

The impact of "Buy American and Hire American" Executive Order No. 13788



Isabelle Bibet-Kalinyak, Courtney G. Tito, Miriam L. Rosen | Monday, June 19, 2017

On April 18, 2017, President Donald Trump signed yet another immigration-related executive order, “Buy American and Hire American” ([Executive Order No. 13788](#)).¹ Executive Order No. 13788 looks to promote the American industry and the production of American-made goods, products, and materials by increasing employment rates in the United States and decreasing the use of foreign workers and the amount of manufactured goods produced outside of the United States for U.S.-based companies.

Executive Order No. 13788 sets forth two key synergistic policy positions advocated by then-candidate Trump during the presidential race, “Buy American” and “Hire American.” The goal of the “Buy American” policy is:

1. To promote economic and national security.
2. To help stimulate economic growth and the creation of good paying jobs to strengthen the middle class.
3. To support the American manufacturing and defense industries by maximizing the use of goods, products, and materials produced in the United States.

In the context of iron and steel products, “produced in the United States,” as defined by the White House, means “that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.”

The “Hire American” policy seeks to protect the economic interest of workers in the United States by:

1. Creating higher wages.
2. Increasing employment rates.
3. Strictly enforcing the laws governing the employment of foreign nationals in the U.S.

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BUY AMERICAN

The “Buy American” policy is not intrinsically new. Multiple “Buy American Laws” already exist on the books in the form of statutes, regulations, rules, and executive orders. “They require, or provide a preference for, the purchase or acquisition of goods, products, or materials produced in the United States, including iron, steel, and manufactured goods.”² President Trump’s new executive order aims at bolstering such Buy American Laws by systematically and methodically targeting the various waivers of, and exemptions from, such laws that are currently at the disposal of the heads of all executive departments and government agencies.

The Buy American policy set forth in Executive Order No. 13788 takes a two-pronged approach – immediate enforcement and assessment of domestic preferences according to the Buy American Laws and judicious use of waivers. Section 3 of the order contains a detailed and aggressive timeline of actions, assessments, and reports expected of all government agencies to “scrupulously monitor, enforce, and comply with the existing Buy American Laws, and minimize the use of waivers.

No later than September 15, 2017, the heads of all agencies must:

1. Assess the monitoring, enforcement, and implementation of, as well as the compliance with all the Buy American Laws within their agencies.
2. Assess the use of waivers by type and impact on domestic jobs and manufacturing.
3. Develop and propose policies to ensure that federal financial assistance awards and federal procurements maximize the use of materials produced in the United States, including manufactured products, components of manufactured products; and materials such as steel, iron, aluminum, and cement.

Of note – and as promised on the presidential campaign trail – Executive Order No. 13788 also specifically instructs the Secretary of Commerce and the United States Trade Representative to assess the impacts of the World Trade Organization Agreement and all free trade agreements such as the North American Free Trade Agreement (NAFTA) on the implementation and effectiveness of the Buy American Laws by the fall of 2017. Ultimately, the Secretary of Commerce, the Secretary of State, the Director of the Office of Management and Budget, and the United States Trade Representative are expected to produce by November 24, 2017 a comprehensive multi-agency report with specific recommendations on how to strengthen the Buy American Laws. Monitoring and annual reporting is set to continue for at least three years to monitor progress.

The second prong of the Buy American policy asserts the judicious use of waivers and exemptions from the Buy American Laws. To the extent permitted by law, Section 4 of Executive Order No. 13788:

1. Stipulates the construction and interpretation of all existing Buy American Laws in favor of the maximum utilization of goods, products, and materials produced in the United States.
2. Limits the determination of public interest waivers to the heads of the applicable agencies.
3. Mandates all applicable agencies to assess the reasons behind the cost advantages of certain foreign-sourced goods and integrate these findings in their decision making process prior to granting public interest waivers. The use of dumped steel, iron, or manufactured goods and the use of injurious subsidies for the same are the explicit targets of the new executive order.

HIRE AMERICAN

Executive Order No. 13788 boasts the Hire American policy to create higher wages and employment rates for American workers by ensuring the integrity of the immigration system. To that effect, Executive Order No. 13788 requires the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security to:

1. Propose new rules and issue new guidance policies to overhaul the current immigration system and protect the interests of American workers through the prevention of fraud and abuse.
2. Reform the H-1B program to ensure that H-1B visas are awarded to the most-skilled or highest-paid applicants.

