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Management Alert

Senate Immigration Reform Bill Offers Surprises Galore for Employers

On April 17, 2013 a bipartisan group of eight senators – Republicans Jeff Flake, Lindsey Graham, John McCain and Marco Rubio, and Democrats Charles Schumer, Michael Bennet, Richard Durbin and Robert Menendez, dubbed the "Gang of Eight" – introduced Senate Bill 744. Known as the Border Security, Economic Opportunity, and Immigration Modernization Act, or shortened below as BESSIE MAE, this 844-page behemoth, if enacted, would dramatically increase immigration opportunities and burdens for employers in contrast to current law.

This Management Alert offers a summary of BESSIE MAE's key opportunities and burdens affecting employers. A variety of section-by-section analyses of BESSIE MAE are available by clicking these links to the following organizations: the *Migration Policy Institute*, the *National Immigration Law Center*, and the *American Immigration Lawyers Association*.

If enacted, BESSIE MAE will require employers in all industries and sectors to reassess their immigration workforce-planning and compliance programs. Prudent employers will therefore approach BESSIE MAE as an immigration portfolio-management challenge and take steps now to learn about its key provisions and prepare their organizations to adapt to its sweeping changes. This is no easy task, for S. 744 is not a freestanding piece of legislation. Rather, it massively amends the Immigration and Nationality Act of 1952, which has been amended repeatedly in the ensuing years, most notably in 1965, 1986, 1990 and 1996.

Opportunities:

Expanded Opportunities for Worker Hiring and Retention.

- The H-1B quota for Specialty Occupation workers is expanded. The current cap of 65,000 H-1B visas each fiscal year is increased to a floor of 110,000 H-1B visas per fiscal year. This expanded base quota may go up or down by as many as 10,000 H-1B visas each fiscal year, but will never exceed 180,000 visas. The increase or decrease will be determined based on H-1B visa demand by employers and the unemployment rate for "management, professional and related occupations."

- Immigrant visa quota backlogs are likely to be eliminated or dramatically reduced. The new law would exempt numerous categories of individuals who are now subject to the annual employment-based immigrant visa quotas. These include spouses and children of immediate relatives, Priority Workers (individuals of extraordinary ability, outstanding researchers and professors, multinational executives and managers), certain medical doctors and healthcare professionals, and graduates with U.S. advanced degrees in science, technology, engineering or math (STEM) and a job offer from a U.S. employer in a related field who earned the eligible degree within five years before filing the immigrant visa petition. In addition, the annual per country quotas, which have caused persons born in China, India and other oversubscribed countries to wait up to 20 years to immigrate, are eliminated. Another 55,000 immigrant visas would also be available for employment-based immigration since the new law would abolish the Diversity Visa program. Moreover, additional green cards can be issued under a provision that recaptures previously authorized immigrant visas which were unused in

prior years.

- A new merit-based point system will be set up as an alternative to employer-sponsored immigrant visas. Up to 120,000 green cards may be issued annually based on a system that allocates points for a variety of positive attributes. These include education, work experience, U.S. family ties, age (with younger workers preferred), English fluency, civic involvement, country of origin (favoring nations with lower rates of immigration to the United States), among others.

- The privilege of visa revalidation within the United States in several nonimmigrant categories would be restored. Nonimmigrants eligible for visa renewal without applying at a U.S. consular post abroad include persons in the A, E, G, H, I, L, N, O, P, R or W categories. For employers, this provision should eliminate the problem of stranded employees abroad waiting for security clearances to be completed. Stateside visa reissuance will only be allowed to "low risk" applicants able to pass a background check, subject to the authority of consular officers to require an in-person visa interview at an Embassy or Consulate outside the United States.

- New work visa benefits are granted to citizens of Ireland, South Korea and countries with U.S. Free Trade Agreements. Irish citizens would be included with Australians under the E-3 visa category. Citizens of countries that have entered into Free Trade Agreements with the United States, other than Chile, Singapore or Australia, will receive E-4 visas, while South Korean citizens would receive E-5 visas. All of these categories are available only if the intending employer files a Labor Condition Application with the Department of Labor. Moreover, the spouses of E-3, E-4 and E-5 principal workers may apply for and be granted open-market employment authorization.

