For Employers, Devil Is In Details Of Immigration Reform

By **Abigail Rubenstein**

Law360, New York (January 28, 2013, 9:18 PM ET) -- The proposal to rewrite U.S. immigration law outlined Monday by a bipartisan group of senators is an encouraging sign for businesses that need foreign workers to fill staff shortages, but employers must remain vigilant as the details of the legislation get hammered out to ensure that any proposals are rational and useful, attorneys say.

The sweeping proposal released by eight senators lays out an agreed-upon framework toward a piece of legislation aimed at overhauling the current immigration system, which the deal's backers touted as a "bipartisan breakthrough" at a news conference Monday afternoon.

The agreement includes four legislative pillars: creating a path to citizenship for unauthorized immigrants currently living in the U.S., reforming the immigration system to better recognize characteristics that will help build the economy, implementing an effective employment verification system and establishing an improved process for admitting future workers.

"It is extremely encouraging," said Eleanor Pelta, a partner at Morgan Lewis & Bockius LLP and former president of the American Immigration Lawyers Association. "The exciting thing is just the bipartisan movement on this issue — the fact that there are people on both sides of the aisle coming together on some points that we in the immigration bar consider major components of meaningful reform."

This collaboration between Republican and Democratic lawmakers builds on and helps drive forward the momentum that many believe could make it possible for immigration reform to become a reality this year.

The senators' proposal addresses in broad strokes many of the issues that businesses seeking to take on foreign employees — highly skilled and less skilled — are hoping changes to U.S. immigration law will remedy, and would also require employers to verify their employees' authorization to work.

But so far, the proposal sketches out only principles, and the details that ultimately make it into the legislation will make a big difference in what any reforms will ultimately mean for employers, lawyers told Law360. The senators behind the proposal said they hoped to draft a bill by March and to get that bill through Congress by late spring or early summer.

"This is just a blueprint, and the devil is in the details," said Susan J. Cohen, chair of Mintz Levin Cohn Ferris Glovsky & Popeo PC's immigration practice. "It is not clear what the provisions are going to look like."

And those details are apt to get fleshed out and refashioned as lawmakers work to craft a piece of legislation that can make it out of Congress and onto the president's desk, unlike previous efforts at immigration reform that ultimately fell apart.

"This [proposal] should be seen as an opening shot at getting immigration reform onto the political agenda," said Ian R. MacDonald, co-chair of Littler Mendelson PC's global mobility and immigration practice group. "The four main areas are in no way new, but they definitely hit at the heart of the immigration reform debate and mirror the challenges or the lessons learned from the last two failed attempts."

As the legislation takes shape over the coming months, it will be important for employers looking to benefit from immigration reform to stay abreast of the changes to make sure that pragmatism doesn't get lost for the sake of political expediency, attorneys say.

The senators' agreement touches on many priorities that could make the immigration system more business-friendly, from addressing backlogs in the family and employment visa categories to awarding green cards to immigrants who have received an advanced degree in science, technology, engineering or math from an American university and creating a guest-worker program for lower-skilled workers.

Lawyers say employers will have to pay attention to how the details of these proposals start shaking out to be sure that, in the end, they actually can use the systems being designed to help them attract and retain employees from abroad.

"In the technology field, for example, employers should look very closely at how generously the STEM field going to be defined," Pelta said. "It won't make any sense for the proposed legislation to create a special category for STEM graduates and then say something like, 'We're not going to include biology,' since that leaves out an entire industry."

Similarly, she said employers in need of less-skilled workers, such as those in the construction or hospitality industries, will need to monitor the development of the provisions affecting those workers to see "whether what is being proposed is realistic for them and usable."

Employers also should stay on top of the aspects of the proposal aimed at stepping up their responsibilities on the enforcement side, attorneys say. Even the proposal to establish a mandatory employment verification system, which would place an additional compliance burden on businesses, could be hashed out so it does not create too many headaches for employers, lawyers told Law360.

"If they can make e-verify mandatory in a way that also makes it very easy and usable for employers, that is really what it is all about, because what they want to do is encourage the maximum number of employers to use the system," Pelta said. "If they really think about it and do a good job in drafting the law by consulting with different stakeholders — from the people that run the e-verify system to the employers that are users of the system — they could potentially come up with something that is better than the I-9 system."

How much a mandatory system will affect employers also depends on whether the law will require employers to run all their current employees through the system or merely use it to verify the status of new employees going forward, according to MacDonald.

"While the distinction is subtle, the difference in the application and impact on employers will be extreme because it's the difference between identifying large percentages of existing workforces as undocumented — and overnight needing an emergency contingency plan — and only newly hired employees being affected, which translates to little or no impact on existing workforces," he said.

With so much potentially at stake for employers if a comprehensive immigration reform bill becomes law, employers should get involved in the process and help work out the details to keep any proposal on track to help them meet their workforce needs, lawyers say.

"It is imperative that employers initiate meaningful dialog with key stakeholders in D.C. while these specifics are still being sorted out," MacDonald said. "Now is the time to act."

--Editing by Elizabeth Bowen and Richard McVay.