

Biden Vows to Roll Back Trump's Immigration Policies

Guest worker visas, green cards, DACA and 'workplace raids' on the agenda

By Roy Maurer

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President-elect Joe Biden's plans for employment-based immigration will primarily be reversing what President Donald Trump has done since 2017 (www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/election-2020-biden-trump-differ-immigration.aspx): turning back the president's executive actions that restricted travel, limited green cards and guest worker programs, and eliminated the Deferred Action for Childhood Arrivals (DACA) program.

Experts believe that Biden's administration will ease restrictive adjudication policies at U.S. Citizenship and Immigration Services (USCIS)—which have led to more visa denials and requests for evidence—as well as rescind recently issued regulations of the H-1B program (www.shrm.org/ResourcesAndTools/hr-topics/talent-acquisition/pages/higher-standards-for-h-1b-visas-announced-.aspx).

Biden's platform also outlines larger goals to work on with Congress, such as increasing the number of employment-based visas, providing a path to legalization for the 12 million undocumented immigrants in the country and creating a new, decentralized immigration stream (www.shrm.org/ResourcesAndTools/hr-topics/talent-acquisition/pages/state-sponsored-visas-skills-based-immigration.aspx) for foreign workers that is based on local employers' needs as well as a new visa option for entrepreneurs.

These plans will be contingent on which party controls the Senate—to be decided in January by two runoff elections in Georgia—and the course of the coronavirus pandemic, which continues to spike across the country, leaving millions of workers unemployed.

"Given the incoming administration's focus on responding to the COVID-19 pandemic, much of Biden's early political capital may be invested outside the immigration realm," said Doris Meissner, senior fellow and director of U.S. immigration policy at the Migration Policy Institute (MPI) in Washington, D.C. However, the president-elect has already pledged significant immigration actions within the first 100 days of his presidency, she added. Some of those items include a temporary moratorium on deportations, the restoration of the Obama administration's workplace enforcement guidelines, and repeal of the Trump administration's 2017 and 2020 executive actions banning travel from several nations determined to lack sufficient vetting procedures for travelers.

"The current White House has issued a number of immigration-related executive orders, presidential memoranda, and regulatory directives which have severely limited an employer's ability to obtain skilled labor," said Jorge Lopez, an attorney in the Miami office of Littler and chair of the firm's global mobility and immigration practice group. "At the outset, Biden will be able to rescind President Trump's executive orders, proclamations and directives and issue new ones in their place if necessary. The administration can also undertake new notice-and-comment rulemaking to revise rules that have already been issued in final form, but that process can take months or years."

Sarah Pierce, a policy analyst at MPI, pointed out that regulations enacted within the last 60 Congressional working days—meaning from around mid-March—can be reversed through the Congressional Review Act. "But if Democrats don't take the Senate, that's far less likely," she said.

"SHRM will urge the incoming administration to embrace immigration policies that will remove unnecessary obstacles to the pipeline of high-skilled talent," said Emily M. Dickens, corporate secretary, chief of staff and head of government affairs at the Society for Human Resource Management. "We understand that there are many competing priorities to be juggled by any incoming administration, and we will

work with policymakers to advance sound public policies that protect the American worker while ensuring employers have access to the talent they need."

Change in Direction

The Trump administration contends that immigration negatively impacts the labor market for U.S. workers, Lopez said. "Through over 400 executive actions, employment-based immigration was significantly decreased by creating hurdles for employers to overcome when attempting to sponsor people for visas."

Biden's proposals assume that immigrants make economic contributions, said Isabel Soto, director of labor market policy at American Action Forum, a Washington, D.C.-based policy and research group.

"Our research finds that adding foreign workers to the economy does not crowd out employment for native workers," she said. "The number of jobs in the United States is not fixed, and as the population and labor force increase, so does total employment. In the medium- to long-term, some aspects of the Biden immigration plan could be an opportunity to expand the U.S. labor force, increase productivity and ultimately lead to economic growth."

Here is what to expect from a Biden administration in key immigration policy areas.

Travel Bans

Biden has stated that one of the first things he will do as president is rescind President Trump's bans on travelers from 13 countries entering the United States (www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/trump-expanded-travel-ban-6-new-countries.aspx). The bans can be easily undone, as they were issued by executive order and presidential proclamation, according to experts, but lawsuits could delay the process.

"President Trump issued a series of executive orders and a proclamation seeking to improve vetting procedures for people traveling to the U.S. and to identify shortcomings in the information needed to assess national security threats from those countries," said Lora Ries, a senior research fellow at the Heritage Foundation and a former chief of staff at USCIS under President Trump.

These orders are different from the pandemic-related travel restrictions (www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/european-travel-ban-imperils-foreign-workers-abroad.aspx) enacted in response to the coronavirus pandemic. While Biden has criticized some of these public-health-related restrictions, he has not said if he would immediately reverse them.

Employment-Based Green Cards

"The Biden campaign states that he would work with Congress to increase the number of permanent employment-based visas based on macroeconomic conditions," Ries said. "The campaign states that the current annual employment visa cap of 140,000 hinders a market approach to respond to demand. He also favors eliminating the country caps on employment-based visas (www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/proposal-eliminating-per-country-caps-work-based-green-cards.aspx), stating they create unacceptably long backlogs."

Due to per-country limits, an employment-based green card applicant from India can potentially wait decades before gaining permanent residence, explained Stuart Anderson, the executive director of the National Foundation for American Policy, a public-policy research organization based in Arlington, Va. Legislation to address the problem passed the House of Representatives in July (www.shrm.org/ResourcesAndTools/hr-topics/talent-acquisition/pages/house-votes-remove-green-card-caps.aspx), but complications and opposition to it blocked the bill.

