



CONSIDERATIONS WHEN TERMINATING A FOREIGN WORKER (H-1B, H-1B1, E-1/E-2, E-3, TN, L-1, O-1)

Employer Considerations

Terminating an employee is always a difficult decision. Terminating a foreign worker has additional challenges and consequences that must be considered, and employers must ensure they comply with state and federal law. An employer should consult with both their immigration lawyer and employment lawyer before taking action.

Notification of Termination

Termination of H-1B, H-1B1, and E-3 employees requires:

- written notice to the employee,
- written notice to USCIS (if the petition was filed with USCIS), and
- withdrawal of the labor condition application (when possible).

The cost of reasonable transportation to the employee's country of last residence must be offered to H-1B and E-3 workers if the employer terminates the employee. The employer is not required to pay transportation for dependents. This offer is not required if the employee resigns or chooses not to leave the United States. The employer continues to be liable for back wages until there is a bona fide termination.

Termination of O-1 employees requires:

- written notice to USCIS and
- offer to pay the cost of reasonable transportation to the country of last residence.

Termination of TN and L-1 employees:

- There is no specific immigration notification requirement or return transportation requirement.

Termination of E-1/E-2 employee:

- While not mandatory, it is recommended that the U.S. consulate that issued the E visa be notified that employment was terminated.

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Grace Period

Regulations give workers in E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1, and TN status a grace period of up to 60 days after the employment is terminated or until the end of the currently authorized stay, whichever is shorter. In other words, if the foreign worker is terminated on 1/1/22 and their I-94 expires 1/15/22, then their grace period expires 1/15/22 (end of the currently authorized stay). If the foreign worker is terminated on 1/1/22 and their I-94 expires 12/15/22, then their grace period expires 3/2/22 (60 days from 1/1/22).

If terminated with grace period availability, the worker may remain in the United States without working and will not be considered out of status. The worker can use this time to prepare to depart, find another employer that will file a petition within the grace period or change to another status.

Note: The grace period is especially helpful for individuals who are eligible for H-1B portability, which permits the worker to begin working as soon as an H-1B portability petition is filed.

I-140 Petition Withdrawal

There is no requirement that an employer withdraw an approved I-140 petition after a foreign worker's employment is terminated. If withdrawal is desired, consider the timing of that request carefully, as it may have adverse consequences for the foreign worker. A withdrawal request made before 180 days have passed from approval will automatically revoke the petition. The worker will retain the priority date for future I-140 petitions but will be unable to rely on the I-140 approval to qualify for H-1B extensions beyond the standard six-year limit. Submission of a withdrawal request after 180 days have passed from approval will not result in automatic revocation of the I-140, and the terminated worker will be entitled to I-140 approval benefits, including continued eligibility for H-1B extensions beyond the six-year limit.

As a sponsoring employer, allowing an I-140 to reach the 180-day mark before withdrawal could be a benefit you want (or do not want) to offer the departing employee.

Dual Representation

There is a dual representation situation in immigration cases where a firm represents both the petitioner (employer) and worker (employee). When this occurs, the attorney is required to keep each party (petitioner and beneficiary) adequately informed of any information related to that representation. Any information revealed by either party during this representation cannot be kept confidential from the other party. If looking for guidance related to the termination of a foreign worker, keep in mind that you should not mention specific names of individuals unless you intend to share this information with all parties.

To find out more about terminating a foreign worker, please contact your attorney.