

THOUGHT LEADER FORUM



Immigration & Employment Law Under the New Administration

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On March 3, 2017, the Puget Sound Business Journal conducted a Thought Leader Forum discussion with five Seattle attorneys specializing in Immigration and Employment Law. The roundtable was moderated by Annette E. Clark, M.D., J.D., Dean and Professor of Law, Seattle University School of Law.

The Puget Sound Business Journal Thought Leader Forum participants were Janet Cheetham, Member, Ryan, Swanson & Cleveland, PLLC; Justo Gonzalez, Shareholder, Stokes Lawrence; Dustin J. O'Quinn, Shareholder, Lane Powell; Jerry Rubin, Of Counsel, Williams Kastner; Sheryl Willert, Attorney at Law, Williams Kastner.

What are the main concerns on employers' minds in the Seattle area given the change in the Administration?

Gonzalez: The enforcement priorities expressed by the new Administration have raised a host of concerns here and in Eastern Washington's agricultural community. Each community is asking what the changes mean and what the enforcement priorities will be.

Willert: The biggest issue we've seen is about ICE (Immigration and Customs Enforcement). "What do I do when ICE shows up?" A lot of employers have never experienced that and don't know what to do.

Rubin: I think a lot of employers are concerned their employees are simply scared. There's fear permeating a lot of workplaces. A good employer is saying "I need to go figure out ways to deal with these concerns."

What best practices should employers follow should they have an ICE raid?

Cheetham: Conduct self-audits of your own company now. Prepare your front desk receptionist for an USCIS (United States Citizenship and Immigration Services) or ICE visit. Prepare your HR manager and employees for any questions they might be asked.

O'Quinn: The first thing employers should do even before an ICE audit is make sure their employees are authorized to work in the US. Ask yourself, "are the right visas filed with the right agencies and are all documents in order?" Learn the difference between a fraud detection site visit, versus a raid versus an I-9 audit. It's important to do dry runs to prepare your staff, your front desk and your employees for what to do if a raid does occur.

Willert: Employees in a unionized environment need to think about how they should partner with the union to be sure there is protection for the employees who need it.

Rubin: Employers should tell managers and supervisors to really listen to what the employees are saying. Don't just pass it off as "this too will pass." Listen to what employees are saying and take those concerns seriously so employees know their employer cares and you don't get surprised.

O'Quinn: It's also important to run your plan by your immigration and/or employment counsel. There's a lot of incorrect and inconsistent information on the Internet and that's the information the employees are finding that leads to their fear. You want to make sure that immigration counsel has the opportunity to advise employers as well as the employees.

Are there industries or particular types of companies that are more likely to have a work site raid?

Gonzalez: In the Seattle area, the industries more likely to see an actual "sweep" or raid are construction and factories. North of Seattle, the reliance on immigrant labor makes agricultural businesses potential targets. Tech companies typically see an I-9 audit of their foreign workers here on visas.

Willert: The restaurant industry is also vulnerable.

Rubin: And hospitality. We are becoming a center for tourism and that's another industry that's on the radar screen.

Many tech companies use H-1B Visas and H-2A visas - what's the difference between those? Are businesses that have more of one than the other likely to be under more scrutiny?

Cheetham: H-1B is more likely used in high-tech and other industries for jobs that require a bachelor's degree. H-2A is only for agriculture workers and we see very few in King County.

Let's move to a setting where ICE shows up at a company. What are the company's legal obligations as far as cooperating with authorities? Should employers try to hide employees who are in danger of deportation? What does being a sanctuary city mean? Does it provide any lessening of a company's obligations?

Gonzalez: If ICE shows up, an employer is obligated to not interfere. Do not hide employees. Have the employee you have designated as the point person identify the lead agent and ask them for the purpose of the visit - is it a site visit, audit, part of an investigation or a sweep with a search warrant? If it is a sweep, what does the warrant authorize the agents to do? What facilities can they enter? Can they walk on to an orchard? Into an office building? If so, which building? Employers can ask to have their counsel present and if possible to consult with counsel first. First and foremost, you cannot obstruct the officers but you can hold them accountable to what authority they have.

