

Election 2020: What's at Stake for Immigration?

By Aimee Guthat & Meredith K. Stewart

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Meet the Authors



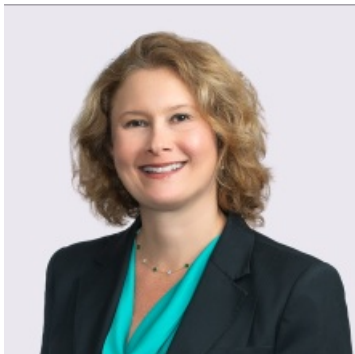
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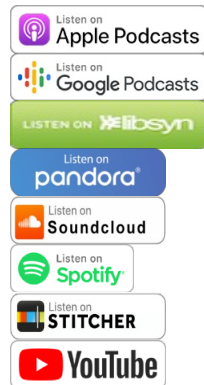
Immigration

Details

October 22, 2020

The current administration's course on immigration ushered in heightened standards for obtaining immigration benefits, restructuring visa allocations through executive orders and renewed and continues to emphasize immigration enforcement. The 2020 election outcome will profoundly shape the ability of U.S. businesses to integrate immigration strategies into their financial plans and operations.

Jackson Lewis P.C. · Election 2020: What's at Stake for Immigration?



Takeaways

The current administration ushered in heightened standards for obtaining immigration benefits, restructuring visa allocations through executive orders and continues to emphasize immigration enforcement. No matter the outcome of the 2020 presidential election, the ability of U.S. businesses to integrate immigration strategies into their financial plans and operations will be impacted.

What Employers Need to Know

- The Department of Homeland Security issued a proposed new rule tightening the definition of specialty occupation and mandating a degree for all H-1B visa applicants. The proposed rule also re-defines the employer/employee relationship and puts a heavier burden on service companies providing expertise and resources to third party customers. The rule will go into effect December 7, 2020. Concurrently, the Department of Labor published a rule change effective October 8, 2020 in the prevailing wage structure, requiring employers to meet wage requirements to qualify for H-1B visas. This requirement may have a chilling effect on some employers while others will have to accept the increases as a cost of doing business. As of October 13, 2020, at least two lawsuits have been filed challenging both rules.
- While waivers are available, travel restrictions stemming from COVID-19 have disrupted business travel and proven challenging. Operational limits at

consulates have slowed and, in some cases, routine services have been suspended. Additionally, there are inconsistencies in how each consulate applies standards for exceptions to visa allowances.

- The current administration continues to call for tightened border security and the construction of a wall with Mexico. Restrictions on travel and revisions to the H-1B visa application process have been leveraged to address border security and there are calls to end family migration. The current administration has indicated it would impose wider restrictions on immigration to ensure that top qualified U.S. citizens have job opportunities. The current administration also has expressed an interest in eliminating the current diversity lottery, where immigrants are selected based on quotas by country, replacing it with a merit-based immigration system.
- A Biden administration would leave the new H-1B visa requirements intact. He also has proposed creating a new visa category that would essentially be available for cities and states to sponsor foreign workers to work in areas where there is a need. His administration also would introduce a pathway to citizenship for approximately 11 million immigrants that currently do not have status. His administration also likely would preserve the diversity lottery system, increase the number of employment-based immigrant visas annually and eliminate per country limits.
- The candidates have found common ground on immigration issues. Both candidates share concerns that foreign workers can too easily take job opportunities away from U.S. workers. Both support tightening the H-1B program, removing per country limits on immigrant visas and moving to some form of a merit or points-based immigration system. Finally, both candidates agree that ICE should be maintained, however with different views on when enforcement should be taken.

Transcript

Alitia (00:08):

Welcome to Jackson Lewis' podcast We get work™, focused solely on workplace issues everywhere and under any circumstances, it is our job to help employers develop proactive strategies, strong policies and business oriented solutions to cultivate a workforce that is engaged, stable and diverse. Our podcast identifies the issues, dominating the workplace and it's continuing evolution, and helps answer the question on every employer's mind. How will my business be impacted?

The Trump Administration's course on immigration ushered in heightened standards for obtaining immigration benefits, restructuring visa allocations through executive orders, and renewed and continued emphasis on immigration enforcement. The 2020 election outcome will profoundly shape the ability of us businesses to integrate immigration strategies into their financial plans and operations. This podcast will identify the areas of immigration law that will impact employers regardless of the outcome of the 2020 election. Our host today are Aimee Guthat and Meredith Stewart. Aimee is a Principal in the Detroit, Michigan office of Jackson Lewis. She partners with clients to develop strategic and operational planning for employment-based immigration and corporate compliance. Meredith is a Principal in the firm's Boston office, and her practice is

dedicated exclusively to immigration and nationality law. Aimee and Meredith, the question on everyone's mind today is what's at stake for employers utilizing the U.S. immigration system and how will their business be impacted?

