

2017 Immigration Policy Roundup

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This year saw significant changes to immigration policy in the United States. Here is a brief roundup of recent developments that companies should continue to monitor in 2018.

The Travel Ban

Background

President Trump issued the third revision of his travel ban entitled “Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats” on September 24, 2017. This proclamation suspended entry into the United States under most circumstances for nationals of Iran, Libya, Somalia, Syria, Yemen, Chad, and North Korea. It also suspended entry into the US for certain officials of the Venezuelan government and their immediate family members. Chad, North Korea, and Venezuela are new additions to the list of “banned” countries.

[Click here to read our full analysis on the travel ban.](#)

Where we are today

On December 4, 2017, the Supreme Court entered orders ([links here](#) and [here](#)) staying preliminary injunctions issued in the Fourth and Ninth Circuits to block the operation of the third revision of President Trump’s travel ban. These orders effectively permit the third travel ban to operate until the appeals of these injunctions are finally resolved. [Click here for more details.](#)

This third Travel Ban order represents a continuation of President Trump’s efforts to ban travel from certain countries that began with his January 27, 2017 Executive Order entitled “Protecting the Nation from Foreign Terrorist Entry Into the United States,” which similarly banned entry by nationals of Iran, Libya, Somalia, Sudan, Syria, Yemen, and Iraq. In most instances, these restrictions were intended to go into effect on October 18, 2017, but did not until now. It appears that these restrictions will persist indefinitely.

What’s next?

The third Travel Ban is being challenged in multiple courts, including the US District Courts for the Districts of Maryland and Hawaii. Both courts enjoined its operation ([links here](#) and [here](#)). Those cases are currently on appeal to the Fourth and Ninth Circuit Courts of Appeal. The orders of the Supreme Court mean that the injunctions will not be in effect while those appeals progress.

Business Visas

With no Congressional action, the President issued another executive order on April 18, 2017: “Buy American, Hire American.” The order outlined the administration’s goal of managing US immigration programs with a priority toward protecting US workers and preventing fraud within the current immigration system. It resulted in heightened scrutiny of H-1B, L-1A/B, TN and O-1 visa petitions. For example, the number of requests for evidence on H-1B visa petitions for skilled workers shot up by 45 percent this year compared with the same period in 2016, per US Citizenship and Immigration Services (USCIS) statistics.

Another major business immigration shift came this summer, when USCIS announced that beginning on October 1, 2017, the agency

would start to implement interviews for employment-based green card applicants. USCIS also rolled back guidance that required officers to give deference to previous decisions when it comes to requests for extensions of non-immigrant visa status. Lastly, USCIS began denying advance parole renewal requests filed by green card applicants if they left the US, which was a departure from previous years. [Click here to read what employers can expect from the interview process.](#)

The Obama-era International Entrepreneur Rule (“IE Rule”) was scheduled to go into effect on July 17, 2017; however, six days before it was set to take effect, the Trump Administration published its own rule delaying implementation until March 14, 2018. The Administration’s rule indicated that it was likely going to rescind the IE Rule. The Administration was sued in US District Court for the District of Columbia, and the court ruled that the Trump Administration had implemented the delay without following the necessary Administrative Procedures Act (APA) Notice and Comment Period regulations, ordering the implementation of the IE Rule. [Click here for further analysis.](#)

What’s next?

DHS announced on December 14, 2017 that it is taking steps to implement the IE Rule to comply with the court order. However, the agency simultaneously announced that it is in the final stages of drafting a notice of proposed rule-making to repeal the rule. The repeal of the IE rule can take several months, so it is unclear if anyone will be granted this discretionary admission in the meantime, and if granted, what that could mean to their admission to the US if the IE is eventually revoked.

US Embassies and the US Custom Border Protection (CBP) also were embolden by the EO, and began to use “extreme vetting” measures, and in some cases deny, foreign nationals attempting to be admitted to the US in a variety business visa categories. In some cases, “extreme vetting” resulted in foreign nationals with approved visa petitions to wait more 3 months of additional security checks to obtain a visa stamp to return back to the US to resume employment. [Click here to read about the new vetting standards.](#)

Unlike the travel ban, which resulted in a flurry of litigation and a lot of press, the business immigration policy changes were in most part under the radar but equally troubling to US employers who compete for and rely on global talent.

