



## MARCH 2017 IMMIGRATION UPDATE

*Posted on February 28, 2017 by Cyrus Mehta*

### Headlines:

1. [DHS Issues Two New Immigration Enforcement Memos](#) – Two new DHS memoranda call for strict enforcement of immigration laws, stepped-up detentions, and enhancement of expedited removal, among other things.
2. [TSA Notifies Travelers of Upcoming 2018 REAL ID Airport Enforcement](#) – Effective January 22, 2018, TSA will start enforcing REAL ID requirements at airport security checkpoints.
3. [DOJ Final Rule Changes Office of Special Counsel for Immigration-Related Unfair Employment Practices to 'Immigrant and Employee Rights Section'; IER Publishes New Guidance](#) – Revised regulations, effective January 18, 2017, conform DOJ regulations to the text of the INA's anti-discrimination provision, simplify and add definitions of statutory terms, update and clarify the procedures for filing and processing charges of discrimination, ensure effective investigations of unfair immigration-related employment practices, reflect developments in nondiscrimination case law, reflect changes in existing practices such as electronic filing of charges, and reflect the office's name change.
4. [New Immigrants Can Create USCIS Online Account When Paying USCIS Immigrant Fee](#) – The account allows new immigrants to track the status of their green cards, receive electronic notifications and case updates, and change and update their mailing addresses.
5. **Firm In the News... in this issue:**

### **Details**

1. **DHS Issues Two New Immigration Enforcement Memos**

John Kelly, Secretary of the Department of Homeland Security (DHS), has signed two new memoranda that implement two of President Trump's recent immigration executive orders. The DHS memos call for strict enforcement of immigration laws, stepped-up detentions, and enhancement of expedited removal, among other things. As part of the new enforcement efforts, U.S. Immigration and Customs Enforcement (ICE) will seek funding to hire 10,000 new officers and agents and the Border Patrol will seek funding to hire 5,000 new agents.

Among other things, the DHS memos clarify that:

- Anyone who has committed any immigration violation is now at risk of being put into deportation proceedings.
- Many more people will be detained under the new guidelines.
- DHS will expand its 287(g) program to allow state and local police to identify and hand over suspected immigration violators.
- DHS will expand its existing expedited removal program so that many more people will be immediately removed without a hearing unless they are an unaccompanied minor, intend to apply for asylum or have a fear of persecution or torture in their home country, or claim to have lawful immigration status. Previously, expedited removal only applied to people who were caught within 100 miles of the border within 14 days after entering the country. Now expedited removal will apply to people who have been in the United States for less than two years. A Federal Register notice will soon follow to make this change.
- The executive orders and implementing memos do not affect the Deferred Action for Childhood Arrivals (DACA) program.

Below are details of the two memoranda:

Memo implementing "border security" executive order. A memorandum issued on February 20, 2017, from Mr. Kelly to U.S. Customs and Border Protection (CBP), ICE, and U.S. Citizenship and Immigration Services, among others, implements the "Border Security and Enforcement Improvements" executive order signed by President Donald Trump on January 25, 2017. The memo calls for detention of people arriving at the borders pending final removal determinations. The memo also ends "catch-and-release" policies and states that discretionary parole authority may be exercised only on a case-by-case basis and only for urgent humanitarian reasons or significant public benefit.

Among other things, the memo calls for a "surge" in deployment of immigration judges and asylum officers to interview recent border entrants and adjudicate their claims, and the establishment of "appropriate processing and detention facilities."

The memo also orders immigration officers who determine that an arriving person is inadmissible to the United States under INA § 212(a)(6)(C) or (a)(7) to order the person removed from the United States "without further hearing or review" unless the person is an unaccompanied alien child, indicates an intention to apply for asylum or a fear of persecution or torture or a fear of return to his or her country, or claims to have a valid immigration status within the United States or to be a citizen or national of the United States.

The memo states that as DHS works to expand detention capabilities, detention resources should be prioritized based on potential danger and risk of flight. The guidance "does not prohibit the return of an alien who is arriving on land to the foreign territory contiguous to the United States from which the alien is arriving pending a removal proceeding."

The memo also calls for enlisting state and local law enforcement agencies and personnel to assist in the enforcement of federal immigration law. Among other things, the memo also calls for identification and allocation of funding sources to build a wall along the southern border.

Memo implementing "public safety" executive order. A second memorandum also issued on February 20, 2017, from Mr. Kelly to U.S. Customs and Border Protection (CBP), ICE, and U.S. Citizenship and Immigration Services, among others, implements the "Enhancing Public Safety in the Interior of the United States" executive order signed by President Trump on January 25, 2017.

