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Employers and Immigration Under Trump: What You Need To Know



With the new administration set to start next year, many employers are focused on immigration and how President-elect Trump's return to the White House may affect their workforce.

Though there remains a level of uncertainty regarding what immigration policies and priorities President-elect Trump may implement, his earlier term may shed some light on things employers should be mindful of before and during this transition of power.

Immigration Benefits

Employers who plan to file for employment-based immigration benefits for their foreign national employee populations need to be aware of the following:

- U.S. Citizenship and Immigration Services (USCIS) will likely no longer provide deference to previously approved applications and petitions. Instead, USCIS will likely begin to implement “*de novo*” review of each application and petition submitted regardless of whether USCIS previously approved the application and petition for the same company and individual being sponsored by the company.
- National Interest Waiver (NIW) petition adjudications will likely be much more rigorous. Under the current administration, there was a focus on advancing the United States’ national interest in science, technology, engineering, and math (STEM) fields, so NIW petitions were reviewed favorably. This led to an influx of NIW petition filings. It is likely that adjudication standards will shift under the new administration, and the adjudication of NIW petitions will be more challenging.
- Adjustment of status applications filed in connection with employment-based green card petitions will likely revert to requiring in-person interviews, which may lead to extended processing times.
- Potential impacts to visa processing abroad may occur, which could affect the ability of some foreign national employees to travel internationally and re-enter the United States. With the inauguration and

transition of power set to take place on January 20, 2025, there is a chance for visa processing disruptions, such that any foreign national employees outside of the United States who plan to return in January 2025 may be delayed in obtaining a travel visa to return to the United States and end up unable to re-enter without a valid visa stamp already in place.

- Potential delays to processing of H-4 and L-2 dependent applications may occur. The *Edakunni and Mayorkas* settlement, which requires USCIS to adjudicate dependent applications simultaneously when concurrently filed with the principal beneficiary's H-1B and L-1 petitions, expires January 18, 2025. Consequently, H-4 and L-2 dependents applications may be adjudicated separately from the principal H-1B and L-1 petitions.
- Potential shift to H-1B policies, inclusive of increases to prevailing wage rates and revisions to eligibility criteria.

Based on these potential shifts to filings for immigration-related benefits, employers may wish to consider taking the following actions:

- Determining whether any applications/petitions could benefit from being filed and adjudicated during the current administration and filing those as soon as possible (with premium processing). This includes determining whether any pending applications and petitions with USCIS should be upgraded to premium processing.
- Maintaining an open line of communication with all foreign national employees and understanding their upcoming travel dates to discuss potential implications of such travel.
- Assessing green card-related solutions and determining if alternative paths are feasible prior to the administration change.

Immigration Enforcement

President-elect Trump named Thomas D. Homan his border czar on November 10, 2024, stating that "Homan will be in charge of all Deportation of Illegal Aliens back to their Country of Origin." Homan was acting director of Immigration and Customs Enforcement (ICE) under Trump in 2017.

In October 2024, Homan stated that large-scale worksite raids would resume under Trump. Such raids, which are conducted by ICE, generally involve agents physically searching a worksite without advance notice and/or inspection of employer records regarding workers' identities and work authorization. Raids can lead to the arrest of individuals who are not authorized to work in the United States.

In addition, employers can expect a significant rise in the number of government audits of Form I-9 records. While precise statistics are not available, practitioners estimate that there were roughly 12,000 Form I-9 audits during Trump's last year in office, compared to around 400 during Biden's last year in office.

As these enforcement transitions take place, employers should be cautious about how they interact with their workforce regarding such issues. Employers must remain in compliance with current law, including by:

- Not asking prospective employees about their national origin, citizenship, or immigration status during the recruitment process.
 - Employers may ask applicants certain, limited questions in accordance with applicable law, but should only do so after consulting with experienced counsel.
- Not specifying the documentation employees may provide when completing Form I-9.
- Not acting on "tips" regarding the immigration or work authorization status of employees without conducting an audit or taking other appropriate steps.

Failure to adhere to these requirements can result in an investigation or charges by the U.S. Department of Justice's Immigrant and Employee Rights Section, which is responsible for enforcing the antidiscrimination provision of the Immigration and Nationality Act (INA). This law protects U.S. citizens and certain other work-authorized individuals from employment discrimination based upon citizenship or immigration status. The INA also protects all work-authorized individuals from national origin discrimination, unfair documentary practices relating to the employment eligibility verification process, and retaliation.

Should you have any specific questions regarding filings for immigration-related benefits or immigration enforcement and how the new presidential administration can affect these processes specific to your organization, please contact experienced counsel as soon as possible.

Authors

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