



Cut Through the Noise: Trends in Immigration Law

CORPORATE EXECUTIVES NEED TO PAY ATTENTION TO these five key trends in immigration law and policy.

1. *Increased complexity and delays.* Immigration has been called the second most complex area of law. Several reasons account for this complexity, including the involvement of numerous agencies with inadequate funding, conflicting mandates and a huge backlog of cases.

- *Multiple agencies.* A typical green card case for an employee involves three federal agencies: the U.S. Department of Labor (DOL), the U.S. Department of Homeland Security (DHS), and the U.S. Department of State. Each agency has its own rules, some of which conflict.

- *Underfunded agencies with conflicting mandates.* Congress has never funded immigration law adequately. That leads to processing delays and inconsistent enforcement. Moreover, the agencies have conflicting duties. The DHS is supposed to enforce America's borders but also provide good service to noncitizens seeking immigration benefits. The DOL is supposed to protect U.S. workers but also certify eligibility of foreign workers for U.S. jobs.

KEY CONSIDERATIONS

- IMMIGRATION LAW IS COMPLEX BECAUSE IT INVOLVES NUMEROUS AGENCIES WITH INADEQUATE FUNDING AND CONFLICTING MANDATES AND A HUGE BACKLOG OF CASES.

- AS THE U.S. ECONOMY GROWS AND THE POPULATION AGES, THERE ARE NOT ENOUGH U.S. CITIZENS TO FILL KEY KNOWLEDGE-WORKER POSITIONS.

- INCREASINGLY, IMMIGRATION LAW IS OVERLAPPING WITH LABOR AND EMPLOYMENT LAW.

- WHILE THE FOCUS OF INCREASED IMMIGRATION ENFORCEMENT WILL CONTINUE TO BE ON LARGE EMPLOYERS, DHS MAY BEGIN TO LOOK MORE CLOSELY AT THE PRIVATE HOME.

- *Backlogs.* Immigration law imposes caps on various types of temporary and permanent visas.

These caps cause backlogs. For example, an employer who wants to sponsor a worker with a bachelor's degree for a green card has a four-year wait right now.

There are also caps on some temporary work visas. For example, Congress has limited the annual number of H-1B visas for professional workers to just 65,000 a year, with some exceptions. Last year and this year, those visas were used up before the fiscal year began. That means that employers must wait more than a year to sponsor workers for H-1B visas, find another visa category they fit in or abandon the effort to hire them.

This complexity will only

increase if Congress enacts immigration reform. The bill the U.S. Senate passed in May 2006 is 796 pages long. As just one example, the Senate bill would not grant blanket "amnesty" for undocumented workers. Instead, the bill divides the undocumented into three groups, depending on how long they have been in the United States. Each group has its own eligibility requirements and restrictions.

- 2. *Greater compliance risks and increased enforcement.* Wal-Mart's March 2005 \$11 million civil settlement with Immigration and Customs Enforcement (ICE) to resolve allegations of hiring undocumented janitors through the use of subcontractors was noteworthy for several reasons: The subcontractors paid an additional \$4 million to ICE and pleaded guilty to corporate criminal charges; Wal-Mart agreed to set up a program to ensure that all future independent contractors will take "reasonable steps" to comply with all immigration employment laws; and it foreshadowed the trend toward even tougher enforcement, according to an ICE press release.

Indeed, since then ICE has filed criminal charges against other employers who commonly employ undocumented workers. Julie Myers, assistant secretary for ICE, was quoted in an April 16 article in *The Washington Post* as saying, "If you're blatantly violating our worksite enforcement laws, we'll go after your Mercedes and your mansion and your millions. We'll go after everything we can, and we'll charge you criminally."

For the moment, the big unknown remains whether and when Congress will require all employers to use a beefed-up version of the current DHS Basic Pilot Program, which enables employers to verify electronically their employees' eligibility to be employed — that is, whether the employees are U.S. citizens, resident aliens or otherwise work-authorized. But in a June 21, 2005, report on immigration enforcement, the Government Accountability Office stated, "Current weaknesses in the pilot program's implementation, such as its inability to detect identity fraud and DHS delays in entering data into its databases, could adversely affect increased use of the pilot program, if not addressed."

