

IMMIGRATION FOR BUSINESSES IN 2018

34th Annual Labor & Employment Law Conference

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Firm Profile

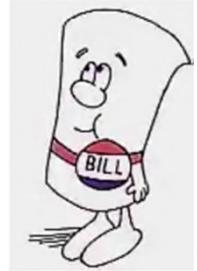
Clark Hill PLC is one of the 200 largest law firms in the nation, with 650 attorneys in offices around the US. The Immigration Practice Group handles client cases nationally, with immigration attorneys in Detroit, Washington DC, and Austin, TX, and over 150 years of combined immigration law experience.

DISCUSSION TOPICS

- What changes will require laws or regulations?
- Visa changes – H-1B, L-1, and TN
- What are we seeing?
- Visa delays, extreme vetting, and border searches
- Other recent immigration/policy updates
- I-9 updates

Today's discussion is based on what has been stated by President Trump and his Administration. This is not a critique of these policies.

HOW U.S. LAWS WORK



- Generally, the President can only enforce the laws
- Immigration law and policy rests solely with Congress (House and Senate)
- Once Congress passes a bill the President can sign it into law, or veto the entire bill
- 2/3 of Congress has to approve a law to override a veto
- Congress also controls the funding – the President has very little discretionary spending
- Regulations are a U.S. government agency's interpretation of how a law will be implemented
- The agency proposes regulations internally, and then they go to the U.S. Office of Management and Budget (OMB) for edits and comments
- The regulations are released for notice and comment to the public
- Then the regulations go back to the agency to summarize the comments and address why they will or will not follow the suggestions and then back to OMB before being released
- Eliminating a final regulation is just as hard as making a new one – or a law change
- The courts interpret the laws – Congress can develop new laws, but they cannot violate the U.S. Constitution, as some level of due process is to be given to anyone in the U.S.

H-1B VISA BASICS

- U.S. employers frequently use/sponsor a worker under the H-1B Visa category to quickly hire foreign nationals
- A foreign national generally qualifies for H-1B status if he/she holds at least a U.S. Bachelor's Degree (or equivalent) relevant to the field in which he/she will be working, and the position normally requires at least a Bachelor's Degree as an entry-level requirement to perform the job
- Must not be “cheap immigrant labor” – must be paid the same amount the employer normally pays for that job, or the government's wage scale, whichever is higher
- Numerically limited visa – only 65,000 available per year, with an additional 20,000 available per year for those who have a U.S. Master's Degree or higher
- H-1B CAP was reached again within the first five business days of April – this year was April 2nd – 6th
- Most employers have F-1 OPT students
 - One year of OPT
 - Up to two additional years of STEM OPT
 - If student has a U.S. Master's Degree, or higher, increases chances of being selected in the H-1B lottery

H-1B VISA & RECENT CHANGES



- Several bills have been introduced – common themes
 - Advertisements/web posting likely before an H-1B can be filed and increased wages
 - No increase in the number of visas – but we could end up with a ranking system of who gets selected and preference
 - Non-displacement rules for all – and more investigative power and higher fines for non-compliance
- Recent H-1B changes
 - No new H-1B laws are expected in 2018 – why?
 - RFEs up to almost 45% since August 2017 – on everything
 - H-1B lottery – 190K received. 50/50 odds of being accepted expected
 - Benched or Terminated – greatest liability for employers – three steps to terminate an H-1B
 - No reimbursement for H-1B fees and costs
 - H-4 EADs – Immigration plans to work to withdraw it
 - More site visits – focused on third party placement
 - Comes from April 18, 2017 Executive Order titled “Buy American, Hire American”

L-1 VISA & POSSIBLE LEGISLATIVE CHANGES

- Available to foreign nationals moving from foreign operations to U.S. operations
- Foreign national must have worked one of the last three years for the foreign operation before coming to the U.S.
- The U.S. and foreign company must have a parent/subsidiary/affiliate relationship
- Two types of L-1 Visas
 - L-1A: For managers and executives
 - L-1B: For those foreign national's who possess specialized knowledge of the companies products, processes, etc.
 - Site visits to increase – third party worksites – new
- Proposed L-1 Law Changes (Durbin & Grassley draft bill of 2015)
 - L-1A: For managers and executives – L-1 site visits underway
 - No outplacement of workers without a waiver
 - More investigation power
 - Wage floors likely will be introduced – not required today
 - Non-displacement rules
 - More fines for non-compliance
 - Tougher standards for L-1B employees

TN VISA

- The TN Visa is a product of the NAFTA treaty between the U.S., Canada, and Mexico
- No NAFTA treaty – then no TN visa?
- Renegotiation appears more likely – Senate has to approve treaties
- Talks aren't going well
- If renegotiated, it is unknown if the visa will be impacted
- President Trump must give six months' notice if the U.S. will pull out
- No discussion of visas in NAFTA that we have seen



WHAT ELSE ARE WE SEEING?

