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What to know while DACA is in flux

By Brandon Milostan and Wendy Lane

The Deferred Action for Childhood Arrivals program granted temporary deportation protection and renewable two-year employment authorization documents to certain people who illegally came to or remained in the United States as minors. Since the Trump administration recently announced that it plans to sunset the DACA program, the approximate 800,000 DACA recipients and their employers face considerable uncertainty as to how to plan for the future.

With employment-immigration laws in flux, employers should be aware of the following best practices:

Don't ask whether an employee is a DACA recipient. While employees are welcome to volunteer that they are DACA recipients, asking an employee, or even a job applicant, about their immigration status may be considered discrimination based on immigration status, nationality, citizenship and/or race. Employers' inquiries should not go beyond ensuring that new applicants satisfy I-9 requirements and asking current employees for verification of employment authorization renewal when an employee's previous authorization expires.

Don't terminate DACA-recipient employees in anticipation that they will lose their employment authorization. Employers should resist the temptation to terminate known DACA-recipient employees prior to the expiration of their employment authorizations. While the DACA sunset provides that no renewable employment authorization documents will be issued after March 5, 2018, DACA recipients will still be eligible to work until their current authorization expires.

Furthermore, deportation and/or employment ineligibility of employees under DACA may be stayed or postponed due to pending legislative or judicial action. For example, a California federal judge recently issued a nationwide injunction that will allow DACA-recipients to continue to renew their protections while legal challenges work their way through courts. Other jurisdictions may follow suit. Moreover, Congress may soon pass the Dream Act or similar legislation that will provide for lawful employment for these DACA recipients. Thus, employers should not rush to lose the benefits of continuing employment of loyal and well-trained employees as long as they are legally permitted to keep working.

Employers should remember that such employees are still entitled to anti-discrimination protection under federal law as well as the laws of many states, including California, as long as they are legally permitted to continue working in the U.S. With certain statutorily enumerated exceptions, the federal Immigration and Nationality Act prohibits employers from discriminating against any individual "because of an individual's national origin" or because of the citizenship status of a "protected individual," which includes certain individuals who have temporary residence and/or refugee or asylum status. An employer that terminates an authorized employee strictly because of their possible future immigration status will run afoul of these laws.

Don't refuse to hire someone/rescind a job offer because of their DACA-recipient status. As with the protections for authorized employees, employers must be careful not to discriminate against job applicants. A 2014 federal court ruling suggests that DACA recipients are "lawfully present" and are protected against an employer refusing to hire them, or rescinding a job offer made to them, because their employment authorization is likely to expire in the future. *See Juarez v. Northwestern Mutual Insurance*, 69 F.Supp.3d 364, 370 (S.D.N.Y. 2014). Additionally, the Department of Justice has extended the protections of the Immigration and Nationality Act to applicants, stating that employers "cannot refuse to hire an individual solely because that individual's employment authorization document will expire in the future. The existence of a future expiration date does not preclude continuous employment authorization for a worker and does not mean that subsequent employment authorization will not be granted. In addition, consideration of a future employment authorization expiration date in determining whether an individual is qualified for a particular job may constitute an unfair immigration- related employment practice in violation of the anti-discrimination provision of [the act]."

Don't continue employing DACA recipients once their employment authorization expires. While employers must be careful not to discriminate against employees who are still eligible to work in the country, they must be equally vigilant not to employ an individual after their employment authorization has expired. If an employer is found to have knowingly continued to employ a DACA-recipient employee after their employment authorization expires, the employer may be subject to criminal penalties and fines ranging from $500 to $4,000. Given the announcement by Immigration and Customs Enforcement that it plans to drastically increase worksite investigations this year, employers who continue to employ unauthorized individuals are at a greater risk of being identified and penalized. As such, employers should implement a "tickler" system to keep track of expiring employment authorizations and should also follow legislative and judicial updates regarding the status of DACA recipients on the U.S. Citizenship and Immigration Services website and by checking with legal counsel.

Don't respond to emails from USCIS requesting I-9 forms. According to a recent USCIS warning, employers should neither respond to nor click the links in emails sent from USCIS regarding I-9 forms. Employers should remember that they are never required to submit I-9 forms to USCIS, as I-9 audits are conducted by ICE.

Do restrict ICE agent's access to nonpublic places of employment and employment records, if you are a California employer. California Assembly Bill 450, which became effective in 2018, prohibits California employers from allowing ICE agents to inspect nonpublic areas of a business without a warrant and from handing over employee records without being served with a subpoena. California employers also must provide employees with a written notice describing any ICE inspections within 72 hours. Finally, employers may not "reverify" a current employee's employment eligibility unless federal law so requires. California employers who violate any of these new laws face a first-offense fine of $5,000 and subsequent- offense fines of $10,000.

With employment-immigration law in such a state of upheaval, employers are advised to proceed cautiously and consult with legal counsel to stay advised of any further developments.

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