

Placing foreign workers on leaves of absence

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When U.S. employers approve or require an employee's leave of absence, they are typically guided by their human resources policies and relevant employment laws. Granting leave becomes more complex when the employee is a foreign national whom the employer sponsored to work in the United States.

Depending on the reason for the leave, the extent to which the employee will be compensated while on leave, and the employee's immigration status, employers may have to also consider and comply with U.S. immigration law.

Principal reasons for leave include personal circumstances, such as maternity leave or other approved leave under the Family and Medical Leave Act or a state equivalent; leave mandated by the employer, including bench time for lack of work; and leave compelled by a loss of the employee's U.S. employment authorization.

LEAVE REQUESTED BY EMPLOYEES

As a general matter, when a sponsored employee requests leave for personal reasons, the employer may grant the leave without offending the immigration laws or jeopardizing the employee's immigration status and ability to return to work at the end of the leave, provided the employer-employee relationship continues throughout the leave. Both employer and employee should nevertheless bear in mind a few important considerations.

If employees travel abroad and seek to return to the United States during the leave, they may be questioned by a U.S. consular officer (if applying for a visa) and/or an immigration officer at a port of entry about the leave and asked whether they plan to resume their employment.

Since eligibility for admission to the United States will be tied to an employment relationship with the sponsor, employers should ensure the employee carries a letter confirming the continued employment relationship, the timing and nature of the leave, that the leave comports with the employer's normal leave policy, and the time frame in which the employee is expected to return to work.

If the leave is unpaid, employees should be prepared to explain to a consular or border officer how they will financially support themselves and any dependents during the leave. This may be in the form of bank account statements, confirmation of disability payments or insurance, or other evidence of financial security. Immigration officers may refuse admission to foreign nationals whom they determine might require public assistance upon entry into the United States.

When determining the length of the leave, employers should pay close attention to the validity of the sponsored employee's employment authorization, which is usually governed by an approval notice issued by U.S. Citizenship and Immigration Services and/or an I-94 record showing the expiration of an employee's authorized period of stay in the United States.

If the leave will extend beyond the expiration of the employee's authorized stay, the employer may need to request an extension of stay with USCIS on the employee's behalf. These applications must include the employer's credible assertion that it continues to offer the employee paid employment in the United States.

If the employee has been or will be unpaid during the leave, the employer may need to demonstrate the existence and validity of the approved leave and how the employee and any dependents will financially support themselves until paid employment resumes.

LEAVE REQUIRED BY EMPLOYERS

Leave may also be driven by the employer. Two common examples are employees placed on leave pending a disciplinary investigation and employees placed in nonproductive status, or "benched."

If these leaves are paid, then the employer should be able to maintain employees on leave until the disciplinary action is resolved (which may lead to either termination or a return to work) or until productive work resumes.

Regardless of whether the employer-mandated leave is paid or unpaid, if the employer must file a petition to extend the employee's stay during the leave period, then the petition must include the employer's truthful confirmation that it intends to offer the employee paid employment in the United States when the leave ends.

If the involuntary leave is unpaid, the employer should also consider the issues described above regarding international travel.

Placing a sponsored foreign worker on an unpaid leave of absence due to a lack of work may have additional legal and practical consequences, especially for H-1B workers.

Unlike most other visa categories, H-1B program rules require employers to attest to the U.S. Labor Department that they will meet certain conditions while employing a sponsored H-1B worker. Among other things, sponsoring employers must pay their H-1B employees a competitive wage — a calculation known as the "required wage" — for the entire period of employment in the United States.

U.S. Labor Department regulations and related case law provide that the obligation to pay the required wage does not cease until the employer formally terminates the employment relationship, among other requirements.

Those regulations further provide that if an H-1B worker's leave or nonproductive status is due to a lack of work or other reasons related to employment, then the employer must continue to pay, and will be held liable for, the required wage during the leave.¹

The regulations clarify that if the employee requests the leave for personal reasons, such as maternity or other approved personal leave, then the employer is not obligated to pay the required wage during the leave.

Where the facts are ambiguous, such as when an employee's request for personal leave coincides with a lack of work or circumstances suggest the leave may have been prompted or coerced by the employer and not principally for the benefit of the employee, the Labor Department may initiate an enforcement action that could render the employer liable for back wages.

Employers should carefully document an H-1B worker's request for leave, including the reason for the leave, to avoid confusion in the event the nature of the leave is later questioned.²

The above considerations, of course, pertain only to employees placed on leaves of absence. If after consultation with employment counsel an employer decides to terminate the employment relationship, then a leave of absence is no longer relevant.

LEAVE COMPELLED BY LOSS OF IMMIGRATION STATUS OR EMPLOYMENT AUTHORIZATION

There are two principal circumstances that result in the loss of U.S. employment authorization: termination of the immigration status that conferred the authorization, and/or expiration of employment authorization documentation, or EAD.

For foreign nationals sponsored by their employers to work in the United States, lawful status depends on continuing employment with a sponsoring employer. If that employment ends — either because employment authorization is invalidated by a loss of immigration status or because the employer or employee chooses to terminate the employment relationship — then the employee is no longer authorized to work in the United States absent a separate grant of employment authorization.

Individuals issued EADs may not accept or continue employment beyond the EAD expiration plus any grace period recognized by regulation, or if USCIS revokes the EAD.

