Global Talent Procurement in a Tight Domestic Labor Market: Pipe Dream or Possible Reality? Immigration Attorneys Weigh In

By Samuel Newbold and Caroline Murphy

The COVID-19 pandemic has posed enormous labor management and procurement challenges for employers across the country. According to a survey conducted by the Society for Human Resource Management (SHRM) in August 2021, nearly 90 percent of 1,200 employers surveyed were struggling to fill open positions, and 73 percent said they are seeing a decrease in applications for those hard-to-fill positions. According to the Bureau of Labor Statistics Current Population Survey (CPS), 15.5 percent of individuals aged 25-54 worked from home due to the pandemic. While this is down from the high of 38.8% in May 2020, it may reflect a shift in the way companies employ individuals going forward.

The proliferation of the remote workforce caused by the COVID-19 pandemic has changed not just domestic employment patterns, but international ones, too. Employers are rapidly pivoting to remote working policies to maintain their competitiveness in the labor market.

While U.S. immigration laws have always presented a challenge to employers seeking to hire foreign talent, the response to the pandemic from U.S. Citizenship & Immigration Services ("USCIS"), U.S. Department of State ("DHS") and U.S. Customs & Border Protection ("CBP"), under both the Trump and Biden administrations, have been unprecedented in the hurdles presented to employees seeking to enter and work in the United States.

Take for example a New York City-headquartered company that recently implemented a work-from-anywhere employment policy. In just one week, the company hired three fully remote employees: a full stack developer in Austin, a finance director in Chicago and a product developer in Des Moines. While the Company's new policy makes it attractive to a wider and deeper talent pool, it also presents new and developing compliance issues in the areas of labor, tax, and immigration law.

The first challenge presented by a remote workforce policy is I-9 compliance. Every U.S. employer is required to complete a Form I-9 upon hiring a new employee. Section 1 of the Form I-9 must be completed by the employee no later than the first day of employment. Form I-9 requires the employee to present documentation of their identity and U.S. work authorization within three business days of hire, and the employer must complete Section 2 of Form I-9 and attest to the inspection of the documents presented by the employee **in-person** to correctly establish the employee's identity and employment authorization.

In March 2020, recognizing the practical hardships that COVID-19 imposed on employers to remain compliant with the in-person inspection of employee documents for purposes of completing the Form I-9, the Department of Homeland Security ("DHS") announced that it would exercise discretion to defer the compliance requirement for the employer to personally inspect its employees' documents associated with the Form I-9 rules under Section 274A of the Immigration and Nationality Act ("INA"). Under the temporary rule, employers could satisfy the document inspection requirement remotely (e.g., over video link, fax or email, etc.) and store copies of the employees' documents to maintain compliance. DHS instructed employers to enter "COVID-19" on the Form I-9 as the reason for the delay of the physical inspection of employees' documents. It was anticipated in March 2020 that the rule would indeed be a temporary one and, therefore, DHS indicated that once the newly hired employee was able to physically return to the office, the employer would then inspect the employees' documents in-person and make an appropriate notation in Section 2 of the Form I-9.

As the pandemic continues to be a potential health risk for workplace environments, and with remote work arrangements likely here to stay, DHS updated its guidance in April 2021 to state that if employees hired on or after April 1, 2021 work exclusively in a remote setting "due to COVID-19 related

precautions", they are temporarily exempt from the physical inspection requirements until they undertake non-remote employment on a regular, consistent, or predictable basis, or the extension of the flexibilities is terminated, whichever is earlier.

Traditionally, employers who hired employees away from the office were required to have the employee come to the office to complete HR onboarding, including the Form I-9 and inspection of documents, or had to use a notary service or other third-party service provider to complete the in-person inspection of employee documents remotely. Time will tell whether DHS' temporary relaxation will be adopted permanently or if employers will have to fall back on traditional methods of onboarding employees in order to satisfy the Form I-9 rules.

Employers should realize that every employee that has been onboarded during the pandemic utilizing the remote inspection of documents may have to have their documents reviewed again in-person, and for some employers, that could be dozens or even hundreds of workers hired since the pandemic started. What a headache it will be for HR teams without a plan for mass inspection of documents if and when DHS disposes of the temporary rule.

Things get even wilder for U.S. companies hiring employees based abroad. Labor shortages in both blue-collar and white-collar jobs have strained companies and their existing workforces. That same New York City company referenced above has been trying to fill two critical positions for nearly a year. One such position is the Head of Global Markets. Finally, the Company has interviewed the ideal candidate; a British national who is currently based in Hong Kong and has a spouse and two children living in the U.K. The problem is that the combination of travel bans, visa bans, and consulate closures and delays have made it incredibly difficult for the Company to get the candidate and his family to the U.S. with the proper visas.

First, many prospective hires have been subject to travel bans imposed on individuals physically present in China, Iran, the Schengen Zone, Ireland, the U.K., Brazil, South Africa and India within the preceding fourteen days to entry to the U.S. This means that, unless an individual is subject to an exception such as that for U.S. citizens and their family members, they cannot board a flight directly to the U.S.

The U.S. State Department and U.S. Customs and Border Protection have been accepting applications for National Interest Exceptions to the various travel and visa bans for individuals and companies that can demonstrate that the employee will provide vital support or executive direction for critical infrastructure. Moreover, because appointments for visa interviews at U.S. consulates are so backed up due to elongated consulate closures during the pandemic, employees cannot even obtain a visa appointment without being granted an expedite with an approved National Interest Exception.

Despite an army of supporting documentation and clear need for the employee, the Company could not break through the decision making of the local U.S. consulate to obtain an expedited appointment for the employee using the National Interest Exception. Hundreds of U.S. employers have experienced the same frustration since the imposition of COVID-related travel and immigration bans. With key positions going unfilled, U.S. employers have tough choices to make. Some employers have no choice but to keep looking for a suitable employee within the U.S., or not fill the position at all. Either scenario requires them to leverage an existing workforce that is already burnt out. Other employers may choose to hire a candidate in a foreign jurisdiction. If the Company decides to hire its Head of Global Markets to work from Hong Kong, it must assess whether it can use a local PEO or similar payroll support provider in that country to be compliant with local labor and tax laws or investigate whether it can put the individual on U.S. payroll. Some foreign jurisdictions require that the employer be a domestic entity, meaning that the U.S. company would have to form a legal employer entity in that foreign jurisdiction in order to employ the worker in a manner that complies with all local rules. With these issues, it is easy for any general counsel or HR leader to see that 'global remote' options can expose their company to a complicated web of laws involving

corporate, taxation, labor and immigration compliance. That said, the competition for the best available talent has led many U.S. companies, especially in New York, to do whatever it takes to fill vital positions with the right candidate.

Many of us welcome the flexibility that has been a byproduct of working through the COVID-19 pandemic, and it may have accelerated some companies' remote hiring strategies for good. We may see more offshore hiring for client-facing positions, and not just for back-end support. However, while companies may avoid the expense and headache of dealing with U.S. immigration laws by employing an individual in a foreign country, this in fact may create more issues than initially perceived.

As we adapt to this new world of a varied and flexible work structure, U.S. immigration laws need to do the same. A permanent policy for remote workers in I-9 compliance, and adherence to a range of recommendations made by the American Immigration Lawyers Association ("AILA") to the White House in July 2021, including stateside visa processing, automatic extension of visas that have expired during the COVID-19 global pandemic, and expanded use of interview waivers at consulates would assist government bodies in returning to normal processing levels and allow U.S. employers to adapt to the new normal.

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