



Labor & Employment Law News

September 2010

IMMIGRATION FOCUS 2010

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Arizona S.B. 1070 Update; Virginia AG Okays Immigration Status Checks by Police

With just hours to go before Arizona S.B. 1070 was slated to go into effect, federal district court judge Susan Bolton issued a preliminary injunction halting the enforcement of major sections of the new Arizona law. Judge Bolton granted the preliminary injunction at the request of the U.S. Department of Justice (DOJ), one of eight plaintiffs who filed suit challenging the constitutionality of the law. DOJ had asked the court to find that the law unconstitutionally preempted federal immigration law and policy, and encumbered the federal government's enforcement efforts.

Judge Bolton's 36-page decision (*U.S. v. Arizona*) found that DOJ has a high likelihood of success on the merits of the law suit and thus issued the injunction. The most notable part of the law halted from taking effect was the so-called "papers, please" provision, which required police officers to inquire into the immigration status of any individual whom they have a reasonable suspicion of being in the country unlawfully. Judge Bolton held

that this provision would likely fail because it places an extreme burden on federal immigration resources by requiring the status checks on many more people. In this way, she ruled, it impermissibly redirects precious resources from the stated priorities of the U.S. Department of Homeland Security to the day-to-day operations of Arizona law enforcement.

Following similar logic, the injunction enjoined other provisions that would make it a state crime for a foreign national to be in the country without documentation, to fail to carry immigration papers, or to work or apply for work without authorization.

Still, Judge Bolton upheld several sections of the law, including a provision that makes it a state crime to knowingly transport, harbor, or shield undocumented immigrants. That section likely did not encumber federal immigration enforcement, she ruled, allowing it to go into effect.

Meanwhile, on the other side of the country, Virginia Attorney General Ken Cuccinelli thrust his state into the center of the national debate on immigration only a

few days after the issuance of the preliminary injunction in Arizona. In a July 30th advisory opinion, Cuccinelli advised that existing Virginia law allows for police officers to check the immigration status of anyone stopped by the police for any reason, as long as it does not extend the duration of the stop. While Cuccinelli's interpretation is less stringent than portions of the Arizona law enjoined by Judge Bolton, it still represents a major departure from common practice of police officers throughout the country.

Beyond mere inquiry by officers, Cuccinelli's memo also authorizes the arrest and detention of individuals who are suspected of committing federal criminal violations — for example, undocumented entry — but stops short of authorizing arrests for federal civil violations such as overstaying a visa. The opinion does not attempt to explain how officers could distinguish between civil and criminal violations, or what type of information could lead to a suspicion of a criminal, rather than civil, violation.

The opinion, issued amid growing national debate and in the wake of the Bolton injunction, proves that immigration will continue to be a hot button issue heading into the fall midterms. Over the next several weeks and months, expect legal challenges to the constitutionality and validity of the Cuccinelli memo. A Ninth Circuit hearing on the merits for the Arizona law is slated for November. Further, at least 20 states have introduced Arizona-style legislation that will be considered in the fall term.

New \$14 Fee for Visa Waiver Travelers Announced

On August 6, the U.S. Customs and Border Protection agency announced the implementation of a \$14 fee beginning September 8 for applications made through the Electronic System for Travel Authorization (ESTA). This fee affects all travelers visiting the United States under the Visa Waiver Program, which is available to nationals of 36 countries for visits of 90 days or less. Travelers in possession of a United States visa or already with an approved ESTA will not need to pay the fee, however, they will be subject to the fee when applying for a new ESTA. ESTA authorization is good for two years. The fee can be paid by credit or debit card.

Immigration Enforcement Intensifies: Updates on Removals and Enforcement Initiatives

As part of the Administration's effort to remake the enforcement of immigration laws, the Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE), and the Customs and Border Protection (CBP) have aggressively stepped up various enforcement activities, including a 10 percent increase in deportations (400,000 people are expected to be deported in 2010), a quadrupling of employer's audits from 2008 to 2010, the use of fingerprinting of people in custody to identify deportable immigrants through the expanded Secure Communities Project, and the deployment of some 1,200 National Guard troops to the southwest border.

Worksite Enforcement

Another tactic designed to beat back illegal immigration is the continuation of stepped-up worksite enforcement. Contrary to previous policies that focused on individual workers and factory raids to sweep up dozens or hundreds of workers at one time, the Obama Administration has shifted its attention to the individuals and institutions who knowingly flout the law and hire undocumented workers. In just the first six months of 2010, there were nearly twice as many successful prosecutions against employers than in all of 2009, and three times as many investigations and audits than in all of 2008. (The government has now audited some 2,900 companies, assessing over \$6 million in employer sanctions-related fines.)

National Guard Enforces Southwest Border

And, finally, the Obama Administration began deploying 1,200 National Guard troops to the southern border to provide direct support to federal law enforcement officers and agents working in high-risk areas. The first troops, stationed on August 1, will be strategically deployed to target criminal drug and human smuggling operations across the Mexican border with Texas and Arizona. Over the next four weeks, the rest of the troops will be trained and placed in high-risk locations along the border. The troops also come with \$47 million in federal grants to pay for the opening of new CBP offices and training facilities, as well as a cash infusion to repay states for overtime and use of local resources.

Obama and Fixing the Immigration System: Where Are We and What Can We Expect?

The above articles make clear that immigration issues are front and center. But, what does this mean for the enactment of comprehensive immigration reform and when can we expect such reform?

