LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com

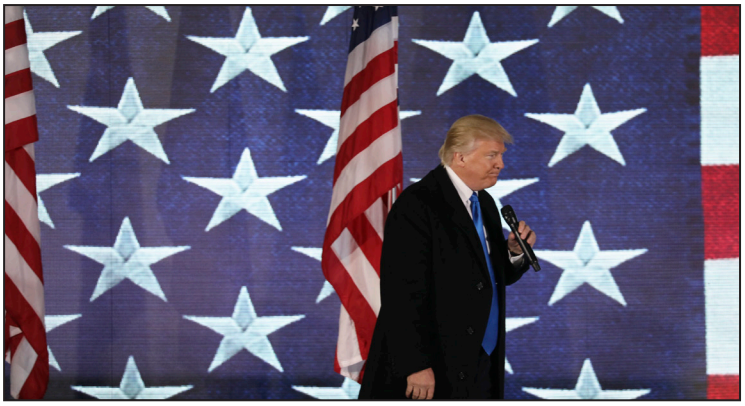
WEDNESDAY, MAY 24, 2017

PERSPECTIVE

Trump's America and employer concerns

By Angela S. Rho

Donald Trump's young presidency has proven to be action-packed and rife with controversial executive orders and proposed policies. Among the most relevant to California employers are the proposed legislation impacting immigration worksite enforcement actions, foreign-worker visas, and transgender employee rights and discrimination claims.



New York Times News Service

Trump speaks at the Lincoln Memorial, Jan. 19, 2017

Immigration Worker Protection Act

The Trump administration's unyielding efforts against illegal immigration may potentially ensnare California employers in the middle of a policy battle between California legislators and the federal government, and at the very least, would impose more onerous requirements on California employers.

Assembly Bill 450, the Immigration Worker Protection Act — proposed by assembly-member David Chiu (D-San Francisco), the Service Employees International Union (SEIU) California, and the California Labor Federation — represents the country's most aggressive challenge to Trump's anti-immigrant rhetoric and agenda. AB 450 seeks to protect employees from workplace raids taking place under the guise of immigration enforcement, many of which unlawfully violate employees' rights. Previously, Immigration and Customs Enforcement conducted workplace raids using narrowly tailored individual arrest warrants to question and detain every single employees at a worksite, irrespective of U.S. citizenship or legal status, violating employees' basic and fundamental constitutional rights.

AB 450 would also prohibit California employers from providing federal immigration enforcement agents access to employment records (including I-9 Employment Eligibility Verification forms) and worksites without a judicial warrant or subpoena. As a further deterrent, the proposed bill would also authorize the California labor commissioner to recover civil penalties ranging from $10,000 to $25,000 for employer violations of these new requirements.

Finally, AB 450 would require employers to provide at least 24 hours' written notice to both employees and the labor commissioner of impending immigration worksite enforcement actions (worksite audits or inspections, investigations, and/or raids). The employer would also be required to give the labor commissioner access to the workplace and allow the labor commissioner to conduct its own investigation. In the event a federal immigration enforcement agent appears at the worksite without 24 hours' written notice, the employer is required to immediately notify the labor commissioner and provide the labor commissioner access to the worksite to provide employees with protections afforded by the Constitution. An employer's failure to comply with these notice provisions would subject the employer to civil penalties ranging from $10,000 to $25,000. The employer's notice obligations would continue after a worksite investigation as well, with the employer being required to notify all affected employees of the results of the audit within 24 hours.

As currently proposed, AB 450 imposes significant obligations on California employers and a close eye must be kept on the legislative process to see whether the bill passes both houses before ultimately being signed into law.

"Buy American, Hire American" and H-1B Visas

On April 18, Trump signed the Buy American, Hire American order which he touted would eliminate abuse in the H-1B Visa program, which is designed to give American employers access to highly skilled foreign workers. H-1B Visas allow foreign workers with in-demand skills to spend up to six years working at a U.S. employer that sponsors them. H-1B Visas are especially popular for technology and engineering positions in Silicon Valley and San Francisco. Critics of the program argue that issuance of H-1B Visas have led to the replacement of U.S. employees by cheaper, foreign workers, while advocates of the program maintain that skilled foreign workers are needed to fill the gap left by lessskilled U.S. employees.

While the order itself was characteristically devoid of details, administration officials stated that the Homeland Security, Justice and Labor departments may be asked to scrutinize employers who "abuse" the visa program (defined as "to bring a worker not because you need their skills or talent, but for the purpose of undercutting the American worker") and to propose reforms to ensure that H-1B Visas are awarded to the most-skilled workers at the highest wage levels. Administration officials further intimated that H1-B Visa reform could include elimination of the random lottery system currently used to assign visas and increased fees for H-1B Visas.

Increased Number of H-2B Visas

Employers in need of temporary, seasonal workers for landscaping and hospitality jobs this summer may have an additional opportunity to hire H-2B Visa workers. The H-2B Visa program allows U.S. employers to hire foreign workers during peak seasons to supplement the native workforce, primarily in landscaping, forestry, hospitality and recreation jobs.

On May 4, Congress passed a federal spending bill that allows the Department of Homeland Security to increase the number of H-2B Visas available for fiscal year 2017, as long as the total number of visas doesn't surpass

past usage of the program (approximately 130,000). Congress has set the H-2B Visa cap at 66,000 per fiscal year, with 33,000 visas granted for workers who begin employment in the first half of the 12-month period (October 1-March 31) and 33,000 visas for workers who begin employment in the second half (April 1-Sept. 30). Any unused numbers from the first half of the year can be made available to employers seeking to hire H-2B Visa workers during the remainder of the year.

The H-2B Visa cap for fiscal year 2017 was reached on March 16, leaving no visas available until Oct. 1, 2017. According to the H-2B Workforce Coalition, because the cap was reached so early this year, "many small businesses faced the threat of not operating at full capacity during their peak season as they struggled to find the workers needed to support their full-time, domestic staff." The spending bill promises renewed life for landscaping and hospitality businesses dependent on foreign workers during the 2017 summer season.

Takeaways

Employers effected by any of the above legislation should consider performing an audit of their immigration and hiring practices to ensure that their policies are compliant with California Labor Code Section 1019, which makes it unlawful for employers to misuse employment authorization verification systems, threaten false reports to state or federal agencies, or threaten to contact immigration authorities. Moreover, employers should establish new policies and procedures to provide notice to employees and the labor commissioner of immigration worksite activity, and deny access of employment records and worksites to federal agents absent a judicial warrant or subpoena.

Transgender Employee Rights and Discrimination Claims

In *Gloucester Co. School Board v. G.G.*, the U.S. Supreme Court recently refrained from ruling on the legality of a Virginia school district's policy requiring students to use the bathroom of their birth sex. This was due to the Trump administration's reversal of federal guidance previously issued by the Obama administration specifying that Title IX of the Education Amendments Act of 1972 gave transgender students the right to use bathrooms corresponding with their gender identity. However, at the same time, the Trump administration also indicated that it did not plan to repeal President Barack Obama's 2014 executive order providing protections for gay, lesbian, bisexual and transgender employees of federal contractors.

Though it remains unclear how the new administration's conflicting message will affect transgender employees' rights, employers should carefully monitor these developments to ensure they comply with federal laws and regulations. It also remains unclear if there will be any potential discrimination claims against employers for violation of those rights. Employers should also remain mindful of California state laws which offer greater protections to affected employees.

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