- 3. *Globalization and the battle for the best and the brightest.* Knowledge workers, especially in science, technology, engineering and math, increasingly are

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important for most companies. As the U.S. economy grows and our population ages, there are not enough U.S. citizens to fill those key positions. Increasingly, the talent pool lies outside the United States. Thirty-three million young professionals with university degrees and work experience live in 28 low-wage countries, compared with 15 million in eight high-wage nations, including 7.7 million in the United States, according to McKinsey & Co. This will lead to even greater reliance on employment-based immigration to fill key positions.

Persuading those key workers to come to the United States may be difficult. Competition for talent has grown as other countries have expanded their research infrastructure and created more opportunities for international students. More and more U.S. companies will need to implement a global immigration strategy to complement their global hiring and personnel practices.

4. *More interplay between immigration and employment law.* Increasingly, immigration law is overlapping with other areas of law. For example, in 2002 the U.S. Supreme Court held in *Hoffman Plastic Compounds Inc. v. NLRB* that undocumented immigrant workers are not eligible for back pay under the National Labor Relations Act (NLRA).

It is unclear how far *Hoffman* extends. Although the case addressed a narrow legal point, it emboldened employers to argue that certain immigrant workers have no workplace rights. But the National Labor Relations Board reaffirmed after *Hoffman* that undocumented workers are covered by the NLRA and that an employer who fires an employee in violation of the NLRA is liable, except for back-pay remedies, regardless of the employee's immigration status. Similarly, the Equal Employment Opportunity Commission held after *Hoffman* that undocumented immigrant workers are still entitled to relief under federal antidiscrimination laws, except for back pay.

Similarly, several state courts have held that federal immigration policy doesn't bar workers' compensation claims or personal-injury damage awards to undocumented workers for lost wages caused by negligence in the workplace.

A relatively new development is the use of the Racketeer Influenced and Corrupt Organizations Act

(RICO) to argue that some employers and recruiters are engaged in illegal criminal enterprises to hire undocumented workers.

Immigration law also intersects with labor law for higher-skilled workers. For example, the DOL can fine employers who fail to pay H-1B temporary professional workers the correct wage. Recently, DOL administrative law judges held two New Jersey companies and their presidents in violation of the H-1B law and ordered them to pay \$567,090 in back wages to 16 foreign workers.

The Social Security Administration (SSA) also gets involved with immigration. The SSA mails no-match letters to employers when an employee's Social Security number does not match SSA records. Employers, confused about what to do, sometimes unnecessarily and illegally reverify employees' immigration status. The immigration agency, however, has stated that a no-match letter does not necessarily mean that a worker is out of status.

5. *The domestic service problem.* Buried deep within the immigration regulations at 8 C.F.R. 274a.1(h) is this nugget: "[E]mployment does not include casual

The big unknown remains whether and when Congress will require all employers to use a beefed-up version of a program that enables electronic verification of work eligibility.

employment by individuals who provide domestic service in a private home that is sporadic, irregular or intermittent." This regulation, created in the wake of the Immigration Reform and Control Act of 1986, seems to mean that a homeowner doesn't need to fill out a Form I-9 for the occasional housekeeper and perhaps the lawnmower. But it begs a series of questions: how to define the terms "casual," "in," "sporadic," "irregular" and "intermittent." And it says nothing about the homeowner's obligations under the Internal Revenue Service and SSA statutes and regulations, issues that derailed the attorney general nominations of Zoe Baird and Kimba Wood.

While the focus of increased immigration enforcement will be, in the main, on large employers, DHS may begin to look more closely at the private home, and the regulation cited above could be amended or eliminated as part of the overall effort to "get tough" on immigration violators.

Even if Congress does not pass immigration law reform this year, these underlying trends will continue to affect us all.

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