



# The Undoing Of Trump's Immigration Agenda: Biden Unveils Series Of Immigration Reforms

Insights

1.27.21

One day is all it took for the Biden-Harris administration to repudiate the Trump-era crackdown on immigration. By issuing a series of Executive Actions, Presidential Memoranda, and Proclamations on January 20 and the days thereafter, President Biden demonstrated his administration's commitment to undoing much of what his predecessor did over the past four years while also modernizing our country's immigration system. He also unveiled his administration's attempt to address the long-standing goal of comprehensive immigration reform through a detailed legislative proposal that will soon be taken up in Congress. What do employers need to know about these actions and what steps should employers take now as a result?

## Four Significant Immigration Actions Impacting Employers

The first days of the Biden administration saw at least four significant actions impacting immigration and the workplace.

### ***Halt On Trump's Last-Minute Work Visa Rules***

The White House Chief of Staff issued a memorandum withdrawing all rules pending at the *Federal Register* that have not been published and advising agencies to consider postponing the effective dates for regulations that have been published, but not yet taken effect, for 60 days. As a result, the USCIS Final Rule that had created a wage-based selection process for H-1B visas may be postponed until March 21, 2021. In addition, the DHS Final Rule clarifying how USCIS will determine whether there is an "employer-employee relationship" will be withdrawn.

### ***Protections for Dreamers***

President Biden signed a Presidential Memorandum directing the Secretary of Homeland Security, in consultation with the Attorney General, to preserve and fortify Deferred Action for Childhood Arrivals (DACA). This program provides temporary relief from deportation on a case-by-case basis to more than 700,000 young people who were brought to this country as children, and who met rigorous requirements and background checks. Many are serving our country in the armed services or as essential workers on the front lines of the pandemic. The Trump administration tried to terminate DACA beginning in 2017, but the U.S. Supreme Court rejected that effort and required reconsideration of that decision. After Biden's action, the program will continue for the foreseeable

future, accepting new applications and renewing DACA for those who qualify under the 2012 requirements.

### ***Ending Discriminatory Bans On Entry***

President Biden also issued a Proclamation putting an end to the Muslim and Africa Travel Bans. It instructs the State Department to restart visa processing for affected countries and to swiftly develop a proposal to restore fairness and remedy the harms caused by the bans, especially for individuals stuck in the waiver process and those who had immigrant visas denied. The Proclamation also provides for the strengthening of screening and vetting for travelers by enhancing information sharing with foreign governments and capacity building with our partners, and directs reviews of other Trump administration “extreme vetting” practices.

### ***Suspension Of Entry Of Persons Who Pose A Risk Of Transmitting Coronavirus***

On January 25, President Biden issued a Proclamation to maintain travel restrictions on individuals from the Schengen Area, U.K., Ireland, and Brazil, which were scheduled by the Trump Administration to end on January 26, 2021. The Proclamation also adds South Africa to the list of countries with restrictions on entry into the U.S. The effective date of the suspension and limitation on entry from South Africa is 12:01 am (ET), January 30, 2021. The Proclamation will remain in effect until terminated and the Biden administration will reevaluate the restrictions monthly.

The Proclamation does **not** apply to:

- lawful permanent residents of the U.S.;
- any noncitizen national of the United States;
- any noncitizen who is the spouse of a U.S. citizen or lawful permanent resident;
- any noncitizen who is the parent or legal guardian of a U.S. citizen or lawful permanent resident, provided that the U.S. citizen or lawful permanent resident is unmarried and under the age of 21;
- any noncitizen who is the sibling of a U.S. citizen or lawful permanent resident, provided that both are unmarried and under the age of 21;
- any noncitizen who is the child, foster child, or ward of a U.S. citizen or lawful permanent resident, or who is a prospective adoptee seeking to enter the United States pursuant to the IR-4 or IH-4 visa classifications;
- any noncitizen traveling at the invitation of the United States Government for a purpose related to containment or mitigation of the virus;
- any noncitizen traveling as a nonimmigrant pursuant to a C-1, D, or C-1/D nonimmigrant visa as a crewmember or any noncitizen otherwise traveling to the United States as air or sea crew;
- any noncitizen (A) seeking entry into or transiting the United States pursuant to one of the following visas: A-1, A-2, C-2, C-3 (as a foreign government official or immediate family member

...seeking asylum; (A) E-1 (as an employee of TECRO or TECO or the employee's immediate family members), E-2 (as an employee of TECRO or TECO or the employee's immediate family members), G-1, G-2, G-3, G-4, NATO-1 through NATO-4, or NATO-6 (or seeking to enter as a nonimmigrant in one of those NATO categories); or (B) whose travel falls within the scope of section 11 of the United Nations Headquarters Agreement;

- any noncitizen who is a member of the U.S. Armed Forces and any noncitizen who is a spouse or child of a member of the U.S. Armed Forces;
- any noncitizen whose entry would further important United States law enforcement objectives, as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees, based on a recommendation of the Attorney General or his designee; or
- any noncitizen whose entry would be in the national interest, as determined by the Secretary of State, the Secretary of Homeland Security, or their designees.

