ASAP™ A Littler Mendelson **Time Sensitive** Newsletter

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Comprehensive immigration reform bill proposes sweeping changes that would impact U.S. companies.

Littler Mendelson is the largest law firm in the United States devoted exclusively to representing management in employment and labor law matters.

Global Edition

A Littler Mendelson Newsletter specifically for the Global Industry

Impact Analysis of Comprehensive Immigration Reform Senate Bill

By Bonnie K. Gibson

Since our last ASAP announcing that the Senate bill was proceeding to the floor for debate and amendment, two significant amendments have passed. On May 23 the quota for the new guest worker visa was reduced from 400,000 to 200,000. On May 24, the Senate approved an amendment to increase the existing H-1B education and training fee from $1,500 to $5,000.

The following is an analysis of the major provisions of the bill and their impact.

Non-Immigrant Issues

H-1B Cap and F-1 Students

H-1B Cap: increased to 115,000, and adjustable in subsequent years up to 180,000

20,000 advanced U.S. degree set-aside H-1B cap remains

F-1 Optional Practical Training ("OPT") increased 24 months for Science, Technology, Engineering, Mathematics ("STEM")

Immigrant intent allowed for STEMs

The increase likely would not be enough for nationwide quota demand, but depends upon how much demand for H-1Bs is reduced by the new ability of some in OPT to apply for permanent residence without first changing status to H-1B. It seems likely that young STEM employees with graduate degrees will easily have enough points in the merit-based permanent residency system to bypass the H-1B, however, it is hard to predict with any accuracy the overall impact on H-1B demand.

For specific examples of how the merit-based points system will be applied, see examples at the end of this document.

Burdensome H-1B LCA Changes

While a company's need for H-1Bs might be dramatically reduced by OPTs applying directly for permanent residency, the imposition of recruitment and displacement attestations would be burdensome for the remaining H-1Bs. It is ironic that after eliminating the role of the U.S. Department of Labor in Labor Certifications for permanent residence, similar recruitment and displacement provisions would reenter the system for a mere temporary visa status.

While many companies do recruit U.S. workers, the audit files that would need to be kept are burdensome and the requirement that "equally" qualified U.S. workers must be favored is too vague a standard for real world hiring. This would likely have a chilling effect such that only clearly superior H-1Bs would be hired over U.S. Workers. The displacement provision also does not comport with business reality because it shuts down H-1B hiring following standard workforce adjustments that are a constant feature of many corporations' continual fine-tuning. The audit files are also burdensome to maintain.

Degree Equivalencies

Degree equivalencies that use work experience to equate to a degree are no longer permitted.

Merit-based Point System for Immigrant Visas

Examples of the point system are at the end of this section

This point system probably would make the permanent residency process less expensive and streamlined for many employees (depending on the ultimate quota supply and demand and the profiles of the companies' applicants), but even if that is the case there is likely to be uncertainty or impossibility for

some employees (presumably those without graduate degrees, and/or not in STEM or specialty occupations (as defined by H-1B law)). Uncertainty is disruptive to business planning. And the presumed need to hold the applications until the end of the year and adjudicate in bulk prolongs uncertainty.

Additional Visas Provided to Clear Backlog

During the first five years of the new law, an additional 90,000 visas will be allocated specifically to eliminate current backlogs. This could carry into years six to eight, depending on the need.

This system could work well for some companies if there are enough visa numbers: the permanent residency process would be cheaper and streamlined, and the H-1B process could often be entirely bypassed. But if there are not enough visa numbers, then applicants without high enough point totals might never qualify for permanent residency. They would lose every year. This contrasts with the current system where many companies' sponsored employees virtually always eventually get permanent residency.

EXAMPLES of the Merit-based Points System

EXAMPLE 1:

- 28 years old
- Ph.D.
- Electrical Engineer position
- Newly hired out of college
- Fluent in English
- No family ties in United States
- Total = 80 points.

EXAMPLE 2:

- 25 years old
- Bachelor's
- Electrical Engineer position
- Newly hired out of college
- Fluent in English
- No family ties
- Total = 76 points.

Note: Add two for every year of U.S. work experience. Deduct three if the person is not yet 25. So, if hire a 22-year old and they don't have enough point, wait three years until age 25 and accumulate three more points for age and six for work experience.

EXAMPLE 3:

- 28 years old
- Bachelor's
- Sales position (high-demand)
- Non-STEM position
- 5 years of U.S. work experience
- Fluent in English
- Total = 66 points.

Note: This person clearly loses to specialty occupation employees, despite the experience and family ties to the United States.

EXAMPLE 4:

- 42 years old
- Bachelor's
- Operations Manager (was previously a manager at a subsidiary in Malaysia)
- Non-STEM position
- 1 year of U.S. work experience
- Mid-range English proficiency
- Total = 54 points.

Note: Unlike the current system in which multinational managers (intra-company transferees) are in the "First Preference" category, the point system does not provide extra points for being a multinational manager. So, a 42 year-old senior manager with a Bachelors degree in Electrical Engineering, workable proficiency in English, no family ties, but twenty years of experience with the company (non-U.S.), would merely get 54 points, which is well below any of the previous examples. So, whereas this person would fare very well under the current system, the new system might prevent this multinational manager from ever qualifying for permanent residency.

Employment Verification

I-9 Form: Document Retention

The bill requires maintenance of I-9 documentation for seven years after hire or two years after termination, whichever is earlier. This would mean either using electronic storage, with the attendant costs, or storing additional paper documents, including copies of work authorization documents, plus a page for electronic verification proof – which would quadruple the pages needed to be stored per I-9 from one to four.

Additional Authentication Steps

It will be approximately four times more time intensive to perform I-9 authentication, as work authorization documents will need to be copied, signed by both the employee and the site coordinator, and maintained with the I-9 form – this part of the legislation should be squared with electronic signature or dropped.

It will also be troublesome for U.S. citizen employees. For example, if the home state does not issue REAL I.D. drivers' licenses (and many do not), the drivers' license is only effective if presented with a birth certificate or other proof of citizenship – not a social security card.

This will require additional on-site coordinators at every location to manage the process required to get notices to employees who mismatch. Note that this will be complicated because all the Z visa holders – former illegal aliens – will be eligible for employment with new and questionable interim documents. Many companies could have these individuals as applicants, and they likely (although the statute does not expressly state this) will be protected from discrimination.

Re-verification

The statute is too vague about how this will be accomplished to know the cost – e.g., whether one could run a single check on all social security numbers, or whether it will require a separate inquiry per name. All is speculative at this time, but if it is possible to run a single SSN batch, this should be relatively straightforward.

It would be helpful for statutory language to tell employers how they will do this, and that allocates funds for batch runs. It would also be helpful for DHS to produce a schedule so that everyone does not have to run checks at once.

Company Liability

The statute attaches liability for "reckless disregard" of the facts that someone is unauthorized to work. This does not appear to be materially different from the current standard of "constructive knowledge."

SSN No Match Process

For new employees going through the Electronic Employment Verification System ("EEVS"), the employer must continue to employ the worker during the appeal process, until there is a final non-confirmation.

As for social security mismatch notices before EEVS goes to current employees, there will be regulations published to fill in the details. It appears that the employee will continue to work until the government can definitively say that there is a final non-confirmation (i.e., an unresolved mismatch).

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