Meredith Stewart (01:46):

Thanks Alitia. Well, Aimee Guthat and I are really excited to be here today. We work together in the immigration practice group at Jackson Lewis. We have conducted some client pitches together and worked together on a number of projects. We're recording this on October 13th, 2020. Things are changing daily in immigration. Aimee, the talk of the hour is the new H-1 rule. There are, from what I understand, two rules that have just come out or once in a comment period, can you fill us in on what these are about?

Aimee Guthat (02:14):

Yeah, so there's always activity in the world of immigration and we had just last week two new rules that... Are separate one out of the immigration service and one from Department of Labor, but working in tandem. Labor's rule came out on Thursday, October 8th and took effect immediately and essentially changed how Department of Labor is structuring prevailing wage requirements. And that has a significant impact on H-1B filings by employers, as well as the PERM green card process. Employers have to meet certain wage requirements for these two immigration benefits. And we've seen now overnight a huge skyrocket in the base salary level. And this is going to really have a huge impact on a lot of companies in that now they have to look at how they're paying their certain foreign workers and whether or not they can even meet these new requirements.

There's also a new rule from immigration that tightens up the H-1B program. And that rule is subject to a 60 day comment period, but it has some pretty scary provisions I think or pretty restrictive provisions. One of which is the redefinition of specialty occupation. So how do you think that would impact the clients that you work with Meredith?

Meredith Stewart (03:37):

Well, I think in particular, we're really going to have to [inaudible 00:03:41] between the degree that the foreign national has and the position being offered by the employer by close correlation in the past we could file computer related occupation for example, for somebody that maybe had an engineering degree, that wasn't quite on point, but it was an engineering degree. From what we understand that would not be the case with this new rule in effect.

Another provision of this particular rule that my clients are concerned about are third party work sites and people that they have working for customers, especially in the tech industry. These folks are going to be limited to one year H-1Bs going forward that are going to have to be continuously renewed with significant documentation. So this is quite a large burden for industries who do have employees going out to third-party client sites. I think that we're really going to have to keep an eye on how these provisions are implemented and it'll be a lot harder to get HB petitions through the system.

Aimee Guthat (04:45):

I absolutely agree. I think that the cost of doing business has just gone up for most employers that have any sort of immigration program. The other thing that really concerns me about that role, I'd be interested to hear what you think of it too as you've mentioned that we have to show a closer correlation between the actual position and the degree field of study. So a lot of IT positions, a lot of engineering positions as you said, we might have a job that's say a software developer, but the individual has an electronics engineering degree, which there are overlaps in those programs, but it seems that the rule isn't going to allow that anymore.

I'm also concerned about the wording that a bachelor's degree is always required or will always be required, which is a little bit of a departure from what we have now, which is a bachelor's degree is the normal or typical requirement. So when we're talking about always, I mean that's pretty absolute. That means that a job is never going to have a qualification less than that.

Meredith Stewart (05:53):

Right. And that's hard for a lot of our IT companies, especially for employees who have U.S. workers who have been with the company for a very long time, perhaps came into the company and don't have bachelor's degrees in that particular field, but yet they're a great asset to the company. So their skill level is measured in other ways besides their education, but in future requests for evidence, we may have to shut every person holding that job, or does have at least a bachelor's degree in a particular field, which is not practical at all in the real world.

Aimee Guthat (06:24):

My goodness.

Meredith Stewart (06:25):

On that note, we do have colleagues in the field who are already busily preparing litigation to fight these two new rules that have been introduced. One, as we said, it's still in the comment period and the Department of Labor one did go into effect last Thursday. So we are waiting to see what happens with those, whether or not there'll be an injunction enjoining the relative agencies from implementing these further or not. But moving on in other news, there's a lot going on in immigration. The pandemic has really had an effect on our clients and other ways to just travel restrictions, and visa bans, and overseas at the consulates, Aimee in your practice, what have you noticed regarding the travel bans and travel restrictions? How has this affected your employer clients?

