The Blunt H-1B Instrument Hidden In Trump Orders

By **Blake Chisam and Edward Raleigh** (August 26, 2020)

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President Donald J. Trump's administration hid a blunt instrument among two recent shiny objects.

Deep in the text of the June 22 "Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak," the president ordered the secretary of labor to use a never-tapped investigatory authority to conduct compliance investigations of companies that use the H-1B program.

Then, in the "Executive Order on Aligning Federal Contracting and Hiring Practices With the Interests of American Workers" on Aug. 3, the president ordered all agency heads to conduct an analysis of their contractors to see if their contractors are using nonimmigrant labor or offshoring either directly or through subcontractors.

On the same day, the secretary of labor announced how he intends to execute on the president's directive by drawing on a new source of information by wiring the U.S. Department of Labor into databases maintained by U.S. Citizenship and Immigration Services.

Most companies' attention piqued when the president issued the federal contracting executive order, because of its potential impact on a large source of revenue, i.e. their contracts with the federal government. The thrust of the executive order is ensuring that the administration does everything possible to avoid adverse effects on American workers caused by temporary visa holders and offshoring. The president sought to accomplish this through two discrete orders:

- He ordered agency heads to review federal contract arrangements for adverse effects on U.S. workers caused by government contractors and subcontractors using employees in the U.S. on temporary work visas, or by offshoring work that is part the performance of the contract.

- He directed the secretaries of labor and homeland security "to protect United States workers from any adverse effects on wages and working conditions caused by the employment of H-1B visa holders at job sites (including third-party job sites), including measures to ensure that all employers of H-1B visa holders, including secondary employers, adhere to the requirements of" the Immigration and Nationality Act section designed to ensure that the H-1B program is used appropriately and does not adversely affect American workers.

However, the story of where DOL is headed in terms of H-1B investigations — and where the government likely has its biggest opening to investigate the use of temporary visa holders and offshoring in federal contracting — starts earlier this summer.

On June 22, Trump issued his entry ban proclamation. He ordered that "[t]he Secretary of

Labor shall also undertake, as appropriate, investigations pursuant to section 212(n)(2)(G)(i) of the INA (8 U.S.C. 1182(n)(2)(G)(i))."[1] This provision allows for investigations of H-1B employers where the secretary of labor has reason to believe an employer is not in compliance.

On July 31, only four days before the president issued his executive order, the DOL announced a new memorandum of agreement with the U.S. Department of Homeland Security, through USCIS. According to the DOL, this new agreement:

establishes processes by which USCIS will refer suspected employer violations within the H-1B program to the Department of Labor that USCIS identifies in the course of adjudicating petitions – a source of information never previously accessed by the Department for enforcement purposes – and conducting administrative and targeted site visits. The enhanced collaboration and sources of information will be used by Department of Labor in support of Secretary-certified investigations.[2]

Putting all these pieces together, the administration's position toward H-1B investigations is clear. It intends to vigorously investigate whether the H-1B program is being used to disadvantage the American worker in part by using the government's power as a massive contractor.

By ordering each agency head to look for adverse effects on American workers, the president deputized these agency heads to find potential violations of the H-1B program. The secretary of labor likewise entered into an agreement with DHS to give the DOL access to a treasure trove of information that will help it understand the information that the agency heads are gathering and other information that it learns through the media or other channels.

It is essential that companies who employ H-1B workers and those who have H-1B workers on their premises, particularly federal contractors, understand how H-1B investigations work and how secretary-certified H-1B investigations differ from traditional H-1B investigations.

Authority for H-1B Investigations

The Immigration and Nationality Act[3] empowers the secretary of labor to enforce the INA's H-1B conditions of employment.[4] The secretary implemented regulations governing investigations at Title 20 of the Code of Federal Regulations, Section 655.800. By regulation, the secretary delegated nearly all his investigative and enforcement functions under the INA to the administrator of the DOL's Wage and Hour Division.[5]

The Wage and Hour Division can initiate an H-1B investigation in four circumstances.

First, it may conduct investigations upon receiving an aggrieved party complaint.[6]

Second, it may initiate an investigation where it receives specific, credible information of willful violations or a pattern and practice of violations from a reliable source (so-called credible source investigations).[7]

Third, it can initiate random investigations of employers who have been found to have willfully violated the H–1B program's regulations.[8]

Fourth, it can initiate an investigation without receiving any specific reports of misconduct, if the secretary certifies that he has reasonable cause to believe the employer is noncompliant

(so-called compliance reviews).[9] It is this fourth authority that the president cited to in the proclamation.

