

# IMMIGRATION CHANGES: NEW REGULATIONS & ENFORCEMENT

Clients and Friends of the Horton Group

Michael Nowlan

(313) 965-8666

[mnowlan@clarkhill.com](mailto:mnowlan@clarkhill.com)

Lindsey Medina

(313) 965-8672

[lmolina@clarkhill.com](mailto:lmolina@clarkhill.com)

CLARK HILL

---

# Biographies



## **Michael Nowlan, BBA, JD**

Immigration Law Attorney and Immigration Law Co-Practice Group Leader

313.965.8666 ● [MNowlan@clarkhill.com](mailto:MNowlan@clarkhill.com)



## **Lindsey Medina, BA, JD**

Immigration Law Attorney

313.965.8672 ● [LMedina@clarkhill.com](mailto:LMedina@clarkhill.com)



## **Firm Profile**

Clark Hill PLC is one of the 200 largest law firms in the nation, with 12 offices around the US. The Immigration Practice Group handles client cases nationally, with offices in Detroit and Washington DC, and over 150 years of combined immigration law experience.

---

# Discussion Topics

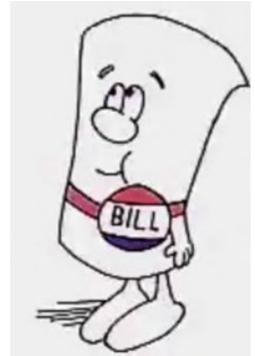
- President Trump's Statements and Authority Of The Office Of The President
- What Changes Will Take Laws Or Regulations
- Possible Visa Changes – H-1B, L-1, and TN
- Recent Immigration/Policy Updates
- I-9 Updates

Today's discussion is based on what has been stated by President Trump and his Cabinet members. 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 only has a 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 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 (midnight regulations)
- The courts interpret the laws; and while Congress can develop new laws, they cannot violate the U.S. Constitution, as some level of due process is to be given to anyone in the U.S.



---

# President Trump's 10 Pt. Plan – Post Election

1. “Begin working on an impenetrable physical wall on the southern border, on day one. Mexico will pay for the wall.
2. End catch-and-release. Under a Trump administration, anyone who illegally crosses the border will be detained until they are removed out of our country.
3. Move criminal aliens out day one, in joint operations with local, state, and federal law enforcement. We will terminate the Obama administration’s deadly, non-enforcement policies that allow thousands of criminal aliens to freely roam our streets.
4. End sanctuary cities.
5. Immediately terminate President Obama’s two illegal executive amnesties. All immigration laws will be enforced - we will triple the number of ICE agents. Anyone who enters the U.S. illegally is subject to deportation. That is what it means to have laws and to have a country.
6. Suspend the issuance of visas to any place where adequate screening cannot occur, until proven and effective vetting mechanisms can be put into place.
7. Ensure that other countries take their people back when we order them deported.
8. Ensure that a biometric entry-exit visa tracking system is fully implemented at all land, air, and sea ports.
9. Turn off the jobs and benefits magnet. Many immigrants come to the U.S. illegally in search of jobs, even though federal law prohibits the employment of illegal immigrants.
10. Reform legal immigration to serve the best interests of America and its workers, keeping immigration levels within historic norms.”

---

# Executive Changes

The President has executive powers in immigration, granted to him by Congress

- Executive Orders can be changed immediately
- Discretionary Agency Directives and Guidance Documents – new heads of the agencies can withdraw or enact new policies.
- Agency Rules and Regulations
  - Making and removing rules all take time
  - More litigation happens in this space
  - Congressional Review Act – Congress can enact legislation to immediately terminate a rule

---

# Executive Changes

The following are believed by most immigration law observers as likely to change in President Trump's administration:

- DACA – 740K approved
- DAPA
- TPS
- Procedures for background checks
- Prosecutorial discretion
- I-9 audits and raids
- NSEERS – reintroduced?
- NAFTA
- “I will direct the Department of Labor to investigate all abuses of visa programs that undercut the American worker,” President-elect Trump said on Nov. 20<sup>th</sup>
- Cabinet appointments help to implement a President's goals – but Congress approves



