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Two More Major Lawsuits Filed Against Trump H-1B Visa Restrictions

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U.S. companies, universities and associations have combined to file two lawsuits against the Trump administration's new H-1B visa regulations. Critics say the purpose of the rules is to make it virtually impossible for U.S. employers to hire high-skilled foreign nationals or sponsor them for permanent residence. Plaintiffs believe the new rules could force about 200,000 foreign-born scientists, engineers and other professionals in H-1B status to leave America when their cases become subject to renewal.

The U.S. Chamber of Commerce, along with the National Association of Manufacturers, the Presidents' Alliance on Higher Education and Immigration, and other organizations and universities that include Stanford, Cornell and the University of Southern California, filed a complaint in the U.S. District Court for the Northern District of California against both the Department of Homeland Security (DHS) H-1B rule and the Department of Labor (DOL) H-1B wage rule. The two rules were published on October 8, 2020.

In a second ("Perdue") lawsuit, Perdue University, the University of Michigan and several other universities and organizations, including the Information Technology Industry Council, filed a complaint against the DOL H-1B wage rule in the U.S. District Court for the District of Columbia. The American Immigration Lawyers Association (AILA) spearheaded the lawsuit, with attorneys who included Jesse Bless, Jeff Joseph, Charles Kuck and Greg Siskind. (Another major lawsuit against the DOL H-1B wage rule was filed on October 16, 2020.)

In the U.S. Chamber of Commerce lawsuit against the DHS and DOL rules, the lead counsel is Paul Hughes of McDermott Will & Emery, who successfully litigated for a preliminary injunction against the Trump administration's June 2020 proclamation that suspended the entry of foreign nationals on H-1B and other temporary visas. In the *Chamber* complaint, stinging opening paragraphs refer to the Trump administration's defeat in that case.

"Five days later, having failed to demolish the H-1B program by imposing an entry ban, the Department of Homeland Security and the Department of Labor announced interim final rules designed to substantially restrict, if not outright eliminate, the H-1B visa category," according to the complaint. "These rules are extraordinary: If left unchecked, they would sever the employment relationship of hundreds of thousands of existing employees in the United States, and they would virtually foreclose the hiring of new individuals via the H-1B program. They would also gut EB-2 and EB-3 immigrant visas, which provide for employment-based permanent residence in the United States."

"Despite their massive impact, defendants promulgated these Rules without the notice-and-comment rulemaking required by the Administrative Procedure Act (APA)," continues the complaint. "Because defendants have no 'good cause' to dispense with the APA's most fundamental protection for the regulated public, the Court should swiftly set these Rules aside."

The plaintiffs dispute that the defendants (DHS and DOL) had 'good cause' under the Administrative Procedure Act to put the H-1B rules into effect without permitting the public to comment because of U.S. unemployment. The *Chamber* plaintiffs cited a National Foundation for American Policy (NFAP) analysis of Bureau of Labor Statistics data that revealed: "The U.S. unemployment rate for individuals in computer occupations stood at 3.5% in September 2020, not changed significantly from the 3% unemployment rate in January 2020 (before the pandemic spread in the U.S.)."

The complaint cites the NFAP analysis to respond to another point argued by DHS to justify a "good cause" exception under the Administrative Procedure Act. "For its part, the DHS Rule also asserts 'a significant jump in unemployment due to Covid-19 between August 2019 and August 2020 in two industry sectors where a large number of H-1B workers are employed,' citing numbers for 'the Information sector' and 'the Professional and Business Services Sector,'" notes the *Chamber* complaint. "But the unemployment figures for those 'sectors' consist of all jobs in the companies that constitute those sectors – janitors, receptionists, and all. In fact, only roughly 10% of jobs in the information and professional services sectors are in occupations similar to those occupied by high-skilled H-1B professionals. Sector-wide unemployment figures are therefore not probative with respect to competition from H-1B workers."

The *Chamber* and *Perdue* lawsuits emphasized the "reliance interests" for employers and foreign nationals in the United States. "[B]oth rules – and their aggressive implementation schedules – seriously erode the 'significant reliance interests' of universities, businesses, research facilities, and healthcare providers that have organized themselves around the existing regulations, and of the foreign workers who set up their lives here in reliance on those policies," according to the *Chamber* complaint. "As defendants see it, roughly one-third of the existing approximately 580,000 employees currently in the United States [in H-1B status] will be rendered ineligible to renew their visas – and thus separated from their job and the home that they have made in America."

