



The Law@Work

Spring 2017

Immigration

USCIS Announces Increased H-1B Audits Under Trump Administration

By Sarah C. Flannery



On April 3, 2017, nearly 200,000 H-1B applications were filed by U.S. employers. That same day, U.S. Citizenship and Immigration Services (USCIS) announced it will increase site visits to ensure H-1B employers are complying with the regulations governing the program.

USCIS started the Administrative Site Visit and Verification Program in July 2009 as a way to verify information in certain employer-sponsored visa petitions. Under this program, Fraud Detection and National Security (FDNS) officers make unannounced visits to collect information as part of a compliance review. The program is fee funded; each initial H-1B petition filed by an employer requires a \$500 anti-fraud fee.

USCIS will continue random site visits but it will now also focus efforts on:

- Cases where USCIS cannot validate the employer's basic business information through commercially available data (e.g., newly established or small businesses);
- H-1B-dependent employers (those who have a high ratio of H-1B workers as compared to U.S. workers); and
- Employers petitioning for H-1B workers who work offsite at another company's or organization's location (e.g., consulting companies and IT staffing companies).

Because these site visits are unannounced, employers should proactively prepare. H-1B employers should:

- Audit H-1B files to ensure the required paperwork is present and continues to accurately reflect the terms and conditions of employment;

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For more information on any of the topics covered in *The Law@Work*, please contact the authors via the links at the end of each article, or contact [Nancy M. Barnes](#), executive editor or [Matthew R. Kissling](#), associate editor. For information on our Labor & Employment practice, please contact [Stephen Richey](#), practice group leader.

- Prepare managers of H-1B workers for the questions USCIS is likely to ask during a site visit; and
- Prepare staff who will first encounter USCIS agents about the protocol to follow—who to call, what to say and what access should be provided.

What to Look for When Auditing H-1B Files:

- Is the H-1B employee still working for the company? If not, the employer needs to notify USCIS that the H-1B employee is no longer working for the employer. If the H-1B employee was terminated, the company may also be obligated to offer payment for return transportation.
- Is the H-1B employee still working for the company in the same role and at the same location described in the H-1B petition? If not, the company needs to determine if the changes require amendments to the H-1B petition.
- Is the H-1B employee receiving the compensation listed in the H-1B petition? A change between part-time and full-time requires an amendment, and a change in compensation structure (e.g., movement from hourly to salary or guaranteed pay to bonus structure) can require an amendment as well.

The Scope of FDNS Officer Reviews

The FDNS officers will ask to speak to the H-1B employee as well as the company representative who signed the petition. They may also want to speak to the manager of the H-1B employee if the company representative is not the manager.

Managers, company representatives and the H-1B employee should be familiar with the company's H-1B petition. The FDNS officers will request pay records to verify that the H-1B employee is being paid the wage offered in the H-1B petition.

USCIS advises that if the employer or H-1B employee expresses an unwillingness to participate, the site inspector will terminate the visit. The inspector will complete the report using the data available and indicate that the site visit was terminated at the request of the employer or H-1B employee. The compliance review will include a follow up with the employer and H-1B employee by phone, fax or email. The USCIS also may choose to issue a Notice of Intent to Revoke the H-1B status of the employee if it is unable to confirm compliance with the terms and conditions of employment as set forth in the H-1B petition. Employers are best served if they are prepared and cooperative on account of confidence in their compliance.

Relationship Between Employer and Third Party Work Site

Employers who place H-1B employees at customer/client sites should alert their customers and clients of the possibility of site visits. Companies that rely on placement companies and IT consulting companies to provide specialized knowledge employees should request the placement companies and IT consulting companies provide the information needed to participate in a site visit if a site visit is initiated at its facility as the work site.

For more information, please contact [Sarah C. Flannery](#).



Other Recent Publications

[New Law Changes Sick Leave Requirements for Some Georgia Employers](#)

[OMB Renews OFCCP Mandatory Disability Self-Identification Form](#)

[Ohio Businesses Should Ensure Compliance With Amended Concealed Carry Laws](#)

Workplace Safety

Locked and Loaded: State Law Expansions of the Right to Bear Arms and What They Mean for Your Workplace Safety Policies

By Matthew R. Kissling



Word for word, the Second Amendment to the United States Constitution reads that “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” Since being authored in 1791, this language has been the subject of considerable debate amongst scholars, politicians and advocates regarding the scope of an American citizen’s individual right to possess firearms. Recent state legislative developments throughout the country have added a new hot topic of debate – a private employer’s right to prohibit firearms on company property.

