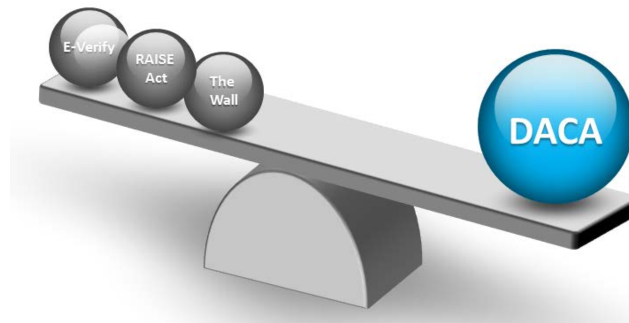
UNITED STATES

WHITE HOUSE IMMIGRATION PRINCIPLES: FIVE TAKEAWAYS FOR U.S. EMPLOYERS



OVERVIEW

On October 8, the White House released a list of immigration priorities that should be included in any legislation to codify the Deferred Action for Childhood Arrivals (DACA) program into law. The priority list makes no immediate changes to the immigration system and is instead intended to shape the upcoming legislative debate surrounding relief for DACA beneficiaries.

The White House legislative director stated on a call that the priorities are essential to mitigate the “legal and economic consequences of any grant of status to DACA recipients.” In his first public comments since being confirmed by the U.S. Senate, Director of U.S. Citizenship and Immigration Services (USCIS) Lee Francis Cissna stated that the changes to the legal immigration system are crucial because “American workers are getting deeply disadvantaged by the current status quo.”

The document released by the White House includes more than 70 unique proposals to reform the U.S. immigration system, including increased border security, new interior enforcement resources and authorities, changes to the asylum program, cuts in legal immigration, and the imposition of a points-based green card system. Several proposals, including reducing family-based immigration by half and authorizing state and local police to enforce immigration laws, have long been considered politically divisive.

What does this mean for DACA legislation? There is overwhelming political support to pass relief before that program expires in March 2018, and there is also widespread support to include *some* enforcement measures in a bipartisan package. The immigration principles the White House has now laid out certainly make those negotiations more difficult and, if pursued to their end, would greatly reduce the likelihood that Congress will enact relief for DACA beneficiaries before that program expires.

Copyright © 2017 Berry Appleman & Leiden LLP. Government immigration agencies often change their policies and practices without notice. Please check with your BAL representative to make sure you have the most recent document version. This document does not constitute legal advice or create an attorney-client relationship.

TAKEAWAYS FOR U.S. EMPLOYERS

The White House will seek to fund border security and immigration enforcement through increased fees on immigration applications.

Generally, immigration filing fees are set at a level to recoup actual processing costs. In 2010, Senator Chuck Schumer (D-NY) orchestrated a legislative deal that funded $600 million in border security through increased fees on companies that relied heavily on H-1B and L-1 visas. It is expected that the administration will pursue a similar model in the upcoming DACA debate and will seek to pay for increased border and interior enforcement through a levy on legal immigration filings. Irrespective of whether the fee increase is included in legislation, the administration is expected to publish a new fee rule in the near future. The agency will likely explore options to increase filing fees for companies that place foreign temporary workers at third-party worksites.

The White House will push for mandatory E-Verify for all employers.

All employers today must verify the identity and work authorization of every new hire in the U.S., but not all employers are required to use the federal government's online system, E-Verify, which verifies whether government databases show that the individual is work-authorized. The administration will seek legislation to make that system mandatory for all employers. The administration will also support preemption of state and local laws related to employment of unauthorized workers, a nod to business interests that seek a uniform national standard. However, the principles include no "safe harbor" for employers that do use the E-Verify system, meaning an employer would face continued liability risk for violations even if the company uses the system when hiring a new worker.

The White House wants additional authority to target employers that utilize work visas (e.g., H-1B and L-1) to replace U.S. workers.

Under current law, an H-1B dependent employer (i.e. more than 15 percent of workforce in H-1B status) is prohibited from replacing a U.S. worker with an H-1B worker. An exception to that prohibition exists if the H-1B worker is paid more than $60,000 a year. The White House is not proposing any changes to that statutory language, but would like increased authority to utilize anti-discrimination laws to target companies that prefer foreign workers or that replace U.S. workers with visa-dependent workers.

Increased legislative authority would greatly increase the ability of the Department of Justice, headed by Attorney General Jeff Sessions, to investigate and charge employers with discrimination based solely on how they use the H-1B program. It would also render all companies, including those that are not H-1B dependent or that are H-1B dependent and only use "exempt" H-1B workers who are paid $60,000 or more a year, subject to increased government oversight and enforcement activity based on how they utilize foreign workers.

The White House will advocate for a points-based green card system.

The White House previously endorsed the RAISE Act, which would reduce legal immigration and convert the existing green card system into a points-based system. The legislation, introduced by Senators Tom Cotton (R-AR) and David Perdue (R-GA), would define family members as spouses and unmarried minor children (of U.S. citizens and permanent residents) and would end immigration for all other family members. For employers, the RAISE Act would terminate the current preference category system, and every employee – including those presently in the green card system or backlog – would be required to qualify for a green card under the new points-based system. The White House principles make no mention of the RAISE Act (or any other specific legislation), but the substantive points listed in the document mirror the provisions in that Act.

Despite the White House endorsement, the RAISE Act has not gained momentum in Congress and does not have any additional co-sponsors in the Senate. For employers, the RAISE Act would not increase the number of available green cards and, in its current form, would harm many employees currently stuck in the green card backlog. The current version of the legislation does not sufficiently account for specific job needs of employers and is instead based primarily on the traits of the immigrant (e.g., education level, English-speaking ability, etc.).

Copyright © 2017 Berry Appleman & Leiden LLP. Government immigration agencies often change their policies and practices without notice. Please check with your BAL representative to make sure you have the most recent document version. This document does not constitute legal advice or create an attorney-client relationship.

The White House does not think it needs additional legislative authority to reshape temporary work or foreign student visa categories.

The principles released by the White House make no mention of temporary work visa categories (e.g. H-1B and L-1B) or foreign student visas (e.g. F-1). Employers and universities should not read that to mean the White House is any less focused on reforming those visa categories. The principles released by the White House are legislative proposals, and the White House does not believe it needs any additional authority from Congress to rescind or revoke the F-1 Optional Practical Training program or the H-4 spousal work authorization regulation. The administration continues to work behind the scenes on regulations and policy guidance to target those policies.

Questions or Inquiries?

Lynden D. Melmed
Berry Appleman & Leiden LLP
lmelmed@balglobal.com

Eileen Lohmann
Berry Appleman & Leiden LLP
elohmann@balglobal.com

Copyright © 2017 Berry Appleman & Leiden LLP. Government immigration agencies often change their policies and practices without notice. Please check with your BAL representative to make sure you have the most recent document version. This document does not constitute legal advice or create an attorney-client relationship.