Both lawsuits cite the unusual rush to publish the Department of Labor rule and bypass the standard review process. "Prior to issuance, the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) made the surprise, unexplained decision to waive review," notes the *Perdue* complaint. "Under Executive Order 12866, any rulemaking that 'is likely to result in a rule that may . . . have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities' requires further review by OIRA."

The *Chamber* complaint focuses on two particular aspects of the DHS and DOL rules. The complaint explains the required salary "increases are staggering" when one compares the

prevailing wage requirements under the prior system to those mandated under the new DOL rule. The complaint cites a National Foundation for American Policy (NFAP) analysis and notes: "For example, the required minimum wage for software developers – a common H-1B occupation – is about 45% higher under the DOL rule than under the agency's prior practice; for computer network architects, the new minimum is about 40% higher. The same pattern is seen across many occupations frequently held by H-1B workers." The complaint reprints the table below from the NFAP analysis.

"H-1B, EB-2 [employment-based second preference] and EB-3 [employment-based third preference] applications, and especially H-1B renewals, occur on a rolling basis," the *Chamber* plaintiffs argue. "Because the DOL Rule is effective *now*, it is causing ongoing harm to employers under these programs. Likewise, as soon as it is operative, the DHS Rule will cause immediate harm to H-1B employers. An immediate injunction is necessary."

A second significant argument the *Chamber* complaint raises is the potential for the DHS rule, in effect, to destroy any practical use of the H-1B visa category by disqualifying large numbers of talented and highly educated individuals, including many current H-1B visa holders. "The DHS Rule's new requirement that a specialized degree must *always* be a minimum requirement for an occupation to qualify as specialized is also arbitrary and capricious. For example, DHS 'failed to consider an important aspect of the problem' . . . by not recognizing that this places an insurmountable barrier to specialty occupation in many cases simply because such proof does not exist."

"In particular, DHS states that it will continue to use DOL's Occupational Outlook Handbook in determining the minimum requirements of a position – but that handbook generally only speaks to what qualifications a position 'usually' or 'normally' requires (not what it *always* requires) and thus cannot satisfy DHS's new evidentiary standard," explains the *Chamber* complaint. "The requirement is also contrary to the purpose of the H-1B statute, which is to balance the needs of the American economy and American labor, not to make it impossible to hire needed temporary foreign workers. For new and emerging fields, it will be difficult, and often impossible, to show that a particular degree is 'always' required for a certain occupation."

The *Chamber* complaint argues limiting an H-1B visa holder to one year if he or she will work at a customer's location and similarly focused restrictions in the DHS rule serve no policy purpose but instead are aimed at destroying a business model (i.e., information technology consulting). The complaint states specialized services that may require work at a customer's site are "critical to the competitiveness of American businesses, research facilities and medical institutions."

To illustrate the Trump administration's haphazard rulemaking process, both complaints cite David Bier of the Cato Institute pointing to an error in the DOL rule and system caused by extreme outliers and a small sample size skewing the Level 4 wage far higher than the 95th percentile, causing the percentages DOL set for Level 2 and Level 3 to be skewed as well. "This is a massive error, the sort of thing that would have been identified and corrected via notice-and-comment rulemaking," notes the *Chamber* complaint.

Plaintiffs believe the DOL rule will drive away international students by making it unlikely they could work in the United States after graduating. “Ultimately, the innovation that these students would bring to this country will migrate to other parts of the world,” according to the *Perdue* complaint. “The long-term impact of this regulation will harm American universities and the innovation and technology that makes the United States a global leader.”

“These actions would have serious consequences for international scholars across America,” said Carol L. Folt, president of the University of Southern California. “Our country benefits immensely from the work of uniquely talented and innovative people who come from around the world.”

“The rules being implemented by the Department of Homeland Security and the Department of Labor undermine high-skilled immigration in the U.S. and a company’s ability to retain and recruit the very best talent,” said U.S. Chamber CEO Thomas J. Donohue in a statement. “If these rules are allowed to stand, they will devastate companies across various industries. The Chamber is proud to join our partners in fighting against these measures that will discourage investment, diminish economic growth and impede job creation in the U.S.”

In the coming days and weeks, federal judges in California and the District of Columbia will hear arguments in these two cases. All sides agree the stakes are high. The plaintiffs in these lawsuits argue the Trump administration has aimed a dagger at America’s future.