Federal Bar Association
Labor and Employment Law Section
Winter 2018

The Labouring Oar

Message from the Chair

By Kathryn M. Knight

Happy New Year! Although the year is off to a bitterly cold and wintry start for many of our members around the country – even the Deep South had snow! – the Labor and Employment Law Section is up and running with its plans for 2018. If your resolutions for the new year include becoming more involved with our Section, we have many opportunities for you and invite your participation.

If you are interested in Programming and CLE, our Section will have something for you. The committee is fine-tuning its plans for the Traveling CLE program, which will offer cutting-edge specialized topics in some venues and a "nuts and bolts" program in others. Do you have ideas for a specialized topic? Would you like to participate as a speaker? Would your local Chapter like to partner with the Labor and Employment Section to have a program presented in your venue? If you answered "yes" to any of these questions, committee co-chairs Whitney Sedwick Meister, Phil Kitzer, and Danielle Brewer Jones want to hear from you. Contact information for each of them is available at the back of this newsletter.

Be on the lookout, too, for programs that the Section will present in collaboration with other Sections of the Federal Bar Association. Our Section is no stranger to collaboration, and we anticipate working this year with both the Immigration Law Section and the ADR Section to present programming. Are these areas of special interest to you? If so, volunteer to assist.

Are you a talented writer? Then you might wish to contribute to our Section's regular publications in the Federal Lawyer, our quarterly Labouring Oar newsletter, or our monthly Circuit Updates. With these publications, we strive to keep our members informed of interesting developments and recent events in the labor and employment field. The Circuit Updates inform readers of trends in recent decisions and often identify divergent views among the circuits, while the articles in the Labouring Oar typically offer deeper treatment of developing issues. We hope you will enjoy the contributions of this issue's authors – Brandon Davis, Kristie Bowerman, and Jack Blum. Will you contribute to our next issue and share your insights and views on an interesting topic? Publications co-chairs Caitlin Andersen and Jack Blum look forward to hearing from you.

Are you anxious for a change of scenery and an opportunity to meet and interact with Section members? Mark your

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A Look at What's Inside

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Welcome New Members!

The Labor and Employment Section welcomes its newest members:

Lisa Allen, *Ansa Assuncao, LLP, Tampa, FL*

Ethan Cohen, *Equal Employment Opportunity Commission, Chicago, IL*

Michelle Gessner, *The Law Offices of Michelle Gessner, PLLC, Charlotte, NC*

Michell Kneeland, *Culhane Meadows, PLLC, Austin, TX*

Katya Lancero, *BurnsBarton LLP, Phoenix, AZ*

Arta Manus, *Aegis Law Firm, Westminster, CA*

Susan Motley, *Wood Weatherly Trial Law, Denton, TX*

Andrew Narus, *Barran Liebman LLP, Portland, OR*

Karen Neilsen, *National Labor Relations Board, Cleveland, OH*

Jennifer Olson, *Best & Flanagan LLP, Minneapolis, MN*

Laura Palk, University of Oklahoma College of Law, Norman, *OK*

Kathleen Rae, *Tarrant County Criminal District Attorney's Office, Fort Worth, TX*

Valerie Talkers, *Taft Stettinius & Hollister LLP, Dayton, OH*

Andrew Vangh, *Rosemount, MN*

Nadi Viswanathan, *Viswanathan Asia-Pacific, New York, NY*

David Volk, *Volk Law Offices, PA, Melbourne, FL*

Jennifer Wood, *Rhode Island Center for Justice, Providence, RI*

We encourage each of you to become involved in Section activities. Consider joining us in New York City for the FBA Annual Meeting and Convention, September 13-15, 2018, and plan now to attend the Section's 2019 Biennial Conference in Puerto Rico (Spring date TBD). Also visit our webpage (www.fedbar.org/sections/labor-employment-law-section.aspx) to take advantage of the information and resources available there, and watch for our monthly Circuit Updates to stay abreast of recent developments in labor and employment law. For additional information on how you might become even more involved in the Section, contact Kathryn Knight, our Section Chair, at kknight@stonepigman.com.

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calendars now. The FBA's 2018 Mid-Year Meeting is March 24, 2018, in Arlington, Virginia; and the 2018 Annual Meeting and Convention is September 13-15, 2018, in New York City. More information on each of these events is available on the FBA's website (www.fedbar.org).

