Beware of These Immigration Pitfalls When Employees Work Remotely

Insights
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There is no doubt that COVID-19 has tremendously affected where and how we work. The same is true for how the coronavirus has impacted immigration laws as they apply to U.S. work authorization. The original lockdowns from the start of the pandemic have morphed into flexible work-from-home policies. And although vaccine availability has led employers to reopen their offices, many companies continue to provide full-time or hybrid work-from-home (WFH) options. These arrangements clearly have benefits for many employers and workers alike, but there are immigration law challenges you need to be aware of when you employ foreign nationals who may be working remotely. Specifically, you should note the potential pitfalls pertaining to nonimmigrant and immigrant work authorizations for H-1B, H-1B1, E-3, and PERM Labor Certification sponsorships. How might remote work arrangements have and unintentionally but harmfully impact work authorization, and how can you avoid such mistakes?

Is WFH an Option Under H-1B, H-1B1, and E-3 Sponsorship?

Any U.S. employer may sponsor professionals for work authorization under the H-1B, H-1B1, and E-3 employment sponsorships, though a "professional" position requires a job-related bachelor's degree or higher.

Here's why the foreign national's physical location is important:

- Once the professional designation is confirmed for the relevant visa, the employer must pay the required local wage for the position based on the prevailing or actual wage requirements designated for that physical location.
- The U.S. Department of Labor (DOL) will issue a Labor Condition Application (LCA), which the employer must sign under penalty of perjury.
- The LCA cannot be filed or certified without listing the appropriate prevailing wage — which is based on the S. Bureau of Labor Statistics' (BLS) Metropolitan Statistical Area (MSA). The MSA commonly refers to a county or group of counties as a specific area.
- The BLS considers information from that MSA to determine the average wages for all occupations in that area. So, the H-1B, H-1B1, and E-3 work authorization sponsorships are dependent on the MSA when determining what the employer must pay in that physical area.

You may risk violating the terms of that employee's current H-1B, H-1B1, or E-3 status if they work outside of the MSA designated in their certified LCA. How can you avoid this pitfall? A new H-1B, H-1B1, and E-3 petition generally must be filed and approved with a new LCA before the employee is to work in a different MSA. However, you should note the following exceptions that allow for some flexibility:

- **Normal commuting distance.** U.S. Citizenship and Immigration Services (USCIS) views any employment within normal commuting distances as not requiring the filing and approval of an H-1B, H-1B1, or E-3 petition with USCIS. This exception applies to the distance that the employee normally will travel on a daily basis from their home to their H-1B, H-1B1, or E-3 listed work location even if the MSAs are different for the home and work locations.

  A word of caution: The test is subjective, since there are no additional, clarifying details. So, for some areas like the San Francisco Bay Area, you could reasonably argue that traveling 70 miles between the home and work location listed on the LCA is within normal commuting distances. But the same may not be true for another part of the country where such distances may not be viewed as normal. The subjectivity of this test makes it imperative to discuss such moves with an experienced legal advisor before making any decision.

- **Short-term placements.** Another exception involves short-term placement of H-1B employees at locations that are outside of the LCA's listed MSA. This exception does not apply to either E-3 or H-1B1 status holders. Under the applicable regulation — 20 CFR 655.735 — H-1B workers may work at locations outside of their MSA for no more than 30 days a year — and in some cases 60 days each year — so long as:
  - the H-1B worker continues to maintain an office or workstation at their permanent worksite based on the original LCA and approved H-1B;
  - the H-1B employee spends a substantial amount of time at their originally approved H-1B worksite in a one-year period; and
  - the H-1B worker's U.S. residence or place of abode is located in the area of the permanent worksite and not in the area of the short-term worksite(s).

  Further, the employer is required to pay the employee's travel expenses, lodging, and meals while that H-1B employee is at the short-term worksite not specified on their current LCA.

If none of the above exceptions are met, then the H-1B, H-1B1, and E-3 employers must file and gain approval of an amended petition before those employees can relocate — even to a home office.

