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DHS PROPOSES NEW $100K H-1B FEE THROUGH FORMAL RULEMAKING: 5 STEPS FOR EMPLOYERS AND HOW YOU CAN GET INVOLVED

Insights
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DHS Proposes New $100K H-1B Fee Through Formal Rulemaking: 5 Steps for Employers and How You Can Get Involved

The Department of Homeland Security published a proposed regulation today that would impose a massive new fee on H-1B cap-subject petitions – $103,265 to be exact – reviving what a federal court struck down earlier this year but pursuing it through an entirely different legal route. Unlike last year's presidential proclamation that triggered months of litigation and confusion, this fee would be created through the standard notice-and-comment rulemaking process, and it would apply more broadly than the version courts already rejected (including on new hires already in the country). What five steps should you consider taking, and how can you get involved in the rulemaking process?

Quick Recap on Past Steps

When we first reported on the $100,000 H-1B fee last September, President Trump had just issued a proclamation requiring employers to pay $100,000 for H-1B workers entering the United States from abroad. That approach relied on the president's authority to restrict entry into the country, and it applied only to consular processing cases, not to workers already in the US on H-1B status or those changing employers domestically.

That proclamation ran into trouble almost immediately. In June, a federal judge in Massachusetts vacated the fee,

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ruling that the administration had imposed an unlawful tax without authorization from Congress, had bypassed the normal rulemaking process required to adopt it, and failed to weigh the fee's impact on sectors that rely heavily on H-1B talent. The administration appealed, but the fee has not been in effect since the June ruling.

What's Different About This Proposal

While the appeals process for the proclamation's fate plays out, DHS is also proposing to reach a similar dollar amount through the formal rulemaking process. The agency published the proposal in the Federal Register, invited public comments, and is working to build an extensive cost-justification record so the fee can stand the best chance of surviving a court challenge.

The new fee also reaches further than the proclamation did:

- **Broader population.** The 2025 proclamation only applied to petitions requiring consular processing from outside the US. The proposed rule would apply to all H-1B cap-subject petitions, including new hires already in the country on other visa statuses, not just workers entering from abroad. That includes cap-subject petitions for workers with a qualifying US master's degree or higher. Those draw from the separate 20,000-slot advanced-degree allocation carved out of the base 65,000 cap, but they're still considered "cap-subject" for fee purposes, so this fee would apply to them, too.

- **Narrower exemptions.** Petitions exempt from the annual H-1B numerical cap, including those filed by universities, nonprofit research organizations, and government research organizations, would not be subject to the new fee. Hospitals would not be automatically exempt. A hospital may qualify for cap-exempt treatment only if it satisfies the applicable requirements for an institution affiliated with an institution of higher education or another qualifying cap-exempt entity. A general community hospital or for-profit health system would still file cap-subject petitions through the annual lottery like any other employer and would owe the new fee. The fee would not generally apply to routine extensions or change-of-employer petitions involving beneficiaries who have already been counted against the cap.

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- **Potential stacking.** If the vacated proclamation is ultimately reinstated on appeal, DHS has made clear that employers subject to both would have to pay the proclamation payment and the new rule's fee separately. As things currently stand, though, the proclamation is set to expire on its own terms before this new fee could take effect, so double payment isn't an immediate concern.

How DHS Arrived at $103,265

DHS calculated the figure by dividing $8.78 billion in projected annual costs by an estimated 85,000 fee-paying H-1B cap-subject petitions per year. The agency projects the fee would generate roughly $8.8 billion annually, distributed across six federal agencies involved in administering the immigration system:

- US Citizenship and Immigration Services: 34.2% ($3.0 billion)
- Executive Office for Immigration Review (immigration courts): 33.7% ($2.96 billion)
- Immigration and Customs Enforcement: 11.9% ($1.05 billion)
- Department of Labor: 13.8% ($1.21 billion)
- Department of State: 5.5% ($484 million)
- Customs and Border Protection: 0.9% ($76.2 million)

DHS says the funds would support adjudications, fraud detection and national security vetting, and the hiring of more than 8,400 additional staff, including immigration judges.

Which Industries Will Feel This the Most

Tech companies and IT services firms have historically been the heaviest users of the H-1B program, and they would likely feel this fee first. But H-1B hiring extends well beyond tech. Healthcare systems, engineering firms, financial services companies, and universities (for their cap-subject positions) also rely on the program, and any cap-subject employer in these industries would face the same $103,265 fee regardless of sector.

What Happens Next

The proposed rule was published formally in the Federal Register on August 25, opening a 30-day public comment period that runs through September 24. DHS must review and respond to public comments before it can issue a final rule, a process that can take at least several months.

What Should You Do? 5 Action Steps

Here are a few action steps to consider:

1. Proceed with business as usual – for now. The rule is still in the early proposal stages and will not take effect until the formal steps are concluded. As of today, the existing H-1B fee structure remains unchanged, and this new fee is not something employers need to pay today.

2. Take advantage of the comment period. Because DHS is required to respond to public comments before finalizing the rule, well-documented input from employers, particularly on cost impact, workforce planning disruption, and effects on specific industries, can shape the final version. Our FP Gov team can help employers and industry groups prepare and submit comments before the deadline.

3. Budget for the possibility. Employers with significant H-1B hiring needs, particularly for the FY 2027 cap season, should start factoring a potential $103,265 per-petition cost into hiring and workforce budgets, even though the fee is not yet final.

4. Reassess cap-exempt strategies. Universities, nonprofit research organizations, and government research organizations should confirm whether their cap-exempt status is properly documented, since this proposal (unlike the earlier proclamation) would leave them out of the new fee entirely. Hospitals should confirm whether they actually qualify for that exemption, too.

5. Watch the litigation track separately. The appeal over the original proclamation fee is still pending before the 1st Circuit. Depending on how that litigation and this rulemaking proceed, employers could eventually face two separate fee regimes, although the scope and affected petitions would differ. The best way to stay up to speed on these developments is to ensure you are subscribed to FP's Insight System.

Conclusion

We will continue to track this rulemaking as it moves through the comment period and provide updates as developments warrant, so make sure you are subscribed to Fisher Phillips' Insight System to receive the most up-to-date information directly to your inbox. Contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our Immigration Practice Team to discuss what this ruling means for your pending or planned H-1B petitions.