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# Reflecting on 2021 and Strategizing for 2022: Focus on Labor & Employment

Annual Illinois Employer Update | Part 2 | December 16, 2021

# Speakers

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# Agenda

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## Compensation and Benefits

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- A. Restrictive Covenants and Equity Awards: the Current Landscape
- B. Developments in Global Compensation: Global Share Plan Updates
- C. Developments in Global Compensation: Global Share Plan Trends

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## Global Immigration and Mobility

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- A. COVID-Related Travel Restrictions and Requirements
- B. Immigration Considerations for Remote / Hybrid Work
- C. Policy Changes under the Biden Administration





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# Compensation and Employee Benefits



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# **Restrictive Covenants and Equity Awards: The Current Landscape**

# Restrictive Covenants in Equity Grants Globally

## Varying Practices



- Not included
  - US centric provisions included without adjustment
  - US centric provisions included with country-specific tailoring
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- Is it really intended to be enforceable or just deterrent language?
  - Non-compete or other restrictive covenants?
  - Same language in award agreements to all recipients or officer language?
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- How are awards accepted?
- Geographic carve-outs ?

# Restrictive Covenants in Equity Grants

## New Illinois Rules



Does not outright ban noncompetes

- Incorporates some income limits
- “Adequate Consideration” requirement
- “Legitimate Business Interest” requirement



Employers must provide an employee at least 14 calendar days as a review period



Employer's burden to bear the employee's legal fees if the employer loses an enforcement proceeding



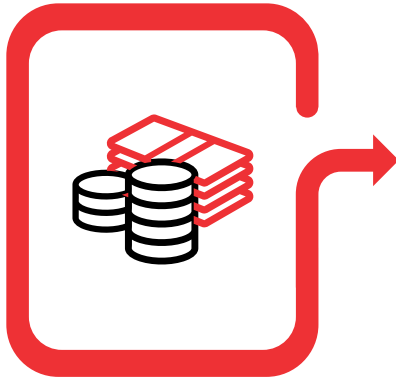
Effective for any agreement entered into after January 1, 2022, and does not apply retroactively

- Consider whether it is possible to rely on prior agreements

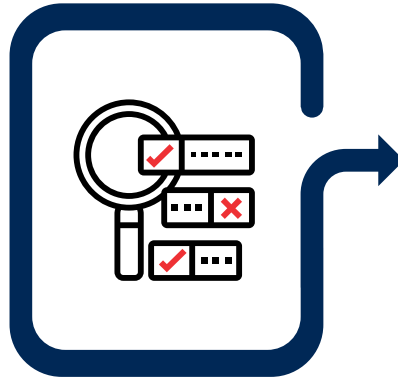


# Why One-Size-Fits-All Restrictive Covenants Don't Work

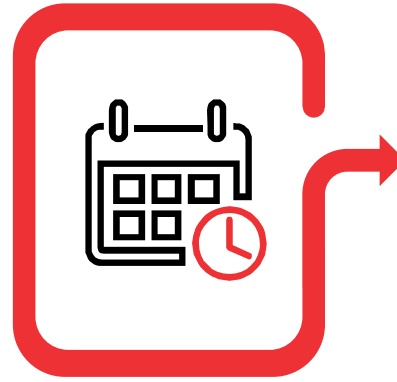
## Jurisdictional issues to consider



Payment of separate consideration to terminated employee during the noncompete period?



Does equity award (or shares issued pursuant to the award) constitute sufficient consideration?



What is a reasonable noncompete period?



What is an appropriate geographical scope?

# Concerns with Restrictive Covenants in Equity Grants

## Other issues to consider



Including unenforceable provisions in an agreement could lead to provisions which could be construed as adverse to the grantee or the entire agreement being declared unenforceable

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Severability or reformation clause could mitigate risk, but rules on severability / contract reformation vary widely. Seeing more waterfall provisions

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Intrinsic tying of employment relationships to awards can cause issues where the employer and the grantor of the equity award are not the same, including potential employee claims (e.g., joint employer liability, vested rights/entitlement claims, a right to receive award documents translated into local language, claims to have the awards be factored in when calculating severance pay, etc.)

