Key Labor, Employment, and Immigration, Regulatory Initiatives in the Obama and Trump Administrations

The following is a summary of key regulatory actions, completed, underway, or anticipated, in which the Chamber has been, or plans on being, actively engaged.

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Labor and Employment Related Regulatory Activity

Executive Orders

Fair Pay and Safe Workplaces Executive Order

On February 2, 2017, the U.S. House of Representatives passed a Congressional Review Act resolution, H. J. Res. 37, to invalidate the rule by a vote of 236-187. On March 6, 2017, the Senate passed the identical resolution by a vote of 49-48. On March 27, 2017, President Trump signed the resolution into law.

President Trump also issued Executive Order 13782, revoking the blacklisting executive order (13673) and instructing departments and agencies to begin rescinding the regulations and guidance associated with E.O. 13673, the Fair Pay and Safe Workplaces executive order. As a consequence of the CRA resolution an agency is prohibited from promulgating “substantially similar” regulations unless Congress explicitly authorizes the agency to do so.

Completed Rulemakings

Updating and Modernizing Overtime Regulations

On March 13, 2014, President Obama issued a Presidential Memorandum instructing the Secretary of Labor to update overtime regulations (Section 541) under the Fair Labor Standards Act.

On July 6, 2015, the Wage and Hour Division issued the proposed rule. The proposed regulation set the minimum salary required for exemption at the 40th percentile of weekly earnings for full-time salaried workers, which means the new salary threshold would be $50,440/year or $970/week, up from $23,660/year or $540/week. The proposal would also increase the total annual compensation requirement needed to exempt highly compensated employees to the annualized value of the 90th percentile of weekly earnings of full-time salaried employees, $122,148/year, up from $100,000/year. Furthermore, the proposed regulation would establish a mechanism for automatically updating the salary levels annually based either on the percentile or inflation. Also, the Department sought comment regarding the “possibility of including nondiscretionary bonuses to satisfy a portion of the standard salary requirement.”

On May 23, 2016, the Department of Labor published the final regulations. The final regulations lower the salary threshold from $50,440 to $47,476; increase the highly compensated salary level to $134,000; “automatically update the salary level every three years based on the 40th percentile of earnings for full-time salaried workers in the lowest-wage Census Region, currently the South”; and permit employers to use nondiscretionary bonuses and incentive payment to satisfy up to 10 percent of the salary level for employees under the standard exemption. In addition, the final regulations do not make any changes to the duties test.
The final rule set the effective date as December 1, 2016, except for health care providers with providers of Medicaid-funded services for individuals with intellectual or developmental disabilities in residential homes or facilities with 15 or fewer beds.

On September 20, 2016, the U.S. Chamber in conjunction with other business trade associations and local Chambers of Commerce filed a lawsuit challenging the overtime regulations in the Eastern District of Texas (Sherman Division), arguing that the salary threshold is too high, and DOL violated the FLSA since the agency lacks the statutory authority to index the threshold to inflation. At the same time, a coalition of 21 states filed a similar (but not identical) challenge in the same court. The difference between the two cases is that the states sought a preliminary injunction while ours does not. On November 22, 2016, the judge in the Eastern District of Texas case issued a nationwide preliminary injunction blocking the new salary threshold from taking effect.

**FAR Regulation: Ending Trafficking in Persons**

On September 26, 2013, the Department of Defense, General Services Administration and the National Aeronautics and Space Administration published a proposed rule in the Federal Register to amend the Federal Acquisition Regulation (“FAR”) to among other things, prohibit federal contractors, contractor employees, subcontractors and subcontractor employees from engaging in any activities related to human trafficking, such as forced labor and prostitution. For contracts that are not solely for commercially off-the-shelf items and where a portion of the contract will be performed overseas, the contractor or successful offeror will be required to develop a compliance plan and issue a certification of compliance at the time the contract is awarded and annually thereafter. The requirements of a compliance plan and certification apply to all subcontracts where the value of the services provided and/or supplies acquired outside the United States exceeds $500,000.

