Employers, Look Forward To Immigration Reform Benefits


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Law360, New York (March 15, 2013, 12:11 PM ET) -- In what is turning out to be the year of immigration, Republicans and Democrats are finally coming to consensus on many of the major aspects of comprehensive immigration reform. Change looks imminent, with President Obama declaring in the State of the Union that he would put forward his own bill if Congress did not act on immigration within the first half of 2013. While employers' responsibilities for ensuring workplace immigration compliance will likely increase, it is possible that American businesses will have access to millions of more workers within a year.

Understanding how reform affects U.S. employers requires knowing why the current U.S. immigration system is widely considered "broken." To start with, there are decades-long delays for individuals wanting to join their family in the United States. An insecure border and market demand has resulted in millions of migrant workers coming to the United States without legal authorization, including some who were brought here as children.

Employers who try to follow the rules face a lack of available visas for the most in-demand workers, and obstacles are too high for many entrepreneurs to qualify for investor visas. Any successful comprehensive immigration reform framework must address each of these issues. So far, the plans on the table indicate that the consequences for employers will, for the most part, be positive.

Employers will feel the impact of immigration reform on both their short-term and long-term workforce. To put this in context, in the current system, there are two kinds of lawful immigration status — nonimmigrant and immigrant. Nonimmigrants include individuals whose visas allow them to work, study or live in the United States for a temporary period, anywhere from a few days to a few years.

Immigrants, on the other hand, plan to stay indefinitely in the United States and are called lawful permanent residents. Permanent resident status is evidenced by a permanent resident card, otherwise known as a "green card."

Permanent residents who meet certain standards can then apply for U.S. citizenship usually after they have had their green card for three to five years. This is an important aspect of the law because it demonstrates the difference between "legalization" (being "documented") and granting citizenship.

Indeed, the most controversial aspect of current reform discussions is whether, and at what point, the 11 million undocumented individuals would be eligible for U.S. citizenship,

as opposed to some other form of legalization such as lawful permanent resident status. Under current law, foreign nationals — even employees with a U.S. sponsor — are always at risk of deportation until they become U.S. citizens.

Citizenship is also a societal indicator of integration and an important achievement for many immigrants. Advocates of the strongest enforcement-based reform efforts generally do not support a path to citizenship but do support a path to "legalization" that would include the right to work. The Senate's bipartisan "gang of eight" proposal would create a path to citizenship and include the right to work but make the initial legalization contingent on verification of border security.

According to White House proposals released earlier this week, President Obama's plan would result in a likely 13-year wait for citizenship, but importantly, undocumented immigrants would be eligible for an interim "lawful prospective immigrant status" that would give them the right to work for any employer at the front end of the process rather than the back end.

This is a significant benefit. Most nonimmigrant (temporary stay) employment authorization is employer-specific, meaning the employee can only work for the sponsoring employer in a specific job function.

By contrast, a long-term immigrant's employment authorization may start out as employer-sponsored, but it eventually becomes blanket work authorization, allowing the employee to switch jobs and employers at will or to engage in self-employment. Ironically, blanket work authorization in this proposal would put an undocumented worker at an advantage over nonimmigrant workers who "followed the rules," such as professionals holding H-1B visas, who can only work for their sponsoring employer, in a specific position, for a limited period of time.

There appears to be consensus in the Senate bipartisan proposal and the White House draft that the only viable solution would be to grant the 11 million or so undocumented immigrants work authorization early in the legalization process. So, the likelihood of this aspect of reform occurring — perhaps within a year — is high.

This would be a tremendous advantage for employers wanting to tap into the currently undocumented labor pool, particularly in agriculture, hospitality, construction and other labor-intensive industries.

In the current system, there is not a visa category for every type of worker. For example, an employer cannot sponsor a nonimmigrant skilled or unskilled worker, other than for limited seasonal work, and employers willing to pay extra to sponsor green cards for skilled workers often are subject to a 10-year waiting period. Creating a lawful workforce of millions would be a sea change.

While many undocumented immigrants will remain in Florida, Texas, California and other border states, granting prospective immigrant status and early work authorization may have geographic consequences as well. As bipartisan support for reform efforts builds — the U.S. Chamber of Commerce and AFL-CIO jointly announced their support recently for basic reform principles — workers may feel free to migrate elsewhere in the country to meet low-skilled labor demands.

Another area of broad consensus is the need for high-skilled immigration. The most detailed proposal so far is the bipartisan Immigration Innovation Act of 2013, introduced by Sen. Orrin Hatch, R-Utah, on Jan. 29, 2013. The act introduces some predictability into the H-1B visa process for those employers sponsoring workers with bachelor's degrees, primarily in the technology industry, by raising the annual cap on H-1B visas for private employers from 65,000 to 115,000 and creating a market-based variable cap that could go as high as 300,000 in a high-demand year.

In the current H-1B system, private employers race to file their H-1B visa petitions before the start of the federal fiscal year, and once the 65,000 slots are used, employers must wait another year before trying to hire employees. Many of these prospective employees are recent college graduates who cannot wait in the United States a whole year to try again for an H-1B visa, with no further guarantee of success.

An additional provision, work authorization for H-1B spouses, may appear as a minor improvement but is actually a major benefit for prospective employees and recruitment tool for employers. Spouses would have blanket work authorization to work for any employer in any position or to be self-employed, potentially adding thousands more qualified workers into the U.S. economy.

Hatch's proposal would also reform the employment-based immigrant visa system by creating green card quota exemptions, the most important of which may be for graduates of U.S. advanced degree programs in science, technology, engineering and math (STEM). To fund STEM and workforce training, though, the bill proposes an additional $500 to $1,000 H-1B visa and green card fee.

A third principle of immigration reform is employment verification, and employers should be ready for a very steep learning curve here. All the major immigration reform proposals currently on the table would make E-Verify, or a similar system, mandatory for all employers.

Employers are already verifying their employee's work eligibility on Form I-9 at the time of hire. Some employers also use the federal government's online E-Verify tool, either voluntarily or as required by state law or by federal law for certain federal contractors and employers of some international STEM students.

There is consensus on the need for greater certainty in employment verification. It is possible that where E-Verify becomes mandatory, the I-9 would be phased out since both processes achieve the same goal, while E-Verify theoretically can accomplish it with greater certainty and lower risk of fraud.

The challenge with E-Verify is familiar to any employer who has tried to use it. It has significant technical and practical kinks because it requires collaboration between several federal agencies and employers. Mandating its widespread use, especially in the largest companies operating in multiple states with numerous hiring sites and potentially thousands of hiring professionals, will require significant training.

Employers should hope that penalties for E-Verify violations would be waived or mitigated in the first several years if it becomes mandatory. Those who have already used E-Verify

know that it is not just a challenge for foreign nationals who present unusual work authorization situations such as refugees or green card applicants.

E-Verify also has created confusion for U.S. workers who don't have adequate documentation of work eligibility, such as those who have recently married or whose driver's license has expired.

If comprehensive immigration reform becomes a reality, it is possible that E-Verify will not pose as great a challenge as it does today. The number of unauthorized immigrant workers should markedly decrease, and current proposals would introduce more sophisticated forms of ID.

As a result, employers shouldn't be spending as much time trying to figure out whether a prospective employee's documents appear genuine. If undocumented workers are given work authorization, and the number of other visas increases to meet market demands, the significant advantages of reform for employers should make the difficulties of workplace immigration compliance a little easier to digest.

--By Elaine Young, Kirton McConkie PC

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