

President Trump States He Will Issue New Travel Ban Executive Order

Written by Kevin J. Fitzgerald

February 17, 2017

On February 16, 2017, in a court filing and at a press conference, President Trump has stated that he will issue a new Executive Order (“EO”) to supplement or replace his January 27, 2017 Executive Order (“EO”) entitled “Protecting the Nation from Foreign Terrorist Entry into the United States.” The terms of the new EO have not yet been announced.

As described in our January 30, February 7 and February 10 Immigration Alerts, President Trump’s original EO essentially prohibited aliens from seven majority-Muslim countries (Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen) from entering the United States for a period of 90 days. The original EO has written in it a mechanism to extend this travel ban indefinitely, as well as to add additional countries to the list. The original EO also suspended the U.S. Refugee Admissions program for 120 days; and Syrian Refugee program indefinitely.

The original EO prompted litigation all over the country on behalf of affected individuals, organizations and states. The plaintiffs allege, among other things, that the original EO is unconstitutional because it is intended to discriminate against Muslims (largely based on then-candidate Trump’s call for a “Muslim ban”) and violates due process rights. Federal courts throughout the U.S. responded to these claims by entering orders restricting the federal government’s ability to enforce the original EO.

One of the most notable cases was filed in Washington State, where a federal judge issued a Temporary Restraining Order (“TRO”) blocking enforcement of the original EO nationwide. The federal government has appealed that TRO. On February 9, a three-judge panel of the U.S. Court of Appeals for the 9th Circuit issued a unanimous order denying the federal government’s request to stay the TRO pending the outcome of the appeal. The TRO remains in place.

Subsequently, an unidentified judge on the 9th Circuit called for a vote as to whether the order denying the stay should be reviewed by a larger group of judges (“en banc”). The parties were ordered to report their position on such review.

On February 16, the federal government filed its report. It stated that it “does not seek en banc review” because “[r]ather than continuing this litigation, the President intends in the near future to rescind the [original EO] and replace it with a new, substantially revised Executive Order to eliminate what the panel erroneously thought were constitutional concerns.” It further stated that “[i]n doing so, the President will clear the way for immediately protecting the country rather than pursuing further, potentially time-consuming litigation.” The report did not specifically indicate what the terms of the anticipated “new superseding Executive Order” will be.

Also on February 16, President Trump indicated in a press conference that a new EO would be signed shortly. He said, “Extreme vetting will be put in place...We are going further. We are issuing a new executive action next week that will comprehensively protect our country...That will be done sometime next week, toward the beginning or middle at the latest.” Trump said, “The new order is going to be very much tailored to...[the 9th Circuit] decision.” However, Trump indicated that he expects to get “just about everything, and in some ways more” through the new EO, presumably referring to the scope of the travel restrictions. Further, contrary to the federal government’s filing in the 9th Circuit, Trump suggested that the federal government will continue to defend the original EO in court, while simultaneously implementing the new EO.

In summary, it appears that the Trump administration will shortly issue a new EO that will include at least some travel restrictions similar to those ordered on January 27. Should that occur, there will likely be a strong response from the State of Washington and other plaintiffs in the ongoing litigation. For example, they may argue that, to the extent the new EO contains provisions similar to the original EO, those provisions are blocked by the court’s existing TRO. They may also assert that issuing a new EO violates the TRO to the extent it orders the

same actions contemplated by the original EO, and that such conduct should be punished as contempt. For now, the January 27 EO remains blocked nationwide by the TRO, and no new EO has yet issued. We will continue to closely monitor this situation and send alerts as events warrant.

RELATED PRACTICES

- [Immigration](#)
 - [Labor & Employment](#)
-

This communication is intended for general information purposes and as a service to clients and friends of Foley Hoag LLP. This communication should not be construed as legal advice or a legal opinion on any specific facts or circumstances, and does not create an attorney-client relationship.

United States Treasury Regulations require us to disclose the following: Any tax advice included in this document was not intended or written to be used, and it cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code.

Attorney advertising. Prior results do not guarantee a similar outcome. © 2017 Foley Hoag LLP. All rights reserved.