

PUBLICATION

MAGA or Else: Trump DOJ Goes After Employer

Authors: Zachary B. Busey

October 16, 2017

In an Executive Order dated April 18, 2017, President Trump announced that it "shall be the policy of the executive branch to buy American and hire American." If an employer does not "hire American," it may find itself the target of an enforcement action by the DOJ's Immigrant and Employee Rights Section.

The [April Executive Order](#) did not provide much guidance on what it means to "hire American." In one section, it stated that "in order to create higher wages and employments rates for workers in the United States . . . the executive branch will rigorously enforce and administer the laws governing entry into the United States of workers from abroad . . ." E.O., Sec. 2(b). In another section, government agencies were instructed to "propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of United States workers in the administration of our immigration system, including through the prevention of fraud or abuse." E.O., Sec 5(a).

These statements are consistent with the sweeping language commonly found in executive orders or other proclamations. As of this writing, there have been no new rules or guidance issued by any federal agency with the stated purpose of "hiring American." The Department of Justice, however, specifically the Immigrant and Employee Rights Section, recently used the "hire American" platform as the launching point for an enforcement action.

The Immigrant and Employee Rights Section (IER) is part of the DOJ's Civil Rights Division. The [IER](#) enforces the anti-discrimination provisions of INA, the Immigration and Nationality Act. Among other prohibited acts, INA bars employment discrimination on the basis of citizenship or immigration status.

A few weeks ago, IER filed suit against a company in the [Office of the Chief Administrative Hearing Officer](#). This is a specialized administrative court tasked with resolving disputes under INA and other immigration laws. IER's theory is that the company showed a recruiting and hiring preference for H-2A visa holders, to the detriment of U.S. citizens. IER alleges that when hiring seasonal help, the company would only hire U.S. citizens that spoke fluent English or complied with interview requirements, whereas H-2A visa holders were not subjected to these requirements. In [a press release](#) announcing the filing, Attorney General Jeff Sessions said the action was "[i]n the spirit of President Trump's Executive Order on Buy American and Hire American."

What does this mean for employers? It is difficult to say. The IER action is in its early stages, and we won't have a ruling for some time. But no matter the basis of any discrimination allegation – "hire American," race, gender, etc. – the defense is generally the same. The employer has to prove a legitimate, non-discriminatory reason for its actions. Planning this defense starts early, and consistency lies at the heart of it. So when it comes to hiring, for example, all applicants should be judged on the same standards and a protected characteristic – which can include citizenship – should not form the basis of any hiring decision.

If you have any questions or need any additional information, please contact the author or your regular Baker Donelson attorney.