The proposed rule mandates that the contractor compliance plans include “procedures to prevent agents and subcontractors at any tier from engaging in trafficking in persons, and to monitor, detect, and terminate any agents, subcontractors, or subcontractor employees that have engaged in such activities.”

On December 20, 2013, the Chamber filed joint comments with the Aerospace Industries Association, the American Council of Engineering Companies, the National Defense Industrial Association, the Professional Services Council, and TechAmerica.

On January 29, 2015, the FAR Council issued the final rule, which became effective March 2, 2015. The final rule sought comment on a recommendation by the Senior Policy Operating Group for the FAR Council to consider a new definition of the term, “recruitment fees” to supplement the regulation. On March 18, 2015, the Chamber submitted comments, which may be accessed here: https://www.uschamber.com/comment/comments-gsa-draft-definition-recruitment-fees-supplement-far-case-2013-001

On May 11, 2016, the FAR Council promulgated a proposed rule, requesting comments regarding the definition of the term, “recruitment fees.” On July 11, 2016, the Chamber
submitted comments, which are available here: https://www.uschamber.com/comment/comments-gsa-combating-trafficking-persons-definition-recruitment-fees

The Chamber is active in promoting best practices to avoid human trafficking and is working to root out both the cause and effects of human trafficking. However, the Chamber is concerned about the creation of potential contractor and subcontractor liability without regard to the realities of global supply chains and various other provisions that complicate employer recruitment processes without a tangible relationship to reducing human trafficking.

**Employer and Consultant Reporting Under the LMRDA’s Persuader Regulations**

On June 21, 2011, the Labor Department published a proposed rule, which would greatly narrow the interpretation of the “advice” exemption. The proposed rule would significantly increase regulation of law firms, trade associations, and others who communicate with employers regarding union issues. Narrowing of the employer exception could also prove extremely problematic for employers and chill exercise of free speech rights.

On March 24, 2016, the Department of Labor promulgated final regulations consistent with the proposed rule.

On June 27, 2016, the U.S. District Court for the Northern District of Texas instituted a preliminary nationwide injunction, stopping the proposal from taking effect. On November 16, 2016, the judge made the injunction permanent thereby invalidating the rule.

**OSHA Injury and Illness Reporting Regulation**

On November 8, 2013, OSHA published a proposed rule to amend its current recordkeeping regulations to add requirements for the electronic submission of illness and injury records employers are required to keep under Part 1904. On August 14, 2014, OSHA published a supplemental notice of proposed rulemaking to explore adding provisions that will make it a violation for an employer to discourage employee reporting. The supplemental would upend the statutory whistleblower protection provisions of Section 11(c) by giving OSHA the ability to issue citations against employers without an employee complaint, i.e. no whistleblower.

On May 12, 2016 OSHA published the final regulations. Employers with 250 or more employees (includes part-time, seasonal, and/or temporary workers) in each establishment must submit electronically their 300, 300A, and 301 forms to OSHA annually basis (instead of quarterly as originally proposed). Employers with more than 20 but less than 250 employees in certain identified industries must submit their 300A form annually.

OSHA will post the data from employer submissions on a publicly accessible website – and vows not to include any information that could be used to identify individual employees. Employers are also required to have a “reasonable” policy in place for employees to report injuries or hazards. A “reasonable” policy is one where a “reasonable employee would not be deterred.” OSHA then elaborated in the preamble that some of the employer actions that might
trigger citations under the anti-retaliation provision would include drug testing seen as punitive or deterring an employee from reporting an injury, or safety incentive programs that rely on a rate of injury, or absence of injuries, for rewarding employees.

OSHA delayed the enforcement date for the anti-retaliation provisions from August 1, 2016, to December 1, 2016, due to ongoing litigation. The initial filing deadline for employers with 250 or more employees to submit their form 300As is July 7, 2017. However, OSHA has yet to create the online portal for filing, despite having said it would be available by February.