H-1B Visa Program Reform

Executive Order No. 13788 specifically targets the H-1B visa program because some U.S. employers have

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reportedly misused the program to hire cheap labor and discriminate against qualified and available American workers.³ But the “Buy American and Hire American” executive order is only the first step in protecting the American workers and preventing fraud and abuse in the immigration system. President Donald Trump has vowed to reform the H-1B program and put American workers first. Resolving this matter is a joint priority for the U.S. Citizenship and Immigration Services (USCIS), the U.S. Department of Labor (DOL), and the U.S. Department of Justice (DOJ). On the same day the White House released Executive Order No. 13788, the DOJ warned employers not to misuse the H-1B process to discriminate against American workers.⁴

USCIS followed suite by announcing new measures to detect fraud and abuse on the very same day.⁵ USCIS will begin random and unannounced site visits to deter and detect fraud and abuse.⁶ The primary targets of the new enforcement measures are:

1. “H-1B-Dependent Employers” that employ a high ratio (more than 50 percent) of H-1B workers in their workforce
2. Employers that deploy H-1B visa holders to off-site third-party locations
3. Employers, whose basic information cannot be validated by USCIS through commercially available data. USCIS and DOL are asking the public at large to report all allegations of H-1B fraud and abuse. Individuals can use the newly created USCIS email address, file Form WH-4 with the DOL Wage and Hour Division, or complete U.S. Immigration and Customs Enforcement’s HSI Tip Form to report suspected H-1B fraud or abuse.⁷

Although the H-1B program is highly criticized by Trump and others, statistics do not support frequent and widespread instances of fraud in the H-1B program.⁸ The H-1B program brings in skilled workers and most employers that utilize the H-1B program comply with their obligations – they merely need the specialty skills of foreign workers to fulfill their workforce needs.⁹ The H-1B program helps U.S. businesses gain access to the sought-after skills of foreign professionals, who benefit the overall economy.¹⁰ For example, the U.S. health care system relies heavily on foreign nationals to provide care for millions of Americans. There is an insufficient supply of American physicians and there is no indication that employment of foreign physicians drives down the wages of American physicians. U.S. employers already find the H-1B program extremely restrictive and cumbersome from a documentation and compliance standpoint.

The brewing H-1B reform will likely include a combination of new measures. Increasing filing fees, stepping up enforcement, limiting the number of H-1B visas, and/or further restricting eligibility for H-1B visas may negatively affect heavy users of the H-1B visa program such as hospitals, health care providers, universities, and tech. companies. But for now, the Trump administration is only targeting fraud and abuse. U.S. employers such as hospitals and health systems can expect site visits and should consult specialized immigration counsel to ensure that all mandated documentation is easily retrievable. Immigration documents and files carry specific retention requirements that should be incorporated in employers’ document retention policies. Health care providers and foreign physicians should otherwise be unaffected by Executive Order No. 13788. They should nonetheless remain vigilant not to become the unintended victims of the upcoming reforms.

1. Executive Order 13788, 82 Fed. Reg. 18837-39 (April 21, 2017), 18837-39, [available here](#)

2. *Id.*

3. See Letter to John Kelly, Secretary of the U.S. Department of Homeland Security, and Edward Huglar, Acting Secretary of the U.S. Department of Labor, March 29, 2017, U.S. Senators Chuck E. Grassley, Richard J. Durbin, Sherrod Brown, and Richard Blumenthal, and U.S. Representatives Bill Pascrell, Jr., Paul A. Gosar, and Dave Brat, [available here](#); see also The Department of Homeland Security’s Response to Chairman Grassley’s et al. Letter,” March 29, 2017, [available here](#)

4. “Justice Department Cautions Employers Seeking H-1B Visas Not to Discriminate Against U.S. Workers,” Department of Justice, Office of Public Affairs, April 3, 2017, [available here](#)

5. “Putting American Workers First: USCIS Announces Further Measures to Detect H-1B Visa Fraud and Abuse,” U.S. Citizenship and Immigration Services, April 3, 2017, [available here](#)

6. “Combating Fraud and Abuse in the H-1B Visa Program,” U.S. Citizenship and Immigration Services, April 3, 2017, [available here](#)

7. “The Department of Homeland Security’s Response to Chairman Grassley’s et al. Letter,” March 29, 2017, [available here](#)

8. AILA Doc.No.17041850, “Impact of ‘Hire American’ Provisions in New Executive Order Remains to be Seen,” April 18, 2017, [available here](#)

9. *Id.*

10. *Id.*



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