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Practice Update

Up Against the Wall: New Immigration Measures Impact Employers

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Employers have a legal obligation to comply with federal immigration law when it comes to the recruitment and retention of a legally authorized workforce. This can prove challenging for employers given the complexity of legal standards and regulatory frameworks involved. Compliance challenges faced by employers are expected to intensify as a result of recent U.S. Department of Homeland Security (DHS) memoranda that put into effect President Trump's January 25 Executive Orders.[1]

I. DHS Secretary Kelly's Memoranda

On February 20, 2017, DHS Secretary John Kelly issued two memoranda that implemented President Trump's January 25 Executive Orders on interior enforcement[2] and border enforcement.[3] Secretary Kelly's memorandum, "Enforcement of the Immigration Laws to Serve the National Interest" sets forth a sweeping plan for interior immigration enforcement and removal operations—a plan that is centered on undertaking the removal priorities articulated by President Trump's January 25 Executive Order, "Enhancing Public Safety in the Interior of the United States." The Executive Order's definition of enforcement priorities is exceedingly broad, placing all unauthorized foreign

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nationals at risk of deportation, including families, long-time residents, and temporary visa-holders.[4] The new DHS initiative facilitates these priorities by simultaneously widening the net of targeted individuals for deportation, while broadening the authority to enforce federal immigration law among local and state agencies.

State and local law enforcement officials have general authority to investigate and arrest violators of federal immigration statutes without prior DHS knowledge or approval, as long as they are authorized to do so by state law. *See* 8 U.S.C. 1324(c). In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) [5] to encourage state and local agencies to participate in the process of partnering with federal agencies to enforce federal immigration laws. IIRIRA added Section 287(g) to the Immigration and Nationality Act (INA), enabling state and local authorities to act in the place of immigration officers for purposes of enforcement.[6] Two decades later, the Trump Administration is now reviving this partnership program, relying on the 1996 legislation to encourage local jurisdictions to cooperate with federal officers in the widespread apprehension, detention and criminal prosecution of "removable" aliens.

The memorandum states that "effective immediately," DHS shall faithfully execute U.S. immigration laws against "all removable aliens" and will no longer "exempt classes or categories of removable aliens from potential enforcement."[7] The DHS guidance defines "removable aliens" in comprehensive terms, encompassing foreign nationals who:

- Have been convicted of any criminal offense;
- Have been charged with any criminal offense that has not been resolved;
- Have committed acts that constitute a chargeable criminal offense;

- Have engaged in fraud or willful misrepresentation in connection with any official matter before a government agency;
- Have abused any program related to receipt of public benefits;
- Are subject to a final order of removal, but have not departed; or
- Otherwise pose a risk to public safety or national security.[8]

This expansive language effectively authorizes deporting immigrants for the most minor infractions, such as trespassing or traffic violations. Moreover, the definition can be applied to include all undocumented individuals under the presumption that they committed the chargeable offense of improper entry.[9] Improper entry to U.S. borders without inspection is a crime under 8 U.S.C. §1325. As such, all persons who entered the United States without inspection become priorities for deportation. Similarly, because the President's January 25 order declares that visa-holders who overstay or violate their visas present a threat to national security and public safety, under the DHS guidelines, these visa-holders now qualify as "removable aliens" who "otherwise pose a risk to public safety or national security." Accordingly, DHS can now target all foreign nationals who overstay their visas as priorities for deportation.

Under this program, DHS directs Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP) and the U.S. Citizenship & Immigration Service (USCIS) to issue guidance and promulgate regulations "as soon as practicable" to execute the assessment and collection of all legally authorized fines and penalties against undocumented immigrants *as well as those who facilitate their unlawful presence*.[10] Employers are alerted that this provision may indicate increased enforcement of existing fines and criminal penalties under federal regulations related to harboring aliens as well as employer recruitment and hire of illegal or

undocumented workers.

In the DHS memorandum, "Implementing the President's Border Security and Immigration Enforcement Improvements Policies,"[11] Secretary Kelly calls for the deportation of any individual who "directly or indirectly" facilitates the smuggling or trafficking of a foreign child into the United States.[12] According to this directive, undocumented parents and family members "often pay smugglers" to bring their foreign national children into the United States, and by doing so "conspire to violate our immigration laws."[13] DHS recommends that ICE and CBP "ensure the proper enforcement" of U.S. immigration laws by placing such parents and relatives into removal proceedings or referring them for criminal prosecution,[14] "[r]egardless of the desires for family reunification, or conditions in other countries."[15] This memorandum implements President Trump's January 25 Executive Order titled, "Border Security and Immigration Enforcement Improvements."

