



Podcast Transcript

Changes to Business Immigration during COVID-19: What Employers Need to Know

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Kattman: Just how much impact is the global pandemic having on foreign national workers and business immigration? How are companies reacting to the challenges this presents to their workforce? I'm Amy Kattman, and you're listening to BakerHosts.

On today's episode we will answer these questions and others, including a breakdown of which foreign national workers are most at risk and how companies can prepare for possible slowdowns in application processing, with our guest Matt Hoyt. Matt is a partner in BakerHostetler's Labor and Employment Group and leads our immigration practice. Welcome to the show, Matt.

Hoyt: Thanks, Amy. Happy to be here.

Kattman: Great. Well, to get us started, Matt, could you tell us how would you describe the last six months during the COVID pandemic from the perspective of business immigration?

Hoyt: In a word, I would say it's been a whirlwind. To understand what's going on in the COVID pandemic, it is important to know that over the last three years the Trump administration has been steadily increasing barriers to legal immigration. We've come to describe this as his "invisible wall". Whereas he has not been able to complete a physical barrier on the border of Mexico, he's done a lot behind the scenes through policy changes and heightened adjudication standards to create an invisible barrier to people who are already in the United States or are seeking to come here the right way. Everything's more difficult. There are more denials, more requests for evidence, more delays than we've ever seen. And I think what we're seeing is the Trump administration take a page out of the playbook of

President Obama's advisor Rahm Emanuel, who said, "You should never let a good crisis go to waste." And I think the Trump administration is taking advantage of the fear that we have right now in the world about foreign travel and other considerations, and they've taken the opportunity to enact several policies

over the last six months really, starting in late January, where many countries' citizens are prevented from traveling to the United States, including most of Europe. Even though the crisis has gotten a lot better in Europe, those individuals are still prevented from coming here. So, what we've seen really is an acceleration of the invisible wall concept during the pandemic to really make it difficult on business travelers, individuals with work visas, individuals pursuing green cards, and even family members of workers who are currently in the United States. So, there's a few different perspectives there amongst different stakeholders. You know, foreign workers are pretty much scared. You know, they're scared about what's happening in the world generally, but they're scared for their livelihoods and the safety of their families. These are individuals a lot of times who have come to the United States for school, you know, and having graduated from a U.S. university they entered our workforce. Some of these individuals have been here for five or ten years, maybe even longer. And they're contributing into the U.S. economy, their children are in school, they've maybe bought houses here and cars, and that all is being thrown into some confusion right now. By now they would have expected to have green cards or maybe even citizenship to make sure they have the permanent right to live and work in the United States. But due to some of these policy changes, even the most recent ones, that grasp on the American dream is being pushed further and further away from them. And we have a lot of clients who are pretty close to giving up and returning to their home countries rather than continue to wait on the U.S. government to give them, you know, what they've been looking for.

Kattman: What are the most common questions business immigration attorneys are getting right now?

Hoyt: By far the most common question we're getting right now is in a response to the most recent presidential proclamation issued by the Trump administration on June 22. Previous announcements by the administration which were travel bans, there was a proclamation issued in April that impacted individuals who were pursuing green cards. I would consider those proclamations to be somewhat of a narrow slice of the foreign worker population. They were very important and very impactful, but you know they were narrow. And we just weren't getting a lot of questions about those from individuals who were truly impacted. The June 22 proclamation changed that. There are much larger implications from the June 22 proclamation because of the number of employees it impacted and frankly some ambiguity in that rule that has since been clarified by the administration. But the way that proclamation was written, it applies to four groups. There are H1B workers which are specialty occupation workers. There are over 500,000 of those in the U.S right now. There are impacts on H2B visa workers which are for temporary and seasonal need. The proclamation applies to J1 workers who are

typically trainees and interns, and there's an impact on L1 workers, which are intercompany transferees which are workers who are employed abroad right now, but are coming to the U.S. to fill roles with the parent affiliate or subsidiary of their current employer abroad. Those are the four groups under that proclamation. Going even further, it really applies to individuals who are abroad right now. Individuals who are currently in the United States on one of those statuses, maybe they're working already, as long as they sit tight there's no direct impact. Where it starts to impact them is when travel abroad becomes necessary or if they are already abroad and they have not yet come to the United States with a visa.

Kattman: You mentioned that foreign workers are scared. Which groups of foreign national workers are most at risk?