It is a violation of the Immigration Reform and Control Act of 1986³ for an employer to hire an individual who lacks evidence of employment authorization. It is also unlawful to continue to employ an individual once the employer knows or should

know the employee is no longer authorized to work in the United States. This raises the issue whether an employer may place an employee on a leave of absence if the employee's authorization to work in the United States has expired.

According to IRCA, an "employee" is "an individual who provides services or labor for an employer for wages or other remuneration."⁴ The plain language of this regulation requires the assessment of two elements in determining if an individual is employed under IRCA and if the employer must verify and maintain evidence of the individual's continued U.S. employment authorization.

If the individual in question is not providing labor or services and is not being compensated,⁵ then that individual is not an employee under IRCA. It seems clear, therefore, that an employee on an unpaid leave of absence is not an employee for IRCA purposes.

Employers should update their HR records to reflect the unpaid leave and should ensure the employee is fully disengaged from the workplace. This may include disconnecting access to email and voice mail, repossessing company-issued devices such as cellphones and laptops, and carefully crafting a communication to the employee (and those in the employee's value chain) confirming the rules of disengagement during the leave.

In the event of a U.S. Immigration and Customs Enforcement action, having taken these steps may prove useful if an employer is asked to explain its decision against terminating an employee who is not authorized to work in the United States.

With regard to paid leaves of absence, here again IRCA's definition of an employee should control. Since, under the law, an employee must be providing labor or services and be compensated for those services, a paid leave should not offend these requirements. Placing an employee who lacks employment authorization on a paid leave, however, must be considered and executed with caution.

Disengagement from the workplace is even more critical than for employees on unpaid leave, since if the employee engages in even negligible work-related activity during the leave, the government may conclude that the employee provided labor or services. Employers should therefore take steps to monitor and confirm the employee's separation from work activities throughout the leave.

Another important issue employers must consider when placing employees who have lost employment authorization on leaves of absence is the duration of the leave. While IRCA's definition of employee, standing alone, does not limit leave duration, employers should nevertheless tie the duration of leaves to specific and reasonably obtainable objectives meant to remedy any deficiencies in immigration status or employment authorization.

By doing so, employers may avoid the appearance of encouraging employees to remain in the U.S. longer than the law would allow.⁶

This reasoning conforms to that of the 9th U.S. Circuit Court of Appeals in *Incalza v. Fendi North America Inc.*,⁷ which held that an employer has the option of placing an employee with questionable immigration status on a leave of absence in lieu of termination.⁸

The court held, “Placing employees on unpaid leave for a reasonable period is consistent with the purpose of IRCA.” It deemed as reasonable “allowing employers to place employees on leave without pay while problems or concerns are resolved” and “[u]npaid leave [that] permits individuals to obtain a different form of work permit to meet changed conditions or renew a permit that has expired as a result of the employer or employee’s inadvertent failure to file for renewal in sufficient time or as the result of the agency’s failure to act promptly upon an application due to the overwhelming backlog it frequently confronts.”

While *Incalza* focused on the propriety of unpaid leave, the court recognized the value of leaves of absence in protecting employee benefits, holding, “Allowing employers to place employees on unpaid leaves furthers Congress’ secondary purpose of protecting the rights of lawful alien workers. It affords employers a means of preserving the *seniority and other benefits* of lawful workers whose work authorization has been questioned or who lack adequate documentation.”⁹

The court did not elaborate on what it meant by “other benefits” but, given the emphasis on worker protection, it stands to reason that it was referring to maintaining benefits, such as health insurance and other insurance, that would avert injury to the worker during a temporary gap in employment authorization.

The 9th Circuit’s decision in *Incalza* is not binding precedent for employers setting leave parameters nationwide, but its reasoning should serve as a framework when authorizing leave for employees whose U.S. employment authorization has ended.

Specifically, employers should determine whether there is a realistic opportunity to reverse or remedy the loss of employment authorization and should align the nature and length of the leave with that determination.

Company policies and relevant employment laws will play a large role in decisions regarding leaves of absence. But when an employee is a sponsored foreign national, employers must also consider the employee’s immigration status and the requirements of IRCA when fashioning the contours of a leave.

NOTES

¹ 20 C.F.R. § 731(c)(7)(i).

² While other employer-sponsored visa classifications, such as the L-1 visa for intracompany transferees, do not include a required wage obligation, employers should consult with employment and immigration counsel if they maintain distinct pay scales based on visa type, as this could not only result in employee relations issues but also in heightened scrutiny of the employer’s overall immigration program by regulating authorities.

³ Pub. L. No. 99-603, 100 Stat. 3359 (1986).

⁴ 8 C.F.R. § 274a(1)(f).

⁵ Employees working without pay during a gap in their U.S. employment authorization triggers serious employment law concerns and is beyond the scope of this article.

⁶ Employers should consult with immigration counsel in determining how long to approve a leave, as there may be circumstances, such as when government authorities have specifically deemed an employee to be in the U.S. in violation of law, where a leave of absence would be ill-advised.

⁷ *Incalza v. Fendi N. Am. Inc.*, 479 F.3d 1005 (9th Cir. 2007).

⁸ *Incalza* involved an Italian citizen whose “E” visa employment authorization was put at risk when his employer, Fendi, was purchased by French nationals and lost its Italian ownership.

⁹ *Incalza*, 479 F.3d at 1012 (emphasis added).

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