

Will Trump's Immigration Stance Foil U.S. Revitalization Plans?

By Chako Perez and Brett Holubeck

While on the campaign trail, President Trump stumped for revitalizing the country's infrastructure and creating thousands of new jobs in construction and manufacturing. However, his intended follow-through changes to immigration law and reduction of refugee programs could conflict with those national rebuilding plans.

President Trump's 10-point immigration plan includes a call for a wall along the U.S.-Mexico border, terminating current amnesty plans that provide work benefits, and eliminating job and benefit magnets. Post-election comments and recent Executive Orders involving travel prohibitions and limits on refugee and visa programs point to President Trump following through on these campaign promises. Industry groups, however, caution that these actions could actually limit the construction industry's ability to meet his similarly important goal to rebuild America. In 2015, the National Association of Home Builders analyzed labor use in residential construction over a 10-year period, and concluded that the flow of the immigrant community is highly correlated with the booms and busts of single-family sales and starts. Any policies that result in the net loss of current and future immigrant workers would leave companies with few substitutes for a similarly skilled, reliable, and flexible workforce to meet future fluctuations in demand. The particular impact of these policies on the construction sector is magnified by an already shrinking pool of skill craft laborers, such as concrete workers and carpenters.

WORKPLACE INSPECTIONS

Further, President Trump's plans to curtail illegal immigration could place new obligations on construction employers and the likelihood of increased enforcement actions. In particular, President Trump called for nationalization of the E-Verify system, which would require employers to run new hire identities through Department of Homeland Security (DHS) and Social Security Administration databases. Although certain federal contractors have been obligated to do this for several years now, the residential and commercial construction industry has not faced this obligation. While some have voluntarily registered to use the automated system under the false hope that it guarantees Form I-9 compliance or that it keeps the company 100% free from

undocumented workers, unfortunately, this has not proven to be the case in practice.

One additional area of major significance to construction industry employers is the likelihood of renewed work-site enforcement through Notices of Inspection (NOIs) and renewed workplace raids by DHS. While such actions had been de-emphasized under the Obama Administration, they are likely to increase in the effort to deny jobs to undocumented immigrants and punish companies who employ them. This will renew the trend last seen with the Bush II Administration where the construction industry was a particular investigation target. It was not uncommon for these companies to not only be cited for their faulty Form I-9 records, but to also lose a large number of workers who could not pass DHS scrutiny. Those who were grossly negligent or who knowingly skirted the law also found themselves paying huge fines and even defending themselves against criminal charges.

PREPARING FOR THE NEW ENFORCEMENT PRIORITIES

With civil penalties now doubled to a minimum of \$216 for each incorrect Form I-9 found during a DHS Notice of Inspection (NOI), a good place to start is with an audit of existing Form I-9s and hiring practices to ensure the Form I-9 is being filled out completely and correctly. (The current version of the Form I-9 may be accessed at www.uscis.gov/I-9.) Any incomplete Form I-9 should be corrected to avoid these failures being used as evidence that the company had little regard for complying with its obligations against knowingly hiring undocumented workers. Companies who depend on second- or third-tier subcontractor companies should also work with those partners and competent legal counsel to ensure their practices do not put the company at risk of a DHS raid or sudden loss of labor.

Employers should also be aware of their state's discrimination laws to avoid going too far into inquiries of individual's national origin or work authorization that could draw a government investigation. For example, effective January 1, 2017, California now prohibits employers from requesting more documentation than is required under federal law, refusing to honor documents that on their face appear genuine, and restricts the ability to reinvestigate/re-verify

an incumbent employee's work authorization absent a legitimate, nondiscriminatory reason.

Front office and human resource staff should be aware of the protocol to follow in the event of any government visit—especially one involving DHS. Here are a few simple steps to follow in the event a company is served with an NOI:

If DHS personnel inquire regarding the employer's hiring practices, immigration policies, or business operations, staff should be trained to refer such questions to counsel.

While in some instances, DHS will secure a warrant for records and/or interviews, an NOI itself is not a warrant. As a result, the employer should not consent to any DHS interviews of supervisors without the presence of immigration counsel.

Nor should the employer consent to an immediate review of I-9 records during an NOI. Employers are allowed 3 days to provide their Form I-9 records and additional extensions are possible. This time will allow your counsel to audit the Form I-9s to understand any areas of concern and consult with the company on the next phases of the NOI process.

Although employers will welcome the more employer-friendly regulatory reforms already undertaken by the Trump Administration, all employers—including those in

the construction industry—should expect increased scrutiny and immigration enforcement activity. Employers should take this opportunity to be proactive, analyze their current practices, and make any necessary changes.



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