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The Impact of Proposed Immigration Reform on Employers

By Vincent T. Norwillo

On April 17, 2013, the bipartisan group of Senators, known as the "Gang of Eight," introduced the Border Security, Economic Opportunity, and Immigration Modernization Act (the "Bill"). The long-anticipated Bill includes numerous revisions to the current immigration system, including border security improvements, prospective legalization for those currently in the United States under unlawful status, and updates to the immigration legal system. House members are also drafting bipartisan immigration reform legislation, but no completion date is imminent. Employers are taking notice of the continuing focus on immigration reform this year because of the likely impact it will have on their operations, particularly through revisions to the employment verification process and non-immigrant work visas.

The Need for Reform:

Many argue that the current immigration system is complex and overly burdensome for those seeking legal entry and employment in the United States. Despite a sustained, high national unemployment rate, employers in specific sectors face serious labor shortages. Limited visa availability for in-demand workers, long waiting periods for sponsorship, and complications with electronic verification systems cause multiple problems for employers who employ immigrant (those with lawful permanent resident status, as evidenced by a "green card") and

nonimmigrant (individuals whose visas allow them to work, live, or study in the U.S. for a temporary period) workers. Currently, private employers seeking to employ workers with bachelor's degrees must file H-1B visa petitions before the start of the federal fiscal year. However, there are only 65,000 visas available per year. When those visas are gone, employers must wait another year before they can attempt to hire those employees. This leads to a race to petition for visas each year. Many employers and, particularly, prospective employees are not able to wait a year for the next round of visas. The prospective employees often are recent college graduates with expiring student visas who can no longer remain in the U.S. Because of the limited visas available, employers may lose out on talented individuals.

Another recurring problem for employers involves the verification of their prospective employees' eligibility to work in the United States. Currently, employers verify employee work eligibility on a Form I-9 at the time of hire. Some employers are also required to use the federal government's online E-Verify system by state or federal law. The current E-Verify system is fraught with technical and practical difficulties, many stemming from the required collaboration between several federal agencies and employers.

Proposed Reform:

The proposed Senate legislation attempts to revamp the current immigration system by focusing on several key areas. Areas of particular interest for employers include the Bill's changes to: (1) the electronic verification system; (2) nonimmigrant visas; and (3) immigrant worker status.

First, the Bill would require all employers to begin using the federal E-Verify system. This requirement will be phased in over the next five years. Employers with more than 5,000 employees will be phased in within two years. Employers with more than 500 employees will be phased in within three years, and all remaining employers will be phased in within four years. The Bill also requires implementation of enhanced fraud-proof documents for the purposes of identity verification, though not with a national identification card. The new system will encourage cooperation as employees will be able to access their personal E-Verify history, and states will be encouraged to provide ID photos to the Department of Homeland Security.

Second, the Bill will raise the yearly cap on some employment-based nonimmigrant visas (H-1B visas) from 65,000 to 110,000. This number could increase further depending on labor needs and the unemployment rate. The Bill calls for the strengthening of the prevailing wage system to protect American workers so that they are not displaced by H-1B workers. Employers will have to pay higher wages for H-1B workers than under current law, as well as advertise jobs to American workers at the higher wage before hiring an H-1B worker for the position. The Bill also

institutes a ban on increasing the number of H-1B workers for an employer if more than a certain percentage of an employer's workforce is comprised of H1-B or L-1 visa employees. In 2014, that percentage will be 75% of an employer's workforce. In fiscal years 2015 and 2016, the percentage would move to 65% and 50%, respectively.

Focusing on lower-skilled workers, the Bill establishes a new nonimmigrant classification known as the "W-Visa." Immigrants eligible for this classification are those individuals who come to the U.S. to perform services or labor for a registered employer and for a registered position. The maximum four-year cap for W-Visas is 75,000 beginning April 1, 2015. A new agency, the Bureau of Immigration and Labor Market Research, would be created to determine the annual change to the cap for W-Visas, alter the recruitment methods employers use to attract eligible prospective workers, and designate any occupation shortages by job zone. Seeing the potential of allowing employers to utilize and maintain employees with advanced degrees in science, technology, engineering, and mathematics (STEM) fields, the Bill allows a generous numerical limit - up to 180,000 - of employment-based visas to those with advanced STEM degrees.

Finally, the Bill allows those individuals unlawfully present in the U.S. to convert to Registered Provisional Immigrant (RPI) status, with the payment of a \$500 penalty, if they lived in the U.S. before December 31, 2011 and do not have a serious criminal record. Once granted, RPI status allows an individual to remain in the U.S. for up to six years. While on RPI status, an individual is permitted to work legally in the U.S. for any employer. The individual can renew his or her RPI status if the individual does not commit any deportable acts and, after 10 years, can be eligible for a green card. The Bill's RPI status proposal could be a great boon for employers seeking to tap into the current large undocumented labor pool, particularly for employers in the construction, agriculture, and hospitality industries.

Looking Forward:

Though the Bill, as well as the latest attempt at immigration reform, remains in the early stages, it would behoove employers to follow any new developments closely because of the potential impact on employers and business operations nationwide. It is certain that the Bill will be revised as additional Senators become engaged and further debate continues. Indeed, the recent controversy surrounding the immigrant status of the Boston bombing suspects, who immigrated to the U.S. in 2002, has caused several high-profile Senators to call for a halt to immigration reform while, simultaneously, others are citing the situation as an example of why immigration reform should occur as soon as possible. It is important to note, however, that any approved Senate legislation has to be reconciled with a House version. This leaves room for the final version of immigration reform to be vastly different from the Bill introduced last week.

Regardless of the current debate, because of the potential impact immigration reform may have on business operations, employers should work closely in the interim with their employment counsel to ensure they pursue appropriate operating strategies and are ready to take advantage of any beneficial reforms.

As a follow up to our 60 Second Memo last week titled "The Approaching New Form I-9 Deadline: An Opportunity to Review The Employment Verification Process," the U.S. Citizenship and Immigration Services (USCIS) published a [correction notice](#) in the Federal Register that corrects a previous USCIS publication error regarding the new I-9 Form. The correction clarifies that employers must be using the new Form I-9 **beginning May 7, 2013. Employers may not use the prior version as of May 7, 2013.

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