

New Immigration, Travel Order Won't Stem Tide Of Lawsuits

By **Kevin Penton**

Law360, New York (March 6, 2017, 11:24 PM EST) -- The Donald Trump administration's second crack at enacting a temporary ban on travel from several Muslim-majority countries is likely only the start of a new period of legal challenges and questioning from those it will impact, experts said Monday.

Under the **new executive order** that is set to go into effect on March 16, non-green card holders from Iran, Libya, Somalia, Sudan, Syria and Yemen will be temporarily barred from entering the U.S., as they were under the previous travel ban, which was rescinded Monday.

Here, experts share their thoughts on the likelihood the new executive order will face legal challenges and how it may impact the business community and the mobility of employees.

It Will Still Be Seen as 'Muslim Ban'

Monday's executive order was clearly an attempt by the Trump administration to respond to the myriad legal challenges made against the **first version**, seeking to more clearly justify why the six nations should be specifically included, said Susan J. Cohen, chair of the immigration practice at Mintz Levin Cohn Ferris Glovsky & Popeo PC.

While the administration may have tried to make the order challenge-proof, opponents undoubtedly will seize on the fact that the vast majority of the nations' residents are Muslim, she said.

"There's no way around the challenge that it's discriminatory in terms of religion," Cohen said. "These are all majority-Muslim countries."

Opponents will also likely claim the justifications do not go far enough in answering questions like the ones posed by the Ninth Circuit when **upholding** a Washington federal judge's nationwide temporary restraining order on the ban, given the scant evidence that nationals from the listed countries have either plotted or are known to be plotting terrorist attacks against the U.S., said A. James Vazquez-Azpiri of Morgan Lewis & Bockius LLP.

"The overriding question that was raised in the hearings was, 'What are the numbers that you can show that really required additional scrutiny of these specific countries?'" said Jorge Lopez of Littler Mendelson PC. "I don't think that has been addressed. I think that's still open."

Companies Will Face Renewed Uncertainty

Many in the corporate community cried foul in the wake of the first executive order, arguing that its provisions would negatively impact their current and prospective employees while potentially curtailing business growth.

Vazquez-Azpiri expects many of his corporate clients will sound similar alarms about the revamped order, as it still injects uncertainty into the ability of foreign nationals to freely move around the world and conduct business before returning to the U.S. without incident.

Yet the attorney also notes that Monday's executive order is narrower in scope and more clearly defines who it applies to and how, giving federal officials on the ground less legal wiggle room to stop foreign nationals from entering the U.S. out of hand.

"The new executive order signifies a considerable retreat from what was in the first executive order, which was much more harsh and allowed officers much more latitude to interpret the executive order in a much more hostile matter," Vazquez-Azpiri said.

For example, Monday's executive order carves out provisions in which U.S. Customs and Border Patrol officials may grant case-by-case waivers, such as when doing so would be deemed to be in the national interest, when the individuals' entries would not be found to pose a threat to national security, and when a determination is made that barring entry would cause "undue hardship."

It cites examples such as individuals who have previously been admitted to the U.S. to work or study; those who have established "significant contacts" with the country or are seeking to enter for "significant business or professional obligations"; government employees who can establish they have provided "faithful and valuable service" to the U.S.; and infants, a "young child" or adoptees, according to the order.

For those from the six countries who currently possess valid visas but who expect the authorizations to expire during the coming weeks, the waivers raise the question of whether they will receive due process should they need to exit the U.S. and return, Cohen said.

"How will they adjudicate those waiver requests?" Cohen asked. "Will there be a fair and equitable procedure? Will it be timely?"

Companies that employ individuals from one of the six countries may experience a chill in their decision making as to travel, with the uncertainty of whether their employees will be allowed to return to work after going abroad on business, said Jeffrey S. Bell of Polsinelli PC.

"There's going to be a concern to have an individual from one of those countries travel, even with a valid visa, out of concern that they may encounter difficulty trying to return to the U.S. or at least encounter delays," Bell said.

Additional Vetting Will Be Expanded

The executive order was not the only significant action on immigration that Trump undertook Monday: In a memorandum circulated around the same time as the new immigration ban, the president ordered the U.S. Department of Homeland Security and the U.S. Department of State to implement procedures to **enhance the vetting** of people seeking entry into the country and "increase the safety and security of the American people."

The president, asserting his authority under the Immigration and Nationality Act, ordered the agencies to "rigorously enforce" any basis to deny visa or refugee claims, and to develop new rules and regulations on the matter. The memo also called for monthly reports on the number of visas issued and the number of "adjustments" made to immigration statuses.

The additional vetting would apply not just to those from the six countries listed in the executive order, but potentially to all foreign nationals, broadening the legal headaches for corporations, which have counted up to now on relatively straightforward processes for visa renewals, even when employees need to do so while abroad, Bell said.

"A lot of more analysis now has to be given, regardless of where the employee is from," Bell said. "Companies must now really dig down and determine and make sure that an employee's visa is current, if it expired, when did it expire, etc. A company that in the past might not have delved down quite so deeply, now they definitely will."

--Additional reporting by Jimmy Hoover. Editing by Philip Shea and Breda Lund.