In addition, the Section continues its planning for the 2019 Biennial Conference in San Juan, Puerto Rico. We understand that the island's recovery is progressing well – although it is far from complete – and that Section members in Puerto Rico will be ready to host our conference in the spring of 2019, with several options available for venues. Unlike other CLE programs our Section presents, the Biennial Conference is designed to present more advanced and developing topics faced by labor and employment practitioners on both sides of the bar, as well as more networking and collaboration opportunities. Further details about this always fun and exciting event, along with registration information, will be available over the coming months. And if you have suggestions for topics or speakers for the Biennial Conference that may be of interest to our Section's membership, please contact one of the Programming and CLE co-chairs.

As a Section, we strive to provide value to our members through programming, publications, and in-person meetings. With you becoming more involved and active, our Section is certain to have a productive year!■

A Membership Perk: Monthly Circuit Updates

Don't forget that your membership in the Labor and Employment Section gives you access to the Monthly Circuit Updates! Each month, summaries of all the major labor and employment decisions in each Circuit are provided to all members in an eNewsletter that is also available on the Section's webpage at www.fedbar.org/sections/labor-employment-law-section.aspx. These Updates are an invaluable resource that allows members to stay up-to-date on important developments in each Circuit. Take a deep dive into all the new cases within your Circuit each month, or peruse all of the developments around the country to stay abreast of the law for your clients. If you would like to volunteer as a contributor for the Circuit Update, please contact Caitlin Andersen (candersen@seatonlaw.com) or Jack Blum (jblum@paleyrothman.com) for more information.

The NLRB Loosens Regulation of Employee Handbooks

By Jack Blum

Following the appointment of William J. Emanuel to the National Labor Relations Board ("NLRB" or "Board"), the NLRB swung to a Republican majority for the first time since 2007. That majority came to an end on December 16, 2017 with the conclusion of Chairman Philip A. Miscimarra's term on the Board, leaving the NLRB split until another Republican nominee is confirmed by the Senate. While relatively short-lived, the GOP majority went out with a bang during the week of December 11, 2017, issuing three "buzzer beater" decisions that present stark reversals of many of the advances of the previous Democratic NLRB majority.

While each of the three December 2017 decisions are significant, the Board's decision in *The Boeing Company*,[1] is of particular note because of its impact on *both* unionized and non-unionized workplaces. As the rate of private-sector union membership has continued a long-term decline, many perceived the NLRB as increasingly seeking to regulate non-union employment relationships. One of the primary catalysts for this push to regulate non-union employment was employee handbooks which set forth many of the basic rules and expectations of the employment relationship. In *The Boeing Company,* the NLRB curtailed one of its primary mechanisms of handbook regulation by defanging its ability to find unfair labor practices based on the mere maintenance of workplace rules that could be reasonably construed to prohibit protected activity.

The NLRB's move into handbook regulation was powered by its 2004 *Lutheran Heritage Village-Livonia*[2] ("*Lutheran Heritage*") decision, which held that workplace rules violate the National Labor Relations Act (NLRA) if they (1) were promulgated in response to union activity, (2) have been applied in the past to restrict the exercise of NLRA rights, or (3) *would be reasonably construed by employees to prohibit NLRA-protected activity.* Under the NLRA, employees have not only the right to unionize, but also the right to take group action to improve their terms and conditions of employment outside of the union context. The third, "reasonably construed" prong of *Lutheran Heritage* proved to be a potent tool in the NLRB's regulation of non-unionized workforces because it allowed the NLRB to find unfair labor practices based upon handbook provisions that were neither motivated by, explicitly applicable to, or actually enforced against union or other protected activity.

Based on the NLRB's active application of the *Lutheran Heritage* standard, even non-unionized employers have been forced to alter or remove policies governing matters as varied as social media, civility, insubordination, confidentiality, workplace photography and recording, mandatory incident reporting, and investigations, even when those policies were enacted and enforced for completely proper purposes. The NLRB regularly found that policies in all of these areas could be construed by employees to restrict their NLRA rights to communicate and take group action to better their employment conditions, and held that the mere maintenance of the policies was unlawful. For example, workplace civility or conduct codes were frequently invalidated because they could conceivably be used to punish employees for raising employment-related disputes in a manner that is not considered to be civil, and confidentiality rules were stricken on the grounds that they could be construed to prohibit employees from engaging in group discussions of their wages and other terms of employment. Under *Lutheran Heritage*, it mattered not whether the rule had ever actually been enforced to limit the exercise of NLRA rights (or, indeed, ever enforced at all) or what business interests the employer sought to advance by creating the rule because the NLRB limited its analysis solely to the text of the rule. Merely having an offending rule in effect was an unfair labor practice.

