

White House Orders Review of Foreign Hiring by Federal Contractors

More scrutiny of H-1B program expected

By Roy Maurer

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A recent executive order issued by President Donald Trump increases scrutiny of federal contractors' use of temporary foreign workers in the U.S. and overseas to determine whether U.S. workers are adversely affected.

Experts believe the Aug. 3 executive order requiring federal agencies to review contractors' use of foreign national workers could be a prelude to new restrictions on employers of H-1B workers in contracting arrangements.

"This new executive order requires federal agencies to review their contracts and subcontracts from fiscal years 2018 and 2019 to assess whether their contractors used temporary foreign labor to perform the contracts in the United States, or performed such contracts in foreign countries when the work had previously been performed in the United States," explained Dana Pashkoff, a government contracts attorney in the Washington, D.C., office of Faegre Drinker. "Federal agencies are then required to determine whether these temporary foreign labor hiring practices and/or offshoring practices negatively affected opportunities for U.S. workers."

The agencies have 120 days—until Dec. 1—to report the results of their review, along with recommendations to improve their procurement processes, to the White House, she added.

The order is aimed at protecting jobs for U.S. workers in an economic recession, according to the White House.

"It is the policy of the executive branch to create opportunities for United States workers to compete for jobs, including jobs created through federal contracts," the order stated. "These opportunities, particularly in regions where the federal government remains the largest employer, are especially critical during the economic dislocation caused by the 2019 novel coronavirus pandemic."

The action was partly prompted by the Tennessee Valley Authority's announcement earlier this summer that it planned to outsource more than 100 of its technology jobs abroad. The Tennessee Valley Authority is a federally owned corporation that provides utility services to several Southeastern states. After the signing of the executive order, the company reversed its plans to outsource the jobs and rescinded related layoffs that had already occurred.

Employer Burden to Increase

Experts questioned how the executive order will be carried out. "The action to be taken after the reviews are completed is not defined in the executive order, and there is no clear guidance how this process will be implemented," said Jorge Lopez, chair of the global mobility and immigration practice group at international law firm Littler.

"Employers with federal contracts should be aware of impending reviews of those contracts, to include vetting vendor employees on visas assigned to federal contracts, and advising subcontractors that they must determine numbers of employees potentially impacted by the review," he said.

Pashkoff said the executive order will significantly impact government contractors' compliance burdens. "Government contractors must now be even more strategic about the workforce they hire and rely upon to perform federal contracts," she said. "Contractors already face numerous compliance obligations and restrictions on the use of foreign workers, especially in the technology industry. The new executive order may serve as an additional disincentive to providing services to the government and is seemingly inconsistent with technology innovation efforts."

Joint-Employer Liability

A "disconcerting aspect" of the executive order, Lopez said, requires that the departments of Homeland Security (DHS) and Labor (DOL) act by Sept. 17 to protect U.S. workers from any adverse effects on wages and working conditions caused by the employment of H-1B visa holders at job sites, including third-party job sites. "That may require specific information such as immigration status and I-9 compliance from third-party employers."

The directives could lead to new regulations making H-1B employers and their end-clients jointly liable for compliance with H-1B visa program rules on wages and working conditions, experts agreed.

Data Sharing

The executive order follows a July 31 information-sharing agreement between the DHS and the DOL.

The agreement establishes processes by which U.S. Citizenship and Immigration Services (USCIS) will refer suspected employer violations within the H-1B program to the DOL.

"Employers need to ready themselves for investigations from the Department of Labor into the use of H-1B visas," said Amy Peck, an attorney in the Omaha, Neb., office of Jackson Lewis. "In the past, USCIS has conducted unannounced worksite visits to ensure H-1B compliance. With DOL stepping into this new role, employers likely will see additional investigations and penalties for violations, including awards of back pay for wage errors."

The Trump administration is reportedly working on still more changes to the H-1B visa program that may be announced in coming weeks, including another executive order implementing a more merit-based approach to immigration, and new regulations redefining key aspects of the program.

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