TechServe Achieves Significant Victory in Final 20% Pass-Through Deduction Regulations

The Department of Treasury and Internal Revenue Service (IRS) on January 18 released the final regulations to implement the 20% pass-through deduction included in the Tax Cuts & Jobs Act (TCJA) of 2017, P.L. 115-97. TechServe submitted comments and testified at the IRS October 16, 2018 public hearing. (See “What’s New in Washington.”)

TechServe is pleased that the final regulations made clear that member firms that operate as sole proprietorships, limited liability corporations, partnerships, or S corporations would be eligible for the full 20% pass-through deduction. To ensure that field agents had no questions regarding what constitutes “consulting,” TechServe urged the IRS to include clarifying specific examples in the final regulations. On page 84 of the preamble to the final regulations, the IRS described the specific substance of the TechServe comments and concluded by saying: “The final regulations adopt these suggestions.” The changes made in the final regulations clarify that staffing firms fall do not fall within the definition of a specified service trade or business.

The only outstanding issue for staffing firms would be if the firm is separately paid for consulting, apart from payments for staffing personnel. If the consulting business is not separate from the staffing business and the consulting business is not de minimis compared to the staffing business, then the staffing business may be treated as a specified service trade or business.

The TechServe Government Affairs Team on January 30, 2019 held a webinar, “The Pass-Through Deduction: Eligibility of IT & Engineering Staffing Firms.” The webinar recording, PowerPoint, and supplemental information are posted on the TechServe member-only section of the TechServe website. If your firm utilized this deduction in your 2018 tax filings, please share your story with the TechServe Government Affairs team.
Lobby Day 2019—
Our Direct and Grassroots Advocacy Continues

TechServe Alliance’s Executive Board and Government Affairs Committee urges members to make plans now to attend Lobby Day 2019, May 20-21. Given the sweeping changes brought about by the November 2018 election, there are many opportunities and a significant need to educate new Members of Congress about TechServe Alliance priorities and business model. Because in-person meetings are the most effective way to influence legislators, the Government Affairs Team plans to recruit and support enthusiastic TechServe member advocates to increase Lobby Day impact, as well as promote year-round advocacy. Click here to volunteer and/or provide a testimonial on your past Lobby Day experiences. Members are encouraged to register for the program no later than April 19th and reserve hotel accommodations as soon as possible.

NLRB & DOL Issue Proposed Joint Employer Regulations

The National Labor Relations Board (NLRB) released proposed regulations redefining “joint employer” to restore the standard in place before Browning-Ferris, Inc. decision. The comment period was extended several times until February 11, 2019 producing close to 29,000 comments. The U.S. Chamber of Commerce filed comments and a reply brief that urged the NLRB to reverse the current definition of joint employer as found in the Browning-Ferris decision. The Chamber’s comments support the NLRB proposal to restore a definition that adheres to long-established common-law principles regarding a joint employer relationship. The NLRB, responding to past criticism of how it processed comments, has taken steps to ensure a timely, thorough review. On April 1, 2019, the Department of Labor (DOL) announced proposed regulations to clarify the definition of joint employment relationship under the Fair Labor Standards Act under “a clear, four-factor test—based on well-established precedent—that would consider whether the potential joint employer actually exercises” certain power. The NPRM published on April 9; comments are due June 10, 2019.

TechServe Alliance Files Comments Opposing Proposed Changes to H-1B Visa Lottery Process

TechServe Alliance CEO Mark B. Roberts on January 2, 2019 submitted comments opposing proposed changes to federal regulations that could jeopardize the upcoming H-1B visa lottery and disadvantage many IT and engineering staffing firms.

While fully supporting the development of an online H-1B visa application system

in principle, TechServe identified several concerns with the 2018 Proposed Rule, including: potentially limiting access to the H-1B visa program for small IT staffing firms; significant questions that remain unanswered about the electronic registration process; and insufficient analysis of the impact of the new selection process which could result in unintended consequences. Roberts said, “Significant, last-minute, untested changes to the H-1B visa lottery have the potential to jeopardize the availability of scarce technical talent and could result in companies cancelling U.S.-based projects and sending the work offshore.”

(See page 3 for results of TechServe’s advocacy.)
DHS Regulation Delays Implementation of H-1B Visa Electronic Registration; Adopts Revised Selection Process

On January 30, 2019, less than 30 days after the comment period closed, the Department of Homeland Security/U.S. Citizenship and Immigration Services (USCIS) announced the finalization of a regulation to create an electronic pre-registration system for the H-1B visa lottery and to revise the H-1B visa selection process.

In a major victory, the final regulation suspends the proposed electronic registration requirement for the FY 2020 cap season to complete user testing and ensure the system and process are fully functional. The business community, including TechServe, expressed strong opposition to implementing an untested registration system for the FY 2020 cap season.

