IMPACT OF LAYOFFS, TERMINATIONS, FURLOUGHS, AND REDUCTIONS IN PAY ON VISA HOLDERS

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IMMIGRATION SOLUTIONS

We recommend that this document serve as a point of reference and starting point for managing your foreign national population in the event of changes to your workforce. We encourage you to contact your Meltzer Hellrung Attorney regarding layoffs, terminations, furloughs, and reductions in pay for your foreign national population.

IMPACT OF LAYOFFS, TERMINATIONS, FURLOUGHS, AND REDUCTIONS IN PAY ON VISA HOLDERS

Changes in workforce, such as layoffs, furloughs, terminations, and reductions in pay, are not uncommon in most industries. The impact of such changes on foreign national populations will vary based on the visa status of the foreign national employee. Obligations surrounding visas that have underlying Labor Condition Applications (LCAs), namely H-1B, H-1B1, and E-3 visas can impact the employer's ability to utilize layoffs, terminations, and reductions in pay for those employees. This document provides a broad overview of the impact of these actions on foreign national employees.

TERMINATION OF EMPLOYMENT AND LAYOFFS

- H-1B

  If an H-1B employee is terminated before the end of his/her authorized stay (for any reason other than voluntary departure by the employee), the company is required to offer the reasonable cost of return transportation to the employee's last country of residence. This obligation does not apply to family members. If the employee voluntarily resigns or transfers employer after termination, a company is not required to offer the cost of return transportation. As a rule, H-1B employees are permitted to stay in the U.S. for up to 60 days after their last official date of employment or to the expiration of Form I-94, whichever is earlier. This allows employees time to wrap up their affairs in the U.S. or to find new employment.

  In order to properly terminate the employer-employee relationship for H-1B employees, a withdrawal must be submitted to United States Immigration and Citizenship Service (USCIS). Submission of the withdrawal cuts off any potential liability the employer may have for back wages to the terminated employee. Back wages are defined as wages which may accrue after termination of the employee but before the withdrawal. Please notify your Meltzer Hellrung so that we can proceed with submission of the withdrawal.

• E-3/H-1B1

For E-3 and H-1B1 employees who applied for their visas at USCIS, a withdrawal should be submitted to USCIS to terminate the employer-employee relationship. For E-3 and H-1B1 employees who obtained their visas at the consulate, without prior CIS approval, a withdrawal of the underlying LCA with the Department of Labor (DOL) is required. These employees are subject to a 60-day grace period upon termination.

• TN

TN employees may be terminated without notification to USCIS. As this petition does not have an underlying LCA, notification to USCIS is not required in order to terminate any financial obligation to the employee. These employees are subject to a 60-day grace period upon termination.

• L-1

L-1 employees may be terminated without notification to USCIS. As this petition does not have an underlying LCA, notification to USCIS is not required in order to terminate any financial obligation to the employee. These visas are company specific and cannot be transferred to another employer. Individuals in L-1 status will likely have to depart the U.S. or apply for another visa category which they may be eligible for. These employees are subject to a 60-day grace period upon termination.

• E-1/E-2

E-1 and E-2 employees may be terminated without notification to USCIS. As this petition does not have an underlying LCA, notification to USCIS is not required in order to terminate any financial obligation to the employee. These visas are company specific and are unlikely to be transferred to another employer. Individuals on E-1 or E-2 visas will likely have to depart the U.S. or apply for another visa category which they may be eligible for. These employees are subject to a 60-day grace period upon termination.

• O-1

If an O-1 employee is terminated before the end of his/her authorized stay (for any reason other than voluntary departure by the employee), the company is required to offer the reasonable cost of return transportation to the employee's last country of residence. This obligation does not apply to family members. If the employee voluntarily resigns or transfers employer after termination, a company is not required to offer the cost of return transportation. As a rule, O-1 employees are permitted to stay in the U.S. for up to 60 days after their last official date of employment or to the expiration of Form I-94, whichever is earlier. This allows employees time to wrap up their affairs in the U.S. or to find new employment.

If the O-1 was acquired through an agent, both the petitioning agent and the employer are responsible for the reasonable costs of return transportation to the employee's last country of residence in the event of an involuntary termination.

• F-1 OPT/STEM OPT/CPT

Employees on F-1 OPT and CPT can also be terminated without notification to USCIS. The employee is required to notify the DSO of the termination and would begin to accrue days of employment. F-1 OPT employees can accrue no more than 90 days of unemployment in order to maintain status. F-1 STEM OPT employees can accrue no more than 150 days of unemployment during the entire three-year period during which they are granted OPT. STEM employers are required to report termination to the school within 5 business days.