On March 21, 2017, Ohio became the latest state to enact legislation restricting a private employer’s ability to prohibit the possession of firearms on company property. Commonly known as Senate Bill 199, Ohio law now makes it illegal for an employer (private or public) or any other property owner to “establish, maintain, or enforce a policy or rule” that “prohibits or has the effect of prohibiting” any person holding a concealed carry permit from transporting or storing a firearm in their personal vehicle. Instead, Senate Bill 199 permits a concealed carry permit holder to transport and store a weapon in his or her vehicle **while on an employer’s property**, as long as the firearm is properly stored or secured and the vehicle is in a parking lot or other location where vehicles are permitted. Any employer policy that serves to prohibit or restrict these rights will be found to violate Ohio law.

Ohio employers are hardly alone in this narrowing of their ability to prohibit weapons on company property in the interest of workplace safety. Nearly 20 other states, including Indiana and Kentucky, have laws on the books that restrict an employer’s workplace safety efforts in favor of protecting Second Amendment rights. The specific protections and restrictions of these “parking lot” laws differ from state to state. For example, Ohio and Indiana each permit employees to possess a firearm **in or on** a personal vehicle while on company property, but both states require employees to hide

or secure the weapon before exiting the vehicle. In addition, neither state permits an employee to remove or handle the weapon for any purpose while at work. On the other hand, Kentucky law not only allows an employee to store a firearm in his or her vehicle on company property, but also permits the employee to remove and handle the weapon for defensive purposes or if “otherwise authorized” by the property owner. Additionally, Kentucky does not require an employee to hide or secure the weapon when exiting the vehicle; instead, the firearm can be left in plain sight throughout the workday.

Despite their differences, the practical effect of these laws is the same – employers are no longer permitted to enforce blanket prohibitions against possessing firearms while on



company property, or otherwise adopt any workplace policy that may have the effect of such a prohibition. Even if such policies are well-intentioned and designed to enhance workplace safety, state law now requires that exceptions be made to allow concealed carry permit holders to transport their firearms to work in their personal vehicles. For this reason, employers would be wise to carefully review and, if necessary, revise their workplace safety policies and procedures to ensure that they are not violating these state “parking lot” laws.

Unfortunately, the devil is often in the details, since employers who do business in multiple states may be subject to conflicting obligations with respect to their employees’ rights to possess firearms. Nevertheless, employers can take several steps to help ensure their policies conform to the requirements of state law.

Incorporate Specific Exceptions Into Your Policy

Employers should update their safety or weapons policies to specifically account for the requirements of state law. These changes can be as simple as creating an exception from any weapons prohibition for conduct permitted under state law. For example, the following provision may comply with the majority of state laws: “Nothing in this policy shall prohibit an individual holding a valid state concealed carry license, or who is otherwise in lawful possession of a firearm, from engaging in conduct permitted under applicable state law while on

company property." Alternatively, employers can craft state-specific policies that identify what is permitted and what is not permitted under the relevant state law. Regardless of the approach, employers should make certain their policies cannot be interpreted as restricting an employee's right under state law to transport a firearm onto company property.

Identify Where Vehicles Can Be Parked

Employers should also clearly define **where** on company property an employee's personal vehicle is permitted. While a parking lot or garage seems to be the obvious answer, employer policies may not specifically communicate this to employees. The absence of such clarity can inadvertently expand an employee's legal right to transport firearms onto company property. For example, Ohio law's protections are not limited to a company parking lot, but instead allow employees to transport and store firearms in their personal vehicle **anywhere** on company property where their vehicle "is otherwise permitted to be." Unless company policy clearly defines where such vehicles are permitted, employers will have a difficult time enforcing any weapons prohibition against individuals who park their vehicles somewhere other than in the parking lot.

Notify Your Workforce

Any updates or revisions to an employer's weapons or safety policy should be clearly communicated to all employees, supervisors and managers. All employees should be given

examples of conduct that is permitted under state law, as well as conduct that is not allowed and may lead to disciplinary action under company policy. Supervisors and managers should likewise be provided guidance on how to enforce the revised policy without running afoul of state law. This guidance should include procedures for addressing the actual or suspected possession, transportation or storage of firearms on company property in a manner that may **not** be protected by state law. Finally, all employees should be reminded that carrying firearms (open or concealed) while at work is still largely prohibited under state law and company policy, and will subject an employee to disciplinary and legal action.

