

Immigration

DOL Promises Vigorous Enforcement of Visa Program Rules

The Labor Department will take additional actions to protect U.S. workers and enforce visa program rules, including “heightened” use of criminal referrals, the agency announced June 6.

“Entities who engage in visa program fraud and abuse are breaking our laws and are harming American workers, negatively affecting Americans’ ability to provide for themselves and their families,” Labor Secretary Alexander Acosta said in a statement. The department will focus on preventing visa program abuse and will “take every available legal action against those who abuse these programs,” he said.

President Donald Trump said shortly after the November 2016 election that he would be directing the DOL to investigate cases of visa abuse. The heightened investigations were part of the president’s plan for his first 100 days in office.

The DOL will use a variety of tactics, from collecting more information from employers to using different prosecution methods, agency officials said during a June 6 press call. The idea is to protect U.S. workers but also send a message to employers that those who cheat the system will face the “full force” of the federal government, the officials said.

Prosecutions Over Civil Penalties The agency’s traditional model has been to impose civil penalties, but the process takes a long time and doesn’t always compensate affected workers adequately, one of the officials said. Now, the agency will be pursuing injunctions in civil cases and coordinating with U.S. attorneys’ offices on criminal prosecutions.

“This is completely expected,” American Immigration Lawyers Association President William Stock told Bloomberg BNA June 6.

“They are not going to be contented with the civil fine regime, they are not going to be contented with debarment,” under which an employer is temporarily blocked from hiring foreign workers, said Stock, who practices with Klasko Immigration Law Partners in Philadelphia. “They are going to go criminally after the principals of the company,” he said.

The DOL’s announcement is “a welcomed change in the status quo,” Robert Law, director of government relations for the Federation for American Immigration Reform, told Bloomberg BNA June 6. But “it’s frankly sad that this announcement is even considered news,”

as this type of enforcement “should have been going on for years,” he said.

‘Sense of Urgency’ The DOL highlighted its case against G Farms LLC, an onion farm in Arizona that violated the H-2A agricultural guestworker program. For the first time in its enforcement history, the agency used a preliminary injunction to clamp down on workers’ dangerous housing conditions, a DOL official said. The H-2A program requires that employers provide housing.

The idea is to introduce a “sense of urgency” to these cases, she said. The DOL officials spoke on background during the press call.

When employers offer substandard wages and working conditions, both U.S. and foreign workers are negatively affected, the official said. U.S. workers are deprived of a job opportunity that they might have taken had the employer offered the wages and working conditions required by law, she said. And foreign workers are lied to about what the jobs entail, only to be exploited once they get to the U.S., she said.

But Richard Mahrle of Gammage & Burnham in Phoenix, an attorney representing G Farms and owner Santiago Gonzalez, said there was no intent to exploit the workers in this case. The farm stipulated to a preliminary injunction because it already had cured all violations within 24 hours of the DOL’s notice, he told Bloomberg BNA June 6.

G Farms advertised jobs that entailed eight hours of work a day, five days a week, he said. And the workers were supposed to be housed in hotels, he said. But the farm discovered at the last minute that rooms weren’t available, and converted buses were used as a last-minute backup plan, Mahrle said. Contrary to the DOL’s claims, the buses had functioning air conditioners, he said.

“No one is more upset at people who abuse the system than employers who are trying to follow the rules,” Stock said. But due process is “critical,” especially where the government is going to use injunctions and civil forfeiture, he said.

H-1B Changes In addition, the DOL “relatively shortly” will be proposing changes to the labor condition application, the form that employers must complete to verify that they’re paying the required amount to H-1B skilled guestworkers and that U.S. workers aren’t available, an official said.

The idea is to get more information from employers to help root out fraud and abuse, he said. That includes more information related to outsourcing, such as whether the employer will be exempt from the require-

ment that U.S. workers not be displaced by an H-1B worker.

Under the law, “H-1B dependent” employers—those with a certain percentage of their workforce on H-1B visas, depending on size—can’t displace U.S. workers through an outsourcing arrangement unless they pay the H-1B workers at least \$60,000 a year or the workers have master’s degrees.

“The only concern I would have” is whether the DOL “goes beyond its statutory authorization to collect information at the beginning of the process regarding the wages and working conditions” of the position, Stock said.

The law calls for an “attestation-based and complaint-driven enforcement mechanism,” Stock said. That means employers don’t have to prove to the DOL that they’re following the rules in order to get the visas, and the agency can’t launch independent investigations.

“An overhaul of every guestworker program needs to happen,” said Law of FAIR, which supports lower im-

migration levels. There’s still an incentive for employers to use cheap foreign labor, even if all program rules are followed, he said.

The law needs to state that guestworker visas “are only available to employers who legitimately cannot find qualified American workers who meet the minimum qualifications,” he said. That includes a requirement for a “real, good-faith effort” to recruit U.S. workers, he said.

What the DOL can do under current law is “very narrow,” and what the agency announced “appears to be the fullest extent of what they’re capable of doing,” Law said.

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