On July 8, 2016, the National Association of Manufacturers and other business groups filed a lawsuit against OSHA targeting the impact on drug testing and safety incentive programs under the anti-retaliation provision. On January 4, 2017, the Chamber, in conjunction with other business groups such as the National Association of Home Builders, filed a lawsuit in the U. S. District Court for the Western District of Oklahoma seeking a permanent injunction based on a Motion for Summary Judgment. Both cases are currently stayed until June 5, 2017, to allow the new administration to review and determine how to respond.

On May 5, 2017, the litigants submitted a petition to Secretary of Labor Alex Acosta requesting a stay of the rule and reopening of the rulemaking to further consider the impact of the rule and whether OSHA had proper statutory authority, and following proper rulemaking procedures.

**Workplace Wellness Programs and Employment Discrimination**

On April 20, 2015, the EEOC released proposed regulations that describes how Title I of the American with Disabilities Act applies to workplace wellness programs that are part of group health plans and that include questions about employees’ health (such as questions on health risk assessments) or medical examinations (such as screening for high cholesterol, high blood pressure, or blood glucose levels) for employee-only coverage.

On October 30, 2015, the EEOC promulgated proposed regulations that amends the regulations implementing Title II of the Genetic Information Nondiscrimination Act of 2008 as they relate to workplace wellness programs and address the extent to which an employer may offer an employee inducements for the employee’s spouse who is also a participant in the employer’s health plan to provide information about the spouse’s current or past health status as part of a health risk assessment administered in connection with the employer’s offer of health services as part of an workplace wellness program.

On May 17, 2016, the EEOC promulgated the final ADA and GINA regulations.

On October 24, 2016, AARP sued the EEOC, arguing for an injunction to stop the rules from taking effect. On November 22, 2016, the Chamber submitted an *amicus curie* brief, defending the EEOC’s position that wellness programs that offer incentives are not coercive, but rather voluntary in nature. In December 2016, the District Court denied AARP’s motion for a preliminary injunction.
EEOC’s Changes to the EEO1-Form

On February 1, 2016, the EEOC announced that it was seeking a three-year Paperwork Reduction Act (PRA) approval of a revised Employer Information Report (EEO-1) data collection. The revisions include two components: Component 1, which collects the same data that is gathered by the currently approved EEO-1 (e.g., ethnicity, race, and sex, by job category) and Component 2, which includes data on employee’s W-2 earnings and hours worked. Beginning in 2018, filers with 100 or more employees (both private industry and federal contractors) would be required to submit data in response to both Components 1 and 2 (while contractors with 50 to 99 employees would only submit data for Component 1).

On March 16, 2016, the EEOC held a public hearing to discuss proposed revisions to the EEO-1 data collection report, in which Camille Olson, chair of the Chamber’s equal employment opportunity policy subcommittee testified, objecting to the proposal.

On April 1, 2016, the Chamber submitted comments, criticizing the proposal as unnecessary, overly burdensome, lacking utility, and lacking confidentiality/privacy protections. The comments may be accessed here: https://www.uschamber.com/comment/comments-eeoc-proposed-revisions-the-employer-information-report

On July 14, 2016, the EEOC submitted a revised proposal to the Office of Information and Regulatory Affairs (OIRA), as required by the Paperwork Reduction Act. The EEOC revised its original proposal to make the new reporting deadline to be March 31st of each year to more closely align with end-of-year W-2 information.

On August 15, 2016, the Chamber submitted comments to OIRA, which may be accessed here: https://www.uschamber.com/comment/comments-the-omb-revision-the-employer-information-report-eeo-1-form

On September 29, 2016, the EEOC released the final form with reporting instructions, which were identical to the proposal submitted to OMB on August 15, 2016. Employers will be required to report the new information beginning in March 2018.

On February 27, 2017, the Chamber sent a letter to the Office of Management and Budget, requesting that OMB stay the effectiveness of, or otherwise rescind, EEOC’s changes to the EEO-1 Form.