The recent legislative action in Ohio highlights a continuously expanding movement under state law to curb an employer's ability to prohibit weapons on company property in favor of promoting an individual's right to bear arms. While such an entitlement is by no means absolute, employers must nevertheless consider an employee's legal right to possess firearms when crafting and enforcing workplace safety policies. By taking steps now to understand the specific requirements and limitations imposed by state law, as well as to review and update existing policies, employers can ensure that they effectively accommodate the legal rights of employees while also maximizing their workplace safety standards.

For more information about state law restrictions on workplace weapons policies, please contact [Matt Kissling](#) or any member of our [Labor & Employment](#) group.



Thompson Hine Earns First-Tier Rankings in *Chambers USA* *Eleven Practices and 46 Lawyers Recognized*

Thompson Hine LLP has been recognized for the 15th year in a row as a leading law firm in *Chambers USA: America's Leading Lawyers for Business*, which ranks lawyers according to technical legal ability, professional conduct, customer service, commercial awareness, diligence and commitment, based on interviews with clients and peers.

In the 2017 edition, Thompson Hine is named a top firm in 11 practice areas, three of which – Construction, Transportation: Rail (for Shippers) and Transportation: Road (Carriage/Commercial) – are ranked nationally. In addition, 46 Thompson Hine lawyers are recognized as leading lawyers in their practices.

Employment Law

Mandatory Sick Leave Laws May Be Coming to a Workplace Near You ... If They Aren't There Already

By Jason R. Carruthers and Tim McDonald



Some claim that paid sick leave isn't just a nice benefit, but a human right. Others claim that requiring private employers to provide paid sick leave kills jobs and makes it difficult for businesses to compete. This article takes no position on that debate. Rather, it recognizes the reality that since 2011, Arizona, California, Connecticut, the District of Columbia, Illinois, Massachusetts, Oregon, Vermont and Washington have passed laws requiring employers to provide their employees with paid sick leave. In addition, dozens of cities, counties and municipalities outside of the above

referenced jurisdictions have passed similar laws. Further, several states, most recently Maryland in March 2017, have passed mandatory sick leave laws that take effect in the near future. No matter which side of the debate you are on, the fact remains that many private employers are already required to provide their employees with paid sick leave, and in the years to come, many more employers will have to do so.

These new laws have not been passed in a vacuum. Employers have already implemented a combination of sick leave and paid time off policies for their employees that may or may not be deemed to be as generous as those required by law. Nevertheless, sick leave laws may affect more than an employer's sick leave policies. Depending on the jurisdiction, such laws dictate:

- a) the reasons, in addition to an employee's own illness, that he or she must be allowed to use paid sick leave;
- b) the amount of sick leave an employee must be allowed to accrue;
- c) the rate at which an employee must accrue sick leave; and
- d) how much unused sick leave an employee is allowed to carry over from one year to the next.

Many of these laws also have safe harbor provisions that allow an employer to satisfy the dictates of the law with its existing policies so long as it provides its employees with sick leave that is as generous as that required by law. However, satisfying the safe harbor provision may be easier said than



done. For example, an employer who already provides a sufficient amount of sick leave to its employees may fail to satisfy the safe harbor provision because its policy conflicts with required accrual or carryover provisions.

The question is, how can private employers with established leave policies best prepare themselves for the increasingly likely event that they may soon be subject to a local, state or federal sick leave mandate? The best course may be for employers with existing leave policies to consider drafting separate sick leave policies apart from the other paid leave they may provide for vacation, personal time or other reasons. Currently, mandatory paid sick leave laws are a hot legislative initiative. The same cannot be said for other paid time off employers regularly provide their employees. As such, employers can insulate the remainder of their paid leave policies from the restrictions that apply to sick leave by drafting standalone sick leave policies separate from the other paid time off they may offer. This course of action has two key benefits. First, using this strategy allows employers to easily modify their sick leave policies in the future without interrupting their entire paid leave scheme. Second, this strategy also allows employers to craft non-sick leave policies that fit the needs of their business free from restrictions that apply to sick leave policies.

For more information, please contact [Jason Carruthers](#) or [Tim McDonald](#).

