Immigration Alert: Another Executive Order Seeks to Limit Use of Foreign Labor; Restrict H-1B Program

Related Attorneys

David W. Cook

Robert A. Harris

Sachiyo Isoda Peterson

Related Services

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On August 3, 2020, President Trump signed an Executive Order instructing the Secretaries of Labor and Homeland Security to take action to ensure all H-1B employers comply with labor condition and wage requirements. The Order purports to include so-called "secondary employers" (entities that are not the petitioning employer but where H-1B workers are placed to perform services), although regulations only subject the petitioning employers to these requirements and sanctions even when violations result from the secondary employer's actions. The Order also instructs federal departments and agencies to assess the impact of temporary foreign labor used under federal contracts and the impact of work under federal contracts that was performed in foreign countries.

The Executive Order instructs the Secretaries of Labor and Homeland Security to take action within 45 days of the Order to ensure that all H-1B employers are complying with wage and labor condition requirements.

The stated purpose of this Executive Order is to protect U.S. workers from any adverse effects on wages and working conditions as a result of H-1B hiring practices, including through the hiring of H-1B visa holders to perform services for clients or entities other than the petitioning employer. The Order specifically cites the need for compliance with INA § 212(n)(1), which prohibits an H-1B nonimmigrant from being admitted or provided status unless the employer has filed a Labor Condition Application (LCA) pursuant to statutory requirements, and which requires the employer to maintain a public disclosure file (commonly referred to as the Public Access File).

INA § 212(n)(1) requires that the employer state the following in an LCA:

- The employer is offering and will offer during the period of authorized employment to H-1B nonimmigrants the higher of wages that are at least the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment *or* the prevailing wage level for the

occupational classification in the area of employment;

- There is not a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment;
- At the time of the filing of the LCA, the employer has provided notice of the filing to the bargaining representative of the employer's employees in the occupational classification and area for which nonimmigrants are sought *or* where there is no such representative, has provided notice of filing in the occupational classification through physical posting in conspicuous locations at the place of employment or electronic notification to employees in the occupational classification; and
- Specification of the number of nonimmigrant workers sought, the occupational classification in which the workers will be employed, and wage rate and conditions under which they will be employed.

Additional requirements apply to employers who are H-1B dependent or who have committed willful failure or misrepresentation during the 5-year period preceding the filing of the LCA.

INA § 212(n)(1) further requires the employer to make copies of the LCA and any necessary accompanying documents available for public examination within one working day after the filing of the LCA. The Secretary of Labor is also required to compile a list of LCAs filed by employer and by occupational classification that must be available for public examination.

While the Executive Order does not indicate specific actions to be taken to ensure compliance with these statutory requirements, it suggests the Departments of Labor and Homeland Security may announce further policies or regulations or take enforcement actions. Ahead of the issuance of the Order, the two departments had announced an agreement that would make fraud investigations into the H-1B program a joint effort, with the Department of Labor having increased access to the program's data and records as well as greater involvement in the investigation of potential violations. The new agreement between the departments arose from an earlier Presidential Proclamation restricting the new entry of H-1B and other nonimmigrant workers into the U.S. and instructing the departments to take appropriate action, including actions to ensure that the presence of H-1B nonimmigrants in the U.S. does not disadvantage U.S. workers. Click here for our client alert on the Presidential Proclamation.

Apart from the provisions pertaining to H-1B employers, the Executive Order also instructs the heads of each federal department and agency entering into federal contracts to do the following:

- Examine the performance of contracts (including subcontracts) awarded by the department or agency in fiscal years 2018 and 2019 to assess the impact of any temporary foreign labor used in the contracts on opportunities of U.S. workers and on national security;
- Examine the performance of contracts (including subcontracts) awarded by the department or agency in fiscal years 2018 and 2019 to assess the impact of any offshore labor used in the contracts on opportunities of U.S. workers and on national security;
- Assess any negative impact of contractors' (including subcontractors') temporary foreign labor and offshoring hiring practices on the economy, efficiency of Federal procurement, and national security, and propose action as appropriate and needed;
- Review department or agency's employment policies to assess compliance with current federal laws pertaining to the citizenship and immigration status requirements for the hiring of federal employees;

and

- Within 120 days of the Order, submit a report summarizing the results of the review which recommends needed corrective actions and proposes any appropriate Presidential actions.

If you have any questions regarding the Executive Order, compliance with LCA requirements, or creating Public Access Files, we encourage you to contact your Vorys attorney.