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Top 5 Anticipated Changes to the Immigration Landscape During Trump's New Term

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President Donald Trump's return to the Oval Office is expected to reshape U.S. policies related to immigration. Many of those changes will impact U.S. employers, even those without employees on work visas. Here are the top five areas where we expect key changes impacting employers and how to prepare for them.

1. Increased Worksite Enforcement Actions and Raids by Immigration and Customs Enforcement (ICE), Investigations by Justice Department

Form I-9 Audits

ICE is expected to increase its number of Form I-9 audits across the board. Some geographic areas and industries, however, may be of greater interest to ICE. For example, more "immigrant-friendly" or "immigrant-heavy" states and businesses in the construction, agriculture, manufacturing, or hospitality industries are more likely to become targets due to their higher proportion of positions that traditionally do not require extensive training or education.

The Form I-9 serves to verify a worker's identity and permission to work in the U.S. Employers must have a properly completed I-9 for every employee, all of which will be subject to review and potential fines in the event of a government audit. Some common violations committed by employers during I-9 completion include:

- Failing to timely complete I-9s;
- Requesting specific documents;
- Requesting more documents than needed;
- Rejecting acceptable documents;
- Failing to properly capture electronic signatures; and
- Failing to properly reverify certain employees' permission to work after expiration.

Penalties can be as high as $2,789 for each I-9 with substantive violations and $27,894 for knowingly

hiring/continuing to employ workers without authorization. Further, ICE is more likely to issue criminal penalties for a finding of knowingly hiring or continuing to employ unauthorized noncitizens, with harsher fines and/or six months imprisonment. Employees engaging in fraud or false statements, or otherwise misusing visas, immigration work permits, or identity documents may be fined and/or imprisoned up to five years.

To prepare for these investigations, employers can:

- Conduct a professional I-9 audit and review the company's I-9 (and E-Verify if applicable) practices. Obtain guidance on correcting paperwork violations and identifying systematic flaws to correct existing errors and avoid future violations;

- Provide training to the employer's HR team members completing I-9s as employer representatives;

- Institute company policy to ensure fair and consistent I-9 practices as well as standard operating procedures in case of a site visit by ICE.

Worksite Raids

We expect more worksite raids with the use of *Blackie's warrants* (civil search warrant often used by ICE agents to raid a workplace where they believe unauthorized workers are employed but do not have to provide specific names or descriptions of the individuals being sought). With Trump's policy on cracking down on unauthorized workers in the U.S., far-reaching raids of this nature are more likely to occur.

2. Changes to Existing Humanitarian Programs

With anticipated changes to existing humanitarian programs, employees who hold employment authorization under Temporary Protected Status (TPS) and Deferred Action for Childhood Arrivals (DACA) may lose permission to work in the U.S. Such action may impact the operation of businesses who employ large numbers of these individuals.

Although employers are prohibited from terminating employees with this type of employment authorization while such authorization is still valid, companies should review their Forms I-9 and the supporting List A/B/C documents to determine the percentage of the workforce that might be affected and develop plans to minimize the impact of such changes to these humanitarian programs. Of course, employers should still avoid asking direct questions about the applicants' citizenship status or national origin during the hiring process as refusing to hire certain workers due to their perceived citizenship status or national origin is prohibited.

3. Potential Gaps in Work Authorization for Foreign Nationals With Temporary Permission to Work

Some employees may have temporary Employment Authorization Documents (EADs) that need to be renewed by the employees, and timely reverified by employers before their current EADs expire. While such renewal applications are pending, most (but not all) employees in these circumstances can rely on the automatic extension period of up to 540 days. However, given that not all employees are eligible for the 540-day automatic extension

period and that many of the employees authorized to work under an EAD are present in the U.S. pursuant to the above-mentioned humanitarian programs, employers should encourage any employees working pursuant to an EAD to submit their renewal applications as early as possible (usually up to 180 days before their work authorization documents expire). Although these EADs typically do not provide proof of lawful U.S. status, potential future changes to such programs may be implemented differently for those holding valid EADs. The new administration could also seek to change the regulations as well.

4. Heightened Scrutiny on Visa Petitions

Purportedly to encourage the hiring of U.S. workers and to curtail perceived abuses of the employment-based immigration programs, Trump's first term saw a dramatic increase in the issuance of Requests for Evidence (RFEs) coupled with a refusal to defer to prior approvals. Although the Biden administration just published its final rule to codify the policy of deferral to prior approvals along with other substantial changes to the H-1B program, employers filing immigration sponsorship petitions on behalf of their employees (such as H-1B and L-1 petitions) should expect to see heightened scrutiny once again resulting in more RFEs. Specifically, we may see the following actions:

- Attempts to limit the deference given to prior approvals, resulting in more difficult and lengthier processing for renewals;
    - As mentioned above, the Biden administration's codification of the deference policy (to take effect on January 17, 2025, just before Trump takes office) asserts that "adjudicators generally should defer" to prior approvals to promote consistency and efficiency. However, in addition to using the qualifier "generally," the updated regulations broadly provide that deference need not be given if there was a material error, a material change in circumstances or eligibility, or material information adversely impacting eligibility.
- Higher standards and increased scrutiny applied to employment-based visa petitions such as H-1B and L-1 petitions and to applications filed by F-1 students working pursuant to CPT, OPT, or STEM OPT, thereby resulting in more RFEs which may lead to denials.
    - The recent final rule includes provisions relating to H-1B eligibility, including the definition of and the criteria required for a specialty occupation. The new administration will likely leverage these new provisions to make it more challenging for U.S. employers to pursue these visa classifications.

Given these recent changes as well as the recent discourse regarding the H-1B program that has erupted over the past week, it remains to be seen how the employment-based nonimmigrant programs including the H-1B classification will be affected by the transition into the Trump administration. As a best practice, employers are still encouraged to file any petition renewals as early as possible (180 days before the expiration date) and upgrade pending petitions to premium processing (if applicable) before the anticipated heightened scrutiny is implemented. Employers also should consider initiating green card sponsorship for foreign workers earlier than before due to expected delays and changes.

5. Increased Scrutiny and Delays at Ports of Entry, U.S. Embassies/Consular Posts Abroad, and Travel

Bans on Countries

Employees relying on work-authorized nonimmigrant status such as H-1B and L-1 may face issues in obtaining new visas at U.S. embassies and consulates abroad (Department of State) and experience a stricter review process at entry (Customs and Border Protection). These obstacles may result in:

- Increased delays and denials due to higher scrutiny;
- Requests to provide more documentation;
- Detailed review of applicant's social media to search for inconsistencies and misrepresentations;
- Elimination of interview waivers at consulates.

Additionally, we may see a return and expansion of travel bans on nationals from certain countries (mostly Muslim countries) to all "high risk" countries.

Employees working pursuant to immigration sponsorship should take a conservative approach to traveling outside the U.S. When traveling, employees should be sure to have the necessary documents (*e.g.*, I-797 approvals, endorsed Forms I-129S) as well as supplemental documentation (*e.g.*, recent pay statements with employer's name). Due to the unpredictability of the timing of any changes implemented by the new Trump administration, employees currently outside the U.S. should consider returning to the U.S. before January 20.

If you have any questions or require further information, please contact a member of Troutman Pepper Locke's Immigration team. Our Immigration Team will be hosting a webinar to discuss this information in more detail and answer any questions you may have. A formal invitation will be sent out shortly with the webinar details.

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