# Practical Tips

## Rules of the road



Keep the involvement of the local employer in the award administration to a minimum



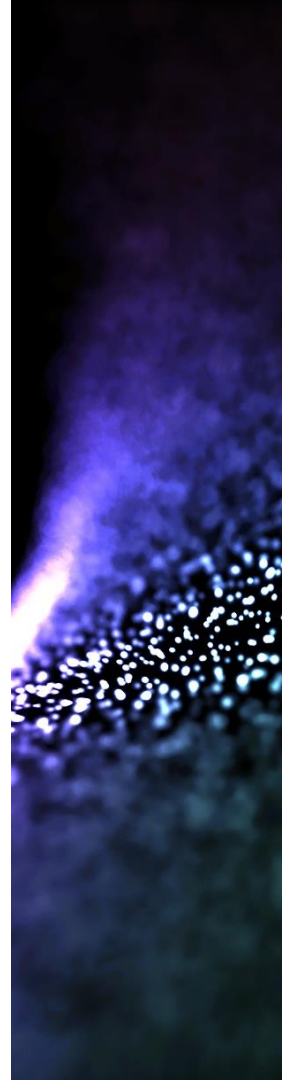
Include restrictive covenants in employment agreements or side agreements (like a PIIA) with the local employer (not the parent company) at the time of employment, or prepare a separate restrictive covenant agreement later as an amendment to the employment agreement and make the next grant of award conditional upon the employee signing the agreement



Ensure any restrictive covenants are enforceable under local law



Even in jurisdictions requiring consideration at the time the restrictive covenant is entered into, don't make the award consideration (i.e., pay the reasonable / nominal consideration required)





**B**

# **Developments in Global Compensation: Global Share Plan Updates**

# Australia: Proposed Changes to Tax Treatment and Securities Exemptions



## Background

- Share-based awards taxed at termination if awards not forfeited at this time
  - Problematic for vested options, RSUs subject to favorable retirement treatment and PSUs
- Grant of share-based awards subject to licensing and prospectus disclosure requirements unless exemption applies
  - Several exemptions available for grants by listed companies, but not all self-executing
  - Exemptions for grants by unlisted companies more limited, especially for RSUs



## Update

- Australian Government proposed changes in 2021/2022 Federal Budget to:
  - Remove termination as taxable event
  - Introduce new exemptions from licensing and prospectus disclosure requirements
    - Possibly self-executing exemption for grants without consideration (i.e., RSUs), for both listed and unlisted companies
- Was not adopted prior to beginning of new tax year (started July 1, 2021)
- At the earliest applicable to grants made on or after July 1, 2022, but may be delayed even longer



## Take-Away

- No immediate change, but potentially good news for future grants



# Canada: Cap on Stock Option Deduction



## Background

- Beneficial tax treatment currently available for stock options if underlying shares are "prescribed shares"
  - Only 50% of spread at exercise subject to income tax (may differ for Quebec provincial taxes)
- Proposed elimination of beneficial tax treatment in excess of an annual cap introduced and originally intended to force January 1, 2020 but delayed



## Update

- Modified proposals issued November 2020 and approved on June 29, 2021
- Applies to "option agreements entered into" on or after July 1, 2021
  - When employee has legally binding right to the option
- Beneficial tax treatment for options granted by "large corporations" only available for options up to a CAD 200,000 annual limit (per employee)
- Annual limit is calculated for each year of vesting, based on FMV of underlying shares at grant
- One benefit: corporate tax deduction available for option gains excluded from the beneficial tax treatment under new law, if certain conditions are met (e.g., recharge and proper documentation)
- New rule does not apply to options granted by Canadian-controlled private corporations or corporations whose annual gross revenue does not exceed CAD 500 million



## Take-Away

- Determine if the new limitation applies to your company (i.e., whether considered a "large corporation")
- If so, determine if option grants exceed annual cap
  - If exceeded, need to notify employee within 30 days of "qualified" vs. "non-qualified" options
- Adjust tax withholding/reporting at exercise accordingly

