

# 5 Reforms To Watch As The Immigration Debate Heats Up

By Abigail Rubenstein

Law360, New York (May 23, 2013, 8:57 PM ET) -- A Senate panel this week advanced an overhaul of U.S. immigration law, which is likely headed for a full Senate vote in June, but experts caution that the measure is still a long way from being signed into law and could undergo revisions that will affect employers. Here's what employers and their attorneys should keep an eye on as the bill continues to develop.

## Access to Lower-Skilled Workers

To address a void in the market for employers that can't locate lesser-skilled workers for essential positions in the U.S., the proposed legislation creates of a new category of visa, known as the W visa, for lower-skilled workers and their families. But, at least initially, the cap on the number of W visas available is small, so some fear that the number of available visas won't be enough to meet employers' needs.

"It took a long time for business and labor to come to a compromise on that part of the bill that each side thought was fair, but the big question is: Are the numbers going to be enough to adequately prevent illegal immigration and satisfy the needs of employers?" said Eleanor Pelta, a partner at Morgan Lewis & Bockius LLP and former president of the American Immigration Lawyers Association.

But help in that regard could also come from another portion of the bill not explicitly tied to employment: the proposed pathway to citizenship for the 11 million undocumented people already in the U.S. Giving these individuals work authorization would give employers a much larger pool of potential workers to pull from, lawyers say.

Still, this could also create some headaches for employers if current employees hoping to take advantage of the pathway to citizenship come forward and inform their employers of their undocumented status, so attorneys say employers should take note of any revisions that might include provisions to address this issue.

"Companies may be faced with knowledge that employees are undocumented and with having to terminate them immediately, unless the bill has a procedural safe harbor whereby actual knowledge of an undocumented worker is forgiven," said Ian R. MacDonald, the co-chair of Littler Mendelson PC's global mobility and immigration practice group.

## Access to Highly Skilled Workers

On the other end of the spectrum, the bill is also poised to make significant changes to the H-1B visa program for highly skilled workers, which employers that require such workers from abroad should be following, especially as these provisions of the bill have recently become the subject of intense debate.

The bill would help employers by raising the caps on H-1B, but it would also saddle employers using H-1B workers with increased obligations.

Before the bill passed out of the Senate Judiciary Committee, amendments proposed by Sen. Orrin Hatch, R-Utah, intended to make the new obligations more palatable to employers in the technology industry were adopted in order to shore up bipartisan support for the legislation before it goes toward the Senate floor.

The amendments raise the caps even more than the original bill did and call for a market escalator to raise or lower the caps depending on demand. They also lessened some of the original bill's requirements aimed at forcing employers to recruit U.S. workers for positions first and at ensuring that U.S. workers are not displaced by H-1B workers for employers who can show that less than 15 percent of their workforce consists of H-1B visa holders.

The changes to the bill engendered praise from technology industry associations, but also drew the ire of unions that have supported immigration reform, with the president of the AFL-CIO calling them "unambiguous attacks on American workers." As such, employers can expect to see battles over the H-1B issue as debate over the bill progresses, especially if it clears the Senate and is taken up by the House.

"Employers should keep an eye on the recruitment and nondisplacement measures in the House to make sure they don't become too restrictive," Pelta said. "There is the potential for the H-1B program to be laden with so many restrictions that it just dies a long, sad death, and it is a really important visa category."

#### E-Verify Obligations

Whatever changes are ultimately made to the bill, attorneys expect the mandatory use of E-Verify for all employers to remain a part of any final legislation as a means of rooting out illegal immigration.

While this heightens employer's compliance obligations, it should also preempt the patchwork of state laws that has developed concerning E-Verify, which has led to some confusion among large employers that span several states, according to Chris Thomas of Ogletree Deakins Nash Smoak and Stewart PC.

Employers should stay abreast of the dates and deadlines laid out in the bill for the use of E-Verify, especially since the new requirement is expected to take effect alongside an enforcement push, lawyers told Law360.

"There will be increased enforcement in all aspects of immigration law," Thomas said. "In the context of I-9 compliance and E-Verify, those who fail to participate can expect extreme fines and possible criminal prosecution."

Employers will also want to keep an eye on exactly what the final bill require of them, since this could have a big effect on how much the switch to mandatory E-Verify will impact them, attorneys say.

"Companies should closely monitor how E-Verify will be required, whether it will be by all companies for new employees or whether it will be increased to affect not only new but also existing employees, which would be a cataclysmic change in the U.S. workforce — particularly for companies with lesser skilled workers where there is a higher likelihood of undocumented workers," MacDonald said.

#### Industry-Specific Fixes

Employers should also be on the lookout for any discussions that touch on their specific industries as the legislation moves forward, lawyers say. This is especially important for employers in the high-tech industry, because parts of the bill are directly concerned with boosting the chances of employers for hiring foreign workers in the fields of science, technology, engineering and math.

The current bill carves advanced STEM degree holders out from visa quotas for some visa categories and confers new benefits on foreign graduates of U.S. institutions in STEM fields.

“Employers will want to make sure that the definition of STEM [in the bill] is broad enough to include all kinds of science, technology and math graduates,” Pelta said.

The version of the bill that made it through the Senate also includes a provision that permanently ups the number of waivers states would have to spare foreign-born doctors in a certain visa category from needing to return to their home county after two years.

And for businesses that cater to retirees or sell real estate in sunnier estates, lesser-known provisions of the bill granting a certain legal status to foreign retirees that purchase property in the U.S. could be a boon for business, lawyers say.

With so much contained in the 844-page bill, and even more expected to go into the legislation through amendments, employers should be aware of any provisions that could directly affect their industries and any changes to them as the bill advances, even if they aren't the parts of the legislation making headlines.

#### Green Card Availability

The bill includes provisions aimed at eliminating the severe backlog for employment-based green cards, which attorneys say makes it tougher for employers to recruit qualified foreign workers.

Those provisions including one that exempts certain groups from the annual numerical limits on employment-based immigrants. Those groups include families of employment-based green card holders; individuals of extraordinary ability in the sciences, the arts, education, business or athletics; outstanding professors and researchers; multinational executives and managers; doctoral degree holders in any field; and certain physicians.

Employers should be aware of any debates concerning the limits of these categories or the sheer number of green cards that will be made available, lawyers say.

Another effort to reduce the backlog that employers should be tracking is parts of the bill that would inject thousands of previously unused visa numbers from previous years into the system. Attorneys expect there to be a frenzy of filings as soon as new visa numbers become available, so employers should be ready to get file quickly to try to take advantage of the increase in available green cards.

“With the rapid elimination of the backlog, employers have to be in a position to file before the window closes, as it inevitably will,” Angelo Paparelli of Seyfarth Shaw LLP told Law360.

Keeping up with proposed changes to the employment-based green card system to be in a position to

best take advantage of them will be important not only for employers looking to bring on new employees from abroad, but also for those looking to take care of the employees they already have, lawyers say.

“This is going to be so important for employers to keep current employees happy, since at the moment the backlogs are so severe,” Thomas said.