In *The Boeing Company*, the NLRB took a major step towards rolling back this standard. The rule in question was a "no-camera rule" that prohibited employees from using cell phones or other devices to photograph or take video on the company's premises. Under an application of *Lutheran Heritage*, this type of rule would be invalid because it could be construed to prevent employees from documenting and publicizing union organizing or protest efforts or other activities in support of workplace disputes. Rather than engaging in this type of analysis, however, the NLRB instead reframed the *Lutheran Heritage* standard. The NLRB explained that the *Lutheran Heritage* analysis would now consider (1) the nature and extent of the rule's potential impact on employees' NLRA rights, and (2) the employer's legitimate justifications for the rule.

The Board explained that decisions on workplace rules must now recognize that in many cases the risk of an actual intrusion on employees' NLRA rights is minimal. In addition, the NLRB broadened its focus beyond the mere text of the rule to include evidence about the rule's impact on employee rights and the employer's business justifications, distinctions among different types of industries and workplaces, and particular events that shed light on the rule's purpose or impact. Applying this new standard, the NLRB found that the no-camera rule's impact on NLRA rights was minimal. While it was possible that a group of Boeing employees could conduct an employment-related protest and be prohibited from photographing their activity, the rule would not actually prevent the employees from engaging in the protected protest in the first place, and thus had only an indirect effect on concerted activity. On the other hand, the NLRB credited Boeing's justifications for the rule as necessary for the security of its facilities and protection of confidential and proprietary information.

The NLRB also provided some guidance for future cases, noting that some classes of rules would always be lawful to maintain, some would require case-by-case analysis, and some would always be unlawful. As lawful policies, the

NLRB identified the no-camera rule as well as "other rules requiring employees to abide by basic standards of civility." This is a stark reversal, because workplace conduct and civility policies had previously been among the NLRB's most common targets under *Lutheran Heritage*. On the other hand, the NLRB explained that rules prohibiting employees from discussing wages and benefits would always be unlawful because the rule is a direct prohibition on NLRA-protected conduct and typically unaccompanied by a substantial business justification.

As a final note, it is important to point out some limits of the NLRB's ruling. First, it only curtails the "reasonably construed" test under *Lutheran Heritage*; rules that are enacted in response to union activity or have been applied in the past to restrict NLRA rights are still unlawful. Second, the NLRB's reference to rules prohibiting discussion of wages and benefits indicates that the NLRB will not permit rules that directly and explicitly impact NLRA rights, as opposed to rules that merely could be interpreted to affect NLRA rights or only do so indirectly. Finally, the NLRB made clear that although in many cases the mere maintenance of such facially-neutral rules will not be prohibited, instances where an employee is actually disciplined for engaging in NLRA activity under such a rule will still be subject to scrutiny.

While *The Boeing Company* will likely affect the greatest number of workplaces, the Republican Board majority also issued several parting shots that will have a significant impact in the traditional labor law realm. In *Hy-Brand Industrial Contractors, Ltd.*,[3] the Board overruled its 2015 *Browning-Ferris Industries*[4] decision, currently being challenged in the D.C. Circuit, and narrowed the circumstances under which it will find joint employer relationships. In *PCC Structurals, Inc.*,[5] the Board reversed a 2011 decision that had opened the door to union organization of "micro-units" of employees within an employer's workforce.

Jack Blum is an associate in the Employment Law and Commercial Litigation practices at the law firm of Paley Rothman in Bethesda, Maryland. Mr. Blum represents employers in claims involving employment discrimination, agency charges, wage and hour issues, non-compete and non-solicitation covenants, trade secrets, and the interpretation of employment agreements. In the area of commercial litigation, Mr. Blum represents a wide range of clients in cases involving shareholder and partnership disputes, business torts, breaches of contract, real estate, and complex trust and estate issues.

Endnotes:

[1]*The Boeing Co.,* 365 NLRB No. 154, 2017 WL 6403495 (N.L.R.B. 2017).

[2]*Lutheran Heritage Village-Livonia*, 343 NLRB No. 75, 2004 WL 2678632 (N.L.R.B. 2004).

