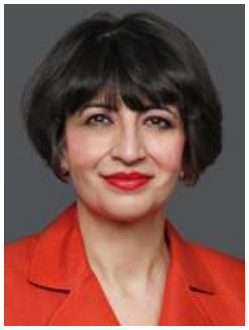
Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Employer Guidance As Courts Consider Trump's Travel Ban

Law360, New York (February 7, 2017, 10:48 AM EST) --



Elizabeth Espín Stern

Paul Virtue

Grace Shie

On Jan. 27, 2017, President Donald Trump signed an executive order titled "Protecting the Nation from Foreign Terrorist Entry into the United States." The executive order includes, among other items, a 90-day restriction on travel to the United States by foreign nationals from seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen. The EO led to the detention — and, in many cases, refusal — of individuals carrying passports from the seven designated countries.

Confusion as to the scope of individuals included within the travel restriction (for example, whether "green card" holders or dual passport holders are included), as well as the potential for new countries to be added to the list, created significant concerns in the business community. As explained below, since Jan. 27 many of the initial questions have been answered by Trump administration representatives, but the controversy about the legality of the EO continues and is the subject of multiple court actions.

To assist employers in providing guidance to their work corps, we provide the following summary regarding the current state of affairs:

- Status of the court actions, including the decision from the U.S. District Court for the Western District of Washington that has resulted in a nationwide stay of implementation of the EO's travel restrictions as of Feb. 3, 2017; and
- Summary of the scope of and most frequently asked questions (FAQs) about the EO.

Summary of Court Actions Challenging EO

Multiple court actions have been filed challenging the legality of the EO and requesting emergency stays of the travel restrictions. These include actions filed in U,S< district courts in Massachusetts, New York, Virginia, Washington and California in the 48 hours following the EO's issuance, each of which resulted in some form of temporary restraining order (TRO). Additional

actions have since been filed in multiple jurisdictions, resulting in over 20 active matters.

The matter pending in the U.S. District Court for the Western District of Washington, Washington v. Trump, which was filed on Jan. 30 by the states of Washington and Minnesota, has garnered significant attention for imposing a nationwide TRO halting (and in some instances reversing) any government action to implement the travel restriction and has attracted the support of a broad base of the business community. Following the filing, several notable events occurred:

- **Nationwide Temporary Restraining Order:** On Feb. 3, 2017, U.S. District Court Senior Judge James L. Robart, Western District of Washington, granted a TRO halting implementation of the EO on a nationwide basis.[1] In granting the TRO on the motion of the states of Washington and Minnesota (the states),[2] Judge Robart found that the states were likely to prevail on the merits of their complaint and that the EO "adversely affects the states' residents in areas of employment, education, business, family relations and freedom to travel." In particular, the states argued that implementation of the EO has inflicted damage "upon the operations of their public universities and other institutions of higher learning, as well as injury to the states' operations, tax bases and public funds." Citing Texas v. United States, 809 F. 3d 134, 155 (5th Cir. 2015), Judge Robart held that anything less than a nationwide order "would undermine the constitutional imperative of a uniform Rule of Naturalization and Congress's instruction that the immigration laws of the United States should be enforced vigorously and uniformly."

- **DOJ Emergency Motion Denied:** In response to the government's appeal seeking to overturn the TRO, on Feb. 5, a panel of two circuit judges for the Ninth Circuit ruled that the TRO would remain in place until the court considers an emergency motion from the U.S. Department of Justice to lift the stay.

- **DOJ Emergency Motion to Lift the Stay:** The Ninth Circuit requested that the states file their opposition to the emergency motion by Sunday, Feb. 5, 2017, at 11:59 p.m. PST and that the DOJ reply in support of the emergency motion by Monday, Feb. 6, 2017, at 3 p.m. PST. The court will then conduct a hearing for oral argument on Tuesday, Feb, 7, 2017, at 3 p.m. PST to decide whether the TRO will remain in place.

- **Amicus Brief:** 127 U.S. companies[3] filed an amicus brief with the Ninth Circuit on Feb. 5, 2017, opposing the travel restriction based on injury to their businesses and undue breadth of the restriction.

If the Ninth Circuit treats the matter as an appealable injunction and declines to lift the TRO,[4] a petition for certiorari is likely to be filed with the U.S. Supreme Court.

FAQs Regarding the EO's Travel Restriction

In view of the nationwide TRO effected by the action noted above, the U.S. Department of State has confirmed that the visas it provisionally revoked on Jan. 27, 2017, (see discussion below) have been reinstated as of Feb. 3, 2017, are once again valid for travel, and will remain so for the duration of the TRO. Similarly, all U.S. Customs and Border Protection (CBP) field offices have been instructed to immediately resume inspection of travelers under standard policies and procedures, and all airlines and terminal operators have been notified to permit boarding of all passengers without regard to nationality for the duration of the TRO.

Employers nevertheless are being asked by their employees and contractors what the impact of the EO would be if the TRO is lifted and the EO is reinstated. The below provides a summary of the scope of the travel restriction pursuant to government guidance immediately preceding the Feb. 3 TRO.

What countries are covered by the EO's travel restriction?

The EO prohibits travel to the United States by foreign nationals from the following seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen.