The Trump Administration: Predicting the Impact on Employment Law Issues

By Nancy M. Barnes



While no one has a crystal ball to help predict the future with any certainty, the changes that the Trump administration has already implemented with respect to Department of Labor leadership positions, regulations and proposed legislation provide a guide for our predictions regarding what to expect in the coming months and years.

When President Trump came into office, he instituted a hiring freeze that was subsequently lifted in April with instructions for nearly all federal agencies and departments to find ways to trim headcount and budgets. The Wage and Hour Division (WHD) alone currently employs about 1,000 investigators who lead audits and investigations into employees' wages, leave and other issues. According to BNA, about 25 percent of the WHD field staff is eligible for early retirement or leave. Given these statistics, we would expect some reductions and turnover in that enforcement arm of the Department of Labor. Nevertheless, we recommend that employers remain vigilant and take compliance seriously. As a reminder, under the Bush administration, the Department of Labor had fewer total enforcement actions, but it used a smaller number of substantial investigations to make well-publicized examples of certain employers.

On April 28, 2017, Alex Acosta, a conservative former U.S. attorney and member of the Bush administration, was sworn in as Secretary of the Department of Labor. One of the items on Secretary Acosta's agenda is the pending appeal of the new overtime rule that was set to go into effect on December 1, 2016, prior to its enforcement being enjoined. The Obama Department of Labor appealed that ruling, but it is unclear whether the Trump administration will withdraw the appeal, revise the regulations or take other action on the issue of overtime under the Fair Labor Standards Act. It currently has a deadline of June 30, 2017 for filing its brief. While it appears unlikely that the subject regulations raising the salary threshold for exempt workers will go into effect at the federal level, employers should be mindful that states are enacting more employee-friendly rules and regulations that may impact overtime eligibility or requirements for certain employees under state law.



At the Equal Employment Opportunity Commission (EEOC), President Trump has appointed Victoria Lipnic as the acting chair. Although Lipnic has not indicated a desire to roll back or change the priorities identified in the agency's most recent Strategic Enforcement Plan, budgetary pressures are expected to limit the agency's ability to exercise its enforcement capabilities and pursue litigation regarding systemic issues. The proposed fiscal year 2018 budget blueprint calls for \$9.6 billion in discretionary spending at the Department of Labor, down from \$12.2 billion for the prior year, according to a proposal released by the White House on March 16. The request did not provide much detail with respect to specific agencies or programs that would be impacted by the budget cuts, if passed. While some employers have welcomed the idea of fewer investigations and enforcement actions carried out by the EEOC, it is important to recognize that many of these activities will be taken up by the EEOC's counterparts at the state level.

The effect of reduced EEOC federal enforcement actions for companies with a national footprint may be less predictability and a somewhat inconsistent approach from the state agencies in question.

Finally, with the addition of Neil Gorsuch to the Supreme Court, employers can expect relatively favorable decisions from the conservative justice who was publicly criticized by some senators for his decision in the "frozen trucker" case that was decided while he served on the Tenth Circuit Court of Appeals. In the coming year, the Court is expected to rule on cases that will address whether the use of mandatory arbitration clauses violates employees' rights under the National Labor Relations Act. Some Supreme Court watchers also anticipate that the Court will likely decide whether public employees can be forced to pay compulsory union dues.

Given the uncertainty of what to expect under the Trump administration, employers are advised to continue their efforts to comply with current rules and keep a watchful eye on rulings or laws that may impact their workforce or employment policies.

Please contact [Nancy Barnes](#) with any questions.

Attorney Spotlight



LINDSAY NICHOLS

Associate, Labor & Employment
Cincinnati Office

I earned my J.D. at The Ohio State University Michael E. Moritz College of Law and bachelor's degree at The Ohio State University. I'm a double Buckeye ... O-H!

My practice is focused on employment counseling, including assisting employers with drafting policies and procedures, preparing employment agreements and addressing workplace issues, and single plaintiff employment discrimination lawsuits and agency charges.

My hobbies include running. This past March, I joined the Thompson Hine team to compete in Cincinnati's Heart Mini Marathon & Walk.

The most unforgettable place I've visited is Capri, Italy. I am daydreaming of planning a return trip!

A television show I'm currently addicted to is *Chef's Table* on Netflix. I don't even like cooking and I love the show – it's that good.

What I'm reading right now: Although I've been a fiction reader for most of my life, I have recently been getting into some non-fiction books. Recent highlights include *The Devil in the White City*.