How Secretary-Certified Investigations Differ

These developments are important because secretary-certified investigations have never been conducted by the DOL, and they can be far broader than the complaint-driven investigations that are the norm today (and tend to be limited to whatever was the area of the complaint).

Unlike the other forms of DOL H-1B investigations based on new allegations of misconduct, i.e., complaint-based, credible source, the INA does not bar secretary-certified compliance reviews where the DOL receives the information about the alleged violation more than 12 months after the violation occurred.[10]

In addition, unlike in credible source investigations, the secretary can consider information from DOL employees and information submitted to the DOL during the process of obtaining a labor condition application and to DHS when submitting a petition for a nonimmigrant worker.[11]

Therefore, by instructing agency heads to look for the displacement of U.S. workers or other adverse effects where government contractors have used the nonimmigrant visa programs, such as the H-1B program, the president is creating sources of information upon which the secretary can initiate secretary-certified compliance reviews or other H-1B investigations.

In addition, USCIS will now be sharing information with DOL about potentially suspect filing patterns or filing of applications to work onsite at companies who have, for example, recently laid off American workers.

Procedural Protections in Secretary-Certified Investigations

Secretary-certified investigations should be handled more delicately than complaint-based investigations because they will be much larger in scope and have farther reaching effects. Greater procedural protections are afforded to employers before the initiation of a credible source investigation or compliance review. Employers should guard these protections scrupulously.

The most important procedural protection is secretary-certification, which can itself limit the scope of an investigation. The INA requires that the secretary "personally certify that reasonable cause exists and shall approve commencement" of a compliance review investigation.[12]

The implementing regulation likewise requires the secretary's personal authorization and certification that the procedural protections have been complied with by the DOL's Wage and Hour Division.[13] In its Field Operations Handbook, the Wage and Hour Division states a secretary-certified investigation "shall be limited to the issues certified by the Secretary."[14]

A secretary-certified compliance review investigation (or a credible source investigation) also cannot be initiated without providing notice to the employer and giving the employer an opportunity to respond.[15] The INA further mandates that this "notice shall be provided in such a manner, and shall contain sufficient detail, to permit the employer to respond to the allegations before an investigation is commenced."[16] This provision, however, does not

apply if doing so could compromise efforts to secure compliance.[17]

Even where an investigation is authorized, the Wage and Hour Division's investigative authority is not plenary. The regulations allow the Wage and Hour Division to investigate certain, defined violations of the H-1B regulations and conditions of employing H-1B nonimmigrants. These violations include, among other things: material misrepresentations on labor condition applications, failure to pay proper wages or provide proper working conditions, displacement of U.S. workers (where applicable), failure to recruit U.S. workers (where applicable), and failure to maintain proper documentation.[18]

Further, in at least one circuit, the Wage and Hour Division must limit its complaint-based or credible source investigations to the violations alleged in the complaint or in the credible information. In Greater Missouri Medical Pro-Care Providers Inc. v. Perez, the U.S. Court of Appeals for the Eighth Circuit held in 2015 that the Wage and Hour Division should be constrained to the breadth of the initial complaint in an aggrieved-party investigation.[19]

The Wage and Hour Division, however, has stated that it does not apply Greater Missouri outside the Eighth Circuit. It is not clear how this restriction would apply to a secretary-certified compliance review, but courts likely will give the DOL great leeway where it has followed the INA when initiating a secretary-certified compliance review investigation.

To limit the scope of an investigation, an employer could argue that the Wage and Hour Division's handbook states that a secretary-certified investigation "shall be conducted in the same manner as an investigation on an aggrieved party complaint."[20] While the handbook likely does not create an enforceable right, a failure to follow its open procedures is arguably arbitrary and capricious action, which could underpin future litigation challenges.

Recognizing a Secretary-Certified Compliance Review Investigation

An employer can recognize a secretary-certified compliance review investigation by the initiation procedures followed by the DOL.

If the DOL issues an appointment letter, then the Wage and Hour Division is following the aggrieved party complaint procedures. If an employer is given the opportunity to respond to allegations before an appointment letter is issued, then the Wage and Hour Division is following the credible source or compliance review investigation regimen. Employers should be sure to understand under what rule set they are being investigated.

