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**Employment Question of the Day: April 21, 2020****Legal Update**

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By Immigration Group

**Question****How can your company's actions impact your nonimmigrant employees?****Answer**

To answer this question, Fredrikson & Byron's Immigration team addresses three key immigration issues: layoffs, furloughs and unemployment compensation.

**What impact does a layoff have on our company's H-1B and other nonimmigrant employees?**

In general, if you terminate the employment of someone in employment-based nonimmigrant status, United States Citizenship and Immigration Services (USCIS) and the Department of Labor (DOL) expect that an employer will also withdraw the individual's nonimmigrant visa petition (if applicable) and the Labor Condition Application (LCA) (applicable to H-1B, E-3 and H-1B1 statuses) supporting the individual's status.

The withdrawal of the visa petition and accompanying LCA effectively terminates the foreign worker's nonimmigrant status and authorization to work for the employer sponsor. If workers in E-3, H-1B, H-1B1, L-1, O-1, TN or E-2 status are terminated, they have up to 60 days or the time remaining on their current I-94 document (whichever is shorter) to (1) file a new nonimmigrant visa petition based on sponsorship through another employer or with the same employer (which can terminate, withdraw and file a new H-1B petition), (2) change their status to another nonimmigrant status, or (3) depart the United States.

**What about a furlough's impact on our company's nonimmigrant employees?**

Because the law in this area has not changed, unpaid leave for foreign workers in certain non-immigrant status could be problematic as tantamount to benching, which is prohibited under the regulations for H-1B, E-3 and H-1B1 status. Under current law and absent additional guidance from the DOL, the only time a

nonimmigrant employee can go unpaid is if the worker is on FMLA or other approved and protected leaves, including those requested by the employee. Furthermore, these nonimmigrant employees need to be paid at or above the prevailing wage and cannot have their salary reduced below that amount.

A furlough is likely not problematic for individuals on L-1, O-1 and TN status, since there is no underlying LCA requiring certain wages and hours of employment. While these nonimmigrant statuses are also tied to employment, they would likely have a defensible claim to maintenance of status while on furlough if the employer treats them as active employees with a valid employer-employee relationship.

### **Are our nonimmigrant employees able to file for unemployment compensation?**

If otherwise eligible under the relevant state unemployment insurance requirements, nonimmigrant employees can file for unemployment compensation. Although USCIS implemented the new Inadmissibility on Public Charge Grounds Final Rule on February 24, 2020, which substantially expands the types of benefits which could make an individual ineligible to become a lawful permanent resident or to seek a change or extension of status, USCIS has stated that unemployment benefits are not generally taken into consideration by USCIS for this purpose.

If you have any questions, contact your Fredrikson & Byron Immigration attorney or Employment & Labor attorney.