Clarification of Employer’s Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness (Volks)

On December 19, 2016, OSHA issued a final rule “clarifying” an employer’s continuing obligation to make and maintain an accurate record of each recordable injury and illness. OSHA was responding to a court decision, Volks II, which held that a citation issued for failing to record an injury or illness after the six month period from the occurrence of the recordable incident is barred by the OSH Act’s statute of limitations. In the rulemaking, OSHA changed its recordkeeping regulations to “clarify” that the duty to make and maintain an accurate record of a
work-related illness or injury extends the statute of limitations during which a citation can be issued from the Congressionally established six months to the five year period for maintaining records.


**Significant Non-Regulatory Activities**

*OSHA Letter of Interpretation Permitting Union Representatives to Accompany an OSHA Inspector at Non-Union Workplaces*

On February 21, 2013, OSHA issued a letter of interpretation, responding to a request from the United Steel Workers, that said a union representative is permitted to accompany an OSHA inspector during a walk-around inspection at a non-union workplace. Current regulations make clear that any employee representative “shall be” an employee of the company. Therefore a non-union workplace would not have a union representative. This is a dramatic reversal of policy and clearly aligns OSHA with union attempts to use OSHA inspections as organizing tools against non-union employers. Furthermore, it was done as a letter of interpretation, not a rulemaking so there was no opportunity for those who will be impacted to provide input, or requirement for OSHA to justify its action. On June 12, 2013, the Coalition for Workplace Safety, which included the U.S. Chamber, sent a letter to the Department of Labor, requesting withdrawal of the interpretation letter.

On April 27, 2017, in response to a court challenge by the National Federation of Independent Business asserting that the letter of interpretation was such a significant change it should have gone through rulemaking, OSHA announced in a court filing that they have withdrawn their letter of interpretation.

*EEOC Guidance on Unlawful Harassment*

On January 10, 2017, the EEOC issued proposed enforcement guidance on unlawful harassment, under EEOC-enforced laws.

On March 21, 2017, the Chamber submitted comments, which may be accessed here: [https://www.uschamber.com/sites/default/files/u.s._chamber_eeo_harassment_comments.pdf](https://www.uschamber.com/sites/default/files/u.s._chamber_eeo_harassment_comments.pdf)
Immigration Regulatory Activity

Executive Orders

Border Security and Immigration Enforcement Priorities

On January 25, 2017, President Trump signed Executive Order 13767, entitled “Border Security and Immigration Enforcement Improvements” that among other things, directs the Secretary of Homeland Security to build a wall on the southern border between the U.S. and Mexico; “issue new policy guidance to all Department of Homeland Security personnel” to end the practice known as “catch and release”; sets forth a goal of hiring 5,000 additional Border Patrol agents, provides for foreign aid reporting requirements pertinent to “identify and quantify all sources of direct and indirect Federal aid or assistance to the Government of Mexico on an annual basis over the past five years”; permits state and local officials to enter into agreement with the Secretary of Homeland Security under Section 287 (g) of the Immigration and Nationality Act; authorizes the Secretary of Homeland Security to promulgate regulations with respect to revising the parole and asylum provisions of Federal immigration law; authorizes federal government officials to enter federal lands; requires the Attorney General to establish prosecutorial discretion guidelines; and demands that the Secretary of Homeland Security to report “on a monthly basis and in a publicly available way, statistical data on aliens apprehended at or near the southern border.”

On February 20, 2017, the Department of Homeland Security published the implementation memo, “Enforcement of the Immigration Laws to Serve the National Interest.”

On January 25, 2017, President Trump signed Executive Order 13768, entitled “Enhancing Public Safety in the Interior of the United States” that among other things, sets forth a policy to ensure that jurisdictions that do not comply with federal law (typically referred to as “Sanctuary Cities”) do not receive federal funds and that the Department of Homeland Security (DHS) sets enforcement priorities to remove aliens that have a criminal history.

This order also calls for the Secretary to hire 10,000 new Enforcement and Removal Officers (ERO) within U.S. Immigration and Customs Enforcement. With regard to sanctuary jurisdictions, DHS will have the authority to designate an area as a sanctuary jurisdiction and the Justice Department will have the authority to take appropriate enforcement actions against said jurisdictions.