All agree that comprehensive immigration reform will not happen before the November mid-term elections. And, despite rumors that the Democrat majority in Congress could use a lame duck session of Congress to move through immigration reform, there is little hope of that happening. So, what's the new timetable? There isn't one; the schedule for reform all depends on the make-up of the next Congress.

For his part, though, President Obama continues to make clear that he supports immigration reform but that reform cannot happen without bipartisan support. And, although he has set no particular new timetable, he is trying to continue the momentum, create political courage, as well as set the stage for success come January 2011.

In a July speech at American University in Washington, President Obama appealed to both parties in Congress to come together to fix a broken immigration system. But the President acknowledged, as he had done repeatedly in the past, that reform cannot pass without Republican votes. "That," he said, "is the political and mathematical reality." And, Republicans are not likely to come onboard until the borders are secured and our enforcement policy is improved. So, are the Administration's record enforcement activities all politics? Will these improvements persuade Republicans to support comprehensive immigration reform? Will this be enough to get 60 votes in the Senate and 218 in the House for comprehensive reform in the 112th Congress? Until such time, can anything be done? Yes, lots.

While we wait to see how the politics of immigration reform play out, much can be done to address many pressing problems. The government (USCIS) has the authority to fix a number of procedural and legal interpretations that serve to restrict immigration benefits — benefits that are provided for in current law. In fact, a now much-publicized policy memorandum from top-level USCIS staff details a number of far-reaching administrative fixes that USCIS could take to alleviate immigration pressures on certain individuals, promote family unity, and foster economic growth in the absence

of comprehensive immigration reform. Ideas include amending the unlawful-presence policy for adjustment of status applicants, expanding the doctrine of "dual intent" to additional nonimmigrant visa holders, and expanding the availability of premium processing to more types of visa processing.

Nevertheless, comprehensive, sensible immigration overhaul will not be possible without new law, and new law will not be possible without real leadership from the White House as well as members of Congress from both sides of the aisle. In the meantime, the country continues to overheat from tremendously frustrating gridlock.

State Department Moves to Electronic Form for Immigrant Visas at Consular Posts

In a rule promulgated in early August, the Department of State (DOS) is implementing its transition to the use of an electronic application process for immigrant visa applicants, Form DS-260, which will eventually replace the current paper-based application process, Form DS-230. The new form is designed to be completed and signed electronically. While the general procedure remains the same, immigrant visa applicants will complete and submit the form online, enabling the National Visa Center and consular officer to review all information entered into the DS-260 at the time of application processing and interviewing. Applicants will no longer be required to print a form to take to the visa interview. By signing the DS-260 electronically (*i.e.*, clicking on the "Sign and Submit Application" button), the applicant will certify that the information provided is correct and will be bound by that information. At the time of the interview, applicants also will be required to swear under oath to statements contained on the DS-260 and to provide a biometric signature in connection with the oath.

While third parties such as attorneys may continue to assist an applicant in the preparation of the DS-260, the applicant must electronically sign and submit the new form. DOS advises that it will continue to accept the DS-230 when necessary, but green card applicants should expect to use the new form going forward.

A similar electronic form for nonimmigrant visa applicants, Form DS-160, has been in use for several months now at U.S. consulates worldwide.

“I Forgot to Turn in My I-94 Form! What Do I Do?”

Occasionally, a nonimmigrant visa holder forgets to relinquish his or her I-94 (Arrival/Departure Record) when departing the United States. In such instances, it is possible that the individual’s departure was not recorded properly, and CBP may conclude that he or she remained in the U.S. beyond the authorized stay. If this happens, the next time the person attempts to enter the U.S. the visa may be subject to cancellation or the person may be returned immediately to his or her foreign point of origin. What’s the person do to?

The U.S. Customs and Border Protection (CBP) provides the following advice: If the departure was by a commercial airline or cruise ship, the departure from the U.S. can be independently verified, and no further action is necessary. (Nevertheless, holding on to and presenting, if necessary, the outbound boarding pass can help expedite reentry in the U.S.) If, however, the departure was by land, private vessel, or private plane, the individual should take steps to correct the record. CBP further cautions that under the Visa Waiver Program (VWP), visitors who remain beyond their permitted stay in the U.S. cannot reenter the U.S. in the future without obtaining a visa from a U.S. consulate. (VWP travelers who enter Canada or Mexico by land for an onward flight should, in particular, register

their timely departure if their green I-94W was not taken when they exited the U.S, which often is the case.)

For those who fail to turn in their I-94 Departure Record, send the I-94 along with any documentation that proves the departure from U.S. to: DHS-CBP SBU, 1084 South Laurel Road, London, KY 40744. *Do not mail to a U.S. Consulate or Embassy.* CBP will consider a variety of information that proves departure from the U.S., including original boarding passes, entry stamps to another country, subsequent paystubs from abroad, bank deposit records showing transactions abroad, school records from abroad, credit card receipts showing purchases made abroad, etc. The Kentucky office above does not answer correspondence, so such individuals are advised to keep copies of documentation submitted to correct their record.

Senate Votes for Increase in Certain H-1B and L-1 Filing Fees

On August 5, the Senate passed a \$600 million emergency spending bill aimed at improving border security. In order to fund the legislation, the measure includes provision for significantly higher filing fees on many IT staffing companies as well as other companies with large numbers of foreign workers. Further action is required by the House of Representatives before it can be sent to the President for signature.

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