Pursuant to an announcement from the U.S. Department of Homeland Security on Feb. 3, 2017, no other countries are encompassed by the travel restriction, "nor have any other countries been identified as warranting future inclusion at this time, contrary to false reports."

What does it mean to be "from" one of these seven countries?

While the EO does not expressly define what it means to be "from" one of these seven countries, the DHS has stated that this means holders of passports from the affected countries.

Does the EO cover dual nationals?

No. Only passport carriers from the designated countries are restricted.

U.S. Dual Nationals: A U.S. citizen who is a dual national (whether by birth or citizenship) of one of the seven countries is not subject to the travel restriction. U.S. citizens who travel to one of these countries may be questioned, upon their return to the United States, about the purpose of such travel but are not subject to detention and removal under the terms of the EO.

Foreign Dual Nationals: A foreign national who is a dual national (whether by birth or citizenship) of one of the seven countries is not, according to the DHS guidance, subject to the travel restriction if the passport of a nonrestricted country is presented at the U.S. port of entry. As confirmed at a press conference on Jan. 31, 2017, by the secretary of the DHS: "Travelers will be assessed at our border based on the passport they present, not any dual national status. So if you are a citizen of the United Kingdom and you present your U.K. passport, the executive order does not apply to you upon arrival." (See also, FAQs of Customs & Border Protection.)

Visa Processing: Even before the nationwide TRO was issued, the DOS was continuing to process visa applications and issue visas to otherwise eligible visa applicants who applied with a passport from an unrestricted country, even if they were born in or hold dual nationality from one of the seven restricted countries.

Does the EO cover "green card" holders?

No. While the EO's travel restriction language covers immigrant visa holders who have not yet been admitted to the United States for permanent residence, lawful permanent residents (including both "green card" holders and persons admitted to the United States as immigrants but who have not yet received their "green cards") are presumptively exempt from the travel restriction on the ground that their entry is deemed in the "national interest," absent significant "derogatory" information indicative of a threat to security.
(See, Memorandum To The Acting Secretary Of State, Acting Attorney General, And The Secretary Of Homeland Security)

Does the EO cover nonimmigrant visa holders, such as B-1, H-1B and L-1 visa holders?

Yes. It covers nonimmigrant visa holders, with the exception of those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C2 visas for travel to the United Nations and G-1, G-2, G-3 and G-4 visas for personnel of international organizations.

May nationals of the restricted countries apply for visas during the travel restriction?

No. Prior to issuance of the nationwide TRO, the DOS advised that visa issuance for individuals from the restricted countries was suspended under the EO and instructed those scheduled for visa interviews to not attend their visa appointments. The DOS also indicated it had initiated a provisional revocation of existing visas for these individuals, which would have prevented those visa holders from traveling into the United States using those visas in the future, but that revocation is now reversed pursuant to the nationwide TRO of the U.S. Court for the Western District of Washington.

Guidelines for Employers

In view of the fluid nature of the situation, employers should advise their work corps of the precise scope of the travel restriction and refer them to the main government source, the DHS website, for updated guidance. In addition, we have advised employers to:

- Advise potentially impacted employees (i.e., nationals of the seven countries who do not hold other passports) who are currently in the United States to postpone international travel.

- Create a clear escalation vehicle for impacted employees who are currently outside the United States to request assistance or support, particularly if they seek to travel back to the United States during the interim stay. We recommend having a hotline system for concerns, which employers can set up through established security or human resources protocols.

- Advise employees who are not directly impacted, such as those who have previously traveled to the seven countries, to remain calm if they are inappropriately detained. They also should be directed to the company's escalation vehicle.

- Prepare all global travelers for delays due to expected additional screening and vetting stemming from the EO.

—By Elizabeth Espín Stern, Paul Virtue and Grace Shie, Mayer Brown LLP

Elizabeth Espín Stern, Paul Virtue and Grace Shie are partners at Mayer Brown in Washington, D.C. Virtue previously served as general counsel of the U.S. Immigration and Naturalization Service.

DISCLOSURE: *Mayer Brown, as counsel for the 127 companies, filed the amicus brief opposing the travel restriction with the Ninth Circuit on Feb. 5, 2017.*

[1] Washington v. Trump, WDWA, C17-0141JLR

[2] Other states may join this action as well.

[3] The original amicus brief was originally signed by 97 companies. An additional 30 companies have joined since the original amicus brief was filed. See http://cdn.ca9.uscourts.gov/datastore/general/2017/02/06/17-35105 Letter by Additional Technology Companies Joining Technology Companies Amicus Motion and Brief.pdf.

[4] The EO will likely end up before the Supreme Court at some juncture. As it did in Texas v. United States, 809 F. 3d 134, 155 (5th Cir. 2015), the DOJ is challenging the standing of the states of Washington and Minnesota to bring the action as well as the authority of the district court to issue a nationwide injunction. The DOJ is likely to do so in the other cases as well. When the Fifth Circuit upheld the lower court decision on both issues in the Texas case, the DOJ asked the Supreme Court to review the decision on an expedited basis. Whether the Ninth Circuit follows the Fifth Circuit precedent or not, the aggrieved party likely will seek Supreme Court review if the Ninth Circuit treats the lower court's order as an appealable injunction. The question would then become whether the current eight-justice court would vote to hear the case.