---

# Executive Changes

- President Trump has signed four Executive Orders that directly or indirectly pertain to immigration
- 90 day travel ban on individuals from: Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen – Ban is currently on hold
  - Immigration applications are continuing to be processed for individuals from these countries
  - Visas are still active so long as not revoked
  - The ban does not apply to: US Legal Permanent Residents (green card holders) from one these countries or Dual nationals (citizens of one of the listed countries and another non-listed country)
  - Practical effect: at this point, most people who need to enter the US have entered, and most will not travel anymore
- Litigation update
- <http://www.clarkhill.com/alerts/update-regarding-the-january-27-executive-order-on-immigration>

---

# Executive Changes

- On February 20<sup>th</sup>, Secretary of Homeland Security, John Kelly, issued two guidance memos to the Department of Homeland Security (DHS) implementing President Trump's Executive Orders on immigration. Some of the highlights of these DHS guidance memos:
  - Expanded deportation priorities
  - More immigration agents - 10,000 new ICE officers, 5,000 new Border Patrol Agents, and 500 new Air and Marine Agents
  - Stricter detention guidelines
  - Possibly deporting non-Mexicans to Mexico
  - Prosecuting parents of smuggled children
- <http://www.clarkhill.com/alerts/president-trump-s-immigration-enforcement-orders>

---

# Legislative Changes

- Our immigration laws and systems are generally regarded as broken
- Too many applicants, not enough visas, not enough controls or processes for monitoring persons who overstay their status in the U.S., and a slow process for deportation and appeals
- No significant changes in immigration law since 1996 – IIRAIRA and AEDPA
- Post 9/11 changes?
- 2007 was the last time a significant law was close to being passed
- The Republican controlled House and Senate (under President Obama) have stated that they want an enforcement first policy, before any new bills will be introduced to fix the problems addressed above
- Southern border enforcement and interior immigration law enforcement are likely first steps

---

# Likely Legislative Changes – Initially

- Southern border enforcement
- An actual wall could cost approximately \$25 billion
- A high tech solution could be much cheaper
- Interior enforcement funding could also be increased
- Unknown how long it would be before these priorities are determined to be completed
- Mid-term elections in two years, and it is possible Republican controlled Congress would want to pass a comprehensive law before the unpredictability of an election season occurs
- These laws may not impact employers – unless more I-9 enforcement is included

---

# Likely Legislative Changes – Later

- Agricultural visa law
  - One of the stickiest issues
  - H-2A and H-2B visas viewed as not workable
  - Will allow for current overstays to apply for status?
- Mandatory E-Verify
  - The agricultural visa problem is the reason this couldn't leave a Republican Controlled House sub-committee
  - But this is likely, with a phase in timeframe
- I-9 changes
  - These could include increased penalties
  - More audits/raids

---

# H-1B Visa & Possible Legislative Changes

- US 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 US 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
- No advertisements needed today
- Must not be “cheap immigrant labor,” as must be paid the same the employer normally pays for that job, or the government's wage scale, whichever is higher
- H-1B changes (Durbin & Grassley draft bill of 2015)
  - Advertisement/web posting likely before an H-1B can be filed
  - No increase in numbers – quota – but we could end up with a ranking system of who gets selected and preference
  - Dramatic wage increases
  - Non-displacement rules for all – and more investigative power and higher fines for non-compliance

---

# L-1 Visa & Possible Legislative Changes

- Available to foreign nationals moving from foreign operations to US operations
- Foreign national must have worked 1 of the last 3 years for the foreign operation before coming to the US
- The US and foreign company must have a parent/subsidiary/affiliate relationship
- Two types of L-1 Visas:
  - L-1A: for managers and executives – L-1 site visits underway
  - L-1B: for those foreign national's who possess specialized knowledge of the companies products, processes, etc.
- L-1 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 US, Canada, and Mexico
- No NAFTA treaty – then no TN visa
- Renegotiation appears more likely – Senate has to approve treaties
- If renegotiated, it is unknown if the visa will be impacted
- President Trump must give six months' notice if the US will not renegotiate the NAFTA treaty