[3]*Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156, 2017 WL 6403496 (N.L.R.B 2017).

[4]*Browning-Ferris Industries of California, Inc.,* 362 NLRB No. 186, 2015 WL 5047768 (N.L.R.B. 2015)

[5]*PCC Structurals, Inc.*, 365 NLRB No. 160, 2017 WL 6507219 (N.L.R.B. 2017).

Call For Articles

The Labor and Employment Section is seeking articles suitable for publication in forthcoming editions of its quarterly newsletter, The Labouring Oar. Articles can address any timely topic of importance to the labor and employment practitioner and should provide balanced coverage of the topic. Suggested length is between 1,300 and 2,500 words. Citations should be formatted as endnotes. Additional guidelines for authors are available here: http://www.fedbar.org/resources_1/copy%20of%20accepting-articles-for-publication/writers-guidelines.aspx.

Upcoming submission deadlines are March 30, 2018 and June 30, 2018.

Before submitting an article for publication, please contact Caitlin Andersen (candersen@seatonlaw.com) or Jack Blum (jblum@paleyrothman.com).

FBA Annual Meeting and Convention

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September 13–15, 2018

Federal Bar Association

Tearing Down the Wall: President Trump's Immigration Policies Warrant Collective Action from the Labor and Employment Community

By Kristie Bowerman and Brandon Davis

During the 2016 presidential campaign, President Trump repeatedly promised to build a wall along the U.S./Mexico border. Supporters praised then-candidate Trump's pledge, believing a border wall was essential to U.S. national security. But after one year in office, no wall has been built along the U.S./Mexico border. And it is unclear whether any border wall will be constructed *or constructive*.

Still, efforts to build a border wall are underway – just not at the U.S./Mexico border. The truth is that the figurative wall is being built in Washington D.C. with the implementation of sweeping administrative changes to immigration policy through the federal agencies President Trump controls. Though lacking mass and physical presence, this administrative "wall" is proving more effective than the border wall President Trump promised his supporters and still claims is under construction. And this is the wall employers should work to tear down.

This wall (which is actually the President's list of immigration principles released on October 10, 2017, allegedly intended to change federal statutes and tighten alleged loopholes) will place serious administrative burdens and restrictions on employers who rely upon foreign talent when U.S. employees are unavailable.[1] So we must examine the major cornerstones President Trump will to use to construct the wall, and we must also identify strategies employers can implement to scale this barrier.

The travel ban is the cornerstone of President Trump's restrictive immigration policy.

The wall is anchored in exclusion. Within a week of his inauguration, President Trump signed an executive order halting all refugee admissions and barring U.S. admission to people from seven Muslim-majority countries. That meant U.S. companies who needed to transport engineers, scientists, and other advanced professionals from those countries immediately felt the brunt of this restrictive policy. The travel ban would have prevented top technologists and other professionals from freely entering the United States.[2] This is why so many Silicon Valley tech leaders resisted the travel ban when it was issued in 2017.[3] One of their chief concerns was the risk that the travel ban would divert global talent from the United States to other countries (like Canada or China).[4]

The courts initially declared the President's travel ban unconstitutional, but the matter is still being litigated. Notwithstanding, President Trump signed another executive order implementing a different version of his travel ban on September 24, 2017.[5] That version increased the travel ban to eight nations, six of which are predominately Muslim.[6] The United States Supreme Court allowed the September 24, 2017, travel ban to go into effect while the legal challenges are adjudicated.[7] And that means employees from the banned counties likely can be barred from working in the United States while their travel authorization is under review.

Using barriers like this to hinder global employment mobility hurts American employment productivity.[8] And besides keeping otherwise eligible candidates from working in the United States, the travel ban has already had other negative impacts on the United States economy. These include the implementation of import fees on U.S. goods and the refusal to admit U.S. citizens into countries subject to the travel ban.[9] If left unchecked – or worse, expanded – these travel prohibitions could eventually cause the U.S. capital markets to suffer by collateral damage.[10]

So the focus now turns to the courts. If President Trump prevails and is allowed to set this foundational slab of restrictive immigration policy, then he likely would be emboldened to expand the travel ban to other middle-eastern countries and the other countries whose citizens he claims are unworthy of U.S. admission. In that case, U.S. employers would likely suffer additional employability limitations as global talent pools are walled off.

Employment blocks will shape the wall President Trump is constructing.

