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Labor & Employment | White Collar Defense & Investigations Update

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Executive Order on H-1B Program Is Latest Sign of Immigration Program Risks for Employers

Sept. 18 E.O. and recent actions by the Departments of Labor and Justice and the Equal Employment Opportunity Commission reflect Administration's escalating campaign against alleged discrimination targeting U.S. workers.

On September 18, 2026, the Trump Administration issued an executive order[1] directing greater scrutiny of applications submitted by U.S. companies seeking to sponsor foreign workers in highly skilled positions (commonly referred to as "H-1B visas"). The introduction of the order contains findings of alleged abuse of the H-1B program to disadvantage American employees. Although there are many points that are left undefined in the new order, its issuance, a contemporaneous announcement by the Department of Labor (DOL) Inspector General touting recent actions suspending visa applications from two technology companies, a video from the Chair of the Equal Employment Opportunity Commission (EEOC), and a spate of recent Department of Justice (DOJ) resolutions under the Immigration and Nationality Act (INA) paint a sobering picture for U.S. employers. In this alert, we survey these developments and include considerations for companies confronting this challenging landscape.

Executive Order

On September 18, 2026, President Trump signed an executive order, accompanied by a proclamation, directing federal agencies to more closely scrutinize H-1B petitions where there is a heightened risk that American workers will be displaced.[2] The order directs the Secretaries of State, Labor, and Homeland Security (DHS) to consider an employer's recent or planned layoffs of similarly situated U.S. workers when adjudicating H-1B labor condition applications, petitions, and visas, and it calls for greater coordination among the Departments of State, Labor, Homeland Security, Commerce, and Education. Within 30 days, the Department of Labor is directed to review data from previously filed labor condition applications to identify sponsoring employers who may warrant further action under existing law.[3] The order characterizes abuse of the H-1B program as a national security threat, pointing to employers that have laid off U.S. workers while continuing to hire H-1B workers and to outsourcing-based business models.[4] Notably, the order does not itself prohibit an employer from laying off U.S. workers and later sponsoring H-1B workers; rather, it signals that this sequence will invite heightened government scrutiny.[5]

The Trump Administration has also proposed, through a DHS rule, a $103,265 fee for new cap-subject H-1B petitions, an amount close to the $100,000 H-1B fee that a September 2025 presidential proclamation imposed and that a federal court struck down in June 2026.[6]

Department of Labor

DOL has launched "Project Firewall," an enforcement initiative under which the Secretary of Labor may personally direct investigations of employers suspected of misusing the H-1B program, and has touted the intra-agency collaboration as a "whole-of-government effort" to "proactively combat unlawful discrimination against American workers and properly enforce the law."[7]

On July 8, 2026, the DOL Office of Inspector General (OIG) announced a major investigation into fraud in the H-1B and PERM systems, conducted with DHS, DOJ, and the White House Fraud Task Force, and reported issuing dozens of subpoenas.[8] On September 8, 2026, the Inspector General announced the first concrete enforcement actions under that investigation – suspension of processing of two technology companies' PERM applications and H-1B applications.[9]

EEOC

EEOC Acting Chair Andrea Lucas stated in a press release last year that one of her priorities is "protecting American workers from anti-American national origin discrimination,"[10] and in November 2025, the EEOC issued a technical assistance document titled "Discrimination Against American Workers Is Against the Law," which flags, among other practices, certain job advertisements keyed to visa status and the potentially discriminatory termination of U.S. workers "at a much higher rate" than visa holders.[11] On September 14, 2026, EEOC Chair Andrea Lucas posted a video on LinkedIn and X soliciting charges from workers who believe they experienced anti-American discrimination, asking, among other things, whether they had been "laid off and told to train an H-1B or other guest worker visa holder who replaced" them.[12] The agency has also initiated litigation. In May 2026, for example, it sued an Oregon-based services company alleging that American workers were subjected to anti-American harassment and that one was terminated after complaining.[13]

DOJ and the Protecting U.S. Workers Initiative

DOJ is responsible for enforcing the anti-discrimination provision of the INA, which prohibits employment discrimination in recruitment, hiring, or termination, on the basis of citizenship or immigration status.[14] DOJ primarily investigates complaints filed by individuals, but also has the authority to initiate independent investigations, typically into corporate policies and practices related to recruitment, hiring, or termination.[15] While DOJ has historically focused its enforcement efforts on bias against immigrants, during the first Trump Administration, the division launched a "Protecting U.S. Workers Initiative" specifically aimed at companies alleged to have discriminated against U.S. workers in favor of foreign visa workers. This initiative was relaunched in January 2025.[16]

Since the initiative's relaunch, DOJ has entered into thirteen settlements.[17] It has also filed at least one administrative complaint against a software company alleging that the company intentionally created a separate, less favorable hiring process that deterred U.S. workers from applying to PERM-related positions.[18]