The legislation would expedite the flow of high-skilled workers from countries such as India and China who face inordinately long waits for employment-based green cards and would clear the wait list in less than a decade. But the bill would also lengthen wait times for immigrant workers from the rest of the world, which made some lawmakers balk.

Biden has also proposed exempting from any cap recent U.S. graduates of Ph.D. programs in STEM fields and providing foreign graduates of U.S. doctoral programs a green card with their degree, said Davis Bae, managing partner of the Seattle office of Fisher Phillips and co-chair of the firm's immigration practice group. "Automatically granting green cards to doctoral program graduates will not only greatly reduce the number of applicants waiting for adjudication of their green card petitions, it would act as an additional incentive for the best and the brightest foreign students to pursue their studies in the U.S. and to stay in the country to benefit the economy after they complete their studies."

H-1B Visas

The H-1B visa program for foreign professionals has been particularly hard hit by the Trump administration's policies, Lopez said. Denial rates for new H-1B petitions rose from 6 percent in fiscal year 2015 to 29 percent through the second quarter of fiscal year 2020.

"The Trump administration sought to combat H-1B abuse and fraud and to protect both U.S. workers and foreign workers," Ries said. Three new regulations were issued in October that would profoundly change the H-1B visa program.

The rules increase the required wages employers must pay their H-1B workers (www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/dol-increases-h1b-wage-minimums.aspx); redefine the degrees, occupations and employer-employee relationships eligible for the visas; and replace the annual H-1B visa random lottery (www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/uscis-proposes-replacing-h1b-lottery-salary-based-selection.aspx) with a process that prioritizes those offered the highest salaries.

"The Biden administration will likely withdraw these rules," Lopez said. Other experts are not so sure, however, as Biden's immigration platform calls for establishing a wage-based allocation process for temporary foreign workers and enforcement mechanisms "to ensure [employment-based visas] are aligned with the labor market and not used to undermine wages" or "used to disincentivize recruiting U.S. workers" for in-demand occupations.

"A priority for the Biden administration should be to fix processing for H-4 employment authorization," Anderson said. "For years, the Trump administration has placed a proposed rule on the regulatory agenda (www.shrm.org/ResourcesAndTools/hr-topics/talent-acquisition/pages/dhs-plans-rescind-h4-work-authorization.aspx) to rescind an existing regulation that allows many spouses of H-1B visa holders (those with H-4 visas) to work."

Anderson also noted that the new administration will need to deal with "enormous backlogs" at USCIS and at consulates abroad due to both COVID-19-related concerns and restrictive policies. "Another priority at USCIS should be to rescind memos that have slowed processing, increased requests for evidence and made it more difficult to gain approval of previously approved applications, such as the 2017 memo that no longer provided deference to previous adjudications (www.shrm.org/ResourcesAndTools/hr-topics/talent-acquisition/pages/visa-extension-requests-undergo-more-scrutiny.aspx)," he said.

Seasonal Workers

Biden aims to allow seasonal employers in certain industries to certify the need for foreign workers based on labor market studies and to make it easier for seasonal workers to switch jobs, Bae said. "His goal is to make it easier for companies reliant upon seasonal workers to qualify to hire such workers legally, while at the same time requiring employers to pay fair compensation based upon the prevailing wage and otherwise protecting seasonal workers from exploitation."

Worksite Enforcement

Biden has said that he will end workplace immigration raids (www.shrm.org/ResourcesAndTools/hr-topics/talent-acquisition/pages/arrests-undocumented-workers-rose-2019.aspx). Practically, this should mean "a sharp decrease in worksite raids, or a redirection to focusing on employers' actions and not those of the workers," Lopez said. "Under the Obama administration, the practice of large-scale raids was halted, but the prosecution of employers that were thought to have knowingly hired unauthorized workers was prioritized through increased Form I-9 audits (www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/hr-prepare-workplace-ice-audits.aspx)."

Legalization Plan

Biden plans to send an ambitious proposal to Congress in his first 100 days that includes calling for a pathway to citizenship for the estimated 12 million undocumented immigrants living in the U.S., reinstating the DACA program, addressing the status of millions more "Dreamers" and their parents living in the country, and legalizing more than 400,000 people covered by the Temporary Protected Status (TPS) program. President Trump's moves to phase out DACA (www.shrm.org/ResourcesAndTools/hr-topics/talent-acquisition/pages/supreme-court-ruling-daca-means-for-employers.aspx) and many of the TPS designations (www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/court-allows-phaseout-tps-immigrants.aspx) have been slowed down or halted by legal challenges.

"The president-elect's pledge to offer a road map to legalize much of the unauthorized population, including with a legalization program for agricultural workers, would be a major legislative lift," Meissner said.

Comprehensive Reform

The prospects for comprehensive immigration reform legislation are also slight, experts agreed.

Biden supported the bipartisan comprehensive immigration package that passed the Senate in 2013 (www.shrm.org/resourcesandtools/hr-topics/global-hr/pages/senate-passes-immigration-reform.aspx) but could not get approval from the House of Representatives.

"Biden has said that he wants to pursue it, but we know it's an uphill task," said Muzaffar Chishti, senior fellow and director of the MPI office at New York University School of Law. "The president-elect will have to deal with the pandemic first. And a divided Congress would make comprehensive reform more difficult."

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