

WHAT'S NEXT FOR EMPLOYERS: TOP 10 IMMIGRATION DEVELOPMENTS TO EXPECT UNDER THE BIDEN ADMINISTRATION

Insights
Nov 16, 2020

While the election results may still be debated until officially certified and litigation is resolved, employers should be looking ahead to what a Biden administration will mean for immigration. Prior to this tumultuous year, immigration was one of the biggest hot button topics in the country. But due to the pandemic, social unrest, and the national economic downturn, immigration has grabbed fewer headlines. Regardless, immigration policy will be one of the areas most significantly impacted by the change in administration. This article will cover the top 10 developments that employers can expect in immigration law under President Biden.

GENERAL OVERVIEW

Before we dive into specifics, it is helpful to take a general view of what we can expect. Biden's immigration policies are defined in detail on his website, and most of the immediate changes he seeks to implement involve reversing Trump immigration policies, modernizing immigration policies, and having more market-driven immigration patterns. Regardless of personal political views, employers should welcome a market-driven and modernized immigration system to end inefficiency and backlogs.

Biden has already said that the first 100 days of his administration will target the humanitarian aspect of many current immigration policies, such as family separation at the southern border and the travel ban from predominately Muslim countries. While these policy announcements are politically and socially significant, the more subtle

Related People



Davis C. Bae

Partner

206.693.5060



Ralph Hua

Partner - In Memoriam

Service Focus

Immigration

immigration policies that impact businesses will also change. The degree of change will depend on whether the Democratic party controls both houses of Congress, either starting in early 2021 or as a result of the midterm elections in 2022. Regardless of the degree of cooperation that the Biden administration enjoys with federal lawmakers, there is room for significant and immediate policy change through the execution of existing law and changes to current policies.

1. The Return Of Highly Skilled Workers

The Trump administration created roadblocks for employers seeking to employ highly skilled foreign workers by tightening the H-1B program's requirements. It did so by increasing the number of requests for evidence and the number of denials, narrowing the definition of "specialty occupations" eligible for H-1B visas, and drastically increasing the prevailing wages companies must pay to employees participating in the H-1B program.

Biden has not said whether he will aim to completely roll back the Trump administration's measures, but his campaign website said he will work with Congress to reform the H-1B visa program. His focus will be to ensure the requirements for those visas are "aligned with the labor market and not used to undermine wages." His campaign platform also indicates that Biden will seek to increase the number of H-1B visas available annually.

2. Addressing Gaps In Immigrant Visa Backlogs

Under the current system, the number of employment-based immigrant visas is capped at 140,000 per year. Qualified applicants for immigrant visas can find themselves waiting for decades to have their cases adjudicated by USCIS, depending on their country of birth.

Biden proposes three potential solutions to this backlog: (i) increase the number of permanent visas available, with mechanisms for reducing that number temporarily during times of high unemployment in the U.S.; (ii) exempt from any cap recent graduates of PhD programs in STEM fields in the U.S. who are poised to make some of the most important contributions to the world economy; and (iii) a proposal that foreign graduates of a U.S. doctoral program be given a green card with their degree.

Automatically granting green cards to doctoral program graduates will not only greatly reduce the number of applicants waiting for adjudication of their green card petitions, it would act as an additional incentive for the best and the brightest foreign students to pursue their studies in the U.S. and to stay in the country to benefit the economy after they complete their studies.

3. Implementing Technology-Based Border Security And Revamping Enforcement Priorities And Actions

Biden's immigration plan aims to end the diversion of government funds to build a wall on the U.S.-Mexico border, and instead invest in new technology to patrol the border and in screening infrastructure at ports of entry. Biden proposes investment in "better technology coupled with privacy protections at the border, both at and between ports of entry, including cameras, sensors, large-scale x-ray machines, and fixed towers," as well as investment in "the aging infrastructure at all of our ports of entry." His proposal also includes increased cross-agency collaboration as well as improved partnerships with Mexico and Canada.

Biden's policies will "prioritize enforcement resources on removing threats to national security and public safety, not families." This could imply a return to the immigration enforcement actions through employers via I-9 investigations, and a reduction in enforcement raids by ICE and CBP.

4. Pending H-1B Litigation Likely To Overturn Recent Trump Policy

The D.C. Circuit Court is likely to be the first court that will address whether the Department of Labor impermissibly circumvented the necessary administrative process required when it enacted a rule attempting to rewrite the required prevailing wage requirements for certain types of foreign workers. The prevailing wage – the wage that sets the floor for a foreign worker on an H-1B visa and certain other visa categories in a certain geographic area – had been dramatically raised under the new rule.

For entry-level workers, the prevailing wage had historically been set at what the Department of Labor calculated to be the 17th percentile of similarly situated

wage earners but was raised to the 45th percentile under the rule. For the most experienced workers, the prevailing wage had been raised from the 67th percentile to the 95th percentile.

The rule change had the effect of making foreign workers more costly to employers. But because it was instituted with no notice and comment period, opponents argued that it violated required implementation procedures under applicable administrative statutes. The Department of Labor takes the position that expedited action was required to protect the labor force in response to economic shock caused by the COVID-19 pandemic.

In related litigation, multiple courts are being called on to decide whether the Department of Homeland Security's rule changing the definition of "specialty occupation" and making other changes to the H-1B visa is enforceable. The arguments against this regulatory change are similar to those challenging the Department of Labor rule: whether the regulation was enacted using the proper procedure, whether it is arbitrary and capricious, and whether the rule making goes beyond the scope of the legislative grant of authority. DHS counters by arguing the pandemic's effects on the economy justified its quick action.