On August 4, 2026, the Department of Justice (DOJ) announced a $3.2 million settlement with a leading technology company and its subsidiary resolving allegations that the companies violated the anti-discrimination provision of the INA, 8 U.S.C. § 1324b.[19] The August 4, 2026 settlement is the latest in a string of more than a dozen publicly announced matters in which DOJ alleges that the companies engaged in a "pattern or practice of citizenship status discrimination" by preferring workers holding temporary employment visas over U.S. workers when recruiting through the permanent labor certification (PERM) process.[20]

As with other resolutions of this type, DOJ alleged that the technology companies did not allow U.S. workers to submit applications to PERM-related positions in the same manner that the companies accepted applications for non-PERM roles, such as electronically through their external job website.[21] Notwithstanding the amount of the financial penalty, the conduct alleged by DOJ was narrow, involving fewer than 10 PERM-related positions. DOJ alleged that the companies required U.S. workers to submit their applications to PERM roles by mail. DOJ alleged that this additional burden was not required under the PERM process and did not occur during non-PERM recruitment. DOJ also alleged that the companies advertised for the positions on the radio late at night, which DOJ alleged "discourage[d] U.S. workers from applying."[22]

Under the terms of the settlement, the companies will pay $1.2 million in civil penalties and establish a $2 million back pay fund to compensate alleged victims.[23] In addition, the companies agreed to multiple non-monetary terms: they must adopt a written PERM recruitment policy subject to government pre-approval, post all PERM-related positions on their internal and external career sites, accept electronic applications through the same channels used for ordinary hiring, configure their applicant tracking system so that PERM applications are captured and searchable in the same manner as all other applications, train every employee and agent with a role in PERM recruitment using DOJ-approved materials, and submit semiannual reports detailing each PERM filing, the number of applicants, and the number found qualified.

DOJ's recent settlements are not its first actions under this theory. In 2021, DOJ resolved a landmark PERM-recruitment matter with a major social media company for a $4.75 million civil penalty and up to $9.5 million in back pay—at the time the largest recovery in the anti-discrimination provision's history.[24] In 2023, it reached a similar resolution with a major technology company for a $6.75 million civil penalty and an $18.25 million back-pay fund. [25] In each resolution, DOJ alleged that the company reserved positions for visa holders and ran PERM recruitment through less effective channels, such as requiring applications via mail and failing to post roles on its external careers site, in order to deter U.S. applicants.

DOJ has expanded its enforcement reach beyond major companies. Apart from the matter described above, the settlements announced since June 2025 have overwhelmingly involved IT staffing and consulting companies that allegedly posted job advertisements restricting positions to H-1B or other visa holders. The penalties assessed in these matters generally track the number of positions at issue: from approximately $5,000 to $255,000 in the matters involving smaller companies.[26] The forward-looking obligations in these matters are consistent: each company agreed to train its staff, revise its policies, cease placing advertisements that exclude U.S. workers, and submit to a period of DOJ monitoring, consistent with the broader remedial framework described above.[27]

Where companies have not settled, DOJ has shown it will litigate. In its pending administrative complaint against a software company, DOJ alleges that the company created a "separate hiring process that treated U.S. workers less favorably" for seven PERM positions paying between $180,000 and $294,000 per year.[28] U.S. workers were allegedly invited to apply through a dedicated email address that, for ten months, did not accept messages from external accounts, which the company allegedly never investigated, even as applicants for non-PERM positions allegedly applied through its standard careers site.[29] DOJ filed the complaint on April 28, 2026, and the matter remains pending before DOJ's Office of the Chief Administrative Hearing Officer (OCAHO). Separately, DOL suspended the processing of all of the company's pending PERM applications.[30]

The administrative forum in which DOJ litigates these matters, OCAHO, has drawn a constitutional challenge. In 2023, DOJ filed an OCAHO complaint alleging that an employer had discriminated against asylees and refugees in hiring, in violation of Section 1324b.[31] Rather than litigate before the agency, the employer sued DOJ in federal district court, arguing that OCAHO's structure is unconstitutional because its administrative law judges issue final decisions that are not subject to review by the Attorney General, in violation of the Appointments Clause. In November 2023, the U.S. District Court for the Southern District of Texas found that the employer was likely to succeed on that claim and preliminarily enjoined the OCAHO proceeding.[32] The case never reached the merits. In February 2025, DOJ moved to dismiss its own complaint, and OCAHO dismissed it with prejudice.[33] The constitutional questions remain unresolved, leaving respondents with a potential structural defense to DOJ's chosen forum.

Key Takeaways for Employers

The recent announcements and enforcement actions confirm that H-1B petitions and PERM recruitment are now key parts of the Trump Administration's focus on anti-U.S. worker employment discrimination. A few themes emerge from related settlements and Administration actions.