O'Quinn: Ask the ICE agents to provide credentials and business cards. In the case of a raid or a sweep, the officers should have a warrant and it's ok to ask them for that respectfully. In the case of an I-9 audit, in which ICE also shows up unannounced, they only need to have a notice of inspection and they don't need a warrant. They will ask for your I-9s and you have three days to turn them over. I would warn employers to educate themselves and to talk to counsel. We don't know what will become

of sanctuary cities but part of that is because it is not an actual term designated in a law. What it typically means is that a city does not want to use its local resources in the form of local police, fire, etc., to enforce federal immigration laws.

Willert: You can't say "I'm living in a sanctuary city so you can't do anything." They need to understand they are still required to comply with the warrant or audit.

Rubin: The employer should treat ICE as they would treat Seattle police, IRS, etc. It is a professional organization you treat with dignity and respect but you have certain rights. In a nice way, you are going to say I need to see the warrant and understand the scope of warrant. You are free to ask to make copies of whatever they are taking - but they don't have to agree.

Let's talk about the rights of employees who may be questioned by ICE agents. What rights do they have and what resources are available?

Cheetham: Under the H-1B program they are often asked by the immigration agent what their job is, often asked on site, at the job location. It's important to cooperate at that time when they come to the office.

Willert: I think employers need to recognize that they have the right to ask for counsel before they respond to anything being asked.

Gonzalez: The #1 thing to keep in mind and to follow religiously is not to lie. Employees may properly decline to show their work authorizing documents to an ICE agent. Do not provide any false information.

They have the right to remain silent. They can refuse respectfully and politely to answer any questions or sign any documents ICE agents may present to them until they've had an opportunity to speak with an attorney.

Are there any actions employers can take now to protect themselves from heightened enforcement or workforce disruption?

Rubin: Be prepared. Audit your I-9s. If you have legally done criminal background checks on employees, go through and recheck

those. Alert the front desk so they know the procedure if someone from ICE comes. If employers do this, then their employees will feel empowered and more aware of what they should and should not do and it avoids a panic situation.

Cheetham: Your reputation is everything when you deal with the immigration office,

"I think employers need to recognize that they have the right to ask for counsel before they respond to anything being asked."

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government agencies, the Department of State or the Department of Labor. If you are an employer and you are bringing in people from overseas as visitors and they are conducting employment, the airport will know and you will get a bad reputation. It doesn't take much for an employer to be seen a bad actor.

What effect will the executive orders have on travel for employees who travel for business?

Cheetham: Our rule now is if you are from one of the countries being singled out, if you don't have to go, don't go. The consulate used to waive interviews for repeat applications for visa extensions but those are no longer automatically waived. If you have an employee on a visa who flies out of the country, they may do more extensive background checks when they reenter which could delay entry. If an employee has visited one of the countries on the list since 2011 they could be barred from reentering the US.

O'Quinn: The Department of State and the Department of Homeland Security have always enjoyed wide discretion. We are also seeing that the interviews and questions you are asked upon entering the airport are taking longer after international travel.

When advising employers, do you see any reason for advising against filing applications for the qualified best and brightest individuals that they feel are necessary to hire for their business to operate?

Rubin: The employer is doing nothing wrong in making these applications. I would urge them to continue to do this. We have increased government oversight and enforcement but that does not mean we stop hiring the best people.

Willert: It's important for employers to recognize that there will be the need for greater planning because the time and amount of scrutiny will be much greater.

Cheetham: No, for example employers can also file for an Alien of Extraordinary Ability - an O Visa. Many of these are PhDs with many years of experience and are highly sought after. We need these people with this experience. They should also continue to file L's, H's and other visa categories.

O'Quinn: I would argue that there is a strong business case for doing just the opposite of shying away from hiring foreign nationals. You should probably go ahead and complete the visa petition or status application process now as things may become more difficult in the future.

Is there anything on the horizon that could benefit immigrant employees or businesses?

Rubin: I think the Secretary of Labor Designate Alexander Acosta, who was a member of the National Labor Relations Board, is very well qualified to be Secretary of Labor.

