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Biden Quickly Shifts Immigration Policies – What Employers Need to Know

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With the inauguration of Joseph R. Biden, Jr. as the 46th President of the United States on January 20, 2021, immigration reform is on the near horizon. Employers are advised to stay abreast of fluid immigration policies that could have sweeping effects on the sponsorship of various foreign national workers. In addition, several immigration rules promulgated in the final weeks of the Trump administration are now halted and could soon be reversed.

In his first hours of presidency, President Biden instituted measures to delay some of the "midnight regulations" of the former administration. In a January 20 memorandum issued by White House Chief of Staff Ronald A. Klain, the Biden administration called on the heads of executive departments and federal agencies to withdraw or delay action on pending regulatory initiatives. Whereas Congress introduces and passes bills, which the President may then sign before such bills become law, regulations are issued by federal agencies, boards, and commissions to explain how agencies will implement or carry out laws. Federal regulations are created through a process known as rulemaking and are codified annually in the *Code of Federal Regulations*. The Administrative Procedure Act of 1946 (APA) outlines the rulemaking processes that agencies must follow when writing

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regulations. The APA requires agencies to provide broad public notice of its intended actions by publishing a proposed rule in the *Federal Register* and inviting public comment through a Notice of Proposed Rulemaking (NPRM). The *Federal Register* notice specifies a period for the public to submit comments on the rule, which can range from 30 to 120 days. After the comment period closes, the agency reviews the public's comments and publishes the final version of the rule in the *Federal Register*. The final rule includes (1) a description of the comments received; (2) the agency's response to those comments; and (3) the date the rule goes into effect.

Significantly, the White House memo directs agencies to (1) "immediately withdraw" all rules that have been sent to the Office of the *Federal Register* but have not yet been published in the *Federal Register*; and (2) consider postponing any rules that have been published in the *Federal Register* but have not yet taken effect, for 60 days from the date of the memorandum. Employers looking to hire foreign labor should be aware that the President's "regulatory freeze" impacts the following immigration policies:

1. Final Rule Amending the H-1B Visa Program Definition of "Employer-Employee Relationship" Will Be Withdrawn

On January 15, 2021, the Department of Homeland Security (DHS) sent the Strengthening the H-1B Nonimmigrant Visa Classification Program Final Rule to the *Federal Register*. The rule narrowly amends federal regulations to clarify how the U.S. Citizenship and Immigration Services (USCIS) will determine whether an "employer-employee relationship" exists for purposes of qualifying as a "United States employer" under the H-1B temporary visa program. Under the DHS rule, multiple employers would be required to file separate H-1B visa petitions on behalf of one beneficiary if more than one entity has a simultaneous employment

relationship with the foreign worker. According to the rule, "[I]t is possible that under third-party placement arrangements, where a primary employer contracts out an H-1B worker to a third-party entity, the third-party entity will also be considered an employer of the H-1B worker under the common-law test adopted in this rule." In such instances of outsourcing labor, the primary employer and the third-party entity would be required to file H-1B petitions with the federal immigration service to sponsor the foreign worker. This rule, which was awaiting publication in the *Federal Register* on January 20, will be withdrawn as a result of the administration's freeze on pending regulatory actions.

2. H-1B Wage Selection Final Rule Could Be Postponed Upon Further Agency Action

In accordance with the White House memo, federal agencies may consider postponing until March 21, 2021, any final rule that has already published in the *Federal Register*, but has not yet taken effect. This includes the H-1B Wage Selection Final Rule published by DHS in the Federal Register on January 8, 2021. The final rule applies to employer registrations for H-1B candidates that are subject to the annual H-1B visa quota (or "cap"). This agency action seeks to replace the current H-1B randomized lottery selection process with a wage-based selection process that would favor employers who pay the highest wages and dramatically reduce or eliminate employers' ability to hire foreign workers in entry-level positions. Although the final rule is set to take effect on March 9, 2021, agency action could now be taken to delay the rule's effective date in response to the White House directive. If delayed, the final rule could be inapplicable to this year's H-1B lottery registration process. Employers should contact experienced immigration counsel to monitor the status of the H-1B Wage Selection Final Rule and prepare for the Fiscal Year 2022 H-1B cap season.

3. Effective Date of Final Rule on Computation of Prevailing Wage Levels Could Likely Be Extended

On January 14, 2021, the U.S. Department of Labor (DOL) published the Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States Final Rule in the *Federal Register*. The final rule amends regulations governing the computation of prevailing wage levels under the DOL's existing wage methodology. Under this rule, the DOL's four-tier wage structure will increase salary levels from the 17th, 34th, 50th, and 67th percentiles, respectively, to the 45th, 62nd, 78th, and 95th percentiles. As a result of these changes, sponsoring employers will be required to pay significantly higher wages to foreign national employees hired through the permanent labor certification process and under the H-1B, H-1B1, and E-3 temporary visas programs. This rule, which was previously struck down by a California federal court on December 1, 2020 because the DOL issued the rule without the required notice and comment period, is scheduled to go into effect on March 15, 2021. Further agency action is anticipated to extend the effective date of this rule in light of the executive "freeze" on pending regulatory actions.