5. Changing Fate Of DACA And The Dreamers

There are several other high-profile immigration issues being litigated in the waning days of the Trump administration. DACA, the Deferred Action for Childhood Arrivals policy, was implemented via executive action by President Obama in 2012. With over 700,000 DACA recipients who have received work authorization (sometimes known as "Dreamers" given their relation to the failed DREAM Act), this is an issue that impacts many employers.

The Trump administration attempted to rescind the policy but was defeated on procedural grounds. Eventually, the Supreme Court held this summer that while the Department of Homeland Security has the right to rescind the policy, it had not followed the proper procedures while attempting to do so. President-elect Biden has signaled that his administration will strengthen, rather than attempt

to rescind, DACA.

6. A New Way Of Handling Seasonal Workers

Industries such as agriculture and manufacturing rely heavily upon seasonal workers from foreign countries. According to Biden's campaign website, "The current system for accommodating these workers is cumbersome, bureaucratic, and inflexible — driving up incentives to circumvent the system by hiring undocumented laborers and allowing the employers who control the visa to pay artificially low wages."

Biden plans to work with Congress with the hopes of reforming the current system. He aims to allow seasonal workers in certain industries to certify the need for foreign workers based on labor market studies and to make it easier for seasonal workers to switch jobs. Biden's goal is to make it easier for companies reliant upon seasonal workers to qualify to hire such workers legally, while at the same time requiring employers to pay fair compensation based upon the prevailing wage and otherwise protecting seasonal workers from "exploitation."

As for unauthorized immigrants who may already be working as unskilled laborers in the country, Biden's platform says that he will "aggressively advocate for legislation that creates a clear roadmap to legal status and citizenship for unauthorized immigrants who register, are up-to-date on their taxes, and have passed a background check."

7. Increased Microeconomic Immigration Support For Municipalities

Studies show that areas hit hard by population decline benefit economically from influxes of immigrants, including DACA recipients. The Biden campaign's platform noted that immigrants bring "new life to local economies – starting businesses, paying taxes, and spending their dollars back into their new communities," and specifically mentions the positive effect immigrants have had recently on local economies in the Great Lakes region.

Biden promises to use federal agencies to provide

information and resources in support of community-led efforts to attract immigrants to areas in economic decline. This includes reestablishment of the Task Force for New Americans, aimed at supporting community efforts to welcome immigrants and encourage them to relocate to their communities.

One of Biden's most interesting proposals is his support for a program to allow any county or municipal executive of a large or midsize county or city to petition for additional immigrant visas to support the region's economic development strategy, provided employers in those regions certify there are available jobs, and that there are no workers to fill them. Under this program, holders of these special visas would be required to work and reside in the city or county that petitioned for them, and would be subject to the same certification protections as other employment-based immigrants.

8. End Of The Public Charge Rule

A Trump administration policy requiring that applicants for many types of immigration benefits must demonstrate that they will not become public charges or take certain types of public assistance benefits including food stamps and housing assistance is being simultaneously challenged in several courts. Opponents liken the rule to a "wealth requirement" for immigration.

The status of litigation over this rule is fluid. A federal judge in Chicago recently issued an injunction preventing the enforcement of the rule only to see it overturned the next day by the 7th Circuit Court of Appeals. President-elect Biden has indicated that he will rescind the rule, which should create less strain on the immigration system.

9. Expect Small Tweaks In The Administrative Machine

The Trump administration made various agency policy changes that had an immediate impact on foreign nationals and employers. For example, it started an "extreme vetting" policy in 2017 requiring all employment-based green card applicants to go through an in-person interview. This immediately led to a swelling caseload at various immigration field offices, especially those in major technology hubs. It also led to an increase in cost

associated with in-person interviews for foreign nationals and has indirectly slowed down naturalization processing, for which in-person interviews are mandatory. The administration has also drastically increased the rate of Requests for Evidence, which has led to slower and more costly case processing, and higher denial rates.

The Biden administration will have the authority to quickly and easily revert these agency policies and return to an Obama-era administrative focus. Small tweaks like these can have immediate and large impact on both employers and foreign nationals.

10. Expect Litigation To Dry Up During The Transition

The remaining period of the Trump administration will be marked by defending its positions in litigation. While Trump came into power with hopes of widespread changes in the field of immigration, he was unable to get traction on his objectives through legislation. Instead, many of his immigration goals were enacted through executive actions and administrative rules. As noted above, many of these are now facing court challenges.

Once the Biden administration takes control on January 20, 2021, expect the newly installed Department of Justice to take a fresh look at all of these pending challenges. Following the lead of the new administration, it is probable that the federal government will work in concert with many of those challenging the Trump-era policies instead of in opposition to them. You can expect many of the existing court challenges to dry up as the Biden administration enacts the sweeping changes described above.

CONCLUSION

The full extent of what we can expect in the future when it comes to immigration policy will depend a great deal on what we see in the run off in Georgia for the two remaining Senate seats. These January 5 elections in will determine if the Senate will remain in Republican control.

Should the Democrats win both runoff elections and thus capture both houses of Congress, there is a chance we will see comprehensive immigration reform and a more aggressive movement in the Biden immigration agenda. A

Republican win for either seat in the Georgia senate race, however, will mean continued gridlock on immigration legislative changes. In this scenario, Biden's tools to make changes in immigration will be similar to those utilized by Trump over the past four years: regulatory changes, executive orders, and agency policies.

We will continue to monitor further developments and provide updates in the coming months, so make sure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or any attorney in our [Immigration Practice Group](#).

This Legal Alert provides an overview of a specific development. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.