



Trump Targets Tech Teams (And Others) Through H-1B Crackdown

Insights

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President Trump signed an executive order yesterday directing a full review of the H-1B visa program as part of a continued push to clamp down companies that hire foreign labor instead of American workers. The centerpiece of this directive – dubbed “Buy American, Hire American” – is a proposal to replace the H-1B lottery with a system that distributes visas on the basis of wages, skills, and education.

The thought process behind the proposed revision is that such a system would make it more difficult to use the H-1B program to replace American workers with lower-wage foreign workers. However, because the H-1B program already prioritizes highly skilled workers, it is unclear whether the president’s proposal would actually solve the issue.

Primer: The H-1B Visa Lottery

The H-1B is a temporary nonimmigrant visa category that allows employers to petition for highly educated foreign professionals to work in “specialty occupations” that require at least a bachelor’s degree or the equivalent. That means the majority of H-1B workers are college educated, either through U.S. or international universities. Jobs in fields such as mathematics, engineering, and technology often qualify.

The Department of Homeland Security caps the number of H-1B skilled immigrants allowed into the U.S. each year at 65,000 annually, plus an additional 20,000 for individuals who have received a Master’s degree from a U.S. institution of higher education. However, the demand for highly skilled foreign workers far exceeds that cap, and hundreds of thousands of employers spend thousands of dollars annually on filing fees and attorneys’ fees in the hope of having their petitions to sponsor these professionals selected through the H-1B lottery.

Tens of thousands of foreign workers, many of whom are already in the U.S. as student (F-1) visas and who have a job offer from a U.S. employer, are prevented from remaining in the U.S. Last year, U.S. Citizenship and Immigration Services (USCIS) estimated it received nearly 236,000 H-1B visa applications for fiscal 2017. The number for fiscal year 2018 was released on Monday and the USCIS estimates it received approximately 199,000 petitions.

Trump’s Executive Order

Yesterday's executive order does not mean there will be immediate changes to the H-1B program, but instead requires federal agencies to review the H-1B program and propose reforms. It's unclear what kinds of changes this review will lead to. Will the Trump administration decrease the total number of visas or increase prevailing wages for such workers to encourage the hiring of Americans? At this point, it's anyone's guess.

Employers will welcome substantive reform of the H-1B visa system. The lottery system is expensive for employers while hampering strategic talent management plans, as employers are largely uncertain about whether they will be able to employ the workers they need.

However, turning the program into a bidding war where only the biggest companies can play and win will force smaller companies out of the process. The result could unfairly favor Silicon Valley or employers in high-paid areas like New York City. Small to medium employers, such as manufacturers in Middle America who require the use of skilled engineers, would be shut out of the H-1B program and unable to hire an engineer or IT professional. This would lead to skewed results, where some employers are harmed while others benefit.

What Should Employers Do In The Meantime?

The executive order doesn't set a timeline for when the review of the H-1B program will be completed, and we have no way of knowing when the president will announce specific details regarding his plans for reform. In the meantime, as the review is being conducted, it's likely that employers will see an increase in investigations of fraud in the near future or heightened scrutiny of petitions.

Therefore, you need to ensure you are taking steps to make your company audit-proof. Fending off allegations of fraud requires you to:

- ensure you are maintaining proper public access files that contain information about the worker's wages and how the wage rate was set;
- update the United States Citizenship and Immigration Services (USCIS) on a timely basis with any changes in the H-1B employee's employment, including significant raises, job duties, and location; and
- train staff for onsite visits and audits.

Conclusion

We will continue to monitor the status of all immigration-related executive order activity, including ongoing and future litigation, and publish updates as additional actions are taken, or information is provided, by the White House or the judicial system. Please be sure to regularly review our [Cross Border Employer Blog](#) for updates about these and other developments.

If you have any questions about these developments or how they may affect your business, contact any member of our [Global Immigration Practice Group](#), or your regular Fisher Phillips attorney.

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

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