II. Impact on Employers

Employers should be aware that Section 274(a)(1)(A) of the Immigration and Nationality Act (INA), codified as 8 U.S.C. §1324(a)(1)(A), imposes criminal penalties for bringing in and harboring certain aliens. Pursuant to INA Section 274(a)(1)(A), it is a criminal violation for any person to conceal, harbor, or shield from detection in any place, including any building or means of transportation, any alien who has come to, entered, or remains in the United States in violation of law. 8 U.S.C. §1324(a)(1)(A)(ii)-(iv). This provision includes harboring an alien who entered the U.S. legally but has since lost legal status.[16]

Likewise, INA §274A(a)(1)(B), codified as 8 U.S.C. § 1324a(b), makes it illegal for an employer to hire any person, citizen or alien, without first verifying the person's authorization to work in the United States by completing USCIS Form I-9, Employment Eligibility Verification, and complying with record

keeping requirements.[17] For all new hires, employers are required to examine documents and attest under penalty of perjury that the presented documentation evidences the identity and valid employment status of the individual. 8 U.S.C. § 1324a(b)(1)(A). Employers are also required to retain Forms I-9 for a period of at least three years from the date of hire or for one year after the date the employment ceases, whichever is later. 8 U.S.C. § 1324a(b)(3)(B).[18]

III. I-9 Audits & Compliance

All U.S. employers are subject to the ICE audit authority and investigatory measures to ensure they are in compliance with the I-9 rules.[19] The administrative inspection process is initiated by the service of a Notice of Inspection (NOI) upon an employer. By law, ICE must give employers three business days from the NOI to produce Forms I-9 and other supporting documents, such as payroll information, a list of current employees, Articles of Incorporation and business licenses.[20]

Employers that are either required to use, or voluntarily use E-Verify as an additional employment verification measure must sign a memorandum of understanding that allows the E-Verify Monitoring and Compliance Unit to conduct desk reviews and site visits.[21] The Monitoring and Compliance Unit works to detect employer misuse and identifies and deters possible discriminatory uses of E-Verify. The unit also has the authority to share information with other government agencies.[22]

Employers found to have knowingly hired or continued to employ unauthorized workers after learning that such workers are not employment-authorized in the U.S. will be required to cease the unlawful activity, may face civil fines ranging from $250 to $10,000,[23] and in certain circumstances, may be subject to criminal prosecution and related criminal penalties, according to INA § 274A(a)(1)(a)

or (a)(2), 8 U.S.C. § 1324a(a)(1)(a) or (a)(2). Additionally, an employer determined to have knowingly hired or continued to employ unauthorized workers may be prevented from participating in future federal contracts and from receiving other government benefits.[24]

Criminal penalties for any person employing or contracting with an illegal alien without verifying his or her work authorization can include fines, imprisonment, and in cases of bringing in and harboring aliens, seizure of their vehicles or property used to commit the crime. INA § 274A(f); 8 U.S.C. § 1324a(f); 8 U.S.C. § 1324(a)(1)(B)(i)-(iv); 8 U.S.C. § 1324(b)(1)-(2).

Alternatively, employers can be convicted of the felony of harboring illegal aliens if the employer takes actions in reckless disregard of its employees' illegal status, such as ordering them to obtain false documents, altering records, obstructing ICE or DHS inspections, or taking other actions that facilitate the foreign national's illegal employment. INA § 274C; 8 U.S.C. §1324 (a)(1)(A). The penalties for felony harboring include a fine and imprisonment for up to five years. 8 U.S.C. §1324(a)(1)(B)(ii). The penalty for felony alien smuggling is a fine and up to ten years of imprisonment. 8 U.S.C. §1324(a)(1)(B)(i).

IV. Conclusion

In this climate, employers can expect to face additional scrutiny of their worksites in the United States as part of the government's effort to enforce immigration laws and protect national security. To minimize adverse consequences, employers should:

1. Recommend that employees consult with an immigration attorney if they have family members in the U.S. who have entered the country without inspection.
2. Verify that all employees, regardless of their nationality, hired on or after November 6, 1986,

are authorized to accept employment in the United States.