DHS is also ordered to end the Priority Enforcement Program (PEP), which was established by former President Obama in conjunction with his executive action announcement in November 2014, and DHS will reinstitute the Secure Communities Program that was eliminated in the wake of President Obama’s Executive Action announcement.

Lastly, and this could be problematic if exercised, the order also directs DHS and the State Department to effectively implement Section 243(d) of the INA, which allows the State Department to halt the issuance of both nonimmigrant and immigrant visas to nationals of
countries if their home country either refuses to take their nationals back if they are being removed from the U.S., or if said country unreasonably delays the repatriation of their nationals that are being removed from the U.S.

On February 20, 2017, the Department of Homeland Security published the implementation memo, “Implementing the President’s Border Security and Immigration Enforcement Improvement Priorities.”

On January 27, 2017, President Trump signed Executive Order 13769, entitled “Border Security and Immigration Enforcement Improvements.” A description of the E.O is below:

- There was a 90 day suspension on the entry of nationals from the following countries: Iran, Iraq, Libya, Syria, Somalia, Sudan, and Yemen. Diplomats and other government officials were excepted from this proposed ban. Furthermore, State and DHS jointly retained the authority to issue a foreign national from one of these countries a visa or other immigration benefits on a case-by-case basis if doing so was in the national interest.

- DHS, the State Department, and the Director of National Intelligence must have conducted a review to ensure that foreign countries provide us with the necessary information to adjudicate any petition/application for immigration benefit such that the federal government can determine that the individual is who they claim to be and that they are not a security or public-safety threat. These three agencies must have then issued a report on their findings within 30 days of the issuance of this order. If the State Department determined that there were countries that did not provide the necessary information to the federal government for the stated purposes, then the State Department must have requested that these countries start providing this information to the federal government within 60 days. If these countries did not cooperate, the State Department would have included those countries on a list that the recommends to the President a ban on entry to the U.S. for foreign nationals from those states.

- The Order called upon DHS, the State Department, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation to create uniform vetting standards to identify individuals seeking to enter the U.S. on a fraudulent basis or who are at risk of causing harm subsequent to their admission.

- The Order instituted a 120 ban on the admission of refugees into the U.S., during which time the State Department, DHS, and the Director of National Intelligence would have reviewed the refugee application and adjudication processes to ensure that admitted refugees did not pose a threat to the U.S. The Order directed the State Department to prioritize refugee claims made by individuals who are religious minorities in their home countries, as well lowering the cap on refugee admissions in FY17 from 100,000 individuals down to 50,000 individuals. The State Department and DHS, however, still would have retained the authority to admit certain applicants for refugee status into the U.S. on a case-by-case basis, provided that doing so would being the national interest. Lastly, Syrian refugee admissions were suspended indefinitely, and Syrian refugee applicants were not allowed to avail themselves of the aforementioned discretionary authority until the President decides that admissions of refugees from Syria should resume.
The E.O. suggested that the State Department and DHS, in consulting with DOJ, consider rescinding the exercises of waiver authority with regard to the grounds on inadmissibility with regard to terrorist activities.

The order instructed DHS to expedite the completion of the Biometric Entry-Exit Tracking System.

The President instructed the State Department to suspend the Visa Interview Waiver Program (not to be confused with the Visa Waiver Program) and force people who would otherwise be able to avoid an in-person interview to have to subject themselves to such an interview before obtaining a visa. This would have caused interview wait times to spike in many consular posts around the world.

The State Department would have been required to review all visa reciprocity agreements with other nations to ensure that they are reciprocal, and if the State Department determined that there isn’t true reciprocity, the Secretary of State would have been required to adjust the visa validity periods, the fee schedule, or other measures to achieve parity in treatment.

