Donald Trump’s immigration policies and impacts on U.S. employers: Separating campaign rhetoric from reality

By Jason Gerrol

During the course of the 2016 presidential election campaign, Donald Trump made numerous statements regarding his immigration policy. It remains to be seen whether a Donald Trump administration will actively pursue building a wall along the U.S./Mexico border (and making Mexico pay for it); restrict immigration of certain populations (e.g., Muslims); or conduct mass removal/deportations, to identify just a few of his campaign promises, or whether such statements were simply campaign rhetoric. However, several Donald Trump immigration policies will directly affect employers, if enacted, and thus are worth further discussion.

First, Donald Trump has indicated his intentions to end President Obama’s executive actions for unlawful immigrants, including Deferred Action for Childhood Arrivals (DACA). Under DACA, almost 700,000 unlawful immigrants who were brought to the U.S. as children received temporary work permits and relief from deportation from the U.S. Through an executive action, Donald Trump could easily end the program and, as a result, render these beneficiaries without work authorization and subject them to removal from the United States.

As part of Donald Trump’s strong position against unlawful immigration, and the removal of those in the United States unlawfully, he has previously proposed to triple the number of Immigration and Customs Enforcement (ICE) agents. ICE, a component of the Department of Homeland Security, is charged with not only the removal of unlawful immigrants, but the enforcement of immigration laws through such actions as the inspection of an employer’s Form I-9s. If there were such an increase in ICE agents, as Donald Trump has proposed, there may be a corresponding increase in the number of employer inspections, in particular in industries such as construction and agriculture.

Similarly with regard to employer compliance, Donald Trump has called for a mandatory, nationwide E-Verify program. E-Verify is an Internet-based program that supplements an employer’s Form I-9 obligations, and allows U.S. employers to verify the work authorization of new hires. With certain exceptions, such as in the case of federal contractors, E-Verify is currently a voluntary employer program. As a regulatory program, any unilateral executive action to change E-Verify is
likely to be challenged as unconstitutional, and any changes would have to be made in compliance with the Administrative Procedures Act.

Donald Trump has also specifically addressed the H-1B visa, a work visa used by U.S. employers to hire skilled foreign national workers. As part of his immigration policy, Donald Trump has requested an increase in H-1B prevailing wage requirements in an effort to force companies to first consider workers in the U.S. for these positions. In other words, by making the H-1B prevailing wage cost prohibitive, employers will have an incentive to hire U.S. workers first. Since the H-1B prevailing wages are determined by the U.S. Department of Labor, and are determined by both regulation and statute, any changes to this program are likely to need to be made in compliance with the Administrative Procedures Act, as well as with legislative approval.

Consistent with that policy, Donald Trump has indicated that petitions for workers, including H-1B petitions, should first be sent to the local unemployment office, rather than U.S. Citizenship and Immigration Services, presumably in an effort to first identify qualified U.S. workers for such positions. While Donald Trump has not called this a labor market test, and has not provided further details of how exactly this process would work, his language has suggested that such a requirement would closely resemble a labor market test where employers would first have to demonstrate that there are no qualified and willing U.S. workers for a position before obtaining an H-1B or similar work visa for a foreign national worker.

With regard to employment-based legal permanent residency (or “green cards”), Donald Trump's immigration policy has also called for a “pause” in the issuance of green cards to foreign national workers. During this time period, U.S. employers will first have to “hire from the domestic pool of unemployed immigrant and native workers.” It is uncertain how this “pause” in the issuance of green cards will be implemented, and whether this will be a one-time requirement affecting the thousands of back-logged and pending green card applications, or if this will be a new requirement for all green card cases in the future. Under current law (with exceptions), U.S. employers are already required to successfully complete a labor market test prior to the issuance of a green card to their foreign national employee.

Finally, Donald Trump has previously announced his intention to replace the North American Free Trade Agreement (NAFTA) and similar trade agreements. Under NAFTA, citizens of Canada and Mexico are eligible for a TN work visa, which allows U.S. employers to hire skilled foreign national workers in a number of occupations, including engineers, scientists, medical professionals, and lawyers. The TN visa is widely used by U.S. employers, especially those with cross-border operations in Canada or Mexico. While Donald Trump has made vague references to a new trade agreement with Canada, there have been no similar references to a new trade agreement with Mexico, and no references to the continuation of the TN visa program.

The potential impact on U.S. employers may be the result of executive action by Donald Trump, such as in the discontinuation of DACA, but other immigration changes affecting U.S. employers must comply with the Administrative Procedures Act and provide interested parties with notice and an opportunity to comment on the proposed changes. In addition, proposed changes to the H-1B visa program, and similar work visa programs, could require changes to the Immigration and Nationality Act itself, requiring legislative approval. While the Republican Party enjoys a majority in the House and Senate, many of those Republicans have previously supported immigration reforms that make it easier for U.S. employers to hire skilled foreign national workers, not harder, as in the case of Donald Trump’s proposed changes.
In addition, many of the immigration changes previously announced by Donald Trump will ultimately be delegated to senior cabinet positions. While there have been rumors about who Donald Trump may appoint to certain positions, there is no clear indication at this point of who will occupy these positions, and what their positions will be on immigration.

As always, members of the Nixon Peabody Immigration team are available to answer questions. Please contact any of the following:

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