In light of the issues surrounding the travel ban, what general rules should employers be thinking about to keep workplace issues from escalating?

Gonzalez: The EEOC (Equal Employment and Opportunity Commission) prohibits a backlash against Muslims and people perceived as Muslim. This is a priority of the EEOC and of our own Attorney General in Washington whose responsibilities include enforcement of state and federal anti-discrimination laws. You must guard against backlash and discrimination or you risk your company becoming the subject of complaints and potentially enforcement activities.

Would you recommend that employers conduct broader diversity training and education?

O'Quinn: I would warn against taking certain actions that would appear to be singling out foreign nationals in certain statuses which would violate any number of employment discrimination laws.

Willert: One of most important things is to get management together and discuss that in this country we have laws that prohibit discrimination. They need to talk to them about how they will enforce those laws in terms of policies and procedures and to be vigilant about anything that could be discrimination. This could require sensitivity training to get their management more acclimated to looking at these types of concerns. Additionally, it's important for employees to understand the importance of treating each other well. I tell my clients the Aretha Franklin song says it all - R-E-S-P-E-C-T.



Moderator Annette E. Clark is Dean and Professor of Law at Seattle University School of Law. She is an alumna of Seattle U Law and has served on the faculty since 1989 and as dean since 2013. Dean Clark is the only dean in the country to hold both a J.D. and M.D. degree. Her scholarly and teaching areas of expertise include civil procedure, medical liability, bioethics, and legal education, and she is a frequent regional and national lecturer on these topics.

Fact box

There are many different types of temporary worker visas and employment forms. The visa and form types discussed in this article include:

H-1B

Person in Specialty Occupation

H-2A

Temporary Agricultural Worker

O

Individual with Extraordinary Ability or Achievement

I-9

Not a visa, but a form created by the US Citizenship and Immigration Services sector of the Department of Homeland Security that must be completed for every employee hired in the United States.

Note: Read up on the different types of employment visas for foreign workers and the filing requirements at this US Department of State link: <https://travel.state.gov/content/visas/en/employment/temporary.html>

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Janet Cheetham is an experienced Seattle immigration attorney who has practiced exclusively in the area of immigration and nationality law since 1981. She serves as Chair of Ryan Swanson's Immigration Group and represents businesses and individual clients on all aspects of immigration matters. Janet represents clients in a broad range of industries including fisheries, maritime, computer technology, software development, banking, real estate and forestry.



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Justo has successfully defended clients in class action and multi-plaintiff employment discrimination lawsuits, competition and consumer protection actions, and trade secrets litigation. His employment practice includes working with clients on preventative measures, such as employee training, counseling on disciplinary actions, workplace investigations and conducting employment practices reviews.



DUSTIN J. O'QUINN

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Dustin counsels employers on a wide array of U.S. immigration issues, including I-9 compliance and government audits. He develops immigration programs for companies and advises clients on the immigration implications of potential mergers and acquisitions. Dustin has significant experience representing multinational corporations in H-1B, H-2B and L-1 visa matters, as well as uncommon classifications, including investor and extraordinary-ability visas, and maritime immigration matters.



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Jerome Rubin is Of Counsel in the Seattle office of Williams Kastner. His practice focuses on labor and employment law including NLRB proceedings, union negotiations, equal employment and discrimination claims before agencies and courts, employment at will, Federal Contractor Compliance, wage and hour issues, unemployment and workers' compensation cases, general personnel management and OSHA. Jerry also served as the Chief Trial Attorney for five years in the Seattle office of the National Labor Relations Board.



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Sheryl Willert is a firm member and served as Managing Director from 1996-2001 and from 2006-2013. Ms. Willert is currently on the Board of Directors and chairs the firm's Diversity Committee. Ms. Willert concentrates her practice on counseling, investigations and dispute resolution. She has experience in all aspects of employment law for unionized and nonunionized employers in both public and private sectors. Ms. Willert has been "AV Preeminent" - the highest peer-review rating available, for 25+ years.



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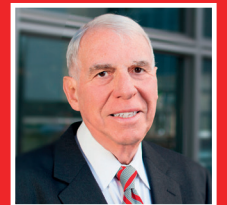
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