# Canada: Application of Salary Deferral Rules to RSUs



## Background

- Cash awards that can be paid more than three years after the end of the year in which services were rendered to which the award relates are considered "salary deferral arrangements" (SDAs) and taxed at grant
- SDA rules do not apply to awards that can be settled only in shares
- To claim tax deduction for share awards, company needs to have discretion to settle awards in shares or cash



## Update

- Canada Revenue Agency (CRA) issued technical interpretation in March 2021 stating that share awards granted under plan which provides for discretion to settle awards in cash or shares are subject to SDA rules
- Technical interpretation also stated that presumption exists that award granted for past services if granted early in year



## Take-Away

- Ensure that award agreement provides for settlement of RSUs in shares only (but not able to take tax deduction) – not certain if sufficient to prevent SDA rules
- Conservatively, ensure award paid out within three years from end of year in which services were rendered to which award relates

# Canada: Battiston v. Microsoft, 2021 ONCA 727



## Best practice: flag termination provisions for employees



### Trial Court

- The trial court found Battiston had been provided with a stock award agreement which included termination provisions which ejected Battiston's entitlements to unvested stock awards after he was terminated without cause, but ruled the termination provisions unenforceable because Microsoft failed to adequately bring them to Battiston's attention
- The trial court emphasized the importance of taking steps to bring potentially "harsh and oppressive" terms to the attention of employees
- The trial court awarded damages to Battiston for stock options that would have vested during his reasonable notice termination period (here, 24 months)



### Overturned on Appeal

- The Ontario Superior Court of Justice (trial court) overturned by the Ontario Court of Appeal on October 18, 2021
- Appellate court found the trial judge had erred in concluding Battiston had not received sufficient notice when (i) for 16 years, he'd expressly agreed to the terms of the stock award agreement (including termination provisions), (ii) he'd made the conscious decision not to read the agreement despite indicating he'd read it, and (iii) by misrepresenting his assent, he was in a better position than an employee who did not misrepresent, and took advantage of his wrongdoing



### Take-Away/Best Practices

- Update form grant agreements and employment agreements to specifically draw attention to termination provisions in incentive plans (instead of just providing cross-references to the provisions within the plan)
- Provide a cover email / memo with a summary of termination provisions that limit significant employee entitlements and attach the incentive plan (instead of putting the onus on employees to read the entire plan)
- As a condition to receiving the award, require employees to sign an express acknowledgement that they have received and read the plan, including the termination provision "in section X"

# Canada: New Methodology for Sourcing RSU Income



## Background

- Canada Revenue Agency (the "CRA") has introduced a new methodology for sourcing RSU benefits – the "Hybrid Methodology"
- Under the Hybrid Methodology, the "in the money" portion of the RSUs is sourced to employee workdays in the year of grant and any increase in value of the RSUs is sourced to the vesting period
- Likely to complicate sourcing for mobile employees who hold RSUs due to mismatch with typical approach taken by other countries
- Unclear whether this overrides the stock option allocation rule in the Canada–US tax treaty (or whether the CRA is distinguishing between options and RSUs)



## Take-Away

- Start withholding/reporting on RSU income for mobile employees based on Hybrid Methodology unless facts strongly support that not for prior year services

# China: SAFE Updates



## Background

- Under Circular 7, non-PRC public companies must seek approval from State Administration of Foreign Exchange ("SAFE") for share-settled equity awards granted to "domestic individuals" working in China, followed by ongoing reporting obligations
  - All proceeds related to awards must be sent through dedicated account set up by applicant entity in China
- Shanghai SAFE required annual re-registration, even in the absence of material changes
- Companies needed to apply for new ESPP quota annually
- Shanghai and Beijing SAFEs have not allowed registration of pre-IPO plans
- Shanghai SAFE required submission of applications through Bank of China, HSBC and Citibank if dedicated account maintained by one of these banks
- Recharge payments are problematic and SAFE has repeatedly declined to approve



