



The Slippery Road Toward Immigration Reform Under President Biden: Beware of ICE!

Insights

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President Biden has proposed sweeping changes to U.S. immigration law, contained in the pending U.S. Citizenship Act of 2021. This piece of proposed legislation, as introduced into Congress by the bill's lead sponsors, Sen. Bob Menendez (D-NJ) and Rep. Linda Sanchez (D-CA), contains several measures which would provide a boost to immigrants and employers aiming to expand their worker pool. However, the legislation would also ramp up enforcement efforts on the part of federal immigration officials – meaning that employers should consider preparing now for increased risks and compliance challenges. What should you know about this proposal?

Overview of Proposed Legislation

The bill contains numerous provisions that would be helpful for immigrants and employers, including:

- increasing the number of immigrant visas (“Green Cards”) available per year;
- adding in unused employment-based immigrant visas from prior years;
- eliminating per-country limits on immigrant visas;
- exempting spouses and children of both family and employment-based permanent residence applications from numerical limits;
- allowing people who have been waiting to file Green Cards for over 10 years to so apply immediately;
- exempting holders of U.S. Ph.D. Degrees from numerical limits on immigrant visas;
- allowing holders of more types of temporary work visas to remain in the U.S. until they are ultimately eligible to apply for Green Cards;
- better protecting children of individuals who face long waits to be eligible to apply for Green Cards; and
- clearing the way for currently undocumented agricultural workers, and their families, to apply for Green Card status.

While many of these provisions are indeed very friendly to immigrants and companies seeking to employ foreign national workers, there are risks for employers contained in this proposed bill as

well. Indeed, the usual horse trade when Democrats propose immigration reform with many immigrant-friendly provisions (i.e., the “carrot”) is that they offer some pro-enforcement provisions in an attempt to attract support from the other side of the political aisle, such as increasing worksite enforcement and audits (i.e., the “stick”).

Potential Risks to Employers

If the bill passes, employers will have more incentives to comply with federal, state, and local employment laws, specifically with respect to enforcement actions by ICE (Immigrations and Customs Enforcement).

Employment Authorization Changes

Title 5 of the proposed U.S. Citizenship Act of 2021 is entitled “Employment Authorization and Protecting Workers from Exploitation,” which envisions the establishment of a “Commission on Employment Authorization.” This group would consist of presidential and congressional appointees who would be charged with examining the current processes for employment authorization and proposing possible changes. The goal of the commission is to “respect the rights of employment-authorized individuals to work in the United States,” and to protect workers’ rights to be free from race and national-origin discrimination.

Employment Verification Once Again Up for Debate

Under Section 5101 of the proposed law, a commission would be established to make policy recommendations regarding employment-verification systems. The goal: to ensure employees are not incorrectly deemed ineligible for employment based on false positives, nor subject to discrimination based on race or national origin. The commission would also review the error rates for E-Verify and its impacts on various groups by national origin, race, gender, and socioeconomic background. At the end of the process, the government would be required to determine which recommendations are “most likely to improve existing employment verification systems,” keeping in mind whether such recommendations are “feasible within existing budget restraints.”

The net result of this activity certainly could involve an increase of employer compliance obligations under both E-Verify and I-9 employment eligibility verification processes. There are also provisions in the proposed legislation that would penalize employers who misuse E-Verify in ways that discriminate based on national origin or citizenship, deny employee benefits, allow unauthorized access to E-Verify data, or use an employment authorization verification system other than E-Verify.

Ramped-Up Penalties

Title 5 of the bill contains a provision which states that if an agency finds that an employer has engaged in civil violations of federal, state, or local labor laws regarding wages and hours, labor relations, family and medical leave, occupational health and safety, civil rights or nondiscrimination

regarding an unauthorized worker, the employer would be subject to an additional civil penalty of up to \$5,000 for each unauthorized noncitizen worker to whom the violation occurred. This fine is separate and apart from any penalties imposed by governmental agencies for violation of the underlying statutes themselves.

Additional Provisions

Some additional provisions of the proposed legislation would aim to refresh the current immigration system in many respects.

Visa Eligibility

Another provision would expand the eligibility of U visas for those who assist with immigration-related compliance and enforcement activities. According to the USCIS, “the U nonimmigrant status (U visa) is set aside for victims of certain crimes who have suffered mental or physical abuse and are helpful to law enforcement or government officials in the investigation or prosecution of criminal activity.” U visa eligibility would be expanded to include workers that have been subject to serious abuse by employers, or that have, are, or will be helpful to authorities investigating, prosecuting, or seeking civil remedies for a labor or employment violation arising from workplace claims.

In addition, the Department of Homeland Security (DHS) would allow an individual to remain in the U.S., delay a removal, and grant such an individual work authorization if this person has filed for a U visa, has filed a claim, or is a material witness to a workplace claim and has, is or will be helpful during the investigation. In situations where the DHS conducts an enforcement action where a workplace claim has been filed or based on information provided in retaliation against employees regarding a claim, the DHS will stay the removal of any detained noncitizens until the law enforcement agency with jurisdiction over the violations/criminal activity has been notified and the agency has had the chance to interview the individual.

Another provision would allow immigrants in the United States on temporary work visas to assert citizenship status discrimination. This is a change from the current law, which only allows U.S. Citizens, Green Card holders, and some asylees or refugees to make such claims. The proposed law would also grant enforcement jurisdiction to the Immigrant and Employee Rights Section of the Civil Rights Division within the Department of Justice, which would remain removing this authority from where it currently resides, with the Equal Employment Opportunity Commission.

Temporary Limitations

One other provision (which is not related to worksite enforcement or penalties per se) would allow the Secretary of Homeland Security to establish procedures for “temporarily limiting” employment-based immigrants from entering the country and/or applying for Green Cards “in geographic areas or labor market sectors that are experiencing high levels of unemployment.” How this provision

could be utilized, or potentially abused, is quite unclear, especially since what is meant by “high levels of unemployment” is not defined in the bill.

Conclusion

We will continue to monitor this bill as it makes its way through Congress. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information directly to your inbox. For further information, contact your Fisher Phillips attorney or any member of our Immigration Practice group. Now is a good time to make sure your internal processes and procedures do not pose potential discrimination claims, and that their I-9's are in good shape. Your Fisher Phillips attorney can guide you through these compliance challenges before ICE ramps up its enforcement efforts.

Service Focus

Immigration