- Advance Parole denials when travelling on an H or L
- In person green card interviews for employment based green card = 120K interviews through 35+ offices
- Naturalization and family based green card interviews running slower
- EAD processing times are up – sinister or incompetence?
- No more deference given to extensions of immigration filings
- STEM OPT and off-site employees
- Some visa processing delays
- What is extreme vetting?
 - Applicants could be asked to hand over their phones and contacts lists; provide social media handles and passwords; and/or provide 15 years of travel history, employment history, and addresses



2017 IMMIGRATION REGULATIONS HIGHLIGHTS

- New Employment Based Green Card and Related Regulations (effective January 17, 2017) Highlights
 - Employment Authorization Documents (EADs)
 - No more 90 day requirement for USCIS to review EAD applications, but can complain at 75 days if applying for an initial EAD
 - Just about everyone can apply 180 days before the EAD start date, including extensions, unless impracticable
 - 15 groups get work authorization for 180 days after their current EAD expires – does NOT include H-4s, L-2s, Spouses of Es, or J2s
 - F-1 STEM students also get 180 days of work authorization after their current EAD expires
 - New grace period after employment ends for E, H-1B, H1-B1, L-1, O-1, and TNs – 60 days
 - New H-1B whistleblowers provision provides protections to H-1B holders who face retaliatory action from their employer because they reported an LCA violation. H-1B holders will be allowed to extend their lapsed H-1B status or change to a different nonimmigrant status.

WHAT TO TELL EMPLOYEES

- Don't panic
- Our system of checks and balances ensures that no one branch controls
- Washington D.C. moves slowly – for both good ideas and bad ideas
- If additional background checks or vetting occurs for persons who are from certain countries, we will be notified
- To HR: Don't fire employees solely because of these impending changes

I-9 AUDITS AND RAIDS

- We expect I-9 audits will rise and possibly the return of raids under the new Administration
- If your business will be audited, Immigration and Customs Enforcement (ICE) will notify you by letter or a phone call – once contacted, you have three business days to produce all I-9s
- If you receive a letter or a phone call from ICE, contact counsel immediately – do not attempt to alter or fix I-9s yourself – if your I-9s have mistakes, you will likely continue to make the same mistakes
- ICE warrant: ICE has the ability to issue a warrant for I-9s to be turned over immediately if there is probable cause to believe that evidence will be destroyed in the three business day time period
- Warrants are limited in scope – ICE needs probable cause to exceed the scope of the warrant
- Remember, be polite to ICE agents and never obstruct justice
- April 2018 ICE raid – \$2.5M Tax Evasion Scheme; Southeastern
 - Provision LLC (meat packing) in TN
- TPS, DACA and other I-9s that need to be tracked



I-9 BEST PRACTICES

- Company compliance policy and training
- Provide candidates with I-9 list of documents
- Be consistent when attaching, or not attaching, copies of work documents
- Online systems for creation and storage of I-9s
- Destroy old I-9s of ex-employees – three years after date of hire or one year after employment ends – whichever is longer
- Audit early and often
- E-Verify for new hires
- For internal audits, NEVER correct an I-9 without initialing and dating the change – without this there could be a charge of document fraud; different color pen preferred
- I-9 Central – <http://www.uscis.gov/I-9Central>

HR/ADVANTAGE – I-9 TRAINING

- Clark Hill’s Labor and Employment Group recently launched a new suite of tools and resources tailored to HR professionals – called HR/Advantage
- Through HR/Advantage, Clark Hill offers an Internal I-9 Audit Package at a fixed rate of \$3500 (www.clarkhill.com/pages/form-i-9-compliance-internal-audits)
- Clark Hill also currently offers two Brown Bag sessions covering I-9 topics
 - How-To: Completion and Storage of I-9 forms
 - How-To: Self-Auditing for I-9 Compliance
- For more information about these series, or to sign up, please contact your Clark Hill Labor & Employment attorney. If you are not currently working with a Clark Hill attorney, contact Practice Group Director, Paul Boehms, at 313-965-8358 or pboehms@clarkhill.com.
- www.hr-advantage.com

QUESTIONS?



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THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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