**Frequently Asked Questions: Laying Off Foreign Employees**

If you are planning on laying off a foreign employee, this FAQ sheet will help answer your questions.

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1. **An employee in H-1B status is going to be terminated. What should we do?**

   Whenever an employee is terminated, laid-off or otherwise no longer under the employ of the petitioning employer, we recommend that the H-1B be immediately withdrawn.

   For one, your immigration services provider is under a legal duty to inform the USCIS that the employee is no longer employed by you.

   From a liability stand-point, withdrawing the H-1B avoids the possibility that the employer will be held liable for continuing to pay the certified wage amount. The U.S. Department of Labor (DOL) does not consider the employee’s termination to be effective until the employer withdraws the H-1B petition. Terminated employees could potentially sue the employer for back-wages from the date of termination to the date of withdrawal of the H-1B even if the employee has not been working for you.

   Work with your immigration services provider to prepare and submit this withdrawal letter.

2. **We're terminating an employee next month. When should the H-1B petition be withdrawn?**

   While you may be aware of an impending termination, we do not recommend that the H-1B petition be withdrawn until the date the termination takes effect. A premature withdrawal of the H-1B petition could result in unauthorized employment from the date of withdrawal to the date of termination.

3. **Are we required to pay for the terminated H-1B employee’s airfare back to his/her country?**

   The employer may be liable to pay for the cost of the employee’s airfare back to his/her home country.

   This is applicable where the employer terminates the employer-employee relationship of an individual in H-1B status, not where the employee voluntarily resigns. If the employee remains in the U.S. following the termination of employment, you may give him/her a specific time frame in which to obtain transportation home. If he/she does not do so within that time frame, you will be relieved of that obligation.

   This requirement is also very specific about the extent of the employer’s liabilities. The employer is not required to pay for the employee’s dependents, nor for any additional moving costs.

4. **Does a terminated non-immigrant employee have to leave the U.S. immediately?**

   Possibly. Unfortunately, the USCIS does not recognize or provide any grace period for maintaining status after a worker in H-1B status has been terminated. While the USCIS has not explicitly stated that the same rule applies for L-1, E-1, E-2, E-3, H-1B1, O-1, and TN non-immigrants, the same analysis applies. As such, when these individuals are terminated, they are considered to be out of status.
If an employee is aware of an impending termination, he/she should try to find an employer to which to transfer his/her visa as soon as possible. If this is done before termination, there should be no problems transferring the H-1B successfully and remaining in the U.S.

If, on the other hand, the employee is terminated and then files an H-1B transfer, the USCIS may look to see if there was a gap between H-1B employers. If the USCIS finds that there was a gap in employment, they may approve the H-1B transfer but not the extension of stay in the U.S. In that scenario, the individual would have to leave the U.S. to get a new H-1B visa stamp and return with a new I-94 in order to begin working for the new employer. If the individual cannot find an employer to whom to transfer the H-1B, he/she will have to leave the U.S.

5. How about an individual with a pending I-485 application to register permanent residence or adjust status? Does he/she have to leave the U.S. immediately?

No. If an individual has a pending I-485 application, he/she can remain here in the U.S. as an I-485 adjustee of status (I-485 AOS), following their termination.

While the pending I-485 authorizes the individual to remain in the U.S., he/she should also try to transfer the green card sponsorship to another employer (see below). An employment-based green card is premised on a permanent offer of employment, and if you are no longer in a position to offer that employment, the individual should find another employer who is.

Although the basis for the green card case is the permanent offer of employment, the USCIS will not be made aware of the termination unless one of the following scenarios happens: 1) The employer moves to withdraw the I-140 employment-based immigrant petition; 2) The USCIS issue a Request for Further Evidence (RFE) for the I-485 case; or 3) The USCIS schedules an adjustment interview for the individual to be interviewed by a USCIS officer. If any of these three things happen, and the individual was unsuccessful in finding a new employer, the I-485 will likely be denied for lack of sponsorship.

6. We're in the middle of the green card process but unfortunately we now have to lay this employee off. Does he/she have to start the process over with another employer?

This really depends on where the individual is in the green card process.

ETA-9089 (PERM labor certification) pending/approved:
- Unfortunately, the employee is in the first stage of the green card process, and he/she will have to start over the green card process with a new employer. An approved labor certification cannot be transferred to another employer.