On February 3, 2017, U.S. District Judge James Robart from Washington issued a temporary restraining order, which blocked the enforcement of the Executive Order until the court could hold a hearing on a motion for a preliminary injunction. On February 9, 2017, the 9<sup>th</sup> Circuit Court of Appeals upheld the District Court’s temporary restraining order.

On March 6, 2017, President Trump signed E.O. 13780, which revoked the original E.O.

The revised Executive Order made the following changes:

- Sets the effective date to March 20, 2017.

- For 90 days, prohibited the entry into the US from six countries: Iran, Libya, Somalia, Sudan, Syria, and Yemen (this new E.O. omitted Iraq from the list) only for those with new visas (existing visa holders as of January 27, 2017 as well as existing lawful permanent residents, valid visa holders, any foreign national who is “admitted to or paroled into” the United States including those with advance parole, dual nationals, diplomats, governmental officials (G-1 G-2, G-3, or G-4 visas), visitors to the UN (C-2 visas), and NATO officials are exempt; Commissioner or delegate of U.S. Customs and Border Protection may make case-by-case exceptions when “in the national interest.”

- In the first twenty days, the Department of Homeland Security was ordered to conduct a country-by-country review of the information the six nations provide to the U.S. for visa and immigration decisions. In the next 50 days, those countries will then have to comply with U.S. government requests to update or improve that information.

- The order also made significant changes to the U.S. Refugee Admissions Program. The cap for refugee admissions for the current fiscal year remained unchanged from the initial order at 50,000 and the temporary ban on refugee admissions will still last for 120 days starting on March 16, 2017, but the order no longer contained the language prioritizing individuals who claim that they are religious minorities in their home country. In
addition, the indefinite suspension on refugee admissions from Syria was taken out of the revised order, and the language governing the ability for individual applicants for refugee status to obtain waivers is more specific. The revised order still contains the suggestion that the State Department and the Department of Homeland Security rescind exercising certain waiver authority relating to certain terrorism grounds of inadmissibility.

- The new order calls for the immediate suspension of the Visa Interview Waiver Program, of which all countries are eligible, not just the six countries subject to the temporary travel ban. However, the revised order states that certain statutory exceptions shall apply, thus limiting this provision’s impact to a certain extent.

- The revised order also directs the State Department to review all visa validity reciprocity agreements and make certain adjustments to these agreements if other nations do not accord U.S. nationals with reciprocal treatment. Lastly, this new order contains very similar language with regard to the expedited implementation of the biometric entry-exit tracking system; and

- Calls for expedited completion of the Biometric Entry-Exit system, but the one key distinction is that in the prior order, this system was to cover “all travelers” to the U.S., whereas the language contained in the new order only covers “in-scope travelers to the U.S.”

On March 15, 2017, prior to the second Executive Order taking effect, a Federal District Court in Hawaii and a Federal District Court in Maryland issued a nationwide preliminary injunction, stopping the E.O. from taking effect. The administration has appealed both rulings.

**Buy American, Hire American**

On April 18, 2017, President Trump signed Executive Order 13787, entitled “Buy American, Hire American.”

The Executive Order was not nearly as detailed or prescriptive as some of the orders the Trump Administration has issued in the immigration space in prior months. Section 2(b) of this order made a general policy statement that the executive branch will enforce the laws governing the entry of foreign-born workers into the U.S. to boost the wages and employment rates of American workers.

Section 5 is where the “Hire American” provisions are located in the order. Section 5(a) calls upon the Secretary of State, the Attorney General, the Labor Secretary, and the DHS Secretary to propose new rules and issue new guidance to protect the interests of the U.S. workers in administration of the U.S. immigration system, specifically mentioning fraud/abuse prevention. Section 5(b) calls upon the four aforementioned cabinet members to suggest reforms to the H-1B program such that visas are awarded to the most-skilled or highest-paid petition beneficiaries. What exactly is intended by “most-skilled” or “highest-paid” remains to be seen.
In sum, the immigration provisions in this Executive Order do not create new obligations or institute any new legal requirements for our members; what this order does do is set the tone for what the administration wants to accomplish and telegraphs where the administration is heading from a policy standpoint in the near future.

