

What Employers Should Know About The Raise Act

By **Allissa Wickham**

Law360, New York (August 4, 2017, 5:14 PM EDT) -- President Donald Trump is pushing a bill aimed at reducing legal immigration and creating a points-based visa system, a proposal that attorneys say could make it tougher for employers to get foreign workers in some cases and would require major scrutiny of the points methodology. Here's what employers should know about the Raise Act.

Trump yesterday threw his weight behind a Senate bill called the Reforming American Immigration for a Strong Economy Act. Known as the Raise Act, the measure targets family-based immigration, seeks to end the diversity visa lottery and would supplant the employment-based green card system with one based on points.

Specifically, applicants would be able to accrue points based on English proficiency, education, job offers, age, a "record of extraordinary achievement," and "entrepreneurial initiative," according to the bill's two sponsors, Sens. Tom Cotton, R-Ark., and David Perdue, R-Ga.

Because a job offer would be just one of the potential qualifications for getting a green card, the points-based system would decrease the role played by employers, who currently sponsor foreign workers themselves. Generally speaking, a points-based immigration system would take the decision of who counts as a qualified individual away from employers and give the government more influence, according to Ian Macdonald of Greenberg Traurig LLP.

"It really does reduce an employer's ability to select employees for a specific position that may fall outside of the selection criteria that the government has put together," he said.

Specifically, the current proposal has sparked concerns that companies would be thwarted from hiring foreign workers who they feel are a good fit for a job, because they might not be able to stack up enough points for entry.

"For example, somebody could not even have any prospects of a job and get a lot of points simply because they're very well-educated and speak English," said David Rugendorf of Mitchell Silberberg & Knupp LLP. "Whereas somebody who's really right for a job and selected by an employer may not qualify because they don't have enough points."

Companies would also be removed from the nuts-and-bolts application process, as foreign nationals who think they clear the points hurdle would be able to submit an online application with U.S.

Citizenship and Immigration Services, according to the bill.

“Every six months, Homeland Security will just select people who they think they should get it, without any consideration as to how badly an employer will need that employee,” said Reaz Jafri, head of the immigration practice at Withers Bergman LLP.

Understanding how the points are calculated would also be highly important, said Liz Stern of Mayer Brown LLP, who drew particular attention to the age criteria.

“One of the things that we saw, for example ... is if you were looking at it simply from an age perspective, frankly, a younger-age professional gets much more valuable points than some of your C-suite-level professionals, who might be in their late 40s, early 50s or even older,” Stern said, although she added that “significant accomplishments that those sorts of folks would have would of course yield much more points than the age alone.”

Notably, although the bill has successfully stirred up discourse about restricting legal immigration, it doesn't have a good chance of passing. Sen. Lindsey Graham, R-S.C., has issued a statement criticizing the proposal, and Sen. Ron Johnson, R-Wis., expressed worries on Wednesday.

The significant changes on family-based immigration could also be fatal to the legislation, according to Andrew Greenfield, managing partner of the Washington, D.C., outpost of Fragomen, Del Rey, Bernsen & Loewy LLP.

“In this particular case, what you have is, for the first time in memory, adult U.S. citizens being unable to sponsor their parents, and adult children, and brothers and sisters, for U.S. residency,” he said. “And that alone, in my expectation, is going to cause a sufficient amount of backlash on this proposed legislation, that everything else is going to get swept down with it.”

But even if the legislation doesn't pick up speed in Congress, the Trump administration could use it as a road map for changes to the H-1B visa lottery for skilled workers next year, according to Stern. The H-1B program has already been in the hot seat this year, with an April executive order instructing several agency heads to “suggest reforms” to help make sure H-1B visas are given to the “most skilled or highest-paid” beneficiaries.

“Is this signaling where the administration will go on H-1B?” she asked. “They've just sent a test balloon out. Let's give them feedback.”

--Editing by Katherine Rautenberg and Mark Lebetkin.