- U.S. Citizenship and Immigration Services would be required to give deference in petitions and status extensions for H-1B and L-1s nonimmigrants unless there is a material error in the prior decision, a substantial change in circumstances, new material information has been discovered or, if the agency, in its discretion, decides that the extensions should not be approved. In addition, L-1 workers would be given the opportunity to extend their stay beyond the five or seven year maximum currently allowed if the employer has filed a labor certification or an immigrant visa application which remains pending for more than one year.

- Work visa holders are allowed to continue working while extension petitions are pending. Employees in nonimmigrant categories A, E, G, H, I, J, L, O, P, Q, R, TN whose status has expired but whose employer or agent has submitted a timely extension request are authorized to continue employment until the petition is adjudicated. Current law limits interim employment authorization to 240 days and does not apply to all of the visas listed above.

- A new W nonimmigrant visa for unskilled and lesser skilled workers is created, allowing from 20,000 to 200,000 workers to be hired per year. W visa holders would be granted admission for three years and allowed to extend status for three more years. The spouses and working age minor children of W nonimmigrants will be permitted to apply for employment authorization. A newly created, independent agency, the Bureau of Immigration and Labor Market Research, is charged with identifying "shortage occupations" within the United States or a particular Metropolitan Statistical Area as determined by the Office of Management and Budget. Employers of prospective W workers will be required to submit an application for registration.

- New W-2 and W-3 agricultural worker visa categories will be created to replace the H-2A visa. The Department of Homeland Security (DHS) will be authorized to designate employers in the agricultural industry to hire up to 112,333 W-2 (Ag workers hired on an at will basis) and W-3 (Ag workers employed under a contract) nonimmigrants per year on a quarterly basis for the first four years after enactment. DHS may increase or decrease this quota based on a variety of data, including information from agricultural employers and labor organizations, as well as unemployment statistics and prior demand for W-2 and W-3 visas.

- Undocumented immigrants will be allowed to adjust their status to Registered Provisional Immigrant (RPI) and be granted employment authorization if they prove that they were in the United States on December 31, 2011 and April 17, 2013, and satisfy a variety of other conditions, including the payment of fines and back taxes. An employer who knows that one of its employees has applied or will apply for RPI status after the program begins will not be in violation of the provision of the Immigration Reform and Control Act prohibiting the knowing employment of an unauthorized worker.

Burdens:

Increased Compliance Obligations and Penalties for Employers.

- Electronic employment verification will be mandatory for all employers over a phased-in period. Every employer (defined as any person or entity that hires, employs, recruits or refers for a fee an individual for employment in the U.S. that is not casual, sporadic, irregular or intermittent) will eventually be required to use E-Verify.

  Employers in industries involving critical infrastructure will be required to use the system within one year after regulations are issued and must check employment eligibility of all current and new employees upon receiving 90 days' notice. Large employers – those with more than 5,000 personnel – must enroll within two years after regulations are published and will be required to confirm employment eligibility for all new hires and employees with expiring time-limited employment authorization. Mid-size employers with more than 500 employees have three years and all other employers are given four years after regulations are published to check new hires and employees with expiring temporary work permission. Employers may still voluntarily enroll in E-Verify.

- The new federal law would preempt state laws and ordinances, although states and political subdivisions may continue to enforce business licensing and similar laws if employers fail to use E-Verify. Many provisions in the current E-Verify Memorandum of Understanding are enacted and strengthened under the Senate bill. The Form I-9 (Employment Eligibility Verification) procedure is not expressly abolished. Every employee will be required to attest to his or her identity and employment eligibility under penalty of perjury.

- Burdens, fines and penalties for unlawful employment would be dramatically increased. Workers who receive a tentative nonconfirmation of employment eligibility and who seek an administrative review or a hearing to challenge that finding must be maintained as employees with full compensation and benefits until eligibility is confirmed or a final nonconfirmation notice is issued. Only an employee may pursue administrative review or request a hearing challenging a tentative nonconfirmation. The law would also create a rebuttable presumption of unlawful hiring and good faith defenses for failure to enroll in the system or verify employment eligibility and for de minimis technical or procedural failures of compliance which may be corrected on 30 days' notice.

  The fines for hiring or continuing to employ unauthorized workers would be increased:

  $3,500 to $7,500 per worker;

  $5,000 to $15,000 per worker for employers with a prior violation;

  $10,000 to $25,000 per worker for three or more violations.

  Recordkeeping fines would also increase:

  $500 to $2,000 for each violation;

  $1,000 to $4,000 for a second violation; and

  $2,000 to $8,000 for three or more violations.