**Rulemakings Underway**

*Standards and Procedures for the Enforcement of the Immigration and Nationality Act*

On August 15, 2016, the Department of Justice promulgated a proposed rule to revise regulations implementing a section of the Immigration and Nationality Act regarding unfair immigration-related employment practices.

The impact of the proposed rule is that employers would be subject to a significant increase regarding an employers’ exposure to discrimination claims. The rule would give the Justice Department up to five years from the time of an alleged violation to file a charge against an employer. Under current regulations, charges must be filed within 180 days of the alleged occurrence. The proposed rule also states that the agency has the authority to waive the 180-day time limit for an individual employee to file a charge against an employer if the Special Counsel determines that equitable principles should apply in a given situation. Furthermore, the proposal purports to grant expanded investigative powers to DOJ. This includes the type of information that employers may need to provide to the government and from whom the government is allowed to obtain said information. Lastly, employers would face potential liability for discrimination if they treat employees differently based upon the immigration status of certain individuals, regardless of their reasons for the differential in treatment and even where an employer can show there is no animus or hostility involved in the alleged incident(s).

On October 14, 2016, the Chamber submitted multiple comments, one as part of a coalition the Chamber led with our business allies to inform DOJ of the ill-advised policy decisions it made in its proposal, and one submitted on behalf of the Chamber to call into question the vastly suboptimal economic analysis that DOJ performed in studying the effects of its proposals.


*Significant Public Benefit Parole for Entrepreneurs (USCIS)*

On August 31, 2016, USCIS promulgated a proposed rule to establish a program that allows consideration for parole into the U.S. on a case-by-case basis for certain entrepreneurs. Under the proposed guidelines, program eligibility will be based upon the individual’s role in creating a start-up enterprise wherein the person’s entry into the U.S. would provide a substantial public benefit through substantial and demonstrated potential for rapid business growth and job
creation. This potential could be evidenced by, among other things, the fact that the business has received substantial capital investment from qualified U.S. investors or has obtained significant awards/grants from certain Federal, State, or local governmental entities. Entrepreneurs that qualify for this benefit would be able to stay in the U.S. for a total of 5 years as a parolee in the U.S.

While this rule is well-intentioned, the Department’s focus on the parole process does not provide putative entrepreneurs with the certainty needed for most start-ups to truly flourish in the U.S.

On October 17, 2016, the Chamber submitted comments with several suggestions on how to improve the initial proposal, which may be accessed here:

Improvement of the Employment-Createon (EB-5) Immigration Regulations (USCIS)

On January 13, 2017, USCIS promulgated a proposed rule to update EB-5 regulations that attempt to provide more clarity to the program’s requirements. The proposed regulations address: the designation of Targeted Employment Areas; indirect job creation; the required investment amount; the effects of material changes on conditional residency; the regional center designation process; and monitoring for regional center compliance.

On April 11, 2017, the Chamber submitted comments, objecting to the proposal, which may be accessed here:

Anticipated Rulemakings

Procedural and Technical Employment Verification (I-9) Violations (ICE)

The Department of Homeland Security’s Immigration and Customs Enforcement (ICE) has been indicating since early 2011 that it was prepared to issue a NPRM finally implementing the mandate of the 1996 immigration reform legislation (IIRIRA – the Illegal Immigration Reform and Immigrant Responsibility Act) to distinguish between substantive failures to comply with the employment verification obligations (I-9) and technical or procedural failures. ICE has announced that it expects to move forward with this proposed rulemaking.

Nonimmigrant Classes: Temporary Visitors to the United States for Business or Pleasure (CBP)

The Department of Homeland Security’s Custom and Border Patrol (CBP) is beginning a rulemaking process to clarify when an individual’s activities are appropriate for B-2 tourist or B-1 business visitor classification. A proposed rule was projected to be issued November, 2017.
Department of Homeland Security

Significant Non-Regulatory Activities

Suspension of Premium Processing (USCIS)

On March 3, 2017, USCIS announced that they will temporarily suspend premium processing starting April 3, 2017 for all H-1B petitions. As April 3rd is the first Monday in April, this suspension will be applicable to all cap-subject H-1B petitions for FY18. This suspension will also apply to all cap-exempt petitions filed on or after April 3, which includes petitions for individuals seeking to extend their status or individuals who need to amend their petitions if the worker has been reassigned to a new job site.

