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IMMIGRATION CONSEQUENCES OF WORKPLACE CHANGES

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WITH YOU TODAY



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Andrew is the Managing Partner of Fragomen's Washington, DC office and a member of the firm's Executive Committee. Andrew advises U.S. and global organizations across industries on U.S. immigration and nationality law, regulation, policy and compliance. He counsels clients on visa/work permit matters and on the immigration consequences of M&A and other corporate reorganizations; I-9/E-Verify, H-1B/LCA and PERM compliance, including audit representation; and overall global immigration program management. He also advises international treaty organizations, their officers and employees. Andrew's achievements in the immigration field have been recognized by several publications, including *Chambers USA*, *Best Lawyers in America* and *Who's Who Legal*. Andrew is an accomplished thought leader, author and lecturer and he writes extensively on immigration topics for major publications.

Andrew earned his J.D. from George Washington University and B.A., *cum laude*, from University of Pennsylvania.

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Priscilla is a partner with Fragomen, Del Rey, Bernsen & Loewy's Washington DC office where she advises multinational corporations on employment-related immigration issues, focusing on strategic immigration planning and regulatory compliance. She has extensive experience in wide-variety of industries including information technology, management consulting, energy, non-profit, telecommunications and consumer goods involving all major employment-based temporary and permanent visa categories. Priscilla is currently focused on complex, high volume immigration programs and associated compliance in the IT consulting space. She regularly assists clients with internal audits (LCA and I-9) as well as government investigations. Priscilla is a graduate of the University of Virginia (B.A. Foreign Affairs) and William & Mary School of Law (J.D.). She is admitted to the bar in Virginia and the District of Columbia and is a member of the American Immigration Lawyers Association, the Virginia Bar Association, and the Society for Human Resource Management.

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WORKPLACE CHANGES

TWO KEY CONSIDERATIONS

Changes at the Individual level

- Material changes to the terms and conditions of a foreign national's employment can create compliance obligations and/or lost benefits
- Employer should have policies and procedures in place to address what a material change is and what steps must be followed

Changes at the Organizational level

- Corporate reorganization, such as a merger, acquisition, or divestiture can also create compliance obligations and/or lost benefits
- Lay-offs
- Employers should plan for those issues as far ahead as possible
 - Immigration-related costs associated with the reorganization
 - Interruptions and/or impact to resources

WORKPLACE CHANGES IMPACT

4 key factors drive the impact

- Type of visa/work permit
- Nature of change
- Whether employee is being sponsored for U.S. Residency (“green card”)
- Risk appetite

CHANGES AT THE INDIVIDUAL LEVEL

What types of changes matter?

- Work location (including telework, addition of worksites and short-term deployments)
- Job title or duties
- Compensation
- Hours
- Unpaid time

What are the consequences?

- Possible compliance obligations
 - Required wage increase
 - Required amended petition
- Possible loss of immigration benefits
 - Validity of current work authorization impacted
 - Green card case no longer useable

AMENDED PETITIONS

H-1B WORKERS

Material changes to the terms and conditions of employment or H-1B worker's eligibility 8 CFR §214.2(h)(2)(i)(E)

- Regulations do not define “material change”
- Legacy INS letter from 1995 arguably still applies
 - Changes that directly impact foreign national's eligibility for H-1B classification
 - Promotions to higher positions within same occupation generally not material, provided new role relies on same academic training as sponsored role
 - No penalty for filing amended petition after the material change occurs
- Matter of Simeio Solutions, LLC, 26 I&N Dec. 542, 549 (AAO 2015)
 - Amended petition required for new work locations generally
 - Exception when new location in same metro area/normal commuting distance
 - H-1B worker may move only after petition filed

AMENDED PETITIONS

H-1B WORKERS

- Employment by a new legal entity generally requires amended petition
 - Common law employment test, rather than payroll test
 - Exception: Immigration and Nationality Act §214(c)(10), 8 USC §1184(c)(10)
 - Amended H-1B petition not required where a new corporate entity “succeeds to the interests and obligations” of original petitioning employer and where the terms and conditions of employment remain the same but for name of employer
 - “Interests and obligations” not defined by statute or regulation
 - USCIS policy indicates acquisition of ‘immigration’ liabilities sufficient; e.g., H-1B/LCA obligations

AMENDED PETITIONS

L-1 INTRACOMPANY TRANSFEREES

Governed by 8 CFR §214.2(l)(7)(i)(C)

Changes to qualifying corporate relationships

- U.S. and foreign employers have different corporate relationship than described in initial L-1 petitions
- Reorganizations impacting corporate structure likely to require amended petition

Movement from managerial role to non-managerial role or visa versa

- L-1A to L-1B, L-1B to L-1A

Other changes that would affect L-1 worker's eligibility for the classification

- Lack of clear guidance
- Legacy INS guidelines from 1992 arguably still applies
 - “The amended petition procedure was not devised merely as an avenue to advise the Service of minor changes in the conditions of employment of the beneficiary's eligibility.”
 - Change from one managerial role to another managerial role does not require an amended petition.
 - Movement between corporate entities requires amended petition if individual petition, but does not if blanket petition and new entity is on the approved blanket.

CHANGES AT THE ORGANIZATIONAL LEVEL

Critical Information for corporate reorganizations

- Nature of the reorganization (e.g. merger, asset acquisition, spin-off, etc.)
- Timing of the reorganization
- Reduction in force?
- Employees sponsored for U.S. work permits & type of work permit (e.g. H-1B, L-1, F-1 OPT, etc.)
- Employees sponsored for U.S. Permanent Residency (“green card”), type of green card, and stage of green card process

H-1B liability

- Public Access Files, Notice, Wage system

Employer sanctions liability

- I-9 and E-Verify

Global mobility policy alignment

- Grandfathering or immediate alignment?
- Travel/relocation policy
- Sponsorship policy

LAYOFFS

Critical Information for lay-offs

- Timing
- Employees sponsored for U.S. work permits & type of work permit (e.g. H-1B, L-1, F-1 OPT, etc.)
- Employees sponsored for U.S. Permanent Residency (“green card”), type of green card, and stage of green card process

Other information/decisions to be considered

- Investment to date in foreign nationals subject to lay off
- Post-lay off support (e.g. immigration options consultation)

H-1B obligations

- Notice to USCIS
- Liability for cost of return transportation of H-1B worker to country of last residence

F-1 Students working pursuant to STEM OPT work authorization

- Notice to student’s school

Labor Certification for Permanent Residency

- Layoffs may impact labor certification-based green card cases of employees who are not being terminated

QUESTIONS TO TAKE AWAY

Who are your sponsored employees, what status do they hold and are they in the green card process?

- Who owns, maintains, and updates the list?
 - In-house or outsourced function?
 - Centralized or handled per business unit?

Do you have an internal system that tracks and monitors where sponsored foreign nationals are working and what they are doing?

- Who is responsible for updating the system?
 - Self-reporting? Manager-driven? HR-driven?
- Where does information flow in to?
- Who consults with immigration counsel?

How and when are relevant stakeholders informed on planned reorganizations?

- How can we ensure deal-makers are sensitized to immigration issues and potential liability so these issues can be addressed and resolved as early in the process as possible?

What is your organization's risk appetite? Do you take into consideration your employees' risk appetite?

QUESTIONS