Worksite Enforcement and Raids

In 2017, USCIS released two versions of the Form I-9, Employment Eligibility Verification; the most recent one went into effect on September 18, 2017. An employer’s failure to record a new hire’s identity and employment authorization on the proper version of Form I-9 may be considered a substantive violation, which could subject an employer to civil fines ranging from **\$216 to \$2,156 per employee**. [Click here for more details on the updated instructions.](#)

Where we are today

In line with the Trump Administration’s tough position on immigration, most employers have anticipated increased immigration-focused audits and enforcement actions. But we did not see a noticeable uptick during the first three quarters of 2017. We did, however, see a number of highly publicized raids, that resulted in many arrest of undocumented immigrants, who would have previously been ignored, in places where previously would have been avoided, like courthouses, hospitals, outside of shelters, etc.

What’s next?

Due to the anticipated increase in worksite enforcement, it is critical that employers maintain accurate records of employee work authorization, including the I-9 and other documentation. In addition, employers should put into place policies regarding action to be taken by personnel in the event of a visit by law enforcement authorities. Our firm has significant experience in both areas and we are happy to assist with any compliance needs employers may have.

DACA Rescinded

Background

On June 15, 2012, President Obama issued an executive order that allowed young undocumented immigrants to remain legally in the country to attend school and work. This was referred to as Deferred Action for Childhood Arrivals, or DACA. Deferred action did not grant the applicants a lawful status, but it was the use of DHS’s prosecutorial discretion to defer removal action against an individual for a

certain period of time.

On September 5, 2017, President Trump rescinded the DACA program while giving Congress a 6 month window to save the policy. USCIS immediately stopped considering new applications for DACA, but allowed any DACA recipients who had a EAD set to expire before March 5, 2018, the opportunity to apply for a two-year renewal before October 5, 2017. [Click here to read more.](#)

What's next?

Since Congress failed to act before the holiday recess, it remains to be seen what will happen to those who registered under DACA since 2012. DHS claims that DACA registrants will not be an enforcement priority and that it will not proactively share individual information with ICE unless that person is considered an enforcement priority. Currently, it is our understanding that the enforcement priority criteria for DACA recipients would be people with a felony conviction, three or more non-traffic-related misdemeanors or one "significant" misdemeanor such as drunken driving or domestic violence or gang affiliation. However, DHS will have applicant information for each DACA registrant, so while they may not use that information today for deportation purposes, they may in the future.

Immediately, some DACA immigrants with expired EADs may not be able extend their driver's licenses in certain jurisdictions; may not be eligible for in-state tuition; and may not be able to travel abroad.

Record High ICE Arrests, but Not as Many Deportations

On January 25, 2017, the President also issued a second executive order, "Enhancing Public Safety in the Interior of the United States," which asked immigration agencies to review options for prioritizing the removal of unauthorized immigrants, and enforcing existing immigration laws. The order prioritizes deportation of immigrants who have been convicted of crimes, charged with a crime, done something that counts as a chargeable offense or even those who "in the judgment of an immigration officer" are a "risk to public safety or national security," among several other possible criteria.

This is in contrast to the removal guidance issued by the Obama administration in 2014, which placed immigrants convicted of felonies or crimes related to gang activity, as well as immigrants caught at the border, as the highest immigration enforcement priority, NOT non-criminal immigrants. The President replaced the Obama-era deportation guidelines with sweeping new standards, which significantly expanded the categories of people who are targets for removal. In the months following the order, across the country, the number of noncriminal arrests (FY 2017: 28,000) jumped significantly as well as the total number arrests by ICE increased by 43 percent from the year prior. The shift was seen in deportation numbers, which did not increase (FY 2017: 211,068; FY2016: 240,255), not for a lack of effort. It is speculated that because many of the arrests are being challenged in immigration court, which has a backlog of 600,000 cases, it may take years before those arrested under the new administration are ever deported.

In September 2017, the State Department also began to shift policy when it instructed embassies around the world that visitors who require a visa before entering the US must then follow through on their stated plans for at least three months, a departure from the previous 30 day policy. If the foreign national decides to do something different than what was stated on his or her application, such as marry an American citizen, go to school or get a job, it may be presumed that they have committed "willful misrepresentation." Changes of plans that occur after three months may still be problematic but are not presumed to be the result of "willful misrepresentation," the cable said. That would mean that it may be difficult, perhaps impossible, to renew visas or apply for a change of status, and those who find themselves in this situation may be subject to deportation or removal.

What's next?

Nevertheless, ICE will continue to target criminal immigrants, but the administration has made it clear that anyone in the country illegally is subject to an arrest.

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In the last year we have seen many changes by the new Administration in connection to immigration programs and processes. Even without Congressional immigration reform, the impact to employers has been significant. We expect further impactful policy changes coming in 2018 that may affect the H-1B program, L-1 program, B-1 travel, as well as heightened scrutiny and investigations across the board. Stay tuned.

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