H-1B Visas

President Trump's changes to the H-1B program are a key component of the wall his administration is working to construct. H-1B visas allow highly-skilled foreign professionals to work in the U.S. on a temporary basis. H-1B visas may be issued with validity for up to three years, and include an option to extend for up to an additional three years. Moreover, when H-1B visa holders seek employment-based permanent residence, there are provisions to allow them to continue to renew H-1B status while awaiting green card issuance. This is very important to U.S. employers who often cannot risk losing these vital employees when H-1B status ends pending green card approval.

U.S. employers cherish the H-1B program because H-1B beneficiaries are generally educated at a Bachelor's or higher level and possess high-level professional skills. The H-1B visa is especially popular among foreign IT professionals, but it also benefits health care, science, educators, and finance professionals, among many other fields. Notwithstanding these benefits and the program's popularity, President Trump is raising obstacles to restrict the H-1B program to rid it of alleged "abusers of the program who use the visa to replace American workers."[11]

President Trump laid the first brick by temporarily ending the premium processing or "fast-track" procedure for H-1B visa issuance.[12] President Trump then made the evaluation process for computer programmers more stringent.[13] In April, the president signed the "Buy American and Hire American" executive order and requested suggestions for even more H-1B barriers.[14]

Generally, the wall favors American workers over H-1B candidates – which is theoretically sound, but unstable in practice. If implemented, this portion of the wall will eventually come tumbling down. For example, the President's policies require U.S. employers to make efforts to recruit U.S. workers before hiring foreign laborers through the H-1B program.[15] However, the current law requires U.S. employers to meet certain labor conditions before H-1B employees can be hired. And most employers who rely on the H-1B program do so because they cannot identify U.S. talent to complete the work at hand.

Before this portion of the wall was constructed, H-1B extensions were relatively easy to obtain. Employers would simply file a renewal petition with the government explaining the terms of the employment offered and providing evidence that the prospective foreign worker was a professional who was qualified to fill the position in their initial H-1B petition. As long as no substantive changes were made to the employment, employers could be fairly confident that extensions of an employee's H-1B status would be granted and there would be no interruption in their business. Now, President Trump requires USCIS officers to "apply the same level of scrutiny" to H-1B extensions as it does to initial H-1B petitions.[16] This means the government will no longer defer to the H-1B petitions it approved in past years. The uncertainty this creates within U.S. businesses that hire H-1B employees cannot be overstated.

President Trump is also considering two other blocks that could have insurmountable impacts on employers who use the H-1B program: The first barrier would allow the government to direct workers with H-1B status to leave the country while they wait for green cards.[17] If implemented, this proposal would potentially require 500,000 to 750,000 workers to leave their jobs.[18] The second proposal would roll back an Obama-era rule that allows H-1B status holders' spouses to work in the United States.[19] This proposal would force many H-1B spouses to stay at home because would be unable to obtain a Social Security number. Even worse, these individuals would be ineligible for drivers' licenses in approximately 38 states.[20]

Changes to the H-1B program could have a particularly chilling effect on the tech industry because a majority of H-1B workers work in the tech space.[21] Not only will fewer workers be available, but highly skilled professional workers from other countries might not be able to enter the United States. One of the greatest risks of building this type of wall is that tech companies might be forced to locate their offices in countries that can actually provide the talent they need.

E-Verify

E-Verify currently is a voluntary online program that confirms an employment candidate's eligibility for U.S. employment. But according to an October 10, 2017, policy statement, President Trump will promote mandatory nationwide E-Verify use in a manner that would resemble requirements applicable to federal contractors who must use the system.[22] When explaining this component of the wall, President Trump informed Congress that all U.S. employers should be required to use E-Verify,[23] and private companies that do not comply with E-Verify should face "strong penalties."[24]

Although only nine states require private companies to use E-Verify, according to U.S. Citizenship and Immigration Services ("USCIS"), more than 600,000 employers use E-Verify now. Congressional usage estimates are even higher. For example, House Representative Lamar Smith (R-Texas), House Judiciary Committee Chairman Bob Goodlatte (R-Va.), and Ken Calvert (R-Calif.) stated that over 740,000 American employers use E-Verify.[25] This growing program use encouraged these three Representatives to introduce the Legal Workforce Act ("LWA"). If enacted, the LWA would make E-Verify mandatory, and "'[g]iven that congress has reauthorized the E-Verify program for years, the established mandated requirements for federal contractors, various state requirements and the nationwide use by [some] employers, it is conceivable that a mandatory E-Verify program will garner support.'"[26] So there is a realistic possibility that mandatory E-Verify might be implemented during the Trump presidency. If so, a mandatory E-Verify program would be the capstone of the wall used to negatively impact employers, employees, and the economy as a whole.