Hoyt: So, whereas there's been, you know, lots of groups that are impacted by these recent proclamations and even the June 22 proclamation purports to apply to four groups, two I really want to highlight for the purpose of business immigration. In this podcast are the H1Bs and the L1s. As I mentioned there are over 500,000 H1B visa holders, and you know those folks work for a variety of companies, big and small, throughout the country. And they're all scared and concerned about their futures here. The bottom line for those folks is if they're in the United States right now, they're protected as long as they don't leave. And that sounds like, you know, really unwelcome advice to receive, you know hey, listen, don't leave the country. But it's the state of play right now for U.S. immigration, and that's the advice we're giving our foreign national workers is to sit tight. Not only do you want to sit tight because of the current proclamation impacts you if you leave, but we really can't predict what might happen if you leave and a new proclamation comes out while you're abroad. So, the best advice is to sit tight. Every person who travels abroad needs to go to the U.S. Consulate, the U.S. Embassy in their, probably in their home country or maybe in another country, to pick up a stamp in their passport. And those visa stamps on their passport are what allows you to return through the country and come in through U.S. Customs to return to your job or to come to a job that you're just starting. And that's where this proclamation particularly hits home. Individuals are not going to be permitted in H1B visas and L1 visa classes from going to the consulate to the consulate to pick up a new visa. That's where this proclamation really impacts folks, and whereas some of these H1B visa holders may have been abroad right now and they're planning to come to the United States as early as October 1 to start their jobs, those start dates are going to be delayed until at least January 1. Similarly, for the L1 visas. These are individuals who principally are abroad. They're waiting to come here to start their jobs and they are going to be prevented from going to the consulate to apply for their visa stamps until at least January 1. And some of those workers are here already and they likewise will be prevented for traveling abroad to get new visas until January. And making this worse, to sort of bring this back to the COVID pandemic, you know back in March the U.S. State Department closed all of those U.S. consulates for routine visa processing. So, this has been the state of affairs for you know, four months now, where even prior to this proclamation a lot of individuals had travelled abroad with plans for maybe a short vacation, a short visit to see their family and then they were going

to come right back and resume their jobs here in the United States. And if they happen to have been abroad when the COVID pandemic hit, they may have been prevented from going to the consulate to get a visa. And they may have been abroad since February or March at this point, and this is adding fuel to the fire. This is exacerbating that situation by preventing those folks from going to the consulate now until possibly January. And so, by the time all is said and done, they may have been stuck abroad for nearly a year.

Kattman: Matt, you recently commented in an article that the USCIS has notified over 13,000 of its employees of a potential furlough in August due to a budget shortfall. How should companies prepare for the possibility of slowdowns in processing?

Hoyt: So, this is one of those issues that grabs a lot of the attention in the news right now. It's really sucking up a lot of the oxygen because of the shock value of it. USCIS is proposing the furlough over 13,000 of its workers nationwide due to what it claims is a need for \$1.2 billion in emergency funding, and those numbers just jump out at you. Now, I am an optimist and I believe this will get taken care of by Congress, but at the same time we all need to prepare for the possibility that it won't. You know, Congress is not fond of making solutions to immigration problems. That may sound cynical, but the reason the Trump administration has issued so many executive orders and presidential proclamations, and even previous administrations have done so, is because it's very hard to get Congress to act on anything immigration related. It's such a hot button issue. So that's what we're faced with. They claim there's a big funding shortfall. They have notified 13,000 of their workers that there may be a furlough in late August, and if that happens the entire system's going to come to a screeching halt. We're already seeing record delays, and that will get even worse. So, the question becomes, you know, if you're planning for this, what can you do. And our advice is really two-fold for employers, and that is if you have a case that's currently pending, you should explore any options that are available to expedite the processing of that case. This might be a worker whose visa has already expired, or maybe the visa's expiring in the next couple of months and you should look to whether or not the visa category is eligible for premium process. Premium processing is a service offered by U.S. Citizenship and Immigration Services where the agency will process the case in 15 calendar days for an extra fee of \$1,440. That's a lot of money but it can be well spent if it means that your worker is not, you know, subject to unnecessary delays or just generally the anxiety of knowing that they need a work visa extended when the agency is shut down. So, we're recommending that any case that is eligible for premium processing, that an employer take a hard look at whether or not that is an option that should be pursued. And if that doesn't work there are other options. Congressional outreach services, you know, most senators' offices have an immigration liaison, and they may be able to help push a case along as well. And the second group are those who maybe haven't filed their cases yet but are eligible. These may be workers whose visa expires towards the end of the year, and efforts may be underway to get started on those extensions. It makes a lot of sense to get cases like that filed before a potential shutdown, which is rumored for mid to late August. If the work can be done and the case can be filed in the next two or three

weeks, you may be able to protect your workers because many work visas allow a worker to continue working as long as a timely filed extension is pending with immigration. So if a case can get filed in the next few weeks and in the event of a shutdown it should be able to protect those workers and their ability to work and should be able to alleviate a lot of the anxiety that goes along with some of those uncertainties.

Kattman: Matt, in closing, what are the most important things employers should take away from this discussion?

Hoyt: I think it's very important to keep an eye on the latest developments. You know the June 22 proclamation that we've spent a lot of time discussing here has been amended twice just in the last couple weeks to resolve ambiguities, to make it clear that it doesn't apply to certain groups. In one piece of good news, they just announced this week that it will not be applied to prevent family members who are stuck abroad from returning to the United States to join their husbands and wives and children, which is very welcome news for a lot of our clients. But those kind of developments are not always well publicized, so you're going to want to pay attention to the headlines, but also keep in close contact with your immigration counsel so that you can make sure if there's a window of opportunity to make things a little bit easier on your workers that you have the opportunity to take advantage.

Kattman: Thank you, Matt. If you have questions for Matt, his contact information is in the show notes. We've also included a link to our employment law spotlight blog where Matt is a regular contributor. As always, thanks for listening to BakerHosts.

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