Separately, there are long-term potential immigration issues regarding U.S. permanent residency sponsorship for the green card that can be negatively impacted by such a move. These are discussed below.

Can Remote Work Affect the Employment-Based Green Card Process?

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The employment-based green card process consists of three stages:

1. Program Electronic Review Management (PERM) Labor Certification Process;
2. I-140 Immigrant Petition for Alien Workers; and
3. Adjustment of Status application filed under I-485 for the actual green card.

Obtaining a PERM certification from the DOL is the first step towards allowing an employer to hire a foreign worker to work permanently in the United States. This certification is issued by the DOL after the petitioning employer has tested the local labor market where the permanent position is located to establish that there are no qualified U.S. workers available for the job. If the foreign national employee who is being sponsored is physically located in that market, the PERM can be filed by the petitioning employer.

Since the PERM Labor Certification is location specific, the proliferation of remote work prompted by the COVID-19 pandemic caused confusion for employers about where to conduct and document recruitment.

Labor Department Provides Guidance

The DOL's Office of Foreign Labor Certification (OFLC) responded in July 2022 with guidance on how to indicate telecommuting on both ETA Forms 9141 (Application for Prevailing Wage Determination) and 9089 (Application for Permanent Employment Certification).

In situations where the sponsored foreign national employee is working in a different state or outside the MSA, and the petitioning employer indicates that telecommuting is permissible in the job requirements, the OFLC confirmed that the petitioning employer should include its address as the employer address and the worksite address on both Forms 9141 and 9089, as well as use the employer's address for recruitment purposes. This will allow the employee to continue working remotely and give them the flexibility to move anywhere outside the employer's MSA without requiring of the employer to file a new PERM application.

After a PERM labor certification has been certified, the employer must file an I-140 petition with USCIS to confirm the employee possesses the job requirements that are described in the PERM. If the work location designated in the I-140 petition changes and the telecommuting language is not included in the PERM, then a future PERM and I-140 will need to be filed and approved for the new work location.

Once the I-140 is approved and the priority date for that I-140 becomes current, the I-485 Adjustment of Status (AOS) application can be filed by the employee for their green card. The AOS can only be filed if the job duties and job location remain the same as designated under both the PERM and I-140. Again, a move to a different work location can prevent the employee from filing their AOS if the original PERM and I-140 were for a different work location. The only exception is if

the AOS has been pending for more than 180 days after filing. Should 180 days pass, then the U.S. employer can designate a new work location, so long as the duties remain the same or similar.

Conclusion

U.S. immigration laws are complex — and the COVID-19 pandemic further complicated matters by adding new fact patterns never thought of before. We're here to help keep you in compliance and the employee in valid immigration status.

If you have questions, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Immigration Practice Group. We will continue to monitor further developments and provide updates, so make sure you are subscribed to the Fisher Phillips' Insight system to gather the most up-to-date information.

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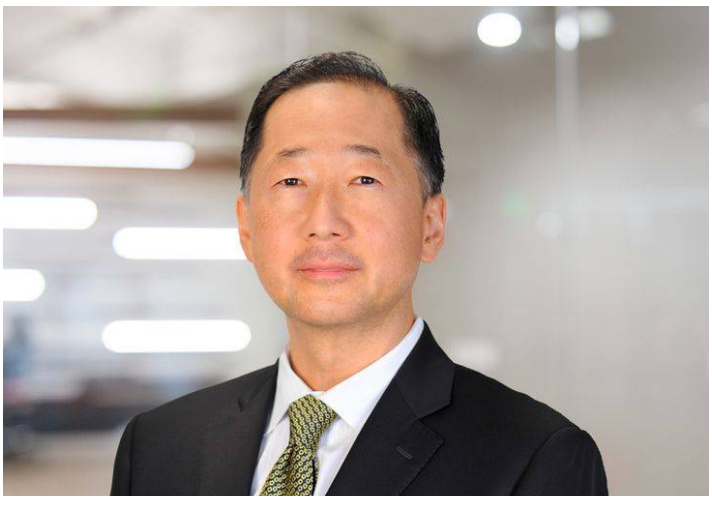

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