• Other EAD Categories

Employees holding an EAD which is not based on an F-1 can be terminated without notification to USCIS. The employment authorization document is not employer specific and can be used for employment with any U.S. employer.

• J-1

If a J-1 employee is terminated, they will no longer be maintaining their status. The employee would enter a 30-day grace period during which they would have to either depart the U.S. or apply for another non-immigrant visa status they may be eligible for. An employer does not have an obligation to notify USCIS of this termination. Employers must give notice to the sponsoring organization regarding the termination.

FURLOUGHS

A furlough is the placing of an employee in a temporary non-productive, non-pay status because of lack of work or funds or any other non-disciplinary reason. If an employee is furloughed the company will generally continue to provide benefits to an employee but will not pay their salary.

• H-1B

H-1B employers are required to pay the foreign national's wages even while in a nonproductive status. For an H-1B employee a furlough would have the same effect as a termination. If furloughed, the employee enters a 60-day grace period which can only be utilized once per the I-797 period. Please notify your attorney of furloughs which occur twice in one I-797 period or if there is a furlough in excess of 60 days.

An employer has the obligation to pay the offered wage as listed in the LCA. These employees cannot be placed on an involuntary leave where they are not being paid the offered wage as listed on the LCA. Only a leave of absence which is requested by the employee is permissible for H-1B employees. Examples of such leave include, but are not limited to parental leave, medical leave, FMLA, or a sabbatical. Any leave that the employee takes must be in line with company policies regarding taking a leave of absence for all employees.

• E-3/H-1B1

H-1B1 and E-3 employees cannot be furloughed. An employer has the obligation to pay the offered wage as listed in the LCA. These employees cannot be placed on an involuntary leave where they are not being paid the offered wage as listed on the LCA. If furloughed, the employee enters the 60-day grace period which can only be utilized once per LCA period.

Only a leave of absence which is requested by the employee is permissible for H-1B1 and E-3 employees. Examples of such leave include, but are not limited to parental leave, medical leave, FMLA, or a sabbatical. Any leave that the employee takes must be in line with company policies regarding taking a leave of absence for all employees.

• F-1 OPT/STEM OPT/CPT

Employees on F-1 OPT cannot be furloughed. The furlough would effectively serve as a termination. The employee would have to notify their school DSO of the termination and the employee would begin to accrue days of employment. F-1 OPT employees can accrue no more than 90 total days of unemployment in order to maintain status. F-1 STEM OPT employees can accrue no more than 150 total days of unemployment during the entire three-year period during which they are granted OPT. STEM employers are required to report termination to the school within 5 business days.

• TN/L-1/ E-1/E-2/O-1

Generally, these employees must be working for the employer named in their petition to maintain status. USCIS has not issued any clear guidance regarding how furloughs would impact this category. However, a liberal approach is that the 60-day grace period would apply in this situation and the furlough would operate as a termination. If an employer chooses to use this approach, it should be noted that the 60-day grace period will only apply once per approval period.

• Other EAD Categories

Employees in these visa categories can be furloughed without any impact on their status.

• J-1

A furlough would likely have the effect of a termination, the employee will no longer be maintaining their status as they will enter a non-productive status. The employee would enter a 30-day grace period during which they would have to either depart the U.S. or apply for another non-immigrant visa status they may be eligible for. An employer does not have an obligation to notify USCIS of this termination. An employer would ne Notice to the sponsoring organization would need to be given regarding the termination. Employers must give notice to the sponsoring organization regarding the termination.

REDUCTIONS IN PAY OR HOURS

• H-1B

The U.S. Department of Labor (DOL) regulations require employers to pay the offered wage as set forth in the LCA. If an H-1B employee takes a position that pays a wage lower than what is listed on the LCA, the company must file a new LCA and file an amended petition with USCIS. The H-1B employee can start employment pursuant to the new wages only upon receipt of the amended petition by USCIS. Note, that the amended petition does not have to be approved for the employee to begin working at the reduced wage.

If the company undergoes a reduction in actual wages for all employees, H-1B employees can be paid a lower wage as long as this wage is higher than the prevailing wage listed on the LCA. An amended petition is not required in this situation.

Additionally, if a reduction in hours from full-time to part-time employment is expected, an amended petition should be filed. Reductions in hours are considered a material change which would require that the immigration service be notified of the change in employment conditions. Once the amended petition is received by USCIS, the reduction in hours may begin.