- Additional forms of immigration-related employment discrimination would be prohibited. Current law already prohibits immigration-related discrimination in employment on the basis of citizenship status and national origin and also prohibits employers from requesting more or different documents than those minimally required to establish employment eligibility.

  BESSIE MAE would also bar the same types of discrimination against persons who would qualify as Registered Provisional Immigrants. In addition, it would penalize employers for national origin or citizenship status discrimination arising in the hiring of the individual for employment or the employment eligibility verification process, or relating to the compensation, terms, conditions or privileges of employment or for actual or constructive discharge from employment. It would bar the use of selective use of E-Verify as a screening mechanism and the practice of requiring job applicants or employees to use the E-Verify self-check system, among other prohibited practices.

Fines for immigration-related discrimination would also increase:

$500 to $2,000 per person for unfair immigration-related employment practices, misusing E-Verify, any intimidation or retaliation, and improper document verification procedures

$2,000 to $5,000 per person who suffers discrimination because of an unfair immigration-related employment practice

$4,000 to $10,000 per person for second offenses

$8,000 to $25,000 per person for three or more violations

- Persons engaged in "foreign labor contractor" activities would be extensively regulated. These activities are defined to mean "recruiting, soliciting, hiring, employing, sponsoring, managing, furnishing, processing visa applications for, transporting, or housing an individual who resides outside of the United States in furtherance of employment in the United States." Under the Senate bill, no employer, foreign labor contractor or agent or employee of a foreign labor contractor may impose any fee (including visa fees, processing fees, transportation fees, legal expenses, placement fees and other costs) on a worker for any foreign labor contracting activity. Moreover, foreign labor contractors are prohibited from discriminating against workers and must register with the U.S. Department of Labor. They must also provide extensive disclosures to workers whom they recruit. Violation of the foreign labor contractor law could lead to fines of $10,000 (for a first offense) up to $25,000 (for a third violation).

  It remains to be seen whether the proposed law was intended to apply a markedly different regulatory structure benefiting workers recruited abroad than the rules applicable to foreign workers hired within the United States. Also unclear is whether lawyers representing U.S. employers that recruit from abroad must register as foreign labor contractors if they engage in visa processing activities.

- The H-1B and L-1 visa categories would include numerous additional regulations and penalties, especially for H-1B and L-1 dependent employers. The changes would include increased authority in the Department of Labor over H-1B investigations and in U.S. Citizenship and Immigration Services to investigate L-1 visa violations by employers.

  In addition, prevailing wage rates and government filing fees would substantially increase, as would associated penalties including debarment from sponsoring nonimmigrant workers for up to three years.

  All employers wishing to hire H-1B nonimmigrants would be required to post job openings on a Department of Labor website for 30 days and offer employment to equally or more qualified U.S. workers who apply. In addition, the Labor Department would be given 14 days (up from seven days under current law) to decide whether to certify a Labor Condition Application (LCA) and authority to reject LCAs not merely if they are incomplete or obviously inaccurate, as allowed under current law, but also if the Department finds "evidence of fraud or misrepresentation of material fact." Employers, however, may submit an uncertified LCA to USCIS but that agency may not approve an H-1B petition until the Labor Department certifies the LCA.

  Employers comprising a single group of affiliated entities that employ 50% or more H-1B and L-1 workers out of their total labor force in the United States would face even higher fines; further, over time, if heavy reliance on H-1B and L-1 workers persists, they might be prohibited from sponsoring additional foreign workers in these visa categories. Such employers may also be prohibited from placing H-1B professionals and L-1B specialized knowledge personnel at another employer's worksite. Excluded from the 50% calculation are H-1B workers who are "intending immigrants." These are workers for whom the employer has filed a labor certification application which remains pending for one year, subject to certain restrictions.

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As can be seen from this brief outline, BESSIE MAE, if enacted in its current form, will dramatically change the employment-based immigration landscape. As a result, employers should begin to consider how the pluses and minuses of the legislation might apply, and what proactive steps can be taken now so that their businesses are poised to exploit new immigration opportunities while minimizing the expanded array of compliance risks. A holistic approach to immigration portfolio management is therefore strongly recommended.

If you have questions about how the Senate bill might apply in your particular circumstances, the lawyers of Seyfarth Shaw's *Immigration Practice Group* stand ready to answer them.

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