# China: SAFE Updates



## Updates

- Central SAFE issued an internal notice making it possible to register pre-IPO plans, provided no shares have been issued
  - Successful approvals from Shanghai SAFE and Beijing SAFE
  - Supporting documents required, including detailed list of prior grants
- Shanghai SAFE implemented new policy, effective January 7, 2021, to streamline its approval process
  - Annual re-registration no longer required, in the absence of material changes
    - Unclear what constitutes material change but likely still most changes such broker change, new/amended plan, new award type, change of the listed company, reorganization of PRC entities
    - But no longer necessary to complete annual re-registration if the only change is to the employee list
  - Can apply for estimated quota for up to 3 years, with no expiration date
- Beijing SAFE also recently indicated (informally) that new quota application only required when old quota used up (not strictly on annual basis)
- Shanghai SAFE indicated that applications can be submitted directly to SAFE even if banking with Bank of China, HSBC or Citibank
- Recent outreach from SAFE officer to BM China to discuss recharge payments

# China: SAFE Updates



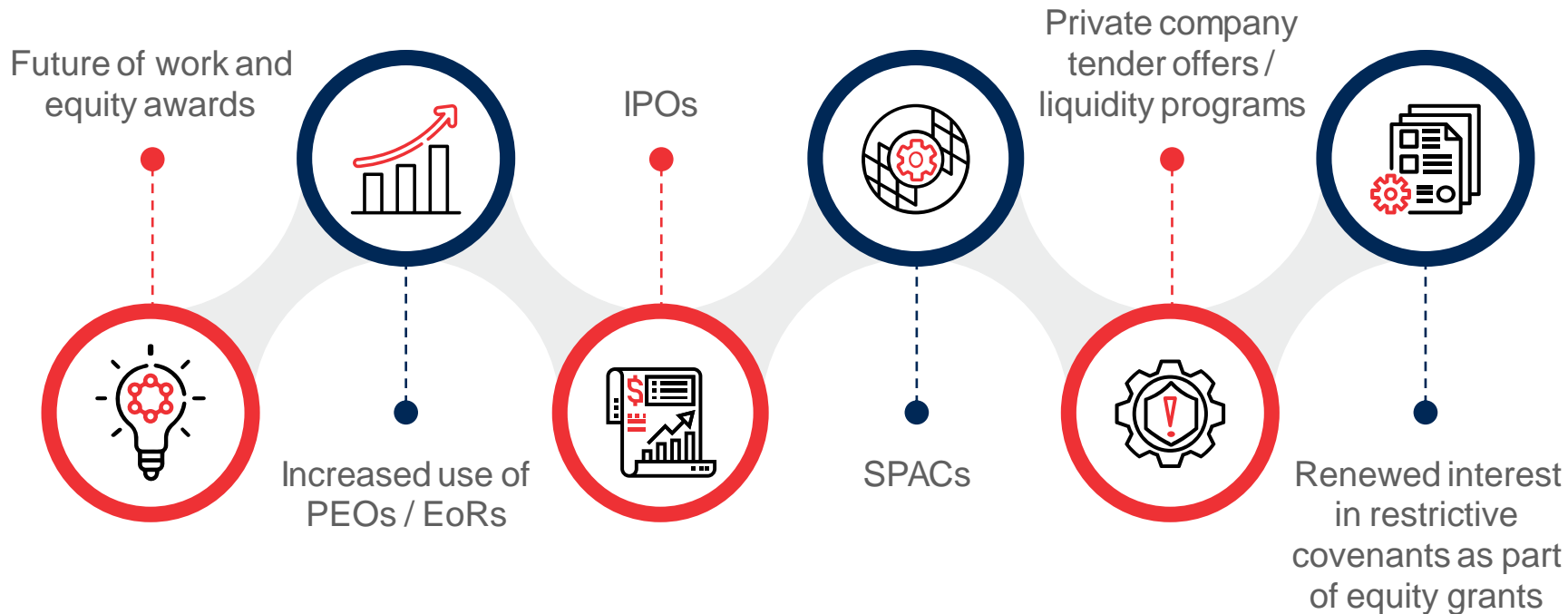
## Take-Away

- Newly public companies can consider registration of pre-IPO plans
  - Similarly, private companies can grant awards pre-IPO with less concern (as long as awards cannot be settled until after IPO and SAFE registration)
- If approval received in Shanghai:
  - If offering ESPP, consider requesting quota amount sufficient for up to 3 years
  - If not offering ESPP, may no longer need to submit annual re-registration application (if no material changes)
  - If banking with Bank of China, HSBC or Citibank, can submit applications directly to SAFE
- If approval received in Beijing, explore if multi-year quota possible
- Stay tuned on recharge payments