However, the final regulation adopts the proposed rule and reverses the order by which USCIS selects H-1B petitions under the H-1B regular cap and the advanced degree exemption. “Effective April 1, USCIS will first select H-1B petitions (or registrations, once the registration requirement is implemented) submitted on behalf of all beneficiaries, including those that may be eligible for the advanced degree exemption. USCIS will then select from the remaining eligible petitions, a number projected to reach the advanced degree exemption.” USCIS projects that the change will increase by up to 16% (or 5,340 workers) the number of selected petitions for H-1B beneficiaries with a master’s degree or higher from a U.S. institution of higher education.

While noting that many member companies reported that they already employ mostly H-1B workers who hold U.S. master’s degrees, TechServe urged that this proposed selection process change also be delayed pending further consideration of unintended consequences.

The final regulation adopts many requested changes to the electronic registration system including extending the time to file petitions and the time to submit materials for selected applications. The regulation does not appear to add suggested safeguards to prevent larger firms from flooding the registration system with petitions. We will continue to monitor USCIS progress to fine-tune the registration requirement.

The Government Affairs Team wishes to thank several TechServe members who joined our “ad hoc regulations response team” and provided important input on the proposed regulations: Mike Hammond, Rick Ritzler, Sue Thaden, Rebecca Zarski, Robert Brown, and Joe Nullmeyer.

Cheryl Stanton Confirmed as DOL Wage & Hour Administrator

After her nomination remained pending on the Senate floor since October 2017, on April 10, 2019 the Senate confirmed 53-45 Cheryl Stanton to be Wage and Hour Division Administrator. Stanton will play a key role in future rulemaking regarding overtime and other pending regulations. Stanton previously lead the South Carolina Department of Employment and Workforce. (See December 2017 and Summer 2018 Washington Reports.)
Federal Court Allows "Third Party Itinerary" Litigation to Proceed; Rejects Motion for Preliminary Injunction

A federal judge in New Jersey on January 18, 2019 refused to dismiss a staffing firm lawsuit against the U.S. Citizenship and Immigration Services (USCIS) for changing policies in violation of the Administrative Procedures Act (APA). In Small and Medium Enterprise Consortium, Inc. et al v. Kirstjen Nielsen, staffing firm plaintiffs argued that USCIS overstepped its bounds when it issued a February 22, 2018 Memorandum requiring a three-year itinerary for H-1B workers placed at third-party sites.

The court order rejected every one of the Government’s arguments, including that the statute of limitations barred the action, that the plaintiffs failed to establish standing, and that the agency action was not final. The court, however, declined plaintiffs’ request for a preliminary injunction stating that “plaintiffs’ apparent ability to have at least some success with its H-1B petitions raises doubts about the immediacy of the harm and whether any such harm would truly be irreparable.”

Further litigation will be needed to determine whether the Memorandum was an unlawful legislative rule. The TechServe Alliance Government Affairs team will continue to monitor the litigation status as well as regulatory and legislative developments.

The U.S. Small Business Administration Advocacy Office is conducting listening sessions to determine the impact of the proposed OT rule on small businesses.

Federal Overtime and Regular Rate Proposed Rules Published in March; Comments Due in May

On March 22, 2019, the Department of Labor’s long-awaited proposed Overtime Regulations were finally published in the Federal Register. The issuance of the proposed regulations had been postponed more than three times over the past year. Comments are due on May 21, 2019. The regulation may not be finalized until early 2020 or even later.

TechServe Alliance submitted comments, filed on September 25, 2017 in response to the initial Request for Information (RFI), that stake out the association’s long-held position that the Fair Labor Standards Act (FLSA) does not give DOL legislative rulemaking authority to impose a salary requirement on computer professionals or narrow the scope of the exemption for those employees who satisfy the “duties” test. The U.S. Small Business Administration Advocacy Office is conducting listening sessions to determine the impact of the proposed OT rule on small businesses. Visit their website to share any concerns.

In addition, on March 28, 2019, DOL announced a proposed rule to amend 29 CFR part 778 to clarify and update regular rate requirements under section 7(e) of the Fair Labor Standards Act (FLSA). The proposed rule defines what constitutes the “regular rate” of pay for purposes of calculating overtime compensation. The proposed regulation clarifies that employers can exclude certain employee benefits (e.g., gym memberships, merchandise discounts, and student loan repayments) from an employer’s regular rate. Comments are due May 28, 2019.

We will thoroughly review these proposed federal rules and file comments as appropriate. We will also work with state chapters to follow state/local developments on related proposed regulations. (See page 5, “State and Local Governments Step in as Federal Action on Overtime Regs & Paid Leave Laws Drags On.”)
State and Local Governments Step in as Federal Action on Overtime Regs & Paid Leave Laws Drags On

Continued federal delays have provided an opening and reason for states to act on overtime regulations. Pennsylvania recently initiated rulemaking; last fall, Washington State engaged in the pre-proposal/cost-benefit analysis stage of revising its regulations.

Washington State Chapter member Marjie Peterson, president and owner of MACRO.CCS, Inc., filed comments opposing provisions changing treatment of computer professionals.

In addition to proposed changes in overtime regulations, localities, including New York City, are considering new paid leave bills. The New York State Chapter, led by Sam Tomarchio is organizing a response and welcomes assistance and input from affected TechServe members.

Among concerns, TechServe small business owners would have to absorb the resulting additional labor costs, and not be able to adjust existing end-user contracts.

