

Trump's Procedural Sidesteps May Doom H-1B Visa Changes

By **Suzanne Monyak**

Law360 (October 7, 2020, 9:08 PM EDT) -- The Trump administration's new restrictions on H-1B specialty occupation visas threaten entry-level recruitment and businesses that rely on technology contractors, but the administration's decision to skirt procedural requirements could tank some of the rules before they even take effect.

The U.S. Department of Homeland Security and U.S. Department of Labor issued a pair of rules Tuesday that would raise the minimum salary requirements for foreign workers and overhaul the eligibility requirements for H-1B visas, which allow foreign professionals with bachelor's degrees or higher to work in the U.S. in specialized roles.

However, while acknowledging the rules would have sweeping effects that could impact more than a third of H-1B visa requests, the administration opted to skirt certain procedural requirements, bypassing both the White House budget office's review of the changes as well as public feedback by issuing the policies as interim final rules.

Experts say this maneuver could bolster upcoming lawsuits challenging the changes and lead to the regulations' downfall.

Leon Rodriguez of Seyfarth Shaw LLP, who served as director of U.S. Citizenship and Immigration Services during former President Barack Obama's second term, said the speedy implementation of the policies — one of which takes effect two days after the text was first posted — could be a "smoking gun" in litigation.

"There, I think, are first and foremost very serious questions about whether the use of an interim final rule, for two rules that have pretty significant and damaging impact on a number of companies, [is] appropriate," Rodriguez said. "And, in my view, the answer is most definitely not."

The H-1B restrictions have been on the White House's agenda since 2017, when President Donald Trump issued his "Buy American, Hire American" executive order promising to crack down on visa abuse to protect U.S. workers.

However, in the months leading up to the November election, the administration has put its foot on the gas with formal regulations.

DHS sent the rule to tighten H-1B eligibility criteria to the Office of Management and Budget for review in early September, and the DOL sent its own accompanying rule on wage salary minimums less than two weeks later.

But by the end of September, the two rules were marked as withdrawn, and USCIS said it was because the budget office had waived its review of the changes.

A senior official told reporters Tuesday that the administration "did all of the reviews internally." The departments also claimed that unemployment caused by the coronavirus pandemic justified fast-tracking the policy changes.

Rodriguez said that while he was aware of the procedural mechanism to skip budget office review, he had never used it while leading USCIS.

"The decision to waive review in a situation like this really is a political decision," he said, adding that he could name "five Republican senators who would call me down to testify the next morning if that had happened for a regulation that I issued."

In addition to skipping typically required steps of review, the DOL's rule will take effect immediately upon publication in the Federal Register, just two days after it was made available, likely bolstering future litigation claiming the rules violate administrative law.

"I don't think that the Department of Labor rule should withstand a court challenge, given its immediate effect, the lack of notice and comment," said Andrew Greenfield, managing partner of global immigration firm Fragomen, Del Rey, Bernsen & Loewy LLP's Washington, D.C., office.

"I think it was jammed through in a way that doesn't respect the protections offered by the Administrative Procedure Act, and I hope it is swiftly enjoined," he continued, referencing the law that lays out those regulatory requirements.

John Quill, a chair of Mintz Levin Cohn Ferris Glovsky and Popeo PC's immigration practice, also raised an eyebrow at the DOL's methodology for calculating the new prevailing wage levels. Under the rule, entry-level wages for foreign workers would start at the 45th percentile of incomes for each industry, a marked increase from the current minimum at the 17th percentile.

He noted the DOL rule specifically states that the changes "further the goals" of the "Buy American, Hire American" executive order, calling into question whether the rule was rooted in the administration's political goals or based on economic analysis.

"I'm not an economist, but I just don't see how this methodology is going to hold up in court, and I think their reference to BAHA is going to sink them," he said.

But the stakes are high. If the administration does prevail in court and the policies do take effect, attorneys worry the restrictions' impact would be sweeping, affecting employers not just in the technology space, but across all industries.

