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Federal Contractors May Face Immigration-Related Hiring Requirements and Barriers

By Paul R. Hurst, Elizabeth Laskey LaRocca, Dana J. Delott, and Caitlin Conroy*

This article discusses an Executive Order that could potentially lead to restrictions on the ability of government contractors and subcontractors to use foreign labor in the performance of government contracts.

With continuing high unemployment rates and COVID-driven economic woes, President Trump issued an Executive Order ("EO") that could potentially lead to restrictions on the ability of government contractors and subcontractors to use foreign labor in the performance of government contracts. Specifically, the EO (1) requires executive agencies to review and assess past contractor hiring practices, and (2) directs the secretaries of homeland security and labor to act to protect U.S. workers from any adverse effects of the employment or contracted use of specified foreign national workers.

REVIEW OF CONTRACTOR HIRING PRACTICES

Specifically, the order directs federal agencies to review, for fiscal years 2018 and 2019:

- Whether contractors (and subcontractors) used temporary foreign labor for contracts performed in the United States, the nature of the work performed by those workers, whether such hiring affected opportunities for U.S. workers or impacted national security.
- Whether contractors and subcontractors moved performance of contracts overseas and whether U.S. workers were affected by offshoring, whether affected U.S. workers were eligible for assistance under the Trade Adjustment Assistance program; and any potential effects on the national security caused by offshoring.

In addition, agencies must assess any negative impact of contractors'(and subcontractors') reliance on temporary foreign labor or use of offshoring

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practices on the economy, efficiency of federal procurement, and on national security and propose any necessary action to address those impacts. Agencies also must coordinate with the Office of Management and Budget to assess compliance with EO 11935 (Citizenship Requirements for Federal Employment).

The EO requires agencies to submit a report with the results of the review to the Office of Personnel Management ("OPM") within 120 days. The outcome of the report—which, notably, was scheduled for after the election—is an open question. However, in IT and other technical areas, it is common for employers to augment their workforce through sponsorship of foreign nationals within the United States, in addition to the use of offshore resources. In light of the clear disfavoring of these practices, a natural expectation is the enhancement of existing restrictions and compliance mechanisms. Potential areas for review include: E-Verify mandates, potential amendments to the Federal Acquisition Regulation ("FAR") restricting contractor reliance on foreign labor, more burdensome reporting requirements, and increased enforcement actions.

When forecasting the potential outcomes of the EO, it is important to also note a related development that was not widely reported. The EO came immediately after the Department of Labor ("DOL") and the Department of Homeland Security ("DHS") entered an immigration-sponsorship and compliance-related data sharing memorandum of agreement ("MOA").[1] Under this MOA, the DOL and DHS will establish processes to share information about employer-sponsorship petition records and data contained within the Office of Foreign Labor Certification's labor certification and labor condition application ("LCA") databases.

The MOA provides two federal agencies responsible for interrelated components of the employment-based immigration sponsorship process the tools for data mining and assessing employer sponsorship and compliance information. It also greatly enhances their ability to act upon suspected non-compliance, as the MOA empowers USCIS to refer suspected H-1B employer violations to the DOL.

MEASURES TO PROTECT U.S. WORKERS

The EO requires the secretaries of labor and homeland security to "take action, as appropriate and consistent with applicable law, to protect United States workers from any adverse effects on wages and working conditions caused by the employment of H-1B visa holders at job sites (including third-party job sites)" within 45 days. Both direct H-1B employers and secondary employers (third-party job sites) are subject to the EO. The H-1B category is appropriate

[1] https://www.dol.gov/newsroom/releases/dol/dol20200731.

for temporary, professional workers. It is widely used for IT professionals, researchers, and other degreed technical positions. As mentioned above, it is common within IT to supplement staff through the use of contracted workers who may hold H-1B status.

