Policy Brief: The Southern Border and the End of the Public Health Emergency

May 12, 2023

Insights for What’s Ahead:

As the national COVID-19 Public Health Emergency (PHE) expired at midnight on Thursday, May 11, immigration officials are preparing for a sharp increase in the number of migrants at the southern border as policies adopted under Title 42 of the US Code relating to public health are also set to expire with the end of the PHE May 11.

- The controversial immigration policy in place since March 2020 under Title 42 cited public health concerns in order to bypass asylum processes and allow for the quick expulsion of migrants.
- DHS released new rules to replace the policy that will limit asylum claims by redefining conditions for eligibility and by disqualifying asylum seekers that do not apply for protection in a country they have passed through on their journey to the US border. The latter provision mirrors a policy struck down in federal court, during the Trump administration, and is expected to face fresh legal challenges.
- On Thursday House Republicans passed a separate border package that would severely limit asylum and parole availability, while boosting resources to border activities. While the legislation passed on a party-line vote and is not expected to advance in the Senate, it may initiate bipartisan discussions.

To read about other public health impacts from the end of the PHE, please see CED’s Policy Brief “The End of the COVID-19 Public Health Emergency.”

Expiration of Border Policy Under Title 42 & New DHS Rules

The border policy under Title 42 introduced in March 2020 is expired at midnight Thursday with the conclusion of the national public health emergency. The policy relied on authority provided by a 1944 law that allows limitations on immigration to protect public health. Under the policy, the US Centers for Disease Control (CDC) issued an order authorizing Customs and Border Protection (CBP) to remove migrants immediately including people seeking asylum. Under the policy an estimated 2.8 million migrants have been removed from the US since 2020.

That policy had been set to expire in December 2022 before the US Supreme Court issued a temporary stay following an appeal by 19 GOP state attorneys general. Before that decision, the Administration had requested the court delay ending the policy, citing concerns over ongoing preparations to handle an influx of migrants expected to follow its termination. Those concerns have been renewed in recent weeks as unauthorized border arrivals have spiked ahead of the May 11 PHE expiration. During a three-day period in the last week, Border Patrol averaged more than 8,700 daily apprehensions, an increase from the 5,200 average in March. The influx prompted the Administration to deploy 1,500 US military troops to the border; separately, Texas Governor Greg Abbott deployed hundreds of members of the Texas National Guard. The administration also announced that it will surge resources to the border to improve processing.
in the face of mounting backlogs, while steps are also being taken to send 24,000 law enforcement personnel to the border as well as 1,100 new US Border Patrol processing coordinators.

To replace the expiring policy under Title 42, a new policy the Departments of Homeland Security (DHS) and Justice released this week as a final rule will go into effect on Thursday that will largely continue the core provisions of the emergency measures. While the administration has already received pushback from immigration advocacy groups, it has claimed daily border crossings could jump to 13,000 if Title 42 were allowed to end without a replacement policy.

The new framework, originally announced in February, restricts claims to asylum through a provision that disqualifies migrants from US protection if they fail to request refugee status in another country on their journey to the southern border, including Mexico. In practice, experts suggest the rule will disqualify most non-Mexican migrants entering the US between ports of entry as migrants will be presumed ineligible unless they are able to prove they have requested asylum in a third country. That policy mirrors a Trump-era policy that was struck down in Federal court in 2021. The ACLU, which led the prior successful challenge, has again voiced opposition to the new rule. "We will sue as we did under Trump. The core illegality is the same," said Lee Gelernt, the ACLU's top immigration lawyer.

The administration will also place significant conditions on asylum eligibility. According to internal training documents, only migrants with "exceptionally compelling circumstances" will meet the new asylum criteria. Those include migrants with an "acute medical emergency," those who face an "imminent and extreme threat," and victims of "a severe form of human trafficking." The policy will also reapply the penalty of disallowing entrance into the US for five years for individuals violating the new rules. To avoid being deported, those who do not qualify for an exemption will need to pass interviews with heightened standards designed to generate more rejections than interviews under the traditional standard of a "credible fear" of harm should they return to their home country. The rule will also not apply to unaccompanied children. Enforcement will rely on DHS' traditional Title 8 authorities, which allow for expedited deportation of migrants encountered between legal ports of entry.

The new framework will also include a new program called Family Expedited Removal Management (FERM), which will track immigrant families released into the US as they await processing. The program will subject heads of households to ankle-monitor tracking and to nightly curfews running from 11pm to 5am. In the coming days, Immigration and Customs Enforcement (ICE) will begin placing some families heading to four cities (Newark, Baltimore, Chicago, and Washington DC) in the new FERM program. The home curfew rules are similar to last year's pilot by ICE that set curfews for migrants residing in Baltimore and Houston, and are being offered as an alternative to placing families in detention centers, which had faced significant pushback from Democratic lawmakers.