The memo states that with the exception of the June 15, 2012, memorandum entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," and the November 20, 2014, memorandum entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents," all existing conflicting directives, memoranda, or field guidance regarding the enforcement of U.S. immigration laws and priorities for removal are immediately rescinded, including the November 20, 2014, memoranda entitled "Policies for the Apprehension, Detention and Removal of

Undocumented Immigrants" and "Secure Communities."

The memo states plainly that other than Deferred Action for Childhood Arrivals (DACA) beneficiaries, DHS "no longer will exempt classes or categories of removable aliens from potential enforcement." Among other things, the memo states that DHS personnel should prioritize for removal "criminal aliens" and those who: (1) have been convicted of any criminal offense; (2) have been charged with any criminal offense that has not been resolved; (3) have committed acts which constitute a chargeable criminal offense; (4) have engaged in fraud or willful misrepresentation in connection with any official matter before a governmental agency; (5) have abused any program related to receipt of public benefits; (6) are subject to a final order of removal but have not complied with their legal obligation to depart the United States; or (7) in the judgment of an immigration officer, otherwise pose a risk to public safety or national security.

The memo also states that DHS "will no longer afford Privacy Act rights and protections to persons who are neither U.S. citizens nor lawful permanent residents."

Meanwhile, in other news, there are rumors that a revised travel ban executive order will be issued shortly. Stay tuned.

Links to the executive orders and related fact sheets, the two DHS memos, press releases, and additional information are at

<https://www.dhs.gov/executive-orders-protecting-homeland>.

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## **2. TSA Notifies Travelers of Upcoming 2018 REAL ID Airport Enforcement**

The Transportation Security Administration (TSA) is notifying travelers via signs posted at airports that effective January 22, 2018, it will start enforcing REAL ID requirements at airport security checkpoints. The Department of Homeland Security (DHS) said this means that travelers seeking to use their state-issued driver's licenses or identification cards for boarding commercial aircraft may only use such documents if they are issued by a REAL ID-compliant state or a non-compliant state with an extension.

TSA's notification follows former Secretary of Homeland Security Jeh Johnson's

announcement in 2016 of the final phase of implementation of the REAL ID Act. DHS noted that as always, travelers may use alternate forms of identification such as a passport, military ID, or permanent resident card.

The REAL ID Act, passed by Congress in 2005, establishes the minimum security standards for state-issued driver's licenses and identification cards and prohibits federal agencies, like TSA, from accepting licenses and identification cards for certain official purposes, including boarding federally regulated commercial aircraft, from states that do not meet these minimum standards and have not received an extension for compliance from DHS.

DHS said it continues to work with states to encourage compliance and may grant extensions or determine compliance for additional states as warranted. TSA said it will update signage if and when states that are currently listed receive extensions.

The DHS announcement is at

<https://www.dhs.gov/news/2016/12/12/tsa-notify-travelers-upcoming-2018-real-id-airport-enforcement>. Former Secretary Johnson's announcement is at

<https://www.dhs.gov/news/2016/01/08/statement-secretary-jeh-c-johnson-final-phase-real-id-act-implementation>. A complete list of identification documents accepted at TSA checkpoints is at

<https://www.tsa.gov/travel/security-screening/identification>. An interactive map showing the current REAL ID status of states and territories is at

<https://www.dhs.gov/real-id-enforcement-brief>.

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### **3. DOJ Final Rule Changes Office of Special Counsel for Immigration-Related Unfair Employment Practices to 'Immigrant and Employee Rights Section'; IER Publishes New Guidance**

The Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) has been renamed the Immigrant and Employee Rights Section (IER). IER enforces the anti-discrimination provision of the Immigration and Nationality Act (INA), which prohibits certain types of employment discrimination based on citizenship, immigration status, and national origin. IER's mission and functions remain the same as OSC's. A related final rule also made other clarifications.

The Department of Justice said in a statement announcing a webinar series to

educate the public about the recent changes that IER's revised regulations, effective January 18, 2017, conform the regulations to the text of the INA's anti-discrimination provision, simplify and add definitions of statutory terms, update and clarify the procedures for filing and processing charges of discrimination, ensure effective investigations of unfair immigration-related employment practices, reflect developments in nondiscrimination case law, reflect changes in existing practices such as electronic filing of charges, and reflect the office's name change from OSC to IER.

Some commenters on the rule objected to the proposed revisions for not requiring that an employer act with ill will or animus to violate the statute (8 USC § 1324b). The DOJ said its position remains that ill will or animus is not required to commit discrimination under the statute. The final rule explains the DOJ's position in more detail "to address any confusion about the meaning of discrimination and to reiterate that discriminatory intent is required in order to violate the statute." The final rule notes that the statute makes clear that any discrimination must be "because of" a protected characteristic; for example, citizenship status or national origin. However, the final rule states that an employer cannot justify discriminatory conduct "simply by claiming a lack of ill will or animus." Explicit discrimination is disparate treatment even absent a malevolent motive, the final rule notes; an otherwise discriminatory employment action cannot be rendered lawful because the employer's motives were benign.

