



Executive Actions Relating to Immigration

There have been four Executive Orders (EO), one Presidential Memorandum, two agency memoranda, and two public releases of draft Executive Orders since President Trump took office in January that address issues related to immigration laws. The Orders, Memoranda and draft Orders address issues related to both lawful and unlawful entry to the United States. The Presidential Memorandum addresses the federal workforce. While it is not entirely clear what impact these executive actions will have on the Agricultural Workforce, they are important to monitor and to understand if only to be able to allay employer and employee concerns. This memo outlines each action and describes the potential impacts of implementation. It is also important to note that Executive Orders themselves while detailing policy directives, cannot be implemented and thus fully understood without additional action and guidance by the agencies named in the Orders.

I. Executive Order 13769

Issued on January 27, 2017, EO “Protecting the Nation from Foreign Terrorist Entry Into the United States” is more commonly referred to as the travel ban. Consisting of eleven separate sections, we believe two sections could have an impact on the expense, and timely entry of workers entering on a non-immigrant visa namely H2A or H2B.

Section 7 of the EO directs the Secretary of Homeland Security to expedite the implementation of a biometric entry-exit tracking system for all who enter the US on non-immigrant visas. The industry generally supports such a system as a mechanism for ensuring integrity in the worker visa programs.

Section 8 of the EO directs the Secretary of State to immediately suspend interview waiver programs and ensure that everyone seeking a non-immigrant visa undergo an in-person consular interview. Currently an H2A worker who has entered in a prior year and is entering to work for the same employer is waived from the consular interview. The elimination of this provision could result in extended processing times and the delayed entry of workers with visas. This order is presently enjoined from implementation by court order but a replacement order is expected in the next week.

II. Executive Order 13767

Issued on January 25, 2017, EO “Border Security and Immigration Enforcement Improvements” is more commonly referred to as the wall EO. Consisting of 17 sections we believe three sections could have a potential impact on the agricultural workforce.

Section 6 terminates the procedure known as “catch and release” and orders the continued detention for all individuals suspected of entering without inspection or proper documents. The previous policy allowed for the release of individuals with order to appear for processing at a future date due to lack of detention space and the long backlog of immigration hearings. Individuals presumably continued working during this time period, which could be as long as 18 – 24 months. Under the EO policy these individuals will remain detained upon apprehension.

Section 8 directs the Secretary of Homeland Security to hire 5,000 additional Border Patrol agents as soon as practicable. Additional agents could lead to more widespread status checks and worksite enforcement in areas in proximity to the border, which could have a disruptive impact on the agriculture workforce.

Finally, Section 11 directs the Secretary of Homeland Security to conduct additional training for its entire personnel on the recognition of activity prohibited by the William Wilberforce Trafficking Victims Protection Reauthorization Act. While focused primarily on the protection of unaccompanied minors, the prevalence of minor children in farm worker family environments could lead to increased scrutiny by overzealous DHS personnel.

III. Executive Order 13768

Issued on January 25, 2017 EO “Enhancing Public Safety in the Interior of the United States” is commonly known as the deportation force EO. Consisting of 18 sections there are four sections that may impact both agricultural employers and employees.

Section 5 prioritizes the grounds for deportation for both individuals who entered without inspection and those who are permanent residents. While similar to the priority enforcement for criminal aliens under the previous

Administration, the grounds are expanded beyond conviction of criminal acts to being charged with an offense. The EO also includes document fraud in connection with “any official matter or application before a government agency”. The expanded categories may impact lawful permanent resident workers, workers with non-immigrant visas and certainly those who entered illegally who are employed in agriculture.

Section 6 directs the assessment of all fines and their collection from those who “facilitate” the presence of aliens who entered unlawfully. This could be implemented to be directed at employers who have had multiple I-9 violations or engage in worker recruitment activities as part of a facilitation argument. In this vein, employers could be targeted under section 11 which directs the Attorney General to devote adequate resources to the prosecution of criminal immigration offenses. It is important to note that the Immigration Reform and Control Act of 1986 created a criminal charge for the “pattern and practice” of hiring unauthorized aliens.

Section 7 of the EO directs the Secretary to take all appropriate action to hire 10,000 additional Immigration and Customs Enforcement (ICE) officers. This force enhancement could result in a significant increase in I-9 audits and worksite investigations of immigration laws.

Finally, Section 10 rescinds the Priority Enforcement Program contained in the 2014 administrative action and reinstates the Secure Communities program. The Secure Communities program encourages coordination with local law enforcement as a tool for force enhancement for the enforcement of immigration laws. Many local jurisdictions could be deputized to act as immigration officers, providing greater capability to investigate and remove individuals not lawfully resident. This enhanced force could impact the agricultural workforce. It could destabilize current workers and inhibit the entry of new workers.

IV. Executive Order 13773

Issued on February 9, 2017, the executive order titled “Enforcing Federal Law with Respect to Transnational Criminal Organizations and Preventing International Trafficking” does not on its face seem to impact the agricultural workforce or employers. However, it could be implemented in such a manner to cause greater scrutiny on employers with a predominantly foreign-born workforce. Activist groups have increasingly tried to link

employment with trafficking. Litigation and proposed legislation attempt to hold employers liable for recruitment violations or abuses occurring outside the U.S. under existing trafficking laws.