Concluding Thoughts

Employers should be aware of the increased risk of sweeping H-1B investigations because of the proclamation, subsequent memorandum of agreement with DHS, and the federal contractor executive order. Companies should be cognizant of the potential that information submitted with their H-1B petitions, responses to request for evidence, and site visit productions could be referred to the DOL.

Employers should consider how to approach investigations initiated under the never used investigative authorities cited in the proclamation. Employers should guard the procedural protections offered to them to best position themselves in the case of a credible source or compliance review investigation. Enforcing the notice requirement will allow employers to understand and respond to the allegations and enforcing the secretary-certification requirement could undercut an investigation before it starts by forcing the secretary to ensure compliance with the procedural protections afforded to companies.

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[1] Proclamation at Sec. 5(b).

[2] DOL, Press Release, DOL and DHS Enter into New Memorandum of Agreement, July 31, 2020, available at https://www.dol.gov/newsroom/releases/dol/dol20200731.

[3] 8 U.S.C. § 1101 et al.

[4] 8 U.S.C. § 1182(n)(2)(A).

[5] 20 CFR § 655.502; 20 C.F.R. § 655.800(a). See also Aleutian Capital Partners, LLC v. Hugler, No. 16 CIV. 5149 (ER), 2017 WL 4358767, at *2, n. 2 (S.D.N.Y. Sept. 28, 2017).

[6] 8 U.S.C. § 1182(n)(2)(A); 20 C.F.R. § 655.806.

[7] 8 U.S.C. § 1182(n)(2)(G)(ii).

[8] 8 U.S.C. § 1182(n)(2)(F); 20 C.F.R. § 655.808.

[9] 8 U.S.C. § 1182(n)(2)(G)(i); 20 C.F.R. § 655.807.

[10] 8 U.S.C. § 1182(n)(2)(G)(vi) (applying 12-month reporting window to credible source investigation but not Secretary-certified compliance reviews); see 8 U.S.C. § 1182(n)(2)(A) (12-month reporting window applicable to complaint-based investigations).

[11] 8 U.S.C. § 1182(n)(2)(G)(iv) (applying source of information restriction to credible source investigation but not Secretary-certified compliance reviews). While the INA does not include 12-month reporting window and the restrictions on the source of information, the implementing regulations do. See 20 C.F.R. § 655.807(c) (imposing 12-month reporting window); see also 20 C.F.R. § 655.807(e) (defining information to exclude information from a DOL officer unless it is found in the course of a lawful investigation and information provided to DHS or DOL in securing the employment of an H-1B worker). DOL will likely take the position that the INA trumps the implementing regulation. See, infra., n. 13.

[12] 8 U.S.C. § 1182(n)(2)(G)(i).

[13] 20 C.F.R. § 655.807(h)(1). Credible source investigations are treated differently under the INA and the implementing regulations. While the INA does not require the Secretary to personally certify a credible source investigation, 20 C.F.R. § 655.807 seemingly provides for the Secretary's personal certification in credible source investigations. WHD, however,

maintains that the INA and statutory changes enacted in the H-1B Visa Reform Act of 2004, Pub. L. No. 108-447, 118 Stat. 2809, make clear that Secretarial certification is not required for such an investigation. Nonetheless, the current regulations remain in effect and require the Secretary to personally authorize any investigation not initiated by an aggrieved-party complaint. 20 C.F.R. § 655.807(h)(1). DOL never amended or rescinded the requirement that the Secretary authorize and certify credible source investigations. To our knowledge, this issue has not been litigated. Employers facing a credible source investigation may consider litigating DOL's authority to initiate such an investigation without the certification.

[14] DOL WHD FOH 71b03(f).

[15] 8 U.S.C. § 1182(n)(2)(G)(vii); 20 C.F.R. § 655.807(f)(1); DOL WHD FOH 71b03(d), (e).

[16] 8 U.S.C. § 1182(n)(2)(G)(vii); see 20 C.F.R. § 655.807(f)(1).

[17] 8 U.S.C. § 1182(n)(2)(G)(vii); 20 C.F.R. § 655.807(f)(2).

[18] 20 C.F.R. § 655.805.

[19] See generally Greater Missouri Med. Pro-Care Providers, Inc. v. Perez, 812 F.3d 1132 (8th Cir. 2015).

[20] DOL WHD FOH 71b03(f).