For starters, a mandatory E-Verify program would prove costly for U.S. employers. In 2013, the Congressional Budget Office found that mandatory E-Verify would likely cost private sector employers over $600 million in three years.[27] Bloomberg has shown that small business owners who used E-Verify in 2010 had to spend $81 million on the program and an E-Verify mandate could cost small businesses as much as $2.6 billion.[28] Requiring employers to use E-Verify would particularly overwhelm employers in the construction and agriculture industries because over half of that workforce is unauthorized.[29]

A mandatory E-Verify program will also put current U.S. citizens and legal non-citizen workers' jobs at risk. The Social Security Administration ("SSA") estimates 3.6 million Americans would be forced to visit an SSA field office each year to keep their E-Verify authorization current.[30] When a U.S. worker is notified of a tentative nonconfirmation from E-Verify, that worker likely will lose time and money when attempting to correct his or her records with the SSA or the Department of Homeland Security. Fourteen (14) percent of these workers lost more than two days of work and almost half lost at least a partial day.[31] These figures are startling when consideration is given to the fact that many Americans rely on weekly earnings. Even more alarming, 42% of workers reported they did not receive notice of an employment eligibility irregularities and that employers would sometimes fire workers who suffered irregularities without notice or without allowing that the employees a chance to correct the error.[32]

Finally, a mandatory E-Verify program may not bode well for the economy as a whole. The Bipartisan Policy Center found that enacting an E-Verify mandate would increase

the national budget deficit by $40 billion in the first ten years and by $110 billion in the first twenty.[33] It would also result in a 1.5 percent decrease in the GDP over the same time period.[34] This is partially due to the number of workers who would leave the formal economy and start working in the unregulated and untaxed underground economy.[35] To top it off, a mandatory E-Verify program will cost U.S. taxpayers over $1 billion in implementation costs alone.[36]

The implications of a mandatory E-Verify program on the workplace could be highly undesirable. This particular portion of the wall would go beyond regulating illegal immigration, by imparting unwanted secondary effects on U.S. employers, U.S. citizens, and the economy.

Increased Worksite Enforcement

U.S. Immigration and Customs Enforcement ("ICE") recently pledged an immigration crackdown on U.S. businesses.[37] This, too, is a major building block of the wall under construction. Although the details of this component of the wall are still unclear, most employment-based immigration stakeholders agree that worksite enforcement is the next major component of the wall taking shape. In short, U.S. employers should brace for immigration policies that will treat illegal employment like white collar crime.

In recent months, ICE has signaled it would significantly step up audits and raids on employers to identify undocumented workers and prosecute the employers who hire them.[38] In fact, when speaking about worksite enforcement initiatives, Tom Homan, Deputy Director of Immigration and Customs Enforcement stated he wants "to see a 400% increase in work site operations."[39] "We're not just talking about arresting the aliens at these work sites, we are also talking about employers who knowingly hire people who are unauthorized to work."[40]

Although ICE has always regularly conducted I-9 audits to verify whether workers have lawful employment eligibility, worksite enforcement activities like this peaked at 3,127 in 2013.[41] In fiscal 2017, ICE audited 1,360 U.S. employers, resulting in 71 indictments and 55 convictions of business owners and managers.[42] So if the government's stated policy is implemented, more than 12,000 U.S. employers could become subject to worksite enforcement activities and the criminal penalties that would likely follow.

The President may use a DACA/DREAM Act failure as posts to support the wall.

Passing the DREAM Act requires political will. But it seems like President Trump will not use his executive power to advance the DREAM Act. Rather, the administrative wall likely will hurt a key group of young people who otherwise could build the U.S. economy.