---

# Highlights of Recent Immigration Regulations

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 periods for E, H-1B, L-1, and TN visa holders – 10 days after status expires to leave
- New grace period after employment ends for for E, H-1B, H1-B1, L-1, O-1 and TNs – 60 days

---

# Highlights of Recent Immigration Regs (cont.)

- New Entrepreneur Regulation – takes effect July 2017
  - Entrepreneurs will be considered for parole (temporary permission to be in the US) to startup businesses and work in the US
  - Requires formation of a new-start up entity and the entity must establish potential for rapid growth and job creation through receipt of investments from US investor, government grants or awards, or through other means
- New DOL PERM regulations – most likely dead for now
- Could we see a change in the discretion of the officers adjudicating the cases? Some say yes – we think it will be a little more tempered
- USCIS isn't under the direct control of the President – the agency is a fee driven agency
- Lots of areas where USCIS hasn't followed the agency's leadership's guidance – EB5s and L-1Bs to name a few

---

# What To Tell Employees

- Don't panic
- Our system of checks and balances ensures that no one branch controls
- Washington DC moves slow - 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 Basics

- I-9s are required for every employee hired since November 7, 1986
- Employee completes section 1 on or before 1<sup>st</sup> day of hire
- Employer has three business days, after the day of hire, to complete section 2 and examine original documents (four day rule)
- Employer, or its agent, reviews original documents and completes Section 2. Employee must be physically present when the documents are reviewed
- Employer may not accept expired documents
- Employer must not hire persons who lack valid work authorization – actual or constructive knowledge
- No I-9s needed people not physically on U.S. soil

---

# New I-9 Form

- New Form I-9 required as of January 22, 2017
- The new form can be found at: <https://www.uscis.gov/i-9>
- Downloadable “smart” .pdf contains error-checking features on certain fields to ensure information is entered correctly (i.e., correct number of digits for SSN, expiration dates on documents, drop-down lists)
- Creating the Form I-9 using the .pdf does not create an “electronic” Form I-9 where electronic signatures may be used
- Employers may choose to complete any or all sections of the form on paper, or using a computer, or a combination of both
- Must still be printed, handwritten signatures obtained, and the original paper copy stored in a secure location (unless an employer uses a compliant electronic Form I-9 software provider)

---

## New I-9 Form (cont.)

- New .pdf form contains embedded instructions for completing each field, accessed by clicking on the question mark for the field
- Heading and instructions confirm to specifically confirm that employers are liable for errors in the completion of [the] form
- Only other LAST names are now required (protection against any potential transgender and other discrimination)
- The Employee Attestation section now only requires that an alien authorized to work provide an USCIS Number/A Number OR I-94 Number OR Foreign Passport Information
- Employees must now affirmatively state whether or not they were assisted by a preparer or translator when completing the form
- Employee information field at the top of page 2 now requires employers record the citizenship/immigration status attested to in Section 1

---

# New I-9 Form (cont.)

- Section 2 now includes an “Additional Information” box for employers to provide any needed explanation for unusual situations, so the employer does not have to write a memorandum or in the margins of the form
- A quick matrix barcode (QR code) generates once the form is printed that can be used to streamline government audits
- Form I-9 instructions are now separate from the form itself, but employers are still required to present the instructions to the employee completing the form
- Handbook: <https://www.uscis.gov/sites/default/files/files/form/m-274.pdf>

---

# 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>



---

# Questions?



**Michael P. Nowlan**

**(313) 965-8666**

**[mnowlan@clarkhill.com](mailto:mnowlan@clarkhill.com)**



**Lindsey M. Medina**

**(313) 965-8672**

**[lmedina@clarkhill.com](mailto:lmolina@clarkhill.com)**

# THANK YOU

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

CLARK HILL