# **Developments in Global Compensation: Global Share Plan Trends**

# Global Share Plan Trends





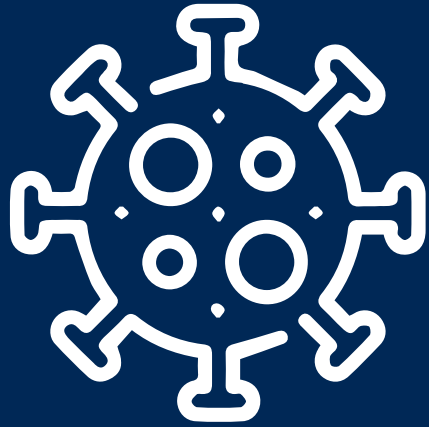
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# Global Immigration and Mobility



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# **COVID-Related Travel Restrictions and Requirements**

# COVID-related Travel Restrictions and Requirements

## Travel resumed for fully vaccinated foreign travelers



As of November 8, the US lifted COVID-19 related restrictions for fully vaccinated foreign travelers under President Biden's October 25 Proclamation on Advancing the Safe Resumption of Global Travel During the COVID-19 Pandemic



The new rules focus on the vaccination status of noncitizen travelers



However many US Consulates and Embassies are not at normal capacity for visa processing - meaning that travelers should expect long backlogs when scheduling visa stamping appointments

- "Expedited" or "emergency" requests may be necessary for individuals seeking to travel and obtain visa appointments over the holiday months

# COVID-related Travel Restrictions and Requirements

## Travel resumed for fully vaccinated foreign travelers



There are a number of exemptions to the vaccine requirement, and unvaccinated noncitizens who are exempted or receive an exemption must follow specific requirements while they are in the US



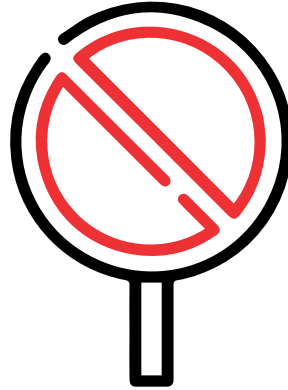
Noncitizens must agree to comply with applicable public health precautions, which currently includes **proof of a negative pre-departure COVID-19 test within one day before travel** and may include proof of having arranged to self-quarantine or self-isolate after arriving in the US

# COVID-related Travel Restrictions and Requirements

## Omicron response: US limits travel from 8 African countries



On November 29, the US implemented travel restrictions on eight African countries (Botswana, Eswatini, Lesotho, Malawi, Mozambique, Namibia, South Africa and Zimbabwe) for individuals traveling from these countries or who have been physically present in these countries within the 14 days prior to entry to the United States because of the COVID-19 Omicron variant



Citizens and lawful permanent residents of the US, certain family members, and other individuals who meet specified exceptions are permitted to enter the US. (A negative COVID-19 test taken within one day of their departure for the US is required as is now standard for all air travel into the United States)



# COVID-related Travel Restrictions and Requirements

Omicron response: US requires COVID-19 testing for all inbound international air travelers



As of December 6, all international air travelers inbound to the US who are two years of age and older are required to show proof of a negative COVID-19 viral test taken within one day of their departure to the United States, regardless of vaccination status



Applies to all US citizens, permanent residents, noncitizens and foreign nationals



Alternatively, passengers can provide proof of recent recovery from COVID-19 instead of a negative test if their positive COVID-19 test result was received no more than 90 days before their flight's departure and they have a letter from a licensed healthcare provider or public health official with permission to travel

# COVID-related Travel Restrictions and Requirements

## Where can US citizens travel?



Most of the world's countries are open to travelers from the US, but that could change as variants (including Omicron) cause coronavirus cases to rise

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Recently, Morocco and Israel have sealed their borders to foreign travelers for at least 14 days to contain the spread of the Omicron variant