The final rule also notes that a number of the commenters' examples would not violate the statute as long as the employers were not treating employees differently because of a protected characteristic. In one example, an employer allows an employee's friend or family member to help translate the Form I-9 for the employee. Such an act would not be considered discrimination, the final rule states, unless the employer allowed only certain employees to have a friend or family member assist in completing the I-9 based on citizenship status or national origin.

The final rule states that many of the examples provided by commenters characterize the act of asking for specific documents from workers during the employment eligibility verification process as "assistance." The DOJ said it disagrees with this characterization: "Requesting specific employment eligibility verification documents from employees unnecessarily limits their choice of documentation. An employer that is interested in helping workers through the

employment eligibility verification process should provide all workers with the Lists of Acceptable Documents and explain to them that they may present one List A document or one List B document and one List C document."

IER also issued guidance for employers on January 18 on avoiding discrimination against citizens of the Federated States of Micronesia (FSM), the Republic of the Marshall Islands (RMI), and the Republic of Palau. As the guidance discusses, citizens of the FSM, the RMI, and Palau (collectively referred to as the Freely Associated States, or FAS) are eligible under the Compacts of Free Association between the United States and the FAS for admission to the United States as nonimmigrants, and are eligible to live and work indefinitely in the United States. FAS citizens are eligible for a variety of documentation that can satisfy the Form I-9 requirements, IER notes, and employers should allow FAS citizens to choose which documents to present from the I-9 Lists of Acceptable Documents to establish their identity and work authorization.

IER is offering information about its revised regulations in its monthly employer and worker webinars and in stand-alone presentations. Topics include the changes to the regulations, how these changes affect the public, and resources for those who would like more information about IER and its regulations. IER also published "Employment Rights and Resources for Refugees and Asylees" on January 18, which discusses several rights that asylees and refugees have in the workplace and how to contact relevant federal agencies if they believe their rights are being violated.

For more information on the webinars/presentations and to register, see <https://www.justice.gov/crt/webinars>. Additional information about IER is at <https://www.justice.gov/crt/ier-policy-and-outreach-news>. The guidance on FAS nondiscrimination is at <https://www.justice.gov/crt/page/file/924571/download>. A link to "Employment Rights and Resources for Refugees and Asylees" is at <https://www.justice.gov/crt/page/file/924681/download>. The related final rule in the Federal Register is at <https://www.federalregister.gov/documents/2016/12/19/2016-30491/standards-and-procedures-for-the-enforcement-of-the-immigration-and-nationality-act>. Additional information for employers about nondiscrimination and the I-9 process is at <https://www.justice.gov/crt/employer-information>, <https://www.uscis.gov/i-9-central>, and <https://www.ice.gov/sites/default/files/documents/Document/2015/i9-guidance.pdf>.



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#### 4. **New Immigrants Can Create USCIS Online Account When Paying USCIS Immigrant Fee**

U.S. Citizenship and Immigration Services (USCIS) announced on February 21, 2017, that new immigrants now can create a USCIS online account when they pay the USCIS Immigrant Fee. The account allows new immigrants to track the status of their green cards, receive electronic notifications and case updates, and change and update their mailing addresses.

Although anyone can pay the USCIS Immigrant Fee on behalf of a new immigrant, only the immigrant can create a USCIS online account. To create the account, a user must verify his or her identity by correctly answering questions about personal immigration history. USCIS recommends having documents such as a passport, immigrant visa, and copies of the visa application and immigrant petition available for reference when answering the questions. Those who cannot answer the questions correctly may schedule a free appointment to visit a local USCIS office to have their identity verified in person after they arrive in the United States.

Creating a USCIS online account is voluntary, and those who choose not to create an account can still track the status of their green card and other cases with Case Status Online.

The USCIS announcement is at

<https://www.uscis.gov/news/alerts/new-immigrants-can-now-create-uscis-online-account-when-paying-uscis-immigrant-fee>. Case Status Online is at

<https://egov.uscis.gov/casestatus/landing.do>. A free appointment to verify identity can be scheduled at <https://my.uscis.gov/appointment>. A change-of-address tool is at <https://egov.uscis.gov/coa/displayCOAForm.do>.

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#### 5. **Firm In the News**

**Cyrus Mehta** served as a judge on one of the hearings at the National Immigration Law Competition, organized by NYU Law Moot Court Board, New York, NY, February 24, 2017.

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