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MARCH 2023

OUTLOOK 2023

The U.S. Immigration Landscape



Executive Summary – The 2023 Immigration Outlook

With a new Congress sworn in in January, Washington has seen a power shift and leadership changes that will shape the immigration debate in the coming year. The Republican-led House of Representatives will focus on immigration oversight and challenges at the border; however, policy changes will continue to come primarily from the executive branch. The focus of executive agencies will be not only the border but also high-skilled immigration programs such as the H-1B program. The judicial branch, meanwhile, will continue to play its role in reviewing the legality of immigration policy changes, including a high-profile enforcement case that could have far-reaching implications.

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Congress – Theater vs. Action

The 118th Congress' split chambers and marked intraparty conflict – exemplified in the prolonged election of Speaker of the House – point to a continued uphill battle to find consensus in many realms of legislation, including immigration.

With a change in House leadership roles, expect to see a corresponding shift in priorities.

- On the House Judiciary Committee, previous chair Rep. Jerrold Nadler (D-N.Y.) has been replaced by Rep. Jim Jordan (R-Ohio). Nadler has taken on the role of ranking member.
- On the Judiciary Committee's Subcommittee on Immigration Integrity, Security, and Enforcement, previous chair Rep. Zoe Lofgren (D-Calif.) has been replaced by Rep. Tom McClintock (D-Calif.). Rep. Pramila Jayapal (D-Wash.) is serving as ranking member.
- On the House Homeland Security Committee, previous chair Rep. Bennie Thompson (D-Miss.) has been replaced by Rep. Mark Green (R-Tenn.). Thompson has remained on as ranking member.

Both Jordan and McClintock are considerably more restrictionist in their views on immigration than Nadler and Lofgren, who are considered pro-immigration and have a good understanding of the needs of the business community.

For his part, Green has his sights set on Homeland Security Secretary Alejandro Mayorkas. House Republicans are preparing to hold hearings on the southern border, which may lead to further oversight of Mayorkas and the Department of Homeland Security (DHS). Such hearings could also set the stage for a possible impeachment inquiry against Mayorkas, though moderate GOP members have noted their skepticism of such action.

Overall, look for more theater than action in Congress, where new leadership will use its posts to highlight the shortcomings of the immigration system but may not be willing or able to muster consensus on significant legislation.

Executive Branch – Driving Policy Change

The executive branch will continue to drive most action on immigration – both on border policy and high-skilled immigration.

With regard to the border, President Joe Biden announced a new [humanitarian parole program](#) in January allowing nationals of Cuba, Haiti and Nicaragua to travel to the United States by air if they have a U.S. supporter. The program was modeled on a similar program for Venezuelans and was paired with new restrictions on entry at the U.S.-Mexico border – including continued reliance on Title 42 to turn migrants away at the border on public health grounds. The administration says the parole program has already [slowed border crossings](#), but Texas and 19 other states [filed a lawsuit](#) challenging it in late January.



Executive Branch – High-Skilled Immigration

On high-skilled immigration, the Biden administration has a crowded [regulatory agenda](#) that includes dramatic fee increases and reforms of key immigration programs. Regulatory priorities include:

- **USCIS immigration fees.** U.S. Citizenship and Immigration Services (USCIS) announced a proposal to [raise fees for immigration benefit requests](#) by a weighted average of 40 percent – and more for most high-skilled classifications. The agency is accepting public comments on the proposal through March 13 and the fees will not be finalized and implemented for at least several months.
- **State Department consular fees.** The State Department is finalizing a rule to raise its fees, though the increases will not be as dramatic as the proposed USCIS increases.
- **Amending Form I-9 document examination rules.** DHS plans to [finalize a rule](#) that would allow the agency to provide alternatives to physical document examination in some scenarios in the Form I-9 process. The agency is targeting May to publish a final rule.
- **Amending adjustment of status regulations.** DHS is targeting July to propose [amendments to its regulations](#) governing adjustment of status to lawful permanent residence.
- **Instituting new DOL wage protections.** The Department of Labor plans to [publish a proposed rule](#) to establish a new methodology for setting prevailing wage levels for the H-1B/H-1B1/E-3 and PERM programs. DOL is targeting September to publish the proposal.
- **Reforming the H-1B program.** DHS plans to [issue a proposed rule](#) to “modernize” H-1B requirements and oversight and provide additional flexibility in the F-1 program. The agency is targeting October 2023 to publish the proposal.

While these regulations would have significant impact on companies' immigration programs, they are at different stages in the rulemaking process, and policies are still being formulated. Proposed regulations are subject to a public notice-and-comment period during which members of the public may submit feedback. BAL will provide updates on these regulations as they move through the rulemaking process.

Judiciary – Policies Under Review

While the executive branch pursues its regulatory agenda, the Supreme Court will address major questions that will define how immigration policy is made going forward, including the ability of states to challenge federal immigration policies.

United States v. Texas is, on its face, about the Biden administration's immigration enforcement guidelines prioritizing certain unauthorized immigrants for detention and deportation. While the policy itself is under review, the potentially highly consequential case also raises questions about whether states have the standing to sue the federal government over disagreements with its actions, as well as if a federal district judge has the power to set aside policy. The case was argued before the Supreme Court in November 2022; a decision is expected later this year.

The Court [canceled arguments](#) in another high-profile case, *Arizona v. Mayorkas*, which concerned the legality of Title 42. The arguments were canceled after the Biden administration announced the COVID-19 national emergency would end in May.





Judiciary – DACA Litigation

Litigation challenging Deferred Action for Childhood Arrivals (DACA) will continue to make its way through the courts but may not reach the Supreme Court until 2024 – in the midst of a presidential election.

The question of legality of the Biden administration’s regulation to “preserve and fortify” DACA is now before Judge Andrew Hanen, a federal judge in the Southern District of Texas. In 2021, Hanen ruled that the Obama administration [did not follow proper steps](#) when it created DACA in 2012. The Fifth Circuit Court of Appeals [upheld his ruling](#) in October but also asked the district court to consider the legality of the Biden administration’s [DACA regulation](#), which was published in August 2022. In December, Judge Hanen agreed to a [briefing schedule](#) that makes a ruling from the district court likely this year. The ruling would likely be appealed to the Fifth Circuit again and then the Supreme Court.

At this time, DHS continues to adjudicate renewal applications (both DACA and employment authorization) and advance parole requests for existing DACA recipients; the agency remains prohibited from granting initial DACA requests and accompanying requests for employment authorization. Given the uncertainty around the litigation, individuals who are eligible to renew their DACA and related employment authorization are urged to do so as soon as possible.

Conclusion

With important regulations in development and key cases in court, 2023 could prove to be a momentous year for immigration policy. The divided Congress appears unlikely to pass major legislation, but the Biden administration has indicated plans to reform and amend both border policy and high-skilled immigration programs. While these changes would have a significant impact on employers and employees, in most cases they are not yet final and will not take effect for several months or longer. BAL will continue following immigration-related developments in Washington and will provide updates as information becomes available.



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