

E-3 Visas and Navigating the Impact of COVID-19: A Guide for Employers

Please note, the information provided below is specifically for employers of E-3 visa holders. If you are an E-3 visa holder yourself, please refer to the information sheet provided specifically for E-3 visa holders.

Guidance for employers of E-3 visa holders affected by COVID-19

Being an employer of an E-3 visa holder in the US right now can feel scary. Not having a plan in place for managing this situation is what underlies that sense of fear. We are here to guide you and reassure you. There is a solution, even if temporary, for everyone. If you are worried your E-3 visa holder employee will need to leave the country but you do not want them to, we can help keep them here in legal status. If you are worried because they are unable or cannot leave to renew or apply for a visa, we can help in such situations also. Below is some guidance to address the main questions and concerns we have received from our clients who are employers of E-3 visa holders.

My employee's E-3 visa is expiring; or my prospective employee needs to apply for a new E-3 visa with my company as a new employer; or my employees visa appointment abroad got cancelled. The employee is still in the US and cannot leave the US due to travel and quarantine restrictions – what do we do?

If your employee's visa is expiring, they are in the US and they are renewing their E-3 with you as the same employer, they can renew their E-3 from within the US by filing an extension petition with USCIS. They will automatically be granted a continuation of authorized employment for a period of up to 240 days. The petition should be adjudicated within that time. This means that you can continue to employ your E-3 visa holder after their visa expires and before the approval of the extension is received.

If you wish to hire an existing E-3 visa holder as a new employer, they can file a change of employer petition within the US, but unfortunately they are NOT allowed to start working for you as the new employer until the petition is approved. Currently these petitions are taking 2.5 – 4 months to be adjudicated and premium processing (asking to pay for expedited adjudication) is not available for E-3 petitions. If you are in this situation, please contact our office and we can navigate options to try to get your employee working for you sooner rather than later. If the employee's previous visa is about to expire and they are not in a position to leave to consular process (as is the case currently) then they may opt to file a change of employer petition with USCIS in the US as a means to keep them in the country until they can leave the US to consular process their application (if their USCIS petition is not adjudicated beforehand). Again, this is something our office can strategize with you, and help you navigate.

My E-3 visa-holder employee's I-94 expires long after their E-3 visa and LCA expiry date – does this allow them to stay and continue working for me?

The I-94 expiry date for E-3 visa holders should match the LCA end date attached to that visa. You will notice more recent E-3 visas now have the LCA number and end date annotated on the visa itself. Earlier E-3 visas did not annotate the LCA end date – for those E-3 visas the correct I-94 is supposed to match

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the end date of the visa. However, what we have seen happen, is I-94's with expiry dates that are two years from the last date of admission to the US after international travel. This is not proper practice, however, many CBP Officers confuse the rules associated with the E1 and E2 visas (which require an I-94 to expire 2 years from the date of admission to the US) with the rules of the E-3 visa (I-94 should match LCA expiry date). Where this occurs, CBP Officers are inadvertently (or unknowingly) applying the E-1 and E-2 rules pertaining to the I-94 to the E-3 visa holder.

An E-3 visa holder is only authorized to work on their E-3 in the US as long as their I-94 and LCA are valid. This means that, in a situation where an E-3 visa holder's I-94 exceeds their LCA, their authorization to work ends when their LCA expires.

Clients have asked if they can just file a new LCA in that instance to extend the period of work authorization. The true answer to this question is that it is a grey area. There is no specific regulation or rule that states that this is ok. At the same time, the *Foreign Affairs Manual* guides the consular officers that when there are multiple LCA's each one needs to be adjudicated on its own merits and the multiple LCA numbers and dates need to be annotated on the visa. Additionally, the E-3 visa was modeled on the H-1B visa. The H-1B specifically requires a new petition to be filed with USCIS containing the new LCA. Both of these instances would point to a conclusion that it likely is not ok to just file a new LCA. Others argue that since only status (as provided by an I-94) and a valid LCA are required, then the extended I-94 and a new LCA may suffice.

Given there are no regulations or guidance from USCIS on this matter, I have been advising clients that the most prudent and correct thing to do is to renew the visa (either by filing a petition with USCIS or via consular processing a new E-3 visa application) by the LCA expiry date. We have used an LCA for "bridging" purposes for some clients but only for a short enough period that it would not affect a subsequent visa application should USCIS determine that it definitively is not allowed to simply file a new LCA. This situation should be carefully navigated and strategized with our firm or with another immigration attorney.

I need to terminate or lay off staff who are E-3 visa holders. What are their options?

The first thing an E-3 visa holder needs to do is check the expiry dates of the following documents: their visa, their I-94 and their LCA. If they have more than 60 days remaining on their I-94 from the date that they stop working, then they will have access to a full 60-day grace period to be able to remain in the US. Within that 60 day period, they can apply for a visa with a new employer (either by filing with USCIS in the US or by traveling abroad once the travel restrictions are lifted) or they can apply to USCIS in the US to change status to B2 tourist status or another status to remain in the US. If they do not pursue one of these options, then they must leave the US by the end date of their 60-day grace period.

If their I-94 expires before 60 days, then they must leave the US (or file an application for extension of stay or change of status with USCIS) by their I-94 end date. It is important to always remember the I-94 trumps everything else: the visa end date, the LCA end date, and the 60-day grace period. An E-3 holder visa always must leave (or file an extension of stay or change of status) by their I-94 end date, regardless of the end dates of those other documents. I cannot stress this enough.