Lastly, if the employee is re-assigned to a new role an amendment may be required as well. Such changes should be discussed with your attorney.

• E-3/H-1B1

The U.S. Department of Labor (DOL) regulations require employers to pay the offered wage as set forth in the LCA. If an H-1B1, or E-3 employee takes a position that pays a wage lower than what is listed on the LCA, the company must file a new LCA and file an amended petition with USCIS or a U.S. consulate abroad. The H-1B1 or E-3 employee can start employment pursuant to the new wages only upon receipt of the amended petition by USCIS or entry with new visa stamp/I-94. Note that the amended petition, filed with USCIS, does not have to be approved for the employee to begin working at the reduced wage.

If the company undergoes a reduction in actual wages for all employees, E-3/H-1B1 employees can be paid a lower wage as long as this wage is higher than the prevailing wage listed on the LCA. An amended petition would not be required in this situation.

Similarly, if a reduction in hours from full-time to part-time employment is expected, an amended petition would have to be filed. Reduction in hours are considered a material change which would require that the immigration service be notified of the change in employment conditions. Once the amended petition is received by USCIS, the reduction in hours may begin.

• TN/L-1/E-1/E-2/O-1

A reduction in pay for employees in these statuses would be permissible and would likely not require an amended petition. If a reduction in hours from full-time to part-time employment is required, an amendment is likely required. Any reduction in pay would need to comply with local, state and federal minimum wage standards.

- ### F-1 OPT/STEM OPT/CPT

  A reduction in pay or reduction of hours from full-time to part-time employment is possible for these employees. The employee's SEVIS record would need to be updated to reflect the change from full-time to part-time employment. The employee would need to contact the DSO to report this change in hours from full-time to part-time status. Any reduction in pay would need to comply with local, state, and federal minimum wage standards.

- ### Other EAD Categories

  A reduction in pay or reduction of hours from full-time to part-time employment will not impact these employees. EAD cards are not employer specific and do not have a prevailing wage requirement, notification to USCIS would not be required for this change to occur.

- ### J-1

  A reduction in pay is possible for J-1 employees but requires that the program sponsor be notified and that the DS-2019 for the employee be updated accordingly. Any reduction in pay would need to comply with local, state, and federal minimum wage standards.

RELOCATION OF EMPLOYEES

- ### H-1B/ E-3/H-1B1

  If an H-1B, H-1B1 or E-3 employee's worksite changes within a normal commuting distance (including a home office), a new LCA is not generally required. Therefore, provided there are no material changes in the terms and conditions of employment (salary change or reduction in hours as noted above), the company does not need to file a new LCA. The company must, however, post the original LCA at the new worksite location for 10 calendar days. Notice is required to be provided on or before the date the H-1B, H-1B1 or E-3 employee begins work at the new worksite location. An amended petition would be required if the change in location is not within normal commuting distance. The public access files should be updated to reflect this change.

- ### L-1/E-1/E-2/O-1

  Employees holding these statuses can be relocated without impact to their immigration related filings. Change to worksite locations within the company will likely not be considered a material change, therefore, an amendment will not need to be filed. If the employee will be placed at a client site, an amendment will likely be required in this situation.

- ### F-1 OPT/STEM OPT/CPT/Other EAD Categories

  Employees in these visa categories can be relocated without notification to USCIS. F-1 employees need to notify their school DSO regarding a change in work location.

- ### J-1

  J-1 employees can also be relocated but need to notify their sponsoring program regarding the relocation. An updated DS-2019 needs to be provided to reflect this change.

LAYOFFS AND PENDING GREEN CARD APPLICATIONS

- ### PERM

  If the company has had a layoff in the area of intended employment for the same or similar position that the foreign national employee is being sponsored for within the six months immediately preceding the filing of a labor certification application (PERM), the company is required to notify and consider laid off employees for the job opportunity, which increases the risk of an audit by the DOL. In a situation where the position is impacted, it may be a better strategy to hold off on filing any PERMs during the 6 months following layoffs. A discussion with your designated Meltzer Hellrung attorney to assess the risks of proceeding with PERMs is recommended.

- ### Adjustment of Status (AOS)

  An employer has no affirmative obligation to notify USCIS of a layoff or termination of former employees with pending AOS applications. Once these applications have been pending for 180 days the employee can port the application to another employer if they will be employed in a similar role. It is respectful to advise employees of this possibility upon termination.

  Should you have any additional questions or concerns regarding any potential changes to your workforce, please contact your designated Meltzer Hellrung attorney.