V. President Memorandum: Hiring Freeze

Issued on January 23, 2017, the memorandum on the hiring freeze is not considered an executive order as the President has direct hiring authority. The freeze provides that no vacant positions as of January 22, 2017 may be filled and no new positions created. National security and military personnel are exempt, so the Department of Homeland Security's hiring of agents and officers directed by the executive order is not impacted. However, there are many other positions that impact the ability of employers to obtain workers when needed under the H2A and H2B visa programs. Also, farm labor contractors who transport workers must obtain inspection certificates from the Federal Motor Carrier Safety Administration local offices. Any freeze or reduction of personnel could impact timely responses and thus the availability of a workforce when needed.

VI. Department of Homeland Security Secretary Kelly Implementation Memos

Issued February 20, 2017, the memos are the first agency guidance issued on any executive order and provides guidance on how the Department of Homeland Security intends to implement Executive Order 13768 – Enhancing Public Safety in the Interior of the United States – and Executive Order 13767 - Border Security and Immigration Enforcement Improvements.

As the first agency guidance, these memos offer the clearest view to date on the practical impact of the executive orders. The interior enforcement guidance reiterates the categories of criminal activity for deportation priority. It does not terminate the 2014 administrative actions on DACA and DAPA, but it prohibits the utilization of parole authority for any other than humanitarian purposes on a case-by-case basis. It reiterates the Secretary's intent to hire 10,000 ICE officers but acknowledges that such activity is subject to resources and appropriations. The Secretary also requires ICE, CBP, and CIS to issue guidance and regulations on fines and penalties, which could include enhanced I-9 audits and investigations.

The guidance appears to advise the field that their focus should be on identification and removal of unauthorized aliens, not on the equities of the employer or individual. This could signal a change from the cooperation since 2014 between DHS and the agriculture industry to minimize disruption and stability in the workforce, but it is too early in the guidance and implementation process to tell.

The remainder of the guidance focuses on federal/local law enforcement agreements and the treatment of “sanctuary cities.” These policies may have an indirect impact on the agriculture workforce to the extent that local law enforcement expands its authority for immigration enforcement and results in worker uncertainty or disruption.

The border security guidance expands on the discussion of ending the “catch-and-release” protocol, calls for hiring additional immigration judges, asylum officers, and CBP agents/officers, expanding “expedited removal” under the INA, and putting in place plans to shift personnel and resources to the border for construction of the wall and enforcement against illegal entries.

VII. Draft Orders

Two additional Executive Orders have been publicized in draft form. It is unclear whether these documents reflect a final determination of policy or whether the orders will be finalized at all. Many policy positions are proposed in the early days of an administration that never become final policy. With that caveat, the draft orders are included in this memo only to demonstrate that certain views exist within the current administration.

A January 23, 2017 memorandum for the president previews a draft executive order entitled “Protecting American Jobs and Workers by Strengthening the Integrity of Foreign Worker Visa Programs.” This order would impact employers who utilize the H2A and H2B programs, the H1B program, and the J and L visas.

The draft order would limit the issuance of work permits, terminate actions designed to avoid immigration caps, align non-immigrant visa programs with Congressional intent, identify ways to expand E-Verify and establish a commission to study and recommend changes to the immigration program.

This draft order focuses on the legal immigration programs, including the work visas. It would direct the Secretary of Labor to initiate an investigation of the extent of injury to U.S. workers caused by temporary foreign workers. It would limit the issuance of work permits to individuals waiting for legal permanent residence by defining when a visa should be considered available. It requires a report on the impact of immigration on wages and working conditions and increased focus on receipt of public benefits as a ground for deportation.

If the draft were to become finalized in its current form, it could have an impact on the work authority of many employed in agriculture. It also seems to encompass a pre-conceived notion that temporary foreign workers negatively impact U.S. workers. This could threaten the future viability of the H2A program by forcing employers to increase wages or provide greater benefits than already required.

The other draft executive order, also dated January 23, 2017, describes itself as “Protecting Taxpayer Resources by Ensuring Our Immigration Laws Promote Accountability and Responsibility.” This draft order calls for the identification and removal “as expeditiously as possible, any alien who has become a public charge and is subject to removal” and to “seek reimbursement from all sponsors of immigrants for the costs of Federal means-tested public benefits provided to sponsored immigrants” and from the sponsors of such immigrants. This draft order would also direct the Secretary of Homeland Security to assess the extent to which aliens and/or immigrants are utilizing public benefits and to prioritize the potential need for such benefits when considering whether to admit an individual to the US.

General Guidance

The same general advice that has always guided employers on this subject applies with equal strength now. Employers are always well served by establishing careful and consistent practices for preparing Forms I-9 for new hires, training your HR staff on the requirements for the I-9 process and using the most current forms, preserving your documents, and conducting self-audits of those records. In the event of audits or raids, having proper documents and knowing one’s rights and duties offer the best protection for the agricultural employer. This is a continuously evolving area, and we and NCAE will continue to track the changes that may affect ag employers.