"Everyone is going to be affected by this. Everyone," said Eleanor Pelta, a business immigration lawyer at Morgan Lewis & Bockius LLP.

And while immigration lawyers remain optimistic the administration will lose in court, they're still bracing for impact, especially with the DOL rule likely to remain in effect for at least several weeks under the fastest litigation timeline.

Several immigration lawyers told Law360 on Wednesday that they are scrambling to file as many labor condition applications as possible the day before the DOL rule is published.

They note the rule will apply to some green card cases that have already been filed, but only to H-1B wage requests filed on Thursday or afterwards.

"My thought process is that, obviously litigation is about to happen as soon as possible, and there will be an injunction. However, for the safety of our clients, we are taking the proactive measures to file the LCAs where we can today," said Nandini Nair, a partner at Greenspoon Marder LLP's immigration group.

Companies that place workers at third-party sites in particular would bear the brunt of the restrictions. The regulation changes the definition of "worksite" and limits visa terms to one year instead of three for companies that place workers at other worksites.

In its policies cracking down on this business model, the Trump administration cited news reports of instances where U.S. workers were replaced with contracted H-1B workers and even asked to train their replacements.

But there are simpler ways to take on bad actors without overhauling the entire program, such as by increasing employer liability, according to Sarah Pierce, an immigration lawyer and analyst at the Migration Policy Institute.

"It's really possible to thread this needle and not harm all H-1B employers and companies that benefit from H-1B labor in the process. But rather than do that, this administration is really attacking the issue with a sledgehammer," she said.

Smaller businesses, nonprofits and universities — which do not tend to pay their employees as much as larger corporations — could also be hard hit by the higher wage requirements.

Miriam Feldblum, executive director of the Presidents' Alliance on Higher Education, stressed that the higher salary levels could pose a challenge to universities that depend on highly educated international researchers on H-1B visas.

"Big science cannot be done without international students and scholars and professors. Just look at the vaccine research and who's involved," she said, referring to the race to develop a coronavirus vaccine at universities across the U.S. "This is not about displacing native researchers or workers. This is about the team."

International students graduating from U.S. universities would also likely struggle to find early-career employment that pays a high enough wage under the new standards, she said.

And attorneys worry the restrictions, if allowed to take effect, could push more jobs outside the U.S., especially since the pandemic has demonstrated that many employees can work remotely over the long term.

Clients would be unlikely to fire existing employees if their visa extensions are denied, and instead be more likely to move those workers to offices in Canada or other countries.

"I think in 2020, the digital world, and in the COVID world, we're learning to support remote work more and more. So ironically, these efforts that were aimed to address the consequences of a COVID economy, the COVID economy may make it easier for work to be done offshore," Fragomen's Greenfield said.

And regardless of how the policies play out in court, the changes create an environment of uncertainty for small businesses without offices abroad to send key workers, and for H-1B workers themselves who have built their lives in the U.S. and must soon apply to extend their visas under the stricter requirements.

"H-1B workers who have gotten extensions over the years — who have settled into the United States, bought homes and cars, and paid taxes and have had their children raised in the United States — may face very surprising results on their next extension," said Pelta of Morgan Lewis.

The timing of the rules and lack of adherence to administrative requirements despite such a sweeping potential impact have fueled criticism that the administration's ultimate goal is to make waves before an election rather than actually reform the H-1B program.

"They write their regulations sloppily. They don't do the notice-and-comment period. It's almost as if they are doing it for show," said Nair. "I think this is a lot of political theater to drum up support from the administration's base to say that, 'Hey, we're being tough on even legal immigration.'"

Noting the presidential election is less than a month away, House Judiciary Chairman Jerrold Nadler, D-N.Y., called the rules "an attempt to score last-minute political points."

"While this program can certainly benefit from reforms, our laws require that the public be provided with adequate notice and a meaningful opportunity to comment before such reforms are implemented," Nadler said in a statement. "This simply cannot be accomplished to the degree required through an interim final rule, and the administration knows this."

--Editing by Philip Shea and Jill Coffey.