Visit my [online biography](#) to learn more or contact me at 513.352.6512 (office), 419.631.3823 (mobile) or Lindsay.Nichols@ThompsonHine.com.

Employee Benefits

The American Health Care Act ... What's Next?

By Julia Ann Love



Unless you are living under a rock, by now you know that on May 4, 2017, the U.S. House of Representatives took a tentative first step in repealing President Obama's signature piece of legislation, the Patient Protection and Affordable Care Act (PPACA), by passing the American Health Care Act (AHCA). Since then, it has been widely reported that the U.S. Senate will review, study and modify the AHCA before taking a vote and may even start from scratch with its own bill. Therefore, it is anyone's guess as to what any fully enacted legislation to repeal, repair or replace PPACA will look like.

Regardless, I have consulted my Magic 8 Ball and my crystal ball and the following are a few of my thoughts.

Health Savings Accounts (HSAs)

The Republican proposals to repeal, repair and replace PPACA, including the AHCA, all include some expansion of HSAs. The AHCA provides that beginning in 2018:

- The maximum HSA contribution amount (currently \$3,400/self or \$6,750/family) is increased to equal the maximum out-of-pocket maximum (currently \$6,550/self and \$13,100/family).
- If both spouses are eligible to make catch-up HSA contributions, both spouses can make catch-up HSA contributions to the same HSA.
- If an HSA is established within 60 days of the date an individual begins high deductible health plan coverage, qualified medical expenses incurred during the period of high deductible health plan coverage are reimbursable tax-free from the HSA – even if the expenses are incurred before the HSA is established.

Additionally, beginning in 2017, the penalty tax for using HSA funds for non-medical purposes decreases from 20 percent to the pre-PPACA level of 10 percent.

Any expansion of HSAs could be a good thing for employers who are looking for stability and predictability in their medical plan spend. Expanded HSAs, coupled with a stable private marketplace for medical insurance AND a loosening



of the restrictions on the use of HSA funds to purchase private insurance, could result in a win-win for employees and employers. Employees would have the flexibility to purchase the medical insurance coverage that is most suited to their family needs and, I'll say it again, employers would have the much needed stability and predictability in their medical plan spend.

Mandatory Employer Reporting

Mandatory employer reporting is here to stay, but it might change. As with the expansion of HSAs, the Republican proposals relating to health care reform all make attempts to eliminate the cumbersome Form 1095-C/1094-C mandatory employer reporting along with the employer and individual coverage mandates. However, in order to determine which individuals are eligible for health care assistance, in whatever final form it takes, one requirement that is consistent among the proposals is determining whether the individual has a qualifying offer of coverage from an employer. The best source for this information is the employer. The AHCA provides that this reporting will be done via the Form W-2.

While many employers will rejoice if Form 1095-C/Form 1094-C reporting is eliminated, the rejoicing may be short lived. As the elimination of the reporting is coupled with the elimination of the employer and individual mandates, the health care reform legislation is left without one of its most significant sources of funding. Therefore, it seems likely that Congress will look for another funding source. While the Trump administration and the Republican congressional leadership have signaled that elimination of the employer deduction for health care is not on the table, one has to

wonder whether that is really true. The employer deductions for health care and retirement plans are two of the largest sources of lost revenue for the federal government and the tax proposals floating around Washington seem to suggest that retirement plan deductions are on the table. This leads me to believe that the health care deductions are also on the table.

More State Control

In order to stabilize the current state marketplaces (state exchanges), many believe that any coverage mandates should be made at the state and not the federal level. This is seen in the AHCA which, in certain cases, allows states to (1) determine their own definition of essential health benefits and (2) request waivers of community rating standards. While this may go a long way toward providing individuals choice in the marketplace and reducing the overall cost of health insurance, these changes could be detrimental to

employers. Employer plans are not likely to be subject to the same flexibility. Therefore, employers who offer health plan coverage may find high-risk individuals more likely to stay in their employer-provided coverage longer, which of course results in high claims cost and experience.

This brief article only scratches the surface of the AHCA and the future of health care reform legislation. Of course, it remains to be seen what, if anything, is passed by Congress and signed into law by President Trump. Therefore, unless and until anything is passed, signed into law and becomes effective, employers should stay the course and continue to comply with the applicable provisions of PPACA, which remains the law of the land.

For more information, please contact [Julia Ann Love](#).