Form I-140 pending/approved and I-485 not yet filed:
- If an employee in this situation finds another employer willing to pursue a green card process, he/she will also essentially have to start over from stage one. On a positive note, there is a chance that the employee can benefit from this “first” green card process. While the green card cannot be “transferred,” his/her new employer may file a new ETA-9089 (PERM labor certification) and I-140 petition for the individual and “recapture” the priority date from the first I-140 approval. This allows the individual to keep his/her place “in line” for a green card.
Form I-485 pending for at least 180 days and Form I-140 approved:

- It may be possible for an individual with a pending I-485 application to effectively “port” (i.e., transfer his/her green card) to another employer. The new position should be similar to the sponsored position; your immigration services provider can do this by comparing the job descriptions of the two positions. The ability to port the employee’s green card case should be evaluated by an attorney on each individual basis.

7. We’ve started the green card process for an employee, but now we have to transfer them to our foreign branch. Can we still continue the green card process?

Yes. Initiating or continuing a green card case does not require that the individual actually work for the green card sponsor at this time or be located in the U.S. As long as the employer has the intent to employ the individual permanently in the U.S. once he/she gets the green card, the employer can proceed with the green card case.

If this situation is applicable to you, we recommend consulting your immigration services provider as it may be advisable to open a different type of case (e.g., a consular processing case).

8. An employee resigned. Can we recover any of the costs associated with his/her visa from them?

Yes. Certain costs may be recovered from an employee who resigns from the company following visa sponsorship. The employment agreement you have in place with your employee will govern this situation. You may want to check with your immigration services provider if they offer a cost recovery agreement template, and if so, request a copy prior to hiring new foreign nationals. We also recommend that you consult with employment law counsel in relation to recovery of these costs.

From an immigration standpoint, the following list represents some of the costs that an employer may not recover from an employee regardless of the circumstances of the individual’s departure from the organization: any costs associated with the filing of a labor certification (i.e., ETA-9089 PERM), including attorney fees; the H-1B Data Collection and Filing Fee ($1,500 or $750); and, the $500 Fraud Prevention and Detection Fee for H-1Bs.

9. A terminated employee (or one who will be soon) is asking for a complete copy of his/her file. Do I have to provide it to him/her?

A terminated employee is only entitled to a copy of certain filings. He/she is not entitled to copies of any labor certification or non-immigrant/immigrant petitions filed by the employer on the employee’s behalf. Employer-filed petitions include: ETA-9089 PERM labor certification; non-immigrant I-129 petition for an H-1B, L-1B, etc.; I-129 petition for non immigrant status (e.g., H-1B, L-1A, L-1B, etc.) and the I-140 immigrant petition. Should an individual ask for copies of the employer-sponsored petitions, your immigration services provider may ask you for your consent before releasing these documents to the former employee. Please be advised that you are not legally obligated to provide such consent but may choose to do so as a gesture of goodwill.

The employee is entitled to a copy of any applications signed by himself/herself or his/her dependents, such as the I-485 application to adjust status to permanent resident, I-131 application for travel document (Advance Parole), I-765 application for employment authorization (EAD card), and any application filed on form I-539, such as an H-4 or L-2 case.

10. Will a layoff have any effect on our other H-1B or green card cases?

Yes. While a company-wide layoff may not have an effect on your current or future H-1B cases, it may have
an effect on current or future PERM green card cases. If there has been a layoff by the employer in the area of intended employment within six months prior to the filing of a PERM labor certification, the regulations require employers to notify and consider any potentially qualified U.S. workers involved in the layoff. The employer should document such contact with that employee (e.g., emails, phone calls, etc.). Additionally, the ETA-9089 requires employers to attest that it acted in accordance with the above process.

The employer does not have to disclose layoffs that occurred more than six months prior to the filing of the PERM labor certification application, as well as any layoffs that happen after the filing of the PERM labor certification application.

We generally recommend that you contact your immigration services provider about the impact of layoffs on the H-1B and/or green card process.

11. We’re not terminating any employees, but the current economic climate has forced us to make a company-wide 10% reduction in salary. Is there anything we should know?
Yes. A reduction in salary may have legal implications for certain foreign national employees.

For example, individuals in H-1B status must be paid at least the prevailing wage for that position in the geographical area. A pay reduction of 10% may result in that individual being paid less than the prevailing wage, which is not allowed by immigration law. Your immigration services provider will have to assess each pay reduction on an individual basis to ensure that each employee in H-1B status will still be receiving at least the prevailing wage.

With regards to an individual with a pending green card case, a pay reduction will generally not have any immediate impact. When the I-140 petition is filed, the employer agrees to pay the individual the offered rate (which is equal to or higher than the prevailing wage) when that individual receives his/her green card.