While TechServe Alliance does not lobby at the state or local level, the Government Affairs team is available to provide advocacy advice to state chapters. We have connected with coalition partners and are investigating ways to further work with state chapters to file comments on certain matters. We will also continue to monitor and respond to federal regulatory developments.

Status Updates: Tracking Key Legislative Issues

The following are final updates for legislative matters reported on in the December 2017 and/or July 2018 Washington Report. No action was taken on any of these bills during the 115th Congress.

S. 180/H.R. 1303, “H-1B and L-1 Visa Reform Act of 2017” — Grassley (R-IA)/Durbin (D-IL)/Pascarella (D-NJ) bills to ban H-1B third-party placements. No action.

H.R. 170, “Protect and Grow American Jobs Act” — Issa (R-CA) bill targeting H-1B dependent employers, amended and reported out of House Judiciary Committee in November 2017 with bipartisan support. No further action taken in House; no companion measures introduced in the Senate.

S. 2344/H.R. 6794 (Coffman (R-CO)/Krishnamoorthi (D-IL)) “Immigration Innovation Act of 2018,” — Hatch (R-UT)/Flake (R-AZ) bill would ensure merit-based immigration, protect American workers, reverse new or promised draconian USCIS policies: deference would be given to prior H-1B approvals absent a material change in circumstances; and work authorization would be codified for spouses and dependent children of H-1B visa holders. Supported by a diverse coalition of academia and business. No action.

H.R. 3825, “Harmonization of Coverage Act of 2017” — Black (R-TN)/Stefanik (R-NY) bill would harmonize the definition of the term “employee” for purposes of federal statutes by amending the Fair Labor Standards Act to adopt a “common law” test for defining the term. No action.


H.R. 3441 the “Save Local Business Act.” — Byrne (R-CA) legislation to change the definition of “joint employer” by amending the National Labor Relations Act and the Fair Labor Standards Act. Passed the House of Representatives on November 8, 2017. No action taken by the Senate.
USCIS Implements First Lottery Under New H-1B Regulations

The United States Citizenship and Immigration Service (USCIS) announced on April 5 that it had received enough petitions to reach the congressionally mandated H-1B regular cap of 65,000. “On April 10, USCIS used a computer-generated random selection process to select enough H-1B petitions to meet the congressionally-mandated regular cap and the U.S. advanced degree exemption for fiscal year (FY) 2020. After completing the random selection process for the regular cap, USCIS also determined that it has received a number of petitions projected as sufficient to meet the 20,000 H-1B visa U.S. advanced degree exemption, also known as the master’s cap.

In accordance with the new H-1B regulation, USCIS first conducted the selection process for H-1B cap-subject petitions submitted on behalf of all beneficiaries, including those that may have been eligible for the advanced degree exemption. USCIS then selected a number projected to reach the advanced degree exemption from the remaining eligible petitions. USCIS will reject and return all unselected petitions with their filing fees unless the petition is a prohibited multiple filing.” USCIS projects that the change will increase by up to 16% (or 5,340 workers) the number of selected petitions for H-1B beneficiaries with a master’s degree or higher from a U.S. institution of higher education.

The TechServe Government Affairs Team is interested in hearing company experiences with the new lottery process. Attend the newly announced Lobby Day Facilitated Industry Roundtable to learn how companies are responding to more restrictive immigration policies and the dearth of domestic IT talent.

Legislative Advocacy + Regulatory Comments Preserve the IT/Engineering Staffing Business Model

During the first few months of the Trump Administration, TechServe Alliance issued several action alerts urging members to communicate with Members of Congress to oppose legislation that would ban third-party placements of H-1B visa holders. The gridlocked 115th Congress took no action whatsoever, whether comprehensive reform or targeted action, on employment-based immigration. However, the Administration aggressively, and successfully, attacked H-1B visas through implementation of the Buy American/Hire American (BAHA) Executive Order (EO).

With an existing IT and engineering talent shortage and record low unemployment, any restrictions on our industry’s access could have an impact on many IT staffing firms being able to meet client needs. Even if you don’t place H-1Bs, these regulatory restrictions will have an immediate impact on the overall talent supply in many high-demand skill sets.

Your representatives need to directly hear from you, their constituent, about how these legislative proposals and administrative actions will negatively impact their state, district, and your business and employees. **TechServe urges all companies to attend Lobby Day and engage in year-round legislative advocacy.**

In addition, given the Administration’s focus and effectiveness in pursuing its priorities through administration changes, TechServe will respond to several expected USCIS Notices of Proposed Rulemaking (NPRMs). Promised NPRMs are expected to revise the definitions of “specialty occupation, employment, and employer-employee relationship,” remove H-4 dependent spouses from group of aliens eligible for employment; reform the practical training programs; institute electronic filings for immigration benefits, eliminating the paper-based process; and revise the USCIS fee schedule.

We will continue to keep members apprised of developments. In addition, the TechServe Alliance Government Affairs Team will ask for input as comments are drafted and will encourage members to submit their own comments. Please contact us if you would like to participate in these efforts.