Last week, Secretary Mayorkas lamented that "fundamentally, we are working within a broken immigration system that for decades has been in dire need of reform. That is a fact about which everyone agrees, and we urge Congress to fix our broken immigration system." Mayorkas voiced the need to build additional lawful pathways to provide a safe and orderly way for individuals to reach the US, citing the success of the parole policy announced in January for migrants from Cuba, Haiti, Nicaragua, and Venezuela that drove a 95 percent drop in border encounters with migrants from those countries.

The US also needs the help of its neighbors, most importantly Mexico. Last week, the President's Homeland Security Adviser met with the Mexican President, agreeing on a commitment to stronger enforcement along Mexico's southern border to prevent individuals from being exploited by smugglers. Mexico also agreed to continue taking migrants from Cuba, Haiti, Nicaragua, and Venezuela after the termination of the Title 42 policy. Additionally, at the end of April, Homeland Security Secretary Alejandro Mayorkas and Secretary of State Antony Blinken announced the development of regional processing centers across South and Central America that would enable individuals to determine their eligibility for lawful pathways into the US.
House Republican’s Border Security Bill

There is a clear divide in Congress, with Republicans focusing on border security, while Democrats focus on pathways to lawful immigration and humanitarian priorities. Scheduled to coincide with the expiration of Title 42 policy, House Republicans on Thursday were able to pass H.R. 2, the “Secure the Border Act.” Originally intended as one of the first major pieces of legislation of the Republican majority, the bill combines nearly 20 separate bills that Republican-led committees had passed in April.

The bill would codify the “Remain in Mexico” program that requires asylum seekers to stay in Mexico while awaiting US immigration court dates. It would also provide additional resources to complete a border wall and to supply border officials additional personnel and technology. However, the bill would also bar border agents from doing any “processing” of migrants, language that Democrats suggest would prevent officers from completing basic tasks. The ability of DHS to provide parole for migrants would also be restricted through new definitions limiting eligible reasons for which parole may be granted. The bill also moves to restrict federal funds from going to NGOs that assist migrants lacking legal status, posing a challenge for the network of nonprofit and religious groups that provide initial care to many migrants and asylum seekers.

Two Republicans voted against the bill—Reps. Thomas Massie (R-KY) and John Duarte (R-CA)—each citing concerns with issues with the inclusion of an employment verification system in the bill that could exacerbate labor shortages of farmworkers in certain districts. Duarte went further, commenting that, “while I wholeheartedly support enhanced border security, Valley families deserve practical solutions that both Democrats and Republicans can support,” noting that the legislation is “dead on arrival in the Senate,” adding “I believe we could do better.”

While the bill has little chance of passage in the Democratic-controlled Senate, some key senators said it could launch bipartisan, bicameral negotiations. “I’m looking for any port in a storm,” said Senate Judiciary Chair Richard Durbin (D-IL). This week Durbin and Senate Majority Leader Chuck Schumer (D-NY) announced plans to introduce a bill to allocate more resources to border agents and communities. However, Senate Republicans are unlikely to support that effort without other border solutions. A separate proposal by Senators Thom Tillis (R-NC) and Kyrsten Sinema (I-AZ) had been proposed earlier that would continue the government’s expulsion authorities for two additional years, including unaccompanied children, while dropping the condition tied to public health. The two senators commented that the House bill was “a good starting place” and that while it would not advance in the Senate without changes, “it will be absolutely an essential part of a border security strategy that would be in a bill we could get 60 votes for.”

Conclusion

While the administration’s new regulation is expected to be challenged in federal court, it signals a growing bipartisan rejection of asylum law under continued pressure to address the inflow of migrants and challenges at the southern border. The continuation of restrictive immigration policies signals a pivot for the President who campaigned on restoring access to the US asylum system.

Further progress on any immigration legislation may depend on how events unfold following Thursday’s expiration of the Title 42 policy and the implementation of the new rules in its place, if they are not enjoined by a federal court. Enacting immigration reform of any type will remain difficult in a divided Congress but it appears the end of Title 42 policy and recent Republican’s proposals could begin discussions on whether further action is needed.
For further reading on the impact of the end of the pandemic Public Health Emergency, see: CED Policy Brief: The End of the COVID-19 Public Health Emergency

For further reading on immigration reform, see: CED Solutions Brief, Immigration Reform: An Essential Key to Growth

About the Authors

Dr. Lori Esposito Murray is President at the Committee for Economic Development, the public policy center of The Conference Board.

Mitchell Barnes is a Senior Economic Policy Analyst at the Committee for Economic Development, the public policy center of The Conference Board.