



Five Months In – Trends in Regulations, Enforcement and Ag Labor Issues

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As the country approaches the five-month point in the Trump Administration, we can look back on current trends in regulations and enforcement activities, and look ahead to what these changes and future changes might mean for agricultural labor issues. Key positions in the Administration have nominees but are yet to be filled – including Administrator of the Wage & Hour Division (WHD) and U.S. Citizenship and Immigration Services (USCIS) Director, with no nominee for Assistant Secretary for the Employment and Training Administration (ETA) – and the process of developing and implementing policies is still in its early days. Early signs suggest trends, however, and we will continue to work with NCAE to provide updates as more information becomes available.

On April 18, 2017, President Trump signed an Executive Order (EO) on “Buy American and Hire American.” In that EO, the President signaled a policy goal “to create higher wages and employment rates for workers in the United States, and to protect their economic interests” to be achieved through a policy “to rigorously enforce and administer the laws governing entry into the United States of workers from abroad.” The Secretary of State, Attorney General, Secretary of Labor, and Secretary of Homeland Security were specifically directed to “propose new rules and issue new guidance” to protect the interests of U.S. workers in the administration of the immigration system, including preventing “fraud or abuse.”

Labor Secretary Acosta was sworn-in on April 28, 2017, and on June 6, 2017, he issued a press release titled “US Secretary of Labor Protects Americans, Directs Agencies to Aggressively Confront Visa Program Fraud and Abuse.” In that statement, Secretary Acosta announced that he had conducted a thorough review of DOL’s foreign worker visa programs and called for vigorous enforcement of existing laws, “including heightened use of criminal referrals.” Specific enforcement proposals include:

- Directing WHD to use “all its tools” in conducting audits.
- Directing ETA to develop proposed changes to labor certification application forms.

- Directing ETA and the Solicitor’s Office to coordinate enforcement activities and make referrals of criminal fraud to the Office of Inspector General.
- Establishing a working group within ETA, WHD and the Solicitor’s Office to supervise this effort, coordinate enforcement, and avoid duplication of efforts.

DOL will also coordinate with the Departments of Justice and Homeland Security to investigate and detect visa program fraud and abuse. Secretary Acosta also stated that DOL has “begun to prioritize and publicize the investigation and prosecution of entities in violation of visa programs.”

Among those investigations the Department is “publicizing” involves G Farms of Arizona. In that case, the H-2A employer is accused of housing its workers in shipping containers in “illegal and life-threatening housing.” The allegations in that case will need to be proven at trial but are certainly outside the behavior that any NCAE member would find acceptable. The Department secured a preliminary injunction against the employer – the first such case in which DOL has done so.

In another case involving outrageous factual allegations and relatively new enforcement techniques, an unregistered farm labor contractor in Fresno, California was arrested and charged by the Fresno County District Attorney with six felony counts of human trafficking and extortion involving three workers from Tijuana, Mexico. The accused allegedly kept the workers visas and passports and made “direct or implied threats of physical harm and threats to report them to immigration.” It is not clear whether the workers came to the U.S. on H-2A visas or entered the country on some other visa. Human trafficking investigations have typically focused on prostitution and child labor situations; relatively few prosecutions have been brought against agricultural employers involving migrant farm workers. Last week, Attorney General Sessions told a conference law enforcement officials that DOJ would make fighting human trafficking a top priority.

Immigration enforcement, particularly interior enforcement by Immigration and Customs Enforcement (ICE), was a cornerstone of the Trump campaign and has been one of the most public exercises of the new administration’s power so far. In Congressional testimony on June 13, 2017, acting ICE Director Thomas Homan described significantly increased immigration enforcement activities already in place and in the coming months, as to both criminals and non-criminals in the U.S. illegally. Arrests of non-criminal aliens during the first three months of the new administration are 157% higher than the same period in 2016. Acting Director Homan specifically told those in the country illegally that “You should be uncomfortable, you should look over your shoulder and you need to be worried.” The President’s Budget, provided to Congress last month, calls for significant increases in

funding for border operations, ICE enforcement, and beds in detention centers for those arrested and awaiting deportation.

In a piece of potentially good news for employers, particularly those in labor-contractor or H-2ALC relationships, WHD announced on June 7, 2017 that it was formally withdrawing the Obama DOL's 2015 and 2016 guidance on joint employment and independent contractors. That guidance had expanded the application of the *Browning-Ferris* decision by the National Labor Relations Board to employment law, generally, and would make many more entities into "employers" with all of the requirements to employees that come with that status. By withdrawing the Obama DOL guidance, WHD signals that it will apply the longstanding interpretation of "joint employment" under which an "employer" has the ability to hire, fire, discipline, direct, and pay employees, a significantly more narrow definition than was briefly in place under WHD for the past year or two. WHD's announcement states that this interpretation will apply to "joint employment" determinations under the FLSA and MSPA.

Overall, the trends discussed during the months-long campaign for the White House have been borne out: protecting U.S. workers from foreign competition, generally pro-business policies, and aggressive immigration enforcement. In industries like agriculture, where the immigration policy and employment policy inevitably intersect, this can lead to difficult situations for employers. Going forward, NCAE will be at the forefront of these issues and we will continue to work together to navigate these new waters.