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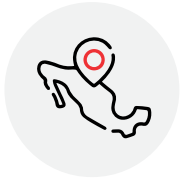
Though most EU countries allow vaccinated US citizens, member countries are free to impose their own restrictions. Partial and full lockdowns have been put in effect in many countries already

# COVID-related Travel Restrictions and Requirements

## Cross-border: Canada and Mexico



**Canada is open to US citizens and permanent residents who currently reside in the US if they have proof of full vaccination**



**Mexico is open to US visitors (both by air and by land) with no testing or quarantine requirement**

- All travelers 5 and older must have proof of a negative coronavirus test (taken within 72 hours of planned entry for motorists and scheduled departure for air passengers) unless they take a trip of fewer than three days. Antigen tests are not accepted
- Unvaccinated visitors must quarantine for 14 days. (Note: some places in Canada require proof of vaccination for many restaurants, events and domestic travel)
- All travelers must be able to present a quarantine plan upon arrival through the ArriveCAN app or online in the 72 hours before arrival

# COVID-related Travel Restrictions and Requirements

## What to do about business travel for employees?



### **Plan in advance and research rules upon arrival/ departure**

- All employers should look closely at the laws of the jurisdiction where their employees are traveling to and from
- All countries have different health and safety requirements for entry during the pandemic, and these requirements change rapidly



### **Vaccine passports may help—but can you require them?**

- Some countries have helpful tools to make it easier for vaccinated employees to travel
- Check with the laws of the jurisdictions where you have employees. Many countries outside of the US (and some US states) allow employers to recommend, but not require, vaccine passports



**B**

# **Immigration Considerations for Remote / Hybrid Work**

# Immigration Considerations for Remote / Hybrid Work

## Form I-9 flexibility requirements



### ICE pandemic flexibility for employers / workplaces operating remotely



Requirement defer the physical presence requirements associated with I-9 completion



Extended to December 31, 2021



Employers with employees taking physical proximity precautions are not required to review the employee's identity and employment authorization documents in the employee's physical presence



However, unless ICE changes its policy with regard to remote workers outside the context of COVID-19, employers will need to return to historical alternatives if remote hires are not able to complete the I-9 at the employer's office and a valid COVID-19-related reason cannot be provided

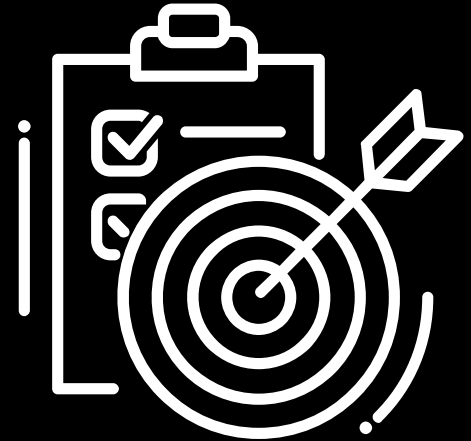


Employers are still required to inspect Section 2 documents remotely, and obtain, inspect and retain copies of the documents within three business days for purposes of completing Section 2 of the I-9

# Immigration Considerations for Remote / Hybrid Work

## Five steps to plan for office reopening for hybrid work— I-9 considerations

- Determine the employees onboarded during the pandemic for whom original documents were not inspected and continue to maintain a separate list or chart for this population, adding any new hires before reopening
- Create a plan across work sites and employee populations to set aside a dedicated time and space during the first three days of office reopening to ensure I-9 compliance is met. Employers considering staggered return plans should require I-9 teams to work across multiple weeks once the office reopens
- Communicate internally to your human resources team — or whoever is responsible for I9 compliance — that immediately upon reopening this will be a large, time-consuming and time-sensitive requirement
- Create a communication strategy to the affected employee population that includes multiple messages to notify each employee of the requirement and timing leading up to office reopening
- Categorize this employee population by (1) worksite, (2) business unit and (3) office reintegration date



# Immigration Challenges: Remote and Hybrid Work

## I-9 Compliance in the new workplace



- Once I-9 flexible guidance expires, historical original review required, *even for remote workers*
- Change in USCIS Policy?
- In-person onboarding
- I-9 completion via mail
- I-9 completion via authorized representative



