorable wages or benefits to H-1B workers than to U.S. workers in comparable positions if this will hurt their working conditions.

**Managing and Planning for Layoffs of H-1B Workers to Reduce Disruption and Liability**

There are many things employers can do to help reduce disruption and liability, and to preserve the continuity of their workforce. Remember, if the employer has many H-1B visa employees, layoffs and reorganizations may affect whether the employer is considered H-1B dependent, affecting compliance obligations. This calculation should be made in advance. H-1B visa dependent employers are subject

to onerous compliance requirements, so dependency should be avoided.

When planning a layoff, give foreign employees as much notice as possible and consider offering affected employees free consultations with an immigration attorney. This may maintain goodwill. If employees are able to stay in the U.S., the employer will save on the cost of paying for employees to return to their home country.

Employers should explore working arrangements that may allow the employees to stay in legal status or avoid being laid off. Employers may want to consider transferring employees abroad, as H-1B visa and LCA requirements do not apply to employees outside the U.S.

It is advisable for the employer to be familiar with the employee's immigration history and whether they have other immigration processes pending — such as a green card application — that could be affected by layoffs. By understanding each employees' immigration situation and considering all available options, employers may be able to improve their employees' immigration outcomes, and minimize disruption and costs for both themselves and their employees.

---

*Matthew Kolodziej is a partner at Jia Law Group.*