1. **DOJ does not view PERM compliance as a complete defense to a discrimination claim.** Even companies technically complying with the DOL's PERM recruitment regulations are not immune to scrutiny. DOJ's theory in its resolved matters appears to have been that employers ran PERM recruitment through channels less effective than their ordinary hiring: mail-only applications, late-night radio advertising, positions not posted on the careers site, applicants not integrated in the applicant tracking

system. Companies should consider whether aligning PERM recruitment with their standard hiring processes better inoculates them from DOJ's scrutiny, even when that alignment goes beyond DOL's regulatory requirements.

2. **Specific steps to consider if and as appropriate.** Across its resolved matters, DOJ has required a consistent set of PERM-recruitment reforms, which together offer a checklist of sorts for companies to consider as appropriate: post all PERM positions on the internal and external career sites used for ordinary roles, accept electronic applications through those same channels rather than requiring mailed applications, capture PERM applicants in the applicant-tracking system so they remain searchable and can be considered for other openings, adopt a written PERM recruitment policy prohibiting citizenship-status discrimination, train recruiters and hiring managers on their anti-discrimination obligations, and reject U.S. applicants only for documented, lawful, job-related reasons. Aligning PERM recruitment with ordinary hiring along these lines both reduces enforcement risk and mirrors what DOJ has required of settling companies.

3. **Workforce reductions invite government scrutiny.** The EEOC's recent public guidance identifies, as potential evidence of unlawful discrimination, "a company terminating American workers who are on the 'bench' between job assignments at a much higher rate than employees who are visa guest workers" and "subjecting U.S. workers to more laborious application methods than H-1B visa holders during the PERM labor certification process."[34] DOL states that it is "prioritizing investigations where there are signs of displacements," and "inadequate recruitment of U.S. workers."[35] The DOJ and DOL also appear to be scrutinizing companies in similar circumstances. Companies should be aware that conducting a reduction in force, and then continuing to sponsor PERMs or file H-1B applications, may generate government interest. Employers planning a reduction in force should involve counsel early, assess the risk of citizenship-status discrimination claims, and consider whether it is appropriate to proceed with pending and contemplated PERM or visa filings.

[1] Executive Order, *Enhancing Program Integrity and Interagency Coordination in the Administration of the H-1B Nonimmigrant Visa Program* (Sept. 18, 2026), https://www.whitehouse.gov/presidential-actions/2026/09/enhancing-program-integrity-and-integrity-and-interagency-coordination-in-the-administration-of-the-h-1b-nonimmigrant-visa-program/ [hereinafter Executive Order].

[2] *Id.*

[3] Fact Sheet, *President Donald J. Trump Further Enhances Program Integrity and Interagency Coordination in the H-1B Visa Program* (Sept. 18, 2026), https://www.whitehouse.gov/fact-sheets/2026/09/fact-sheet-president-donald-j-trump-further-enhances-program-integrity-and-interagency-coordination-in-the-h-1b-visa-program/ [hereinafter Fact Sheet].

[4] Executive Order, supra note 1.

[5] Fact Sheet, supra note 3.

[6] Press Release, U.S. Citizenship & Immigr. Servs., *DHS Proposes Additional H-1B Fee* (Aug. 24, 2026), https://www.uscis.gov/newsroom/news-releases/dhs-proposes-additional-h-1b-fee.

[7] News Release, *U.S. Dep't of Labor, Project Firewall Partnership Leads to Enhanced Federal*

Enforcement Against Discriminatory Hiring Practices (Nov. 24, 2025), available at https://www.dol.gov/newsroom/releases/osec/osec20251124.

[8] Press Release, *U.S. Dep't of Labor, OIG, Launches Investigation into H-1B Visa Fraud and Human Trafficking* (July 8, 2026), https://oig.dol.gov/public/Press%20Releases/OIG-Press-Release-070826.htm.

[9] Inspector General Anthony D'Esposito (@USLaborIG), X (Sept. 8, 2026, at 9:49 AM ET), https://x.com/USLaborIG/status/2097321316995232030 ("Fighting fraud is a TEAM SPORT. @Sonderling47 and I are for real. @Cognizant's PERM filings are suspended. @DOLOIG is on the hunt. Threats to American workers will NOT be tolerated. Alongside @WHFraudTF, we're following facts, fraud and finances. Handcuffs await.").

[10] Press Release, U.S. Equal Emp't Opportunity Comm'n, *EEOC Acting Chair Vows to Protect American Workers from Anti-American Bias* (Feb. 19, 2025) https://www.eeoc.gov/newsroom/eeoc-acting-chair-vows-protect-american-workers-anti-american-bias.

