



Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

What You Should Know About The DHS Job Flexibility Rule

By **Allissa Wickham**

Law360, New York (November 18, 2016, 9:55 PM EST) -- A new rule on job flexibility for foreign workers clocks in at a whopping 366 pages, containing helpful items including a two-month grace period between jobs and ways for immigrants to keep their spot in the green card line.

In a race against the clock, the U.S. Department of Homeland Security officially published a final rule on Friday that seeks to boost job flexibility for skilled foreign workers, issuing the regulation with just enough time for it to go into effect before Donald Trump is sworn in as president in January.

The extensive rule comes two years after President Barack Obama announced his executive actions on immigration — which called for providing clarity on job mobility to help to workers dealing with green card waits — and attorneys largely greeted the regulation as a positive step.

“Overall, I think that there are some extremely-employer friendly and employee-friendly provisions in this new rule,” said Eleanor Pelta, of Morgan, Lewis & Bockius LLP. “And they will prove very helpful for employers that want to retain key talent in the United States, particularly talent that is negatively impacted by immigrant visa backlogs.”

Among the key sections of the rule is a provision that says that immigrant visa applications — known as Form I-140 petitions — which have already been approved for at least 180 days won't be subject to revocation due to a withdrawal by the employer or if the company goes out of business.

The Form I-140 is a crucial part of getting a green card through one's job, and Pelta said the new update means that workers who are using a “priority date” from an older I-140 won't “necessarily be disadvantaged” if their former employer withdraws the application.

“[U]nder the current process, if a prior employer ... withdraws the I-140, it gets automatically revoked,” she explained. “So, the old priority date can no longer be used and it just puts that employee way in the back of the line again. And it's heartbreaking when that happens.”

Priority dates are used to figure out where an immigrant stands in the line for visas, since a limited number are given out each year. Losing one's priority date could send you to the back of the line for getting a green card. But the final rule stipulates that keeping a priority date will “generally be available,” so long as approval of the I-140 application wasn't nixed due to misrepresentation or fraud.

The rule also contains key grace period provisions to help immigrants not violate their status, allowing a first grace period of 10 days before the start of a validity period, and a second 10-day grace period at the end.

“It for the first time, inserts into a regulation that, there's a grace period for 10 days before starting an authorized period of work, and 10 days after it's ended,” said Susan Cohen, chair of the immigration practice at Mintz, Levin, Cohn, Ferris, Glovsky and Popeo PC, explaining that before this change, people would need to enter “on the day they're supposed to start work.”

DHS can also allow a separate 60-day grace period under the regulation, providing a cushion to immigrants dealing with a job loss.

"The fact that there's a 60-day grace period when you cease to be employed is actually a very important bright spot in the rule, because we constantly come across people who get laid off, and they don't get any notice," said Cyrus Mehta of Cyrus Mehta & Partners PLLC, adding that it "gives you a 60-day breather to look for a new job or to change your status to a student application or or to even leave the United States."

The regulation also contains a provision for temporary work authorization for certain foreign nationals who have approved visa petitions but are stuck in the visa backlogs and are dealing with "compelling circumstances." The definition of "compelling circumstances," however, is still rather vague, with the agency said that they are "generally situations outside a worker's control" that warrant an "exercise of discretion in granting employment authorization."

Notably, the rule restricts giving work authorization during these compelling circumstances to just one year, although the immigrant can seek renewals in one-year increments. And the agency also warns that although people who are eligible for these work permits need to have lawful status when they apply, they will "generally lose that status once they engage in employment."

"Such a foreign national will no longer be maintaining his or her nonimmigrant status, but he or she will generally not accrue unlawful presence during the validity period of the EAD or during the pendency of a timely filed and non-frivolous application," the agency said.

One thing the rule didn't do? Generally allow people who have approved Form I-140s to get work permits, which would have freed them up from having to rely on a temporary visa sponsor while they wait for green cards. If workers got an "employment authorization document," as the permits are known, they would "really become free agents," noted Greg Siskind of Siskind Susser PC.

"[O]bviously, these skilled workers — who are in these waits that are 10, 20, 30, who knows how many years — this was something that they were really counting on," he said.

And this is truly the tip of the iceberg with the regulation, which also touches on determining which H-1B workers can be exempt from the H-1B cap, and gets rid of provisions that have required employment authorization processing to happen within 90 days.

And then there's the big question, which is: Will the Trump administration rescind this rule, which goes into effect on Jan. 17, just days before Trump is inaugurated? It's still a bit too early to tell, but some attorneys were hopeful that the rule would live on in Trump's America.

"I think they have bigger fish to fry. This is not at top of their agenda," Siskind said, adding that he suspects there will be backlash if they pull it.

"Because most of the the stuff that's in there, they are based on really sympathetic stories, like giving somebody a grace period when they get laid off," he said.

--Editing by Jill Coffey.