

## Employment Law Daily Wrap Up, IMMIGRATION NEWS—New immigration executive order, new legal battles, (Mar. 8, 2017)

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By Pamela Wolf, J.D.

In the wake of President Trump's revocation of his earlier so-call "Muslim ban" and the issuance of a new immigration executive order that purports to remedy at least some of the challenges to its legality, employers are scrambling to understand the new order's implications. And, as the Trump Administration moves to voluntarily dismiss its appeal to the Ninth Circuit of a Washington federal district court's injunction against the first executive order, the State of Hawaii is asking a federal court there to lift a previously imposed stay so that it can amend its complaint and move forward on a challenge to the new immigration order.

**The new immigration order.** Jackson Lewis attorneys Michael Neifach and Amy Peck spelled out some of the important aspects of the new immigration executive order, "Protecting the Nation from Foreign Terrorist Entry into the United States," issued by the president on March 6, 2017. The new EO suspends processing of visa issuance for individuals from six designated countries until June 14, 2017—90 days from the date on which the EO becomes effective, March 16, 2017, the attorneys explained.

The new EO supersedes President Trump's earlier order, issued January 27, 2017, which banned travelers to the United States from seven countries, including Iraq. That much-criticized EO was blocked by the courts, Neifach and Peck noted. The March 6 EO applies to citizens and nationals from six countries: Iran, Libya, Somalia, Sudan, Syria, and Yemen. Iraq, which was included in the January 27 EO, has been removed from the list.

President Trump's new EO "expressly exempts Green Card holders and dual nationals and is to be applied prospectively only," Neifach and Peck explained. "Individuals currently in the United States or who possess valid visas or entry documents (including those who had valid visas on January 27) will not be subject to the provisions of the EO." But individuals from the six countries whose visas may expire on or after March 16 will need to apply for visas abroad, the attorneys pointed out. "A waiver may be required and will be issued if an individual can demonstrate that denial of entry would cause undue hardship, that his or her entry would not pose a threat to national security, and that the entry would be in the national interest."

The new EO also temporarily suspends for 120 days the U.S. Refugee Admissions Program.

**What should employers be thinking about?** Neifach and Peck also noted that in conjunction with the new EO, President Trump signed a presidential memorandum on short-term enhanced screening and vetting procedures. They suggested that because of enhanced visa screening and vetting being put into place, employers—especially those with a globally mobile workforce—should be asking the following questions:

- Do we have employees from one of the six countries who need to travel abroad and who will need to apply for a visa to return to the United States?
- Do we have employees of any nationality working on U.S. visas who work with technologies, particularly those that are subject to export licenses or could be used for military or security purposes?
- Do we have employees working abroad who wish to enter the United States as business visitors and who have traveled to the six countries listed in the EO, plus Iraq or other countries of potential concern to the U.S. government?
- Are our employees traveling internationally with company-issued laptops or handheld computers (PDAs) that may be subject to search by border authorities?

Employers that answer "yes" to any of these questions should anticipate possible delays in visa processing or during inspection upon return to the United States that could affect their business, according to Neifach and Peck. "An increasing number of individuals applying for visas are experiencing administrative processing delays of weeks or even months, especially employees working in fields on the State Department's Technology

Alert List," the attorneys observed. "In addition, remember that individuals who have traveled to any of the six countries identified in the EO, plus Iraq, since 2011 are precluded from travel under the Visa Waiver Program and are subject to visa requirements and possible administrative processing," they added.

**Appeal in the Ninth Circuit.** The day after the new immigration order was issued, the Trump Administration took action to drop its appeal in the Ninth Circuit of the nationwide preliminary injunction against implementation of the president's January 27 EO, the so-called "Muslim ban" (*Washington v. Trump*). The federal government filed a motion to voluntarily dismiss the appeal with costs, noting that the appellees have consented to the request. A federal district court in Washington had granted a temporary restraining order against that EO, which was later upheld by a Ninth Circuit panel of judges.

**Due process problem.** Among the problems that had surfaced during the same-day implementation of the earlier EO were that it swept up lawful Green Card holders and visaholders who were outside the country at the time. The Ninth Circuit took that into account in determining that the Trump Administration could not show a likelihood of succeeding on the merits of its request to stay the Washington court's preliminary injunction. "The Government has not shown that the Executive Order provides what due process requires, such as notice and a hearing prior to restricting an individual's ability to travel," the court noted. The government argued that the majority of individuals affected by the travel ban do not have due process rights. But the Ninth Circuit rejected this notion, stating that "[T]he procedural protections provided by the Fifth Amendment's Due Process Clause are not limited to citizens." The protections apply to all persons within the country as well as to "certain aliens attempting to reenter the United States after travelling abroad," including lawful permanent residents and non-immigrant visaholders.

**What was so urgent?** Another point raised by the Ninth Circuit judges was the absence of any indication that there was an urgent need for the broad immigration ban put into place. "Despite the district court's and our own repeated invitations to explain the urgent need for the Executive Order to be placed immediately into effect, the Government submitted no evidence to rebut the States' argument that the district court's order merely returned the nation temporarily to the position it has occupied for many previous years."

**The Muslim question.** The Ninth Circuit left the substantive allegation that the earlier EO violated the Constitution's Establishment and Equal Protection Clauses because it disfavored Muslims for the merits of the appeal. Assuming the appeals court grants the Trump Administration's motion to dismiss, that question will not be reached, at least not in this round at the Ninth Circuit.

**Is the fundamental problem fixed?** The Trump Administration is undoubtedly banking that the new EO remedies these and other concerns raised about its earlier iteration. But that remains to be seen. Many commenters have suggested, for example, that Trump's campaign promise to ban Muslims from entering the United States and his comments explaining that the first EO as giving a preference to Christians continue to inject unlawful motivation into his new immigration order. Notably, Trump surrogate Rudy Giuliani has also said that Trump called his earlier order a "Muslim ban" and had asked Giuliani to form a commission to show the president how to do it legally.

**Hawaii ready to battle.** The status of the various lawsuits challenging the first immigration EO will undoubtedly change in the wake of the new EO. Hawaii, for example has moved to lift a stay put in place due to the injunction imposed on the earlier EO. Hawaii is asking for an opportunity to amend its complaint in *Hawaii v. Trump* so that it can challenge the March 6 immigration EO. The parties have also proposed a briefing schedule for the plaintiffs' bid for a temporary restraining order, with the motion for TRO due March 8; the federal government's opposition due 6:00 a.m. on March 13; the plaintiffs' reply due at noon March 14; and a hearing with telephonic access to be held on the morning of March 15.

The Ninth Circuit case is No. 17-35105; the District of Hawaii case is No. 1:17-cv-00050-DKW-KJM.

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