Proposed Senate Bill Would Adversely Impact Outsourcing Companies

A comprehensive new Senate immigration bill includes provisions governing the award of nonimmigrant visas for highly skilled workers (H-1B visas) that are likely to adversely affect outsourcing companies that use a U.S.-based workforce made up primarily of foreign – generally Indian – workers. While the bill, known as the Border Security, Economic Opportunity, and Immigration Modernization Act, contemplates overall increases in the number of H-1B visas issued annually, it also imposes several new restrictions on their acquisition and use. The proposed legislation, which has been the subject of hearings before the Senate Judiciary Committee since the bill's introduction on April 16, has as its primary objective a broad overhaul of U.S. immigration law but is also reportedly aimed at companies that repeatedly bring large numbers of temporary skilled foreign workers to the U.S.

The Senate bill (S.744) would increase the total allocation of H-1B visas available each year, raising the existing 65,000 allotment to 110,000, and provide for additional increases, up to a 180,000 cap, according to a market-based formula that would take into account both the demand for highly skilled workers and the prevailing unemployment rate for management and professional occupations. The bill also allows for an increased allocation of 25,000 visas for STEM (science, technology, engineering and math) immigrants with advanced degrees (up from 20,000).

Although the bill would appear to expand and liberalize these visa allocation policies, the legislation also includes new restrictions that are raising the ire of the offshore outsourcing industry. One restriction, which applies to employers with 50 or more U.S.-based employees, caps the percentage of employees in the U.S. on H-1B or L visas that such an employer can have, relative to its overall U.S.-based workforce. Beginning in 2015, the cap would be set at 75 percent of the total number of an employer's U.S.-based workers. The cap would decrease to 65 percent in 2016 and then 50 percent in 2017.

All employers that seek H-1B visas must also establish that they are not displacing a U.S. worker. The bill differentiates between H-1B-dependent employers and those that are not. H-1B-dependent employers (which include any employer that has at least 51 full-time equivalent employees in the U.S., at least 15 percent of which are on H-1B visas) must show that they have not displaced a U.S. worker within 180 days before or after the filing of any visa petition supporting the visa application. For nondependent employers, the time period is shorter – 90 days; however, these employers are not required to make that showing if the number of U.S. workers they employed in the same job zone as the H-1B visa applicant has not decreased during the one-year period ending on the date of the application. The Act does not provide the same exemption for H-1B-dependent employers. For the purposes of the exemption, the bill defines job zone as a zone assigned to an occupation by either the Occupational Information Network Database (O*NET) on the date of enactment of the Act or any database designated by the Secretary of Labor.

The bill also includes recruitment and reporting provisions aimed at preventing companies, and specifically companies that rely heavily on foreign workers, from giving jobs to foreign rather than U.S. skilled workers. The bill requires all employers to post job vacancies on a government website and to offer those jobs to any U.S. worker who applies and is equally or better qualified for the job than the H-1B visa applicants, before applying for those H-1B visas. In addition, H-1B-dependent employers must also take good-faith steps to recruit U.S. workers for those positions, using procedures that meet industry-wide standards, and must offer compensation that is at least as great as these employers are required to offer to H-1B visa holders.

In another change to existing law aimed at companies that employ a large number of H-1B employees, the bill prohibits H-1B-dependent employers from outsourcing, placing, leasing or otherwise contracting for the placement of an H-1B employee with another employer. Non-H1-B-dependent employers may do so but must pay a fee of $500 to outsource an employee who holds an H-1B visa. The bill removes from the existing law the provision allowing for the outsourcing of employees holding H-1B visas so long as the employer placing the employee has inquired whether (and has no knowledge of the fact that) the company receiving the employee is displacing or has displaced a U.S.-based worker in the 90 days before or after the placement.

The bill also addresses the wage gap between foreign and U.S. workers by requiring employers to pay significantly higher wages to H-1B employees than currently required. In addition, the bill imposes increased filing fees on H-1B-dependent employers, depending on the percentage of nonimmigrants employed by the company. Companies in which nonimmigrant (both H-1B and L-1) employees constitute 30 to 50 percent of their U.S.-based workforce would be required to pay a $5,000 fee per H-1B application. The fee would double to $10,000 per application for employers with 50 percent or more nonimmigrant employees.

As of May 9, 2013, both the Committees on the Judiciary and on Homeland Security and Governmental Affairs had held hearings on the bill, and the Judiciary Committee is in the process of marking up the bill.

If you have any questions or wish to discuss the information in this alert, please contact Steve Semerdjian at ssemerdjian@loeb.com or 212.407.4218.

Outsourcing Group

KENNETH A. ADLER	KADLER@LOEB.COM	212.407.4284
AMIR AZARAN	AAZARAN@LOEB.COM	312.464.3330
STEPHEN H. COHEN	SCOHEN@LOEB.COM	212.407.4279
KENNETH R. FLORIN	KFLORIN@LOEB.COM	212.407.4966
NATHAN J. HOLE	NHOLE@LOEB.COM	312.464.3110
IEUAN JOLLY	IJOLLY@LOEB.COM	212.407.4810
JULIE E. LAND	JLAND@LOEB.COM	312.464.3161
DOUGLAS N. MASTERS	DMASTERS@LOEB.COM	312.464.3144
ROGER C. PENG	RPENG@LOEB.COM	+86 10 5954 3552
ALISON POLLOCK SCHWARTZ	ASCHWARTZ@LOEB.COM	312.464.3169
STEVE A. SEMERDJIAN	SSEMERDJIAN@LOEB.COM	212.407.4218
WALTER STEIMEL, JR.	WSTEIMEL@LOEB.COM	202.618.5015
AKIBA STERN	ASTERN@LOEB.COM	212.407.4235
JAMES D. TAYLOR	JTAYLOR@LOEB.COM	212.407.4895