The EO provides that the DOL and DHS must take "measures to ensure that all employers of H-1B visa holders, including secondary employers," comply with specific U.S. wage level and worker protections contained in the Immigration and Nationality Act ("INA"). These protections are tied to employer attestations contained within a LCA filed with the DOL. Notably, LCA database information is included within the information sharing MOA, discussed above.

This pertinent section of the INA requires H-1B sponsoring employers to make attestations to the DOL, all designed to protect the U.S. labor market and wage levels. These include verification that the employer:

- Will pay the higher of the prevailing or the employer's actual wage paid to similar workers.
- Will provide working conditions for the foreign national that do not adversely impact other workers.
- There is no strike, lockout, or work shortage.
- The employer has complied with LCA notice requirements to employees or employee representatives.

Under current regulations, in very limited situations, employers are also required to make attestations as to non-displacement of U.S. workers both within the H-1B sponsoring employer's workforce as well as the workforce of any secondary employer. Where such attestations are required, good faith efforts to recruit U.S. workers for the position are also required.

EXPECTATIONS AND ACTION ITEMS

The EO directs reviews of past contracting practices and current H-1B related U.S. worker protections over a period of 120 and 45 days, respectively. As such, the EO does not set forth any specific action items or mandates for government contractors or subcontractors. However, the EO indicates government contractors and subcontractors can anticipate inquiries from government auditors related to their use of temporary foreign workers in the United States and/or offshore workers.

As a result, contractors should be prepared to share information and documentation with contracting agencies related to their FY 2018 and 2019 reliance on temporary foreign workers to perform federal contracts (both in the

United States and abroad). This documentation should include an explanation of why the contractor required foreign labor and any supporting documentation. Contractors must consider that their use of foreign workers could include the workforces of companies with which they contracted for supplemental staff. Contractors should review their compliance protocols related to hiring, outsourcing, and contractual staff augmentation. Moreover, in light of the impact of COVID-19 on the U.S. economy, and the EO's clear focus on the protection of the U.S. labor market, contractors also should consider their current practices with respect to the use of foreign labor and evaluate their current justification and need for the continued use of foreign labor.

With respect to the H-1B related EO provisions, in addition to the expectation of enhanced monitoring and enforcement, what is most notable is the focus on secondary employers (third party worksites). These common third-party H-1B arrangements have long been an immigration restriction target. To that end, one of the results of this EO may be the addition of secondary employer attestations matching or similar to what is required of H-1B petitioning employers. This would potentially impose new accountabilities, compliance requirements, and liabilities on the third-party worksite employer.

Under current regulations, the LCA notice requirements extend to the worksite location—including third party worksites. Under the Trump Administration, the LCA was updated to require the sponsor to specify whether the H-1B employee would be placed at a secondary entity. In such instances, the LCA captures the name and location of the secondary entity. This, along with the enhanced data sharing under the MOA makes it much easier to identify the placement of H-1B workers with federal contractors and subcontractors and to execute on any enhanced compliance measures.

As an overarching consideration, federal contractors and subcontractors need to evaluate how this EO may impact their ability to staff, perform, and compete for federal contracts. The EO review of foreign national hiring and staffing practices and the emergence of a coordinated information sharing effort on the part of DOL and DHS drives home the point that federal contractors must assess both their level of reliance on foreign workers and the robustness of their related compliance regimes. The EO signals that federal contractors and sub-contractors should take proactive measures to mitigate disruption and potential enforcement action through self-assessments of hiring and staffing practices, self-audits of compliance-related records, establish or update best practice policies and procedures, and assure that the organization meets legal requirements with respect to immigration, employment, and government contracts.

While the EO is preliminary in nature, the legal areas at issue—government contracts and immigration—are already highly regulated. This provides multiple platforms for implementation of enhanced restrictions and compliance protocols—all aimed at reducing the ability of employers to draw upon foreign national labor sources. It follows previous EOs broadly restricting U.S. immigration based upon the state of the U.S. economy. However, notably, each of those restrictions also provided for exceptions for those who can establish that they provide an economic benefit.