3. Establish a policy or procedure for monitoring the status of foreign national employees to ensure maintenance of lawful immigration status throughout their employment.
4. Stay informed of the proper time to begin the process of extending or renewing work status for employees in order to avoid a lapse in employment authorization.
5. Develop an employee training system to assure that assigned employees understand the compliance policy so that a consistent, correct application of I-9 verification procedures occurs.
6. Become aware of instances where the employee may produce receipts or alternative documentation in lieu of acceptable documents for purposes of completing Form I-9.
7. Have the employee contact an immigration attorney to move forward with applying for a green card or U.S. Citizenship. Individuals in those categories are exempt from I-9 reverification.
8. Be aware of anti-discrimination issues such as requiring specific documents and insisting on a Social Security Number.
9. Contact an immigration attorney if an employee engages in any activity that may impact their work status.

Akerman continues to closely monitor this situation and will keep clients abreast of immigration developments as they occur.

[1] On February 20, 2017, DHS Secretary John Kelly issued a memorandum, “Implementing the President’s Border Security and Immigration Enforcement Improvements Policies” (Memorandum) outlining an implementation plan for President Trump’s January 25 Executive Order, “Border Security and Immigration Enforcement

Improvements," available online at: https://www.dhs.gov/publication/implementing-presidents-border-security-and-immigration-enforcement-improvement-policies; On February 20, 2017, DHS Secretary John Kelly issued a memorandum titled "Enforcement of the Immigration Laws to Serve the National Interest" (Memorandum) outlining an implementation plan for President Trump's January 25 Executive Order, "Enhancing Public Safety in the Interior of the United States," available online at: https://www.dhs.gov/publication/enforcement-immigration-laws-serve-national-interest

[2] Presidential Executive Order 13768 of January 25, 2017, "Enhancing Public Safety in the Interior of the United States," AILA Doc. No. 17012531, 82 FR 8799 (published 1/30/2017).

[3] Presidential Executive Order 13767 of January 25, 2017, "Border Security and Immigration Enforcement Improvements," AILA Doc. No. 17012530, 82 FR 8793 (*published* 1/30/ 2017).

[4] Greg Chen and Royce Murray, "Summary And Questions/Analysis Of Executive Order "Enhancing Public Safety in the Interior of the United States," AILA Doc. No. 17012506, pg. 1 (*published* 2/14/17).

[5] P.L. 104-208, 110 Stat. 3009.

[6] U.S. Immigration and Customs Enforcement, https://www.ice.gov/factsheets/287g

[7] U.S. Department of Homeland Security, "Enforcement of the Immigration Laws to Serve the National Interest" (Memorandum), DHS Secretary John Kelly (2/20/2017), AILA Doc. No. 17021830, pg. 2 (published 2/21/2017).

[8] *Id.*

[9] AILA, "Summary And Analysis Of DHS Memorandum 'Enforcement of the Immigration

Laws to Serve the National Interest,'"(published 2/20/2017).

[10] U.S. Department of Homeland Security, " Enforcement of the Immigration Laws to Serve the National Interest" (Memorandum), DHS Secretary John Kelly (2/20/2017), AILA Doc. No. 17021830, pg. 5 (published 2/21/2017).

[11] U.S. Department of Homeland Security, "Implementing the President's Border Security and Immigration Enforcement Improvements Policies" (Memorandum), DHS Secretary John Kelly (2/20/2017), AILA Doc. No. 17021831, pg. 11 (published 2/21/2017).

[12] Presidential Executive Order 13767 of January 25, 2017, "Border Security and Immigration Enforcement Improvements," Federal Register /Vol. 82, No. 18, AILA Doc. No. 17012530 (*published* 1/30/2017).

[13] *Id.*

[14] AILA, "Summary And Analysis Of DHS Memorandum 'Implementing the President's Border Security and Immigration Enforcement Improvements Policies,'" (published 2/20/2017).

[15] U.S. Department of Homeland Security, "Implementing the President's Border Security and Immigration Enforcement Improvements Policies" (Memorandum), DHS Secretary John Kelly (2/20/2017), AILA Doc. No. 17021831, pg. 11 (published 2/21/2017).

[16] INA § 274(a); 8 U.S.C. §1324(a), available online at: https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-8381.html.

[17] P.L. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-et. seq.).

[18] U.S. Immigration and Customs Enforcement, https://www.ice.gov/factsheets/i9-inspection.

[19] *Id.*

[20] *Id.*

[21]U.S. Citizenship and Immigration Services, https://www.uscis.gov/e-verify/employers/monitoring-and-compliance.

[22] *Id.*

[23] INA § 274A(e)(4)(i)-(iii); 8 U.S.C. § 1324a(e)(4)(A)(i)-(iii).

[24] U.S. Immigration and Customs Enforcement, https://www.ice.gov/factsheets/i9-inspection.

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