The Deferred Action for Childhood Arrivals (DACA) program was created in 2012 by then-Secretary of Homeland Security Janet Napolitano.[43] "DACA is an exercise of prosecutorial discretion, providing temporary relief from deportation (deferred action) and work authorization to certain young undocumented immigrants brought to the United States as children."[44] DACA has enabled approximately 800,000 young adults to work lawfully and attend school.[45] The DREAM Act is essentially DACA in legislative form.[46]

However, on September 5, 2017, the Trump administration rescinded DACA and announced a DACA "wind down."[47] Although that decision is now being challenged in Federal courts, there are serious doubts about whether DACA and/or the DREAM Act will ever come into fruition. Although the President promised to sign a bipartisan bill implementing immigration reform and addressing the DACA/DREAM Act issue, he has failed to do so, causing great uncertainty about whether the DREAM Act will become a reality, or simply another dream deferred.

For every business day the wall is used to block DACA, more than 1,400 individuals lose their ability to work.[48] These figures are staggering. Blocking DACA likely may result in job losses for more than 30,000 individuals per month and nearly 700,000 individuals total. But these are the very people who are currently employed and contribute to the American workforce.[49] The financial strains on the public are also significant. The Cato Institute reported it would cost $60 billion to deport the people protected by DACA. These individuals contribute $28 billion to the economy annually.[50]

It seems President Trump might possibly realize this section of the wall may not be as prudent as first thought because of mounting political pressure to pass the DREAM Act. The DREAM Act would provide current, former, and future undocumented high-school graduates and GED recipients a pathway to U.S. citizenship through college, work, or the armed services.[51] The most recent versions of the DREAM Act were introduced in July 2017, by Senators Lindsay Graham (R-SC), Richard Durbin (D-IL), and Lucille Roybal-Allard (D-CA) and House Representative Ileana Ros-Lehtinen (R-FL).[52] According to the Migration Policy Institute, over 3.4 million individuals would qualify under the 2017 version of the DREAM Act, and over 1.5 million would obtain a green card.[53]

The inescapable conclusion is this insidious wall must come down. Passing the DREAM Act would immensely benefit the American economy. It would add a total of $22.7 billion annually to the United States GDP and could have a cumulative increase over 10 years of $400 billion to $1 trillion dollars.[54] Also, the income of the average American would rise between $82 and $273, annually.[55] These positive economic effects are a great reason to implement the DREAM Act. However, given the Trump administration's restrictive approach to immigration policy, it is unclear whether this Act will be blocked if the wall continues to be built.

Conclusion

In the widely acclaimed play, "Fences," August Wilson explained that some people build fences to keep people out…and other people build fences to keep people in. In this case, President Trump will keep out the good and usher in the bad; but U.S. employers are the people who will

ultimately be trapped by this figurative frontier. This is why employers should not lose sight of the fact that President Trump's promised border wall is merely a distraction. The real wall is, undoubtedly, a political and bureaucratic monument to mass deportation that will place massive administrative burdens on U.S. employers, and harm citizens and the economy as a whole. And if employers are to survive and thrive, they must quickly identify methods to scale this boundary. ■

Kristie L. Bowerman is the founding attorney of Immigration & Nationality Law Group. Her practice is devoted to representing clients around the world in a broad range of U.S. immigration matters, with a particular emphasis on all aspects of employment-based immigration. Ms. Bowerman's clients have included Fortune 100 and Fortune 500 companies, professional sports teams, a world-renowned circus arts entertainment company, oil and gas companies, colleges and universities, K-12 schools, IT companies, financial firms, television networks, hospitals, engineering firms, religious organizations, and marine companies, among many others. Ms. Bowerman also regularly represents clients in matters such as family-based permanent residence and citizenship.

Brandon Davis practices in the areas of labor and employment and business, employment-based and family-based immigration at the New Orleans office of Phelps Dunbar LLP. His employment litigation practice includes representing employers in the defense of employment related claims, alleging retaliation, discrimination and workplace harassment under federal and state statutes. As part of his immigration practice, Mr. Davis represents employers and individuals in a variety of immigration matters including civil and criminal worksite enforcement defense, visa petitions for employees, students, investors/traders, intracompany transfers, and family sponsored petitions. In this capacity, he has successfully represented employers and individuals in the following matters: I-9/E-verify Compliance, Labor Certification, H-1B visas, H-2B visas, Conrad 30 Waivers, J-1 visas, I-130 Applications, Consular processing, Lawful Permanent Resident applications and E-3 visas.

Endnotes:

[1]Mark Rockwell, *E-Verify role upped in White House plans*, FCW (October 09, 2017), https://fcw.com/articles/2017/10/09/everify-immigration-trump-rockwell.aspx.

[2]*Id.*

[3]*Id.*

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