Early Days Of New Administration Show Influence Of TROs

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Law360, New York (March 10, 2017, 12:40 PM EST) -- In the early days of the Trump administration, one of the most controversial, and widely discussed, issues has been Executive Order 13769, "Protecting the Nation from Foreign Terrorist Entry into the United States," which suspended the U.S. Refugee Admissions Program, indefinitely suspended the entry of Syrian refugees and temporarily halted immigration from seven majority-Muslim countries: Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen. 82 Fed. Reg. 8,977 (Jan. 27, 2017). The executive order was met with significant legal opposition, including 25 federal cases pending as of mid-February 2017 — many of which involve the issuance of a temporary restraining order (TRO) under Federal Rule of Civil Procedure 65(b). See, e.g., Mohammed v. United States, No. 17-00786 AB, 2017 (C.D. Cal. Jan. 31, 2017) (issuing a temporary restraining order preventing the removal or detainment of any person from an affected country with a valid immigrant visa), Tootkaboni, et al. v. Trump, et al., No. 17-cv-10154, 2017 (D. Mass. Jan. 29, 2017) (issuing a temporary restraining order to, among other things, limit secondary screening and prevent detainment or removal of holders of valid visas, and people who are part of the U.S. Refugee Admissions Program), Aziz, et al. v. Trump, et al., No. 1:17-cv-116, 2017 (E.D. Va. Jan. 28, 2017) (issuing a temporary restraining order to permit lawyers access to all legal permanent residents at Dulles International Airport and forbid removal of any lawful permanent residents affected by the Executive Order for a period of seven days from the issuance of the TRO).

The most high-profile order was a TRO issued by a federal judge in Washington state that enjoined the enforcement of the majority of the executive order. State of Washington v. Trump, et al., No. C17-0141-JLR, 2017 (W.D. Wash. Feb. 3, 2017). In his decision granting a TRO, Judge James Robart held that "[t]he narrow question the court is asked to consider today is whether it is appropriate to enter a TRO against certain actions taken by the Executive in the context of this specific lawsuit ... [T]he circumstances brought before [the court] today are such that it must intervene to fulfill its constitutional role in our tripart government." Id. Following the government's appeal for an emergency stay of the district court's TRO, a three-judge panel of the Ninth Circuit denied the motion for a stay in a unanimous decision. Washington v. Trump, et al., No. 17-35105 (9th Cir. Feb. 9, 2017). The Trump administration did not appeal and later issued a revised executive order on immigration; it remains to be seen what litigation will be filed in response, and whether injunctive relief will be sought again.

While this executive order and the related preliminary injunctive orders are directly related to concepts of immigration law and whether such an executive order runs afoul of the U.S. Constitution, the TRO mechanism available under Federal Rule of Civil Procedure 65(b) —

including its use against government entities and presidential administrations — is relevant to many practitioners.

Federal courts consistently describe a TRO as an equitable remedy that is issued in exceptional situations when necessary to preserve the status quo until a court has an opportunity to rule on a motion for preliminary injunction after an evidentiary hearing. Mohammed, 2017, at *1 (citing Granny Goose Foods Inc. v. Brotherhood Of Teamsters & Auto Truck Drivers Local No. 70 of Alameda City, 415 U.S. 423, 439 (1974)). As a refresher, a TRO can be entered against a party without written or oral notice to the opposing party if "(1) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss or damage will result to the movant before the adverse party can be heard in opposition; and (2) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required." Fed. R. Civ. Pro. 65(b)(1-2). When the TRO is entered without notice, it is not to exceed 14 days (unless extended by the court for "good cause"). U.S. D.I.D. Corp. v. Windstream Communications Inc., 775 F.3d 128, 132 fn. 2 (2d Cir. Dec. 22, 2014). If the TRO is to last longer than 28 days (the initial 14 days plus a 14-day extension), then the adverse party must consent. Id. Although evidentiary hearings are not required for a TRO under FRCP 65 (b), they may be held. See Free Country Ltd. v. Drennen, 2016, at *1 (S.D.N.Y. Dec. 30, 2016).

In the Second Circuit, to obtain a TRO, a party must establish "(1) irreparable harm and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of the claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party." McDonald v. Escape the Room Experience LLC, 2016, at *2 (S.D.N.Y. Oct. 21, 2016)(quoting Lynch v. City of New York, 589 F.3d 94, 98 (2d Cir. 2009)); see also Tootkaboni, 2017, at *1 (holding the petitioners met the burden of establishing a strong likelihood of success on the merits and that they would likely suffer irreparable harm absent the TRO). Typically, TROs are not granted lightly, as issuing a TRO "based solely on a possibility of irreparable harm is inconsistent with [the U.S. Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." McDonald, 2016, at *2 (quoting Winter v. Natural Res. Defense Council Inc., 555 U.S. 7, 22 (2008)).