In addition, during her press briefing on January 25, Press Secretary Jen Psaki confirmed that, beginning January 26, all international travelers to the U.S. must provide proof of a negative COVID-19 test to airlines within three days prior to their departure.

## **Planned Immigration Reform Legislation**

Beyond these executive actions taken by the White House in the opening days of the new administration, President Biden wasted no time in unveiling his plan for comprehensive immigration reform that can only be accomplished through legislation. His legislative proposal – the U.S. Citizenship Act of 2021 – would provide pathways to citizenship, strengthen labor protections, prioritize smart border controls, and address the root causes of migration. According to the fact sheet released by the White House, the Act would:

- ***Create an earned roadmap to citizenship for undocumented individuals.***
  - Allows undocumented individuals to apply for temporary legal status, with the ability to apply for green cards after five years if they pass criminal and national security background checks and pay their taxes.
  - Dreamers, TPS holders, and immigrant farmworkers who meet specific requirements are eligible for green cards immediately under the legislation.
  - After three years, all green card holders who pass additional background checks and demonstrate knowledge of English and U.S. civics can apply to become citizens.
  - Applicants must be physically present in the United States on or before January 1, 2021.
  - DHS may waive the presence requirement for those deported on or after January 20, 2017 who were physically present for at least three years prior to removal for family unity and other humanitarian purposes.
- ***Keep families together.***

- Reforms the family-based immigration system by clearing backlogs, recapturing unused visas, eliminating lengthy wait times, and increasing per-country visa caps.
- Eliminates the “three- and 10-year bars” and other provisions that keep families apart.
- More explicitly including permanent partnerships and eliminating discrimination facing LGBTQ+ families.
- Provides protections for orphans, widows, children, and Filipino veterans who fought alongside the U.S. in World War II.
- Allows immigrants with approved family-sponsorship petitions to join family in the U.S. on a temporary basis while they wait for green cards.
- ***Embrace diversity.***
  - The bill includes the NO BAN Act that prohibits discrimination based on religion.
  - Limits presidential authority to issue future bans.
  - Increases Diversity Visas to 80,000 from 55,000.
- ***Promote immigrant and refugee integration and citizenship.***
- ***Grow our economy.***
  - The bill clears employment-based visa backlogs, recaptures unused visas, reduces lengthy wait times, and eliminates per-country visa caps.
  - The bill makes it easier for graduates of U.S. universities with advanced STEM degrees to stay in the U.S.
  - Improves access to green cards for workers in lower wage sectors.
  - Provides dependents of H-1B visa holders work authorization, and children are prevented from “aging out” of the system.
  - Creates a pilot program to stimulate regional economic development, gives DHS the authority to adjust green cards based on macroeconomic conditions, and incentivizes higher wages for non-immigrant, high-skilled visas to prevent unfair competition with American workers.
- ***Protect workers from exploitation and improve the employment verification process.***
  - The bill protects workers who are victims of workplace retaliation from deportation in order to allow labor agencies to interview these workers.
  - It protects migrant and seasonal workers, and increases penalties for employers who violate labor laws.
- ***Supplement existing border resources with technology and infrastructure.***
- ***Manage the border and protect border communities.***
- ***Crack down on criminal organizations.***
- ***Address underlying causes of migration.***

- Increasing assistance to El Salvador, Guatemala, and Honduras, conditioned on their ability to reduce the endemic corruption, violence, and poverty that causes people to flee their home countries.
- American Minors Program to reunite children with U.S. relatives and creates a Central American Family Reunification Parole Program to more quickly unite families with approved family sponsorship petitions.
- Improve the immigration courts and protect vulnerable individuals.
- Support asylum seekers and other vulnerable populations.

Just as comprehensive immigration reform has proven elusive under previous administrations, the chances of this bill becoming law are uncertain. Congress will be kept busy in the early days of this administration handling the second impeachment trial, the next stimulus package, vaccination efforts, a variety of other COVID-19-related measures, and many other priorities on the long list of initiatives that the new Democratic majority wants to tackle. It is unclear when federal lawmakers might seriously begin to debate this measure, and whether bipartisan support can be achieved.

### **Steps Employers Should Take Now**

Regardless of the fate of the proposed legislation, employers have awoken to a new day when it comes to immigration matters in the workplace. You should consider the following items to address the new state of affairs taking shape across the country.

1. Work with immigration counsel to identify employees who may be subject to the above-listed Executive Actions, Presidential Memoranda, Proclamations and legislation;
2. For your employees who are abroad and subject to the Proclamation barring travel from the Schengen Area, U.K., Ireland, Brazil and South Africa, work with immigration counsel to determine if the employee meets one of the exceptions, including the national interest exception; and
3. Audit I-9s to ensure that employees in DACA status are properly reverified and that adverse actions are not taken without exploring whether an extension of employment eligibility exists.

Additional executive actions on immigration are expected on January 29, 2021. We will continue to monitor further developments and provide updates on this situation, 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 Global Immigration Practice Group.

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

## ***Related People***

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Immigration