[11] U.S. Equal Emp't Opportunity Comm'n, *Discrimination Against American Workers Is Against the Law* (Nov. 19, 2025), here.

[12] U.S. EEOC (@USEEOC), X (Sept. 14, 2026, 09:42 ET), https://x.com/USEEOC/status/2099494113666027777.

[13] Press Release, U.S. Equal Emp't Opportunity Comm'n, *EEOC Sues Advanced Technology Group, Inc. for National Origin Discrimination and Retaliation* (May 12, 2026), https://www.eeoc.gov/newsroom/eeoc-sues-advanced-technology-group-inc-national-origin-discrimination-and-retaliation.

[14] 8 U.S.C. § 1324b.

[15] *Id.* § 1324b(b)(1), (d)(1).

[16] Press Release, *U.S. Dep't of Justice, Departments of Justice and State Partner to Protect U.S. Workers from Discrimination and Combat Fraud* (updated Feb. 5, 2025), https://www.justice.gov/archives/opa/pr/departments-justice-and-state-partner-protect-us-workers-discrimination-and-combat-fraud.

[17] Settlements and Lawsuits, U.S. Dep't of Justice, Civ. Rts. Div., Immigrant & Emp. Rts. Section, https://www.justice.gov/crt/settlements-and-lawsuits (last visited Sept. 25, 2026).

[18] Complaint, *United States v. Cloudera, Inc.* (O.C.A.H.O. Apr. 28, 2026), https://www.justice.gov/crt/media/1438366/dl.

[19] Press Release, *U.S. Dep't of Justice, Civil Rights Division Secures Settlement with OpenAI for Discriminating Against U.S. Workers* (Aug. 4, 2026), https://www.justice.gov/opa/pr/civil-rights-division-secures-settlement-openai-discriminating-against-us-workers [hereinafter OpenAI Settlement Press Release].

[20] Settlement Agreement Between the United States and OpenAI, L.L.C. and Statsig Inc. (Aug. 3, 2026), https://www.justice.gov/crt/media/1455621/dl [hereinafter OpenAI Settlement].

[21] *Id.*

[22] OpenAI Settlement Press Release, *supra* note 19.

[23] OpenAI Settlement, *supra* note 20, §§ II(2), (4).

[24] Press Release, *U.S. Dep't of Justice, Justice and Labor Departments Reach Settlements with Facebook Resolving Claims of Discrimination Against U.S. Workers* (Oct. 19, 2021), https://www.justice.gov/archives/opa/pr/justice-labor-departments-reach-settlements-facebook-resolving-claims-discrimination-against.

[25] Settlement Agreement Between the United States and Apple Inc. (Nov. 8, 2023), https://www.justice.gov/d9/2023-11/ier-apple_settlement_agreement_signed_2023-11-08_fully_executed.pdf.

[26] Press Release, *U.S. Dep't of Justice, Civil Rights Division Fines Tech Company $200,000 for Discriminating Against U.S. Workers as Part of Initiative* (Sept. 29, 2025), *available at* https://www.justice.gov/opa/pr/civil-rights-division-fines-tech-company-200000-discriminating-against-us-workers-part; Settlement Agreement Between the United States and Creative Team, LLC (July 7, 2026), https://www.justice.gov/crt/media/1451891/dl; Settlement Agreement Between the United States and Compunnel Software Group, Inc. (Apr. 6, 2026), https://www.justice.gov/crt/media/1435411/dl [hereinafter Compunnel Settlement].

[27] *See, e.g.*, Compunnel Settlement, supra note 25 (requiring anti-discrimination training, policy revisions, cessation of discriminatory advertising, and a period of departmental monitoring).

[28] Complaint, United States v. Cloudera, Inc. (O.C.A.H.O. Apr. 28, 2026), https://www.justice.gov/crt/media/1438366/dl.

[29] *Id.*

[30] Inspector General Anthony D'Esposito (@USLaborIG), X, *supra* note 9.

[31] Press Release, U.S. Dep't of Justice, *Justice Department Sues SpaceX for Discriminating Against Asylees and Refugees in Hiring* (Aug. 24, 2023), https://www.justice.gov/archives/opa/pr/justice-department-sues-spacex-discriminating-against-asylees-and-refugees-hiring.

[32] *SpaceX v. Bell, et al.*, No. 1:23-cv-00137 (S.D. Tex. Nov. 8, 2023).

[33] Order Confirming Dismissal, *United States v. Space Exploration Technologies Corp.*, OCAHO Case No. 2023B00082 (Feb. 24, 2025).

[34] *Discrimination Against American Workers Is Against the Law*, supra note 11.

[35] U.S. Dep't of Labor, *Protecting America's Highly Skilled Workforce with Project Firewall*, https://www.dol.gov/agencies/whd/immigration/h1b/projectfirewall.

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