Aimee Guthat (07:12):

Well, I think at the beginning of the pandemic, the impact was more minimal because everyone was sheltering in place and just trying to figure out what is it that we're going through? I mean, something that we've never seen before on any level, but as states started to reopen, operations started to slowly claw back to normal. These travel restrictions have a huge impact on business. There's multiple layers of them. We've got the visa bans. So for certain work visa categories, visas

are just simply not available for the rest of the year for certain people, as well as their family members. And that's problematic for companies that in particular for multinational managers and other specialized intercompany transferees, it's essentially limited employer's ability to get talent over to the U.S. to help revive business operations, right?

We're all trying to recover and we need to be able to do that with the best possible talent and resources and the inability to get some of these visas at least through the end of the year, is really causing a problem. We're also seeing just the impact on basic business travel, right? With some of the COVID based bans that aren't necessarily tied to particular visa categories. They're more so tied to countries and destinations, that we've got lots of senior folks and even just project specialists that need to visit colleagues in other locations, and it's not possible because of the limitations and coming back.

Meredith Stewart (08:52):

Yeah. I know in our practice. So there are certain exceptions that can be applied for even in the H or L context overseas with the consulate to try to get people in for visa appointments. For example, we had an [inaudible 00:09:08] he's the CEO of a global organization, and he needed to get his L1 Visa to come to the United States. Now we were able to obtain a visa appointment for him, but I think a big issue that we all struggle with is the inconsistency across the board with the consulates overseas, and hard to gauge what is going to be accepted as a national interest exemption argument or not. And then also as you mentioned Aimee, this [inaudible 00:09:38] ban has been very disruptive. Haynes in particular, who are used to be freely coming back and forth, so even if they do have a current visa that's valid and their passport, we have to email ahead to customs and border protection at the airport in the United States certain permission to fly into a US airport.

So all these extra things have been significant for our clients and just trying to manage what is a global economy is very challenging. And then I think you alluded to this as well as is just the operational constraints that the consulates overseas too. They have limited staffing. I mean, the Department of State has had its own issues with personnel in certain countries and not wanting to put these U.S. citizens at jeopardy who are adjudicating visas, for example. So they're all at limited staffing. So it makes adds to the equation.

Aimee Guthat (10:32):

Yeah, absolutely. The other thing that we've struggled with in all of these, travel restrictions is just the complete inconsistent application. So just from practical experience or practical examples, getting waivers out of the U.S. consulate and Frankfurt in Germany seems to be very streamlined and very efficient, but yet that's not true in other countries. We've also had scenarios where we have to go to CBP, as you mentioned, and we've been asked by the officer, well, why did this person travel in the first place? Were they traveling because they miss their family or they wanted to see the Alps in the fall, and look at the color changes, or was it really a legitimate business need? And we've had pushback from customs when the travel is for something other than business or a personal family emergency

where they're saying, well, you didn't need to take this trip.

So why should we give you an exception and allow you to come back before you've had that mandatory set out period. So it's really hard to give good advice to clients and help them plan because to a large extent, we just don't know what the government's going to do.

Meredith Stewart (11:45):

Beyond the challenges that we're dealing with, with travel and so forth. I think the question on a lot of people's minds is this situation going to continue? Should the current administration remain in power or would this change if a new administration should be elected? And there's several kind of points that we've been looking at trying to understand this better. Aimee, do you want to take a couple of them initially, and then I can jump in.

Aimee Guthat (12:12):

Sure. The broad answer to everything is, as we say so often in immigration, it depends. It just depends. So the president has a pretty clear immigration platform and has been pretty vocal about his views on what U.S. immigration programs should look like. And probably the most widely-known is of course the wall, which is often sort of the backbone of any immigration discussion within the administration. So looking at tightening up border security through building a wall, the Trump Administration would continue those efforts as we've seen with the travel restrictions and now tightening up the H1B rules and prevailing wage requirements. I think the administration in terms of employment-based immigration is looking to impose some wider limitations with the intention of ensuring that qualified top U.S. citizen workers have job opportunities, and that employers are not looking to fill their highly skilled positions with foreign workers, but they're looking to the U.S. workforce first. And I think that's the intention behind some of these programs that have come out somewhat restrictive.

Meredith Stewart (13:30):

Let me ask you, Aimee though. Do you think that would necessarily change that part about the H-1B rule and all that if the Biden administration were to be elected?

Aimee Guthat (13:40):

At this point in time, I don't. I think that the rule would likely remain in place for some time. So Joe Biden has indicated in response to this new H-1B rule that he would likely leave that rule in effect, and probably would review it to see if there's any areas that maybe need some revision, but he is also very much in favor of ensuring that U.S. talent has first access to these high skill jobs. And I think that's what everyone is really looking for.

