With the Holidays Upon Us, What Your Foreign National Employees Should Know About International Travel in the Pandemic Era

Insights
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Earlier this month, the Biden administration reopened U.S. borders and ports-of-entry to all nonimmigrant international travelers (i.e. ESTA, H, L, F, O, E, and B visa holders) attempting to enter or reenter the U.S. With the holidays nearing and the likelihood that more nonimmigrant employees with be making their international travel plans – not to mention that immigration officials have recently provided further clarification regarding the types of COVID-19 vaccination and testing documentation that nonimmigrants will need to present upon reentering the U.S. – now is the time to review these rules in more detail so that you and your workforce can have a peaceful holiday season.

The Basics – In More Detail

In last month's announcement, we summarized that all nonimmigrants must be fully vaccinated and present a negative COVID test within three days of attempting to enter the U.S. along with presenting their appropriate U.S. entry documents (i.e. unexpired passport with unexpired entry documents such as U.S. issued visa). Note that U.S. citizens and permanent residents are not subject to these reentry restrictions.

The following vaccines are the only types that nonimmigrant employees could have received in order to be allowed U.S. entry or reentry:

1. One dose Janssen/Johnson and Johnson;
2. Two dose Pfizer-BioNTech;
3. Two dose Moderna;
4. Two dose AstraZeneca;
5. Two dose Covaxin;
6. Two dose Covishield;
7. Two dose BIBP/Sinopharm; or
8. Two dose Sinovac.

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The above vaccines must have been administered at least 14 days before attempting to enter the U.S. As an example of calculating this 14-day period, suppose that a nonimmigrant employee's last dose was on December 1, 2021. In such a case, that employee must wait until December 15, 2021 before they can board a flight back to the U.S.

To provide proof the nonimmigrant employee received one of above eight vaccinations, they must provide any one of the following types of documentation to their air carrier right before that nonimmigrant employee board's their flight back to the U.S. (as provided by the CDC):

1. Verifiable records (digital or paper): Vaccination certificate with QR code, digital pass via Smartphone application with QR code (e.g., United Kingdom National Health Service COVID Pass, European Union Digital COVID Certificate);
2. Non-verifiable paper records: Printout of COVID-19 vaccination record or a COVID-19 vaccination certificate issued at national or subnational level or by an authorized vaccine provider (e.g., the CDC vaccination card); or
3. Non-verifiable digital records: Digital photos of vaccination card or record, downloaded vaccine record or vaccination certificate from official source (e.g., public health agency, government agency, or other authorized vaccine provider), or a mobile phone application without QR code.

The contents of any one of the above three types of proof of vaccination must include (a) the nonimmigrant employee's full name plus and either their date of birth or passport number; (b) the name of the agency that issued the record (e.g., a public health agency, government agency, or other authorized vaccine provider); and (3) the vaccine manufacturer and date(s) of vaccination.

The proof of vaccination is just the first of a two-part requirement. The second part requires providing a negative COVID-19 test result (either the NAAT or PCR test) within three calendar days of the nonimmigrant employee boarding their flight to the U.S. For example, if the nonimmigrant employee is to depart at 11 PM on December 10, 2021, then that employee must present their negative test result any time after 12:01 AM, December 7, 2021.

Please note unvaccinated children between the ages of 2 and 17 traveling are allowed to travel with a fully vaccinated adult but must still present a negative COVID-19 test held within this same three-day rule.

National Interest Exception Letter Holders Received before November 8, 2021

If your nonimmigrant employee possesses a National Interest Exception (NIE) Waiver letter or notation in their visa from any U.S. Embassy or Consulate issued before November 8, 2021, that employee can no longer take the benefit of such NIE Waiver letter or visa notation for U.S. entries after November 8, 2021. That nonimmigrant employee must meet the above requirements before they are allowed to enter or reenter the U.S.

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Travel for the Unvaccinated Non-Immigrants

Unvaccinated nonimmigrant employees and their families cannot enter or reenter the U.S. unless they fall under any one of the following exceptions:

1. Are nonimmigrant children under the age of 18.
2. Nonimmigrants who have participated or are participating in clinical trials for COVID-19 vaccination, as determined by the CDC Director.
3. Contraindications situations (whereby a drug, procedure, or surgery could not be performed because it will be harmful to the U.S. traveler) where the nonimmigrant can present a letter to the air carrier from a licensed physician documenting the contraindication. The letter must be signed and dated by the physician clearly stating the contraindication. Non-English letters must include certified translations.
4. Humanitarian or emergency reasons that require immediate travel to the U.S. These nonimmigrants must contact the U.S. Embassy or Consulate where they are at so that Embassy or Consulate can confirm relevant humanitarian or emergency reason.
5. Limited vaccine availability in the nonimmigrant employee's country where less than 10% of the population is vaccinated. This exception does NOT apply to B-1/B-2 visa holders. A passport showing proof of citizenship AND a valid nonimmigrant visa that is not a B-1/B-2 visa will need to be shown. For those that fall under this exception must be vaccinated within 60 days of arriving in the United States. This exception does NOT apply to a non-immigrant residing in country where they are not a citizen.
6. Members of the U.S. Armed Forces and their Spouses and Children.
7. National Interest exception issued after November 8, 2021 by the U.S. Secretaries of State, Transportation, or Homeland Security or their designees.
8. Nonimmigrant Diplomats or related personnel under the A-1, A-2, C-2, C-3 (as a foreign government official or immediate family member of an official), E-1 (as an employee of TECRO or TECO or the employee's immediate family members), G-1, G-2, G-3, G-4, NATO-1 through NATO-4, or NATO-6 (or seeking to enter as a nonimmigrant in one of those NATO classifications) visa classifications.
9. United Nations travelers that fall within the scope of section 11 of the UN Headquarters Agreement or who are traveling pursuant to United States legal obligation.
10. Sea C-1 and D visa Crew Members.
11. Airline Crew Members on official duty assigned by the airline or aircraft operator. This exception does not apply to crew members who are traveling for training, commuting to or from work, or for business reasons not associated with the operation of the aircraft, or personal reasons.

If the nonimmigrant employee or their family members meet any one of the above exceptions, then that employee or their family members may enter or reenter the U.S. so long as they can provide a

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that employee or their family members may enter or reenter the U.S. so long as they can provide a negative COVID-19 test result (either the NAAT or PCR test) within one calendar day of boarding their flight to the U.S.

Conclusion

We will monitor these developments and provide updates as warranted. Make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information. If you have further questions, visit our Vaccine Resource Center for Employers or contact your Fisher Phillips attorney, the author of this Insight, or any attorney on our Immigration Practice Group.

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