Preliminary injunctions (PIs) differ from TROs in that a preliminary injunction requires notice to the adverse party. Fed. R. Civ. Pro. 65(a). Courts also are not lenient in granting PIs, as "[a] preliminary injunction is an extraordinary remedy never awarded as of right." Stagg P.C. v. U.S. Department of State, 158 F.Supp.3d 203, 208 (2d Cir. 2016) (quoting UBS Financial Services Inc. v. West Virginia University Hospitals Inc., 660 F.3d 643, 648 (2d Cir. 2011)). Further, "[a] party seeking a preliminary injunction must generally show a likelihood of success on the merits, a likelihood of irreparable harm in the absence of the preliminary relief, that the balance of equities tips in the party's favor, and that an injunction is in the public interest." Id. (quoting American Civil Liberties Union v. Clapper, 804 F.3d 617, 622 (2d Cir. 2015)(citations omitted)). Similar to TROs, the balance of hardships must tip "decidedly in the movant's favor." Rush v. Fischer, 2011, at *1 (S.D.N.Y. Dec. 23, 2011)(quoting Doninger v. Niehoff, 527 F.3d 41, 47 (2d Cir. 2008)). While a TRO is limited to 14 days with a possible extension, PIs can be unlimited in duration. Granny Goose, 415 U.S. at 445.

TROs and PIs are granted in a wide variety of civil cases, and the current challenges to the executive order are not the first times that Rule 65 motions have been sought against federal agencies. For example, in the final weeks of the Obama administration, a court issued a PI preventing the implementation of a new federal law that would change the national requirements for overtime pay. Nevada v. United States Department of Labor, 2016 (E.D. Tex. Nov. 22, 2016). The Obama administration sought to institute a change to the overtime wage requirements in an effort to "modernize and streamline the existing

overtime regulations for executive, administrative and professional employees." 79 Fed. Reg. 18, 737 (March 13, 2014). The change had many aspects, including raising the salary threshold for exempt employees from $23,660 to $47,892, which would have gone into effect on Dec. 1, 2016. Nevada, 2016, at *2. Nevada, joined by other states and corporations, filed suit against the Department of Labor and sought emergency preliminary injunctive relief. Id.

In evaluating the merits, the district court examined existing statutes as well as congressional intent before determining that the plaintiffs did show a likelihood of success. Id. at *4. The court also held that there was a likelihood of irreparable harm, as some entities with budget constraints would "have relatively few options to comply with the final rule." Id. at *7. The Department of Labor had not shown any harm it would face by the granting of a preliminary injunction, so the court found that the balance of hardships favored the plaintiffs. Id. at *8. Finally, the court held that maintaining the status quo in granting injunctive relief would best serve the public interest. Id. Notably, the court granted the preliminary injunction on a nationwide basis. Id. at *9.

During former President George W. Bush's second term, a district court similarly issued a preliminary injunction against an executive action that would have impacted U.S. businesses. American Federation of Labor v. Chertoff, 552 F.Supp.2d 999 (N.D. Ca. Oct. 10, 2007). The U.S. Department of Homeland Security under the Bush administration implemented a new regulation entitled the "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter." 72 Fed. Reg. 45611 (Aug. 15, 2007). Under this rule change, the definition of "knowing" would have been broadened to include constructive knowledge by an employer such that the employer receiving notice that its employee has a Social Security number that doesn't match Social Security Administration records would have constructive knowledge that it is employing "an alien not authorized to work in the United States." American Federation, 552 F.Supp.2d at 1003.

A collection of business and labor groups filed suit and initially obtained a TRO. Id. at 1005. Following the TRO and at the hearing to consider the propriety of converting the TRO into a PI, the court noted that the rule to be implemented was "staggering" and the implementation of the rule would be "severe." Id. at 1006. The court further noted that the comment period before implementation of the rule weighed against the government's argument that a preliminary injunction would result in undue hardship. Id. at 1007. Examining the merits of the case, the court held that the harm for "business plaintiffs" can include costs associated with "developing new systems and programs necessary" to comply with new administrative rules. Id. at 1014. Concluding that the "balance of harms tip[ped] sharply in favor of plaintiffs and plaintiffs [] raised serious questions to the merits," the preliminary injunction was granted. Id. at 1015.

The early months of the Trump administration have been a reminder of the continued relevance and usefulness of preliminary remedies under FRCP 65 in seeking swift, meaningful relief (including challenges to executive actions) and protecting client interests.

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