# Considerations for Remote and Hybrid Work

## Employees with H-1B status



**The H-1B category (specialty occupation and fashion models) is the most restrictive on worksite location and movement of all of the nonimmigrant work visa sponsorships**



Generally, employees working pursuant to H-1B status are only approved to be employed and perform work at the location(s) specified on their Form I-129 petition and/or Labor Condition Application (LCA)



In other nonimmigrant visa categories (e.g., E, L, TN, F-1 OPT, P-1, O-1 workers), the same strict rules do not apply, and there is greater flexibility as to any required pre-approval of changes to worksite locations

# Considerations for Remote and Hybrid Work

## Employees with H-1B status

For an employer with H-1B workers with approved H-1B petitions who have requested occasional remote work, there are 2 options

### Option 01

The H-1B visa holder can work remotely from home if the home is within a "normal commuting distance" from the employer's office or worksite

- The employee will need to post a Notice of LCA at two locations in their home for 10 consecutive days as soon as possible and no later than 30 days after the move
- The employer must update their Public Access File with a memo / record of the posted LCA, including the location and dates the notice was posted

### Option 02

The H-1B visa holders are working remotely full-time, or in a hybrid environment, where their home is outside of the "normal commuting distance." In those circumstances, the employer must amend the LCA by:

- Providing notice of a new LCA which will include the employee's home location
- Filing that new LCA with the Department of Labor and securing a new certification from the DOL
- Filing an amended H-1B petition with United States Citizenship and Immigration Services (USCIS) that must be approved
- Some exceptions exist for short term placements that are no more than 60 days outside of the "normal commuting distance"

# Important Considerations for Remote and Hybrid Work

## Employees with H-1B status



Given popularity of remote work, consider including both the employer's worksite and the employee's home address for future H-1B sponsorships



Think through prevailing wage rate issues before making decisions on worksite location changes

- The H-1B worker must be paid the higher of the prevailing wage rate of the multiple worksite locations or what other similarly situated employees are paid, whichever is higher
- If an H-1B worker is working within the geographic area of the designated office / worksite location, it may not be an issue, but if an employee wants to move to another state or city, determine any prevailing wage compliance issues



Beware of potential discrimination claims:

- Employers with an H-1B workforce may face potential allegations of discrimination if choosing to exclude H-1B workers from a remote work policy because of prevailing wage issues
- Possible solution: limit remote work arrangements to the same geographic area or within the same state where the company may have an office

# Important Considerations for Remote and Hybrid Work

## "Digital nomads"—working from anywhere



Digital nomads are remote workers who travel to different locations on a regular basis, using modern technology to work from coffee shops, hotels, co-working spaces, etc. with a Wi-Fi connected laptop or smartphone from anywhere in the world



Working from foreign countries while on a tourist visa (which usually expire after 30-90 days) is illegal in most places, but there are some countries now allowing US employees to remain in their countries on "digital nomad" tourist visas while simultaneously performing job duties for their state-side employer



There are some countries—like Spain, Portugal, Bali and Costa Rica—that allow US employees to remain in their countries on "digital nomad" tourist visas while simultaneously performing job duties for a state-side employer. But this isn't common across all borders, so restrictions must be checked in each locale

