



# Federal Appeals Court Rejects Trump's Second Travel Ban

DECISION SETS UP INEVITABLE DATE AT SUPREME COURT

Insights

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In a 10-3 decision, the 4th Circuit Court of Appeals yesterday upheld the nationwide injunction that had blocked President Trump's second executive order banning certain travel into the country from taking effect. The Court held that the text of the second executive order, also known as EO-2, "speaks with vague words of national security, but in context drips with religious intolerance, animus, and discrimination."

Although another appeal is still pending before the 9th Circuit Court of Appeals, and a ruling from that court could come at any time, yesterday's ruling means that the travel ban will remain blocked regardless of how that court rules. While U.S. Attorney General Jeff Sessions immediately stated that the administration will seek review by the Supreme Court, the 4th Circuit's decision means that things remain status quo for employers and their employees seeking entry into the U.S.

## Background

On January 27, 2017, President Trump signed a controversial executive order titled "Protecting the Nation from Terrorist Entry into the United States by Foreign Nationals," which created an immediate freeze on all entry for individuals from Syria, Iran, Libya, Somalia, Yemen, Iraq, and Sudan. Both immigrant and non-immigrant visa holders were impacted by the executive order. The EO also placed several constraints on the admission of refugees into the country and barred indefinitely the admission of Syrian refugees.

The first EO was challenged in federal court and, within a week, the Western District of Washington granted a nationwide temporary restraining order blocking the order from being enforced nationwide for a temporary period. On February 9, the 9th Circuit Court of Appeals upheld the temporary injunction, concluding the executive order unconstitutionally interfered with the due process rights of a broad group of lawful permanent residents, aliens attempting to reenter the country after traveling abroad, refugees, and visa applicants.

At the 9th Circuit's invitation, Trump enacted a second executive order on March 6, 2017. EO-2, which was titled "Protecting the Nation from Foreign Terrorist Entry into the United States," revoked and replaced the first EO and targeted six of the same Muslim-majority countries as the original order while excluding Iraq. Effective March 16, 2017, the new executive order aimed to create a 90-day freeze on entry for all individuals from Syria, Iran, Libya, Somalia, Yemen, and Sudan who are outside

the U.S. on March 16, did not have a valid visa at 5:00 p.m. EST on January 27, 2017, and did not have a valid visa on March 16.

Six individuals and three organizations brought a federal lawsuit in Maryland attacking EO-2. The individuals claimed they had family members from the named countries who either could not gain visas to enter the U.S. in a timely manner or who would altogether be barred from entering the country. The combination of the separation from family members, along with the feelings of “disparagement and exclusion” brought about by the travel ban, led them to file suit. The pro-Muslim organizations argued they were forced to divert significant resources to dealing with the travel ban fallout, including financial injury from a reduced number of refugee cases they would handle.

On March 16, the district court granted the injunction blocking EO-2’s travel ban from taking effect on a nationwide basis, on the same day that another federal court in Hawaii similarly blocked the second travel ban from going into effect. This current appeal followed.

### **The 4th Circuit’s Ruling**

In a dense 205-page opinion containing several concurring and dissenting opinions, the 4th Circuit stated that the plaintiffs had “standing” to bring their case to court because they proved they were harmed by EO-2, and that their injuries were not “remote or speculative.” As for the EO-2 itself, “Congress granted the President broad power to deny entry to aliens, but that power is not absolute. It cannot go unchecked when, as here, the President wields it through an executive edict that stands to cause irreparable harm to individuals across this nation.”

In determining whether EO-2 violated the Establishment Clause of the Constitution, the court applied a test that examined whether the order was “legitimate and bona fide.” According to the court, this required a “look behind the stated reason” for the order to determine whether it was actually motivated by bad faith – in this case, anti-Muslim animus. The court spent more than six pages describing what it found to be “ample evidence” that national security is not the real reason for EO-2, including “then-candidate Trump’s numerous campaign statements expressing animus towards the Islamic faith” and “an advisor’s statement that the President had asked him to find a way to ban Muslims in a legal way.”

The 10-judge majority of the 4th Circuit held that this evidence “creates a compelling case that EO-2’s primary purpose is religious.” The court stated that while it is often hard to find substantial evidence revealing the actual intent motivating an action that has been challenged as being bad faith, in this case, “we need not probe anyone’s heart of hearts to discover the purpose of EO-2, for President Trump and his aides have explained it on numerous occasions and in no uncertain terms.” For this reason, the injunction was upheld.

### **What Does This Mean For Employers?**

While the Court’s decision is likely to produce a plethora of headlines and talking points, it does nothing to change the ability of people to travel from and into the United States. Once again, the

nothing to change the ability of people to travel from and into the United States. Once again, the status quo that we have lived with since the initial federal order blocking the first travel ban on February 3 will continue.

Given the judicial holdings, all U.S. land and air ports of entry are prohibited from enforcing the controversial travel ban portions contained in the first or second executive orders. All Customs and Border Protection (CBP) field offices will continue to inspect travelers under standard policies and procedures. All airlines and terminal operators should continue to permit boarding of all passengers without regard to their nationality.

The Department of Homeland Security will continue its standard inspections of travelers as normal. This includes the inspection and admission of people from the six listed countries and those in the U.S. refugee program. Similarly, the State Department has reinstated any visas that had been provisionally revoked upon the issuance of the initial executive order, and, assuming no other issues exist, they are currently valid for travel.

We continue to recommend that employers with affected employees outside the U.S. have such employees return to the U.S. as quickly as possible. The legal status of the court order could change at any time so immediate action is essential. If you have affected employees with visas still in their passports, their travel should not be impaired. Their visas should have been electronically reinstated. For those employees with visas that were physically revoked, we recommend working with legal counsel to determine whether these employees should apply for a new visa or return to the country and apply for an I-193 (Application for Waiver of Passport and/or Visa) visa waiver for prompt admission to the U.S. Absent any other admissibility issues, these individuals should receive an I-193 waiver upon arrival to the U.S. For those traveling by air, airlines have been instructed to contact CBP to receive authorization to permit boarding.

## **Conclusion**

It remains near impossible to predict what will happen next. We can expect the Trump administration to follow through on its promise and appeal this decision to the Supreme Court, although whether the president is able to obtain a quick review remains to be seen. The Supreme Court will soon begin its annual summer recess by the end of June, and may not agree to entertain this appeal on such a short time frame.

Given the rapid changes in this area of the law, it is very important that your organization confers with legal counsel to ensure the current status and application of immigration laws and policies to your workforce. 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.

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

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

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