On March 23, 2017, the U.S. Chamber wrote a letter, expressing concern with this proposal, which may be accessed here: https://www.uschamber.com/sites/default/files/uscc_premium_processing_letter_final-r.pdf

PERM Actual Minimum Requirements (DOL-ETA)

On March 6, 2017, the Department of Labor published a FAQ entitled, “Actual Minimum Requirements Frequently Asked Questions.” The FAQ document changes how specific an employer must be in describing the actual minimum requirements for a particular job on the ETA Form 9089. In short, this guidance document will require employers to be much more specific in laying out the type of knowledge, experience, or educational attainment that is required to perform the duties associated with a particular job. For example, saying that a job requires “experience in Java and C++” will no longer be sufficient for the purposes of applying for PERM and such a case would be deniable by DOL. Moving forward, employers will be required to state that a job requires “at least 12 months experience of using Java and 18 months experience in working with C++” in order for the case to avoid being denied by the Labor Department. This guidance, which was issued on March 6, 2017 was scheduled to go into effect March 20, 2017. However, on March 10, 2017, ETA issued PERM FAQ Round 14, announcing that they were temporarily removing this proposed guidance from the website and would reissue it at a date to be determined.

Fraud Initiative (USCIS)

On April 3, 2017, USCIS announced that they will be taking a more targeted approach when making site visits across the country to H-1B petitioners and the worksites of H-1B employees:

- Cases where USCIS cannot validate the employer’s basic business information through commercially available data;
- H-1B-dependent employers (those who have a high ratio of H-1B workers as compared to U.S. workers, as defined by statute); and
- Employers petitioning for H-1B workers who work off-site at another company or organization’s location.
According to USCIS, “Targeted site visits will allow USCIS to focus resources where fraud and abuse of the H-1B program may be more likely to occur, and determine whether H-1B dependent employers are evading their obligation to make a good faith effort to recruit U.S. workers. USCIS will continue random and unannounced visits nationwide. These site visits are not meant to target nonimmigrant employees for any kind of criminal or administrative action but rather to identify employers who are abusing the system.”

To further deter and detect abuse, USCIS has established an email address which will allow individuals (including both American workers and H-1B workers who suspect they or others may be the victim of H-1B fraud or abuse) to submit tips, alleged violations and other relevant information about potential H-1B fraud or abuse. Information submitted to the email address will be used for investigations and referrals to law enforcement agencies for potential prosecution.

Additionally, individuals can report allegations of employer fraud or abuse by submitting Form WH-4 to the Department of Labor’s (DOL) Wage and Hour Division or by completing ICE’s HSI Tip Form.

In addition to this USCIS effort, the Department of Labor (DOL) and Department of Justice (DOJ) made statements during this same week in April, 2017, to reinforce the administration’s commitment to ensuring that the H-1B program is not misused by employers. DOJ issued a statement that week warning employers about discriminating against American workers when using the H-1B program. DOL stated publicly that it would support the efforts of USCIS and DOJ, and that they committed to do the following:

- **Rigorously use all of its existing authority to initiate investigations of H-1B program violators.** This effort to protect U.S. workers will also involve greater coordination with other federal agencies, including the Department of Homeland Security and Department of Justice for additional investigation and, if necessary, prosecution.

- **Consider changes to the Labor Condition Application for future application cycles.** The Labor Condition Application, which is a required part of the H-1B visa application process, may be updated to provide greater transparency for agency personnel, U.S. workers and the general public.

- **Continue to engage stakeholders on how the program might be improved to provide greater protections for U.S. workers, under existing authorities or through legislative changes.**