



# The challenges of change

Congressional inactivity, state action and tightened security – will a new Administration and Congress finally provide comprehensive immigration reform in 2009? **Stephen Maltby** of **Gibney, Anthony & Flaherty LLP** comments

The last year of President Bush's administration witnessed little or no meaningful effort by Congress to take on the burning challenge of comprehensive immigration reform. Initiatives in 2006 and 2007 failed to enact legislation providing for border security, legal solutions to the problem of undocumented workers or increased H-1B and immigrant visa numbers for sponsoring employers. These challenges will now fall to a new presidential administration and Congress in 2009.



**Stephen Maltby**

This legislative inactivity, however, has not resulted in a dearth of immigration developments. Indeed, 2008 witnessed an unprecedented number of state initiatives to control immigration, as well as heightened efforts by federal agencies to enforce employer compliance with the law and to tighten national security. British companies seeking to do business in the US and to send home-grown personnel to oversee the company's US operations need to be mindful of this new layer of immigration developments.

## STATE LAWS

The regulation of immigration has historically fallen to the federal government. The Supremacy Clause of the US Constitution establishes the Constitution, Federal Statutes, and US treaties as "the supreme law of the land". Yet, increasingly, lawmakers in states and localities within the US have been enacting laws and ordinances that enforce existing federal immigration laws or create new immigration laws. British firms doing business in the US should be aware that these state and local laws are dressed up to regulate housing, contracting and employment but almost all of them are attempts to regulate immigration.

Arizona, for example, passed a law effective January 2008 to prohibit the unauthorised employment of foreign nationals in Arizona and required all employers in the state to verify the work authorisation of all new hires using the federal government's E-Verify system. This web-based system permits employers to verify the employment eligibility of newly hired employees by comparing employee information against information contained in databases of the Social

Security Administration and Department of Homeland Security (DHS). First-time offenders may have their business licences suspended and a second offence could result in the permanent revocation of an employer's licence to conduct business in the state. The constitutionality of the law is being challenged on the basis that it is pre-empted by federal immigration law. A decision from the US Court of Appeals for the Ninth Circuit is expected shortly.

In addition to Arizona, British companies doing business in the US should be aware that the states of Colorado, Georgia, Minnesota, Mississippi, Missouri, Oklahoma, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia and Utah have each passed laws that add to an employer's obligation under federal law to verify the work authorisation of employees. States such as Delaware, Florida, New Jersey, New York and Ohio are considering them. These laws typically are directed against companies that enter into contracts with the state and provide for the revocation of licences to do business in the state or other fines and penalties against employers who violate the state law. As with the law in Arizona, such laws are constitutionally suspect, but are a reminder that the foreign company with operations in such states now need to be vigilant to the existence of a new layer of local immigration regulation.

## STATE DRIVER'S LICENCES

State initiatives to regulate immigration do not end with worksite enforcement laws. All states are subject to the REAL ID Act of 2005 which had been passed by Congress in response to recommendations made by the 9/11 Commission to enhance national security. According to Homeland Security Secretary Michael Chertoff, the 9/11 hijackers had obtained 30 driver's licences and IDs, and had used 364 aliases.

Effective 11 May 2008, REAL ID established the standards that states must meet to comply with state-issued driver's licences, including verification of the applicant's identity, lawful immigration status and social security number. Under the REAL ID regulations, foreign nationals in non-immigrant status such as those holding E, L-1 and H-1B visas will receive a



temporary driver's licence valid only for the duration of authorised stay in the US and which indicates the card's expiry date. Renewal of such driver's licences is permitted upon the applicant's presentation of evidence that his or her non-immigrant status has been extended.

**BIOMETRICS AND NATIONAL SECURITY**

Efforts to enhance national security have also heightened border security developments. In July 2008, the DHS introduced, initially on a voluntary basis, the Electronic System of Travel Authorization (ESTA), an online pre-approval system for business travellers and tourists participating in the Visa Waiver Program (VWP). ESTA becomes mandatory for all VWP participants on 12 January 2009. Under the system, the traveller must also submit details about his or her destination and flight information. ESTA approval permits a traveller to board a transportation carrier, but does not guarantee admission.

On 24 April 2008 the DHS also published a proposed rule establishing new biometric procedures for foreign nationals who depart the US. Under the rule, transportation carriers will be required to collect biometric information on all departing foreign nationals and transmit them to the DHS within 24 hours of departure. This procedure is designed to correspond to the United States Visitor and Immigration Status Indication Technology (US-VISIT) programme that applies to foreign nationals who enter the US.

In addition to new border procedures for departing foreign nationals, United States Citizenship and Immigration Service required, effective 11 March 2008, lawful permanent residents aged 14 to 79 who file an application for a re-entry permit to provide biometrics at a USCIS Application Support Center prior to departing the United States.

**FEDERAL WORKSITE ENFORCEMENT**

Frustrated by Congressional failure to find a political compromise on the question of immigration reform, the Bush Administration has stepped up enforcement of laws relating to employer worksite obligations. Specifically, the Immigration and Customs Enforcement has launched numerous raids on employers who had hired unauthorised foreign workers. While most of these raids have targeted employers in the construction and food services sectors, enforcement efforts have extended well beyond such targets.

In addition, on 15 August 2007 the DHS released a social security "no match" regulation that requires a notified employer to take specific action upon

receipt of a "No-Match" letter from the Social Security Administration (SSA) or the DHS. SSA "No-Match" letters are generally issued if the agency determines that an employee's name or social security number does not match SSA records. This determination could be based on errors in the SSA database, name changes, typographical errors in the employer's records, or false documentation.

Implementation of this regulation has been suspended pending a judicial determination on its legality. However, an Executive Order dated 9 June 2008 mandating all federal contractors to utilize E-Verify is likely to be implemented without a challenge in the courts, pending final rulemaking by the DHS.

**MCCAIN AND OBAMA IMMIGRATION POSITIONS**

On the issue of immigration, a John McCain or Barack Obama administration will support comprehensive immigration reform. Senator John McCain is committed to a two-step process to reform immigration laws: first, securing the nation's borders and, secondly, working towards comprehensive immigration initiatives. His proposals include the implementation of a secure and reliable electronic employment verification system and include reform of H-1B cap numbers to rise and fall in response to market conditions, ensuring that highly-skilled workers trained and educated in the US have the opportunity to stay and work after graduation.

Senator Obama also offers a comprehensive approach to immigration reform that includes an increase in the number of foreigners permitted to enter the country to a level that keeps families together and meets the demand for jobs that employers are unable to fill. He also supports the creation of a new employment eligibility system for employers to verify that employees are authorised to work in the US

**SUMMARY**

A new Congress and a new Administration will have the opportunity to come together once again in 2009 to bring about meaningful reform of an immigration system badly in need of repair at the border and at the worksite. With such action, US employers may have easier access to the foreign workers whom they desire to employ and the need for the states to regulate immigration affairs will hopefully be lessened.



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