# Important Considerations for Remote and Hybrid Work

## Employer messaging for employees "working from anywhere"



Make it clear that the company expects compliance with local laws / regulations

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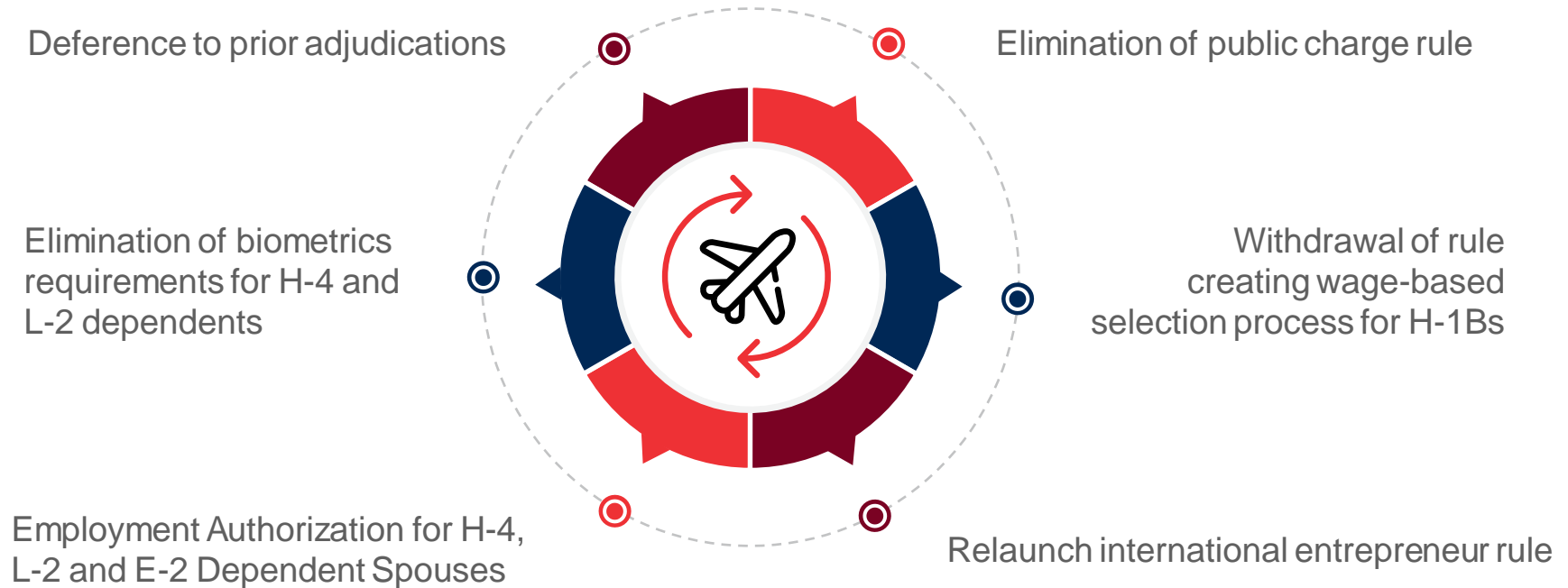
Emphasize that employee is responsible for compliance

- Employee is responsible for complying with local laws and regulations as they relate to immigration status and work authorization
- The company's policy should emphasize that it's the employee's responsibility to make sure they have the unrestricted right to work if they decide to work from anywhere
- Additional obligations—such as tax obligations, licensing requirements, etc.--fall on the employee (to the extent possible)



# **Policy Changes under the Biden Administration**

# Policy Changes under the Biden Administration



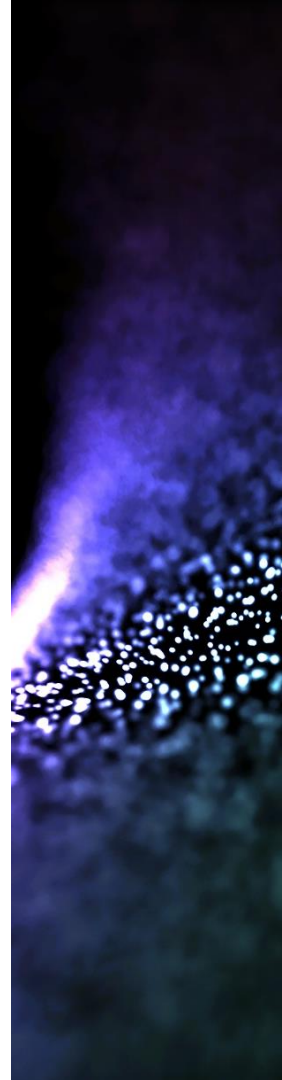
# Practical Takeaways



Stay up to date on COVID related travel restrictions and requirements and keep informed of international travel for employer sponsored visa holders



Be prepared for continued delays in bringing foreign national talent to the United States due to significant backlogs in visa appointment availability at US Embassies and Consulates worldwide







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