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Consider whether there is a chance of rehiring the E-3 visa holder within 60 days. If so, then technically they have a 60-day grace period between being terminated and being rehired. We can guide you and your E-3 visa holder employee on the actions required on their LCA and I-9 paperwork to document this accurately so that as an employer you are compliant, the E-3 visa will not be affected and the E-3 visa holder can remain in the US.

If there is no chance of rehiring in 60 days, then the E-3 employee should determine whether they want to leave the US or try to remain longer.

If they want to leave the US, then the E-3 visa holder must leave by the 60th day in order to avoid any future visa applications being jeopardized.

If they want to stay in the US, then their options include:

- A) Finding a new employer who can prepare their new visa paperwork within the 60-day grace period. In this situation they would apply for their new E-3 visa by or before that 60th day by either consular processing at a US consulate abroad or, if international travel is still restricted in 60 days from now, by filing a change of employer petition from within the US; or
- B) If they have not found a new employer then there is the option of filing an application with USCIS to change their status to tourist status. This option allows an E-3 visa holder to request up to an additional 6 month stay in the US as a tourist. Note that they cannot work during that period and they cannot leave and re-enter the US during this period. Our office can assist you with this option so as to ensure a filing that will not jeopardize any future visa application.

Can I pause pay of an E-3 visa holder; or can an E-3 visa holder take unpaid leave?

Unpaid leave, pause in pay, furlough or "benching " is not allowed under the E-3 visa because as an employer you are obligated by the LCA to pay the rate as specified in the LCA attached to the E-3 visa.

There are certain circumstances when a pause in pay is allowed but only when it is at the E-3 employee's request, not the employer's request. These circumstances are when a situation not related to work would prevent the E-3 visa holder from being able to carry out their duties properly, such as maternity leave, an accident, or if wanting to take unpaid leave after a period of paid leave to extend a holiday pursuant to company policy. It seems that COVID-19 is not a reason that an E-3 visa holder can request unpaid leave.

What are alternatives to unpaid leave?

As an employer, you could terminate and then rehire your E-3 visa holder employee up to 60 days later.

If you cannot rehire the E-3 visa holder, then just before they come to the end of their 60 day grace period (or I-94 end date, whichever is sooner), they can apply to change status to B2 status from within the US. Please ask us about this option and we can help file the appropriate paperwork. This will allow the E-3 visa holder to remain up to an additional 6 months as a tourist in the US and in that time they are not allowed to get paid. This gives the E-3 visa holder effectively up to 8 months of unpaid time in the US. At any point in this time, as an employer you can decide to rehire the E-3 visa holder, or they may find employment with a new employer. Before they start to work for you again, if you rehire, or if they secure a new employer, they will need to re-active an unexpired E-3 visa with you if you were the previous E-3 employer or apply for a new E-3 with their new employer. There is specific paperwork involved with both options that we can assist with.

Both of the above options are dependent on the E-3 visa holder's I-94 and LCA end dates and may require LCA withdrawals and re-filings, petitions filed within the US or consular processing, so please ask our office to assist you so that this is done properly to ensure that you remain compliant and the E-3 visa holder maintains status.

Can I keep an E-3 visa holder employed but pay them less?

As an employer you cannot pay your E-3 visa holder employee less than what was listed on the LCA filed with their visa application.

As an employer you could however make a material change to your employment arrangement by making the E-3 visa holder a part-time employee instead of a full-time employee. In this case, you can then pay an hourly rate rather than a full-time salary rate. As an employer, you would be required to file a new LCA and file an amended E-3 petition for your E-3 visa holder (or they could leave and consular process the new visa with the new LCA – however, during this time of COVID-19 this is not immediately possible).

Can an E-3 visa holder apply for Unemployment Insurance (UI)?

The short answer is not really.

They would need to check the regulations specific to your state to check whether they qualify to apply for unemployment insurance on all other grounds other than their visa status.

Typically, if an E-3 employee applies for UI, they are confirming they are unemployed. Once unemployed, or not working, they are no longer maintaining E-3 status. The maximum amount of time they can no longer be working is the 60 days accorded by the new grace period that went into effect in January 2017 (before then the grace period was 10 days). So even if they did qualify for UI, they could only receive it during that 60-day grace period. Note that E-3 visa holders applying for a change of status to B2 to remain in the US for a longer period than the 60 days grace does not extend the time that they can receive UI. To receive UI you must be ready, willing, and able to accept work and when in B2 status you are not readily able nor allowed to accept work.

Effectively, applying for UI is only a real consideration if one already holds a green card. If applying for UI as a permanent resident (green card holder), it will not trigger the public charge rule when/if a person decides to apply for US citizenship.

Disclaimer

This alert is written to give you guidance on options that are available during this difficult time of COVID-19. It is by no means intended to be used as legal advice for your particular situation. Every individual's situation is different. If you would like our firm's legal advice and a strategy particular to your situation, please reach out to us by email at: info@cammisamarkel.com. We are here to assist you, to hold your hand (figuratively, in-line with social distancing) and create a personalized plan for you, whatever your situation might be. We are here to take away, or at least minimize, your anxiety by providing you with a plan of action specifically tailored to your situation, taking into account your business needs regarding your employees.