So the issue that we as immigration lawyers I think are trying to grapple with is that the top U.S. talent isn't always available or any U.S. talent in some occupations and some regions. And so that's where employers are looking to supplement with foreign workers. One thing that's interesting is proposing, should

he be elected is creating a new visa category that would essentially be available for cities and states to sponsor foreign workers to work in areas where they just have a need. There's just a lack of people or lack of skills. So that's interesting, and that's come up in the past and I'd be interested to see if I did get elected, if there would be any progress on that.

Meredith Stewart (15:01):

Yeah. I think that's a good point. And I think that is a good aspect of what he may be proposing, is these underserved areas who do need certain talent, who U.S. workers perhaps are not readily available or willing to go to these locations? But if it would mean the ability of a foreign national to get a visa, for example, that may inject some real talent to those needed areas. So I think that's a great point as far as the other aspects of their differences. I mean, I think we've all heard the Trump Administration talk about chain migration in the family-based context. So there's been talk of ending this. This would be U.S. citizen children, for example, trying to sponsor parents who are abroad to bring them here in the United States. The current administration has said that they would like to put an end to that.

Whereas the Biden administration instead has not, and also has introduced a pathway to citizenship for approximately 11 million immigrants that currently do not have status. So they've as opposed to a wide brush approach eliminating without putting forward a plan that the current administration wants to eliminate any undocumented immigrants, but these people, some of them have been in the country for years and years. So I think it's important to have some way for them to regularize their status and become on the radar, so to speak. That's a really good point in difference too.

Yeah, of course, there's the diversity lottery that the current administration would like to put it into. It's like a lottery system every year where people are selected based on quotas in any given country that's represented. And whereas the Biden administration would like to preserve that system.

Aimee Guthat (16:49):

And I think it's important to point out too, that Trump and Biden are not totally different on immigration either. You know, we often spend time talking about differences, right? But they do have some overlapping ideologies really. And for us at least in the employment-based immigration arena, I think the big one is push to remove per country limits on those immigrant visa quotas and go to some sort of merit-based system. So while they definitely have difference of opinions in a lot of areas, there are still some similarities there in what they both believe or their belief system, as far as immigration goes.

Meredith Stewart (17:30):

Yeah. And I think that, particularly, as you mentioned in the employment-based categories or the employment-based realm, there are differences really are not so great.

Aimee Guthat (17:39):

Yeah. I would agree. It's more so. And I think the other areas, they fall really on party lines in terms of where they stand with some of those more humanitarian based immigration issues, but you're absolutely right from an employment based context. They're not that far apart from each other, maybe their tactics are different. The communication style is obviously different, but the underlying goal with both of them seems to protect the U.S. worker, and to make sure that any immigration program we have in place is fair and administered efficiently.

Meredith Stewart (18:17):

Yeah. And the other thing that's a big part of my practice is enforcement with immigration customs, enforcement, ICE. So the current administration we've seen a strong emphasis on enforcement and removal really, of individuals with any violation. Whereas the Biden administration is discussion, more of removal of foreign nationals with criminal records, and not taking such a hard stance perhaps on those with other immigration related violations, but neither one of them wants to eliminate ICE for example, altogether.

Aimee Guthat (18:53):

Yeah. That's a really important point. The other thing to keep in mind too, is regardless of the election, right? So, well, and I shouldn't say that if Biden is elected over Trump, I think what's important for people to remember and for employers to remember that we're not going to see on day one, just a broad overturn or a broad overturning of all of the immigration policies and programs that Trump has implemented. There've been very few regulatory changes, right? Most of these changes have been at the policy level, at the field level, as opposed to real meaningful legislative change. And that will still require congressional support. So even if Biden is elected and has plans to make changes to some of these immigration programs, in many cases, he is going to need congressional support.

And I think that's why President Trump has utilized agency memos. And as I said, changes at the policy level to get around the fact that Congress really hasn't passed any massive immigration change or reform package and years, and years and years. It's a hard thing to get through. With a new administration, we may see some changes. I would expect to see changes, but it will take some time for that to happen.

Meredith Stewart (20:13):

Great. Well, I really enjoyed our discussion today, Aimee and I'm sure a lot more is coming down the road as far as new developments.

Aimee Guthat (20:21):

We will find out in a couple of weeks, what is going to happen with the election. And we will certainly have much more to talk about in the world of immigration, depending on who wins. And when we find out who wins.

Alitia (20:36):

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