

Article

Immigration in the post-pandemic world: Is your business on the right track?

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As many companies gradually resume their pre-pandemic routine, return furloughed or laid off employees, and bring employees who have long become comfortable working in their PJs back into offices, immigration is resurfacing as the hot button issue it has been over the past couple of decades.

Unlike many legal areas that were more tolerant to involuntary violations during the world-wide health crisis and allow for a more gradual remedial path, immigration requirements remained, for the most part, unforgiving during even the worst of Covid-19.

The emerging problem is that many businesses are, to this day, unaware of their immigration missteps over the past year, effectively positioning them as “sitting ducks” awaiting the government’s enforcement efforts and resulting fines. When assessing their corporate behavior during the pandemic, companies habitually focused on their fairness towards the employee body as a whole with, for example, pay reductions seen as fair because they were conducted across the board, affected every employee of the business, and resulted in the absence of layoffs. While this approach may well have met the muster of employment lawyers’ review, it does not satisfy immigration regulations.

Thus, well-intentioned employers may find themselves in hot water with immigration and Department of Labor auditors if the across the board pay reduction brought the company’s sponsored H-1B workers’ pay below the wages guaranteed per the H-1B petitions and Labor Condition Applications filed with the government.

And what about furloughs? Weren’t they the life savers allowing companies to conserve valuable workforce throughout the hard times while providing certain assurances to employees whom they would have otherwise had to lay off? This may be true for U.S. workers, but furloughing H-1B workers amounts to the strictly prohibited “benching” and can bring the weight of immigration enforcement onto an unsuspecting company if uncovered by the government.

Working remotely has become a norm for many professionals over the past 12 months, but for certain categories of sponsored foreign workers, a worksite is strictly defined and must be reported to the government with the initial immigration filing and updated upon its change. Failure to do so may result in both the employer and the worker’s immigration violation.

Also suffering during the pandemic were I-9 employment verification and related compliance measures. On one hand, the government relaxed certain in-person verification requirements, but most of the new rules affected only those businesses that had switched to offsite work in full. Use of the relaxed rules by a company that allowed some of its workforce to work from home would put the business at risk of I-9 violations.

To determine where your business stands on the issues above (and a few others as well), a good start is the following questionnaire to be answered by you HR and legal team:

1. Has your company gone through a layoff or a furlough during the pandemic? If yes, which categories of employees were affected and were any sponsored workers among them? (Consequences of a layoff or a furlough are different for a foreign worker and the company than that of a U.S. worker.)
2. Did the business reduce pay for its workforce due to Covid-19? Did this include foreign workers? If yes, did the pay cut result in lowering the foreign worker's salary below guaranteed wages agreed upon during the H-1B proceedings? Have mandatory filings with the government been made?
3. How did you approach employment eligibility verification and related compliance during the pandemic?
4. Have you had a layoff, but are now looking to sponsor your foreign national employees for permanent immigration (Green Card)? If so, you need to consider effects of layoffs on your ability to do so.
5. What have your work from home policies been over the past year and what are they going to be on a go-forward basis? If sponsored foreign workers were and/or are among those working off site, were mandatory postings made?

The above just scratches the surface of multiple immigration issues starting to come to light now that all of us are looking to return to "normal", or whatever the new normal may be. While various government-imposed rules and regulations almost certainly are behind the times, enforcement efforts are never too far away. Now is the time for all employers to focus on immigration-related business practices.

To read the full article, [click here](#).

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