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The Deferred Action for Childhood Arrivals (DACA) Program: Its Implications for United States Employers

October 2, 2012

On June 15, 2012, President Obama announced the Deferred Action for Childhood Arrivals Program (DACA), creating a firestorm of reaction regarding its implications on immigration policy and the affected young people. Some believe as many as 1.26 million will have the opportunity to benefit from the program. Only after the initial excitement began to subside, did employers begin to realize the significant implications the program might have for them.

The DACA Program

The Department of Homeland Security (DHS) does not describe DACA as a program. It describes it as an exercise of discretion, not to enforce departure against individuals who are under the age of 31, as of June 15, 2012, and fit the following criteria:

1. Came to the United States before reaching their 16th birthday; were continuously residing in the United States since June 15, 2007 up to the present time;
2. Were physically present in the United States on June 15, 2012, and at the time of making the request for consideration of Deferred Action;
3. Entered without inspection before June 15, 2012, or lawful immigration status expired before June 15, 2012;
4. Are currently in school, have graduated, or obtained a Certificate of Completion from high school, have obtained a General Education Development (GED) Certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and

5. Have not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

If the Department exercises its discretion and grants Deferred Action, these individuals are eligible to obtain employment authorization and, under limited circumstances, permission to travel in and out of the United States.

HOW THIS IMPACTS EMPLOYERS --

Constructive Knowledge and Actual Knowledge

When an employer has "constructive knowledge" that one of its employees does not have authorization to work, it has an obligation to terminate or suspend the employment of that individual pursuant to the Immigration Reform and Control Act (IRCA). Therefore, if an employee requests a letter of employment to confirm his or her presence in the United States, and makes the employer aware that qualifying for DACA is the purpose of soliciting such a letter, that employer now has constructive knowledge, if not actual knowledge, that the employee is not authorized to work in the U.S. Failure to suspend this employee's employment under these circumstances would be a violation of IRCA.

However, a simple request for an employment confirmation letter, without further elaboration, does not necessarily create "constructive knowledge" since an employee may have many reasons for soliciting the letter. Accordingly, an employer may implement a standardized, objective and neutral procedure for providing employment confirmation letters. This may avoid the employer having to determine whether a "constructive knowledge" threshold has been reached, not because the employer is seeking to avoid its responsibilities under IRCA; but rather because it might find itself in the impossible position of trying to balance the rights of its employees against the obligations of IRCA.

United States Citizenship and Immigration Services (USCIS) has confirmed that businesses can provide employment verification letters to DACA applicants and that, as a general rule, this information would not be shared with other enforcement authorities "unless there is evidence of egregious violations of criminal statutes or widespread abuses." DHS spokespersons have assured the public that the agency is not interested in investigating applications, unless there is a "widespread pattern and practice of unlawful hiring" by a particular employer. Businesses quoted in the press, including *The New York Times,* have not been reassured by these government statements.

Actual Knowledge, But After the Fact

Another result of DACA is that an employee may present an Employment Authorization Document issued pursuant to the DACA program, requesting that his/her records be updated. By doing so, the employee is in all likelihood confirming that documentation previously presented at the time of hiring to complete the I-9 process may have been false and that, until now, such employee was not authorized to work in the United States.

It is well established under U.S. immigration law that an employer may continue the employment of such an individual after updating records and correcting past filings, as now she is legally authorized to work. However, if the company has an "honesty" policy, there may be an obligation to terminate this employee to avoid a claim of discrimination should other employees, who where terminated based upon the "honesty" policy, allege discrimination.

Employers who are confronted with this situation should seek counsel as to scope of its "honesty" policy and how it could be applied in a humane way.

Actual Knowledge After the Fact and the I-9 Process

Presentation of this new Employment Authorization Document to the employer presents another dilemma. How to handle the I-9 process? There are pundits who would argue that it is simpler, more efficient, and appropriate to simply treat the employee as a new hire, and execute a new I-9. Specifically, fire the "old" individual and hire this "new" employee with the proper documentation. Although this avoids a lot of difficult administrative and paperwork problems, such as retroactively amending tax records, corporate records and Social Security records, and in practice is often the approach that employers have taken when they discover that a longtime employee was undocumented, it is hard to see the legal justification for doing so.

Whatever errors in the corporate record are now revealed, this is not truly a new hire. One can only speculate how DHS, the Department of Justice, and the Department of Labor would treat this type of practical accommodation. Again, it is advised that employers confronted with these issues should seek counsel.

New Employees Who Present a DACA EAD

DACA beneficiaries are granted Deferred Action status at the discretion of DHS for a period of two years and may, if the policy remains in place, request renewal. However, this status and employment authorization is purely at the discretion of DHS, and is subject to the possibility of a policy change. Certainly if there is a change in the government administration, DACA could be eliminated.

As a result, an employer may wish to avoid hiring any individual that presents a DACA Employment Authorization Card. Would this subject the employer to a charge of discrimination? Under IRCA, there are non-U.S. citizens who are in a "protected status" with regard to hiring and firing, but individuals granted "Deferred Action," which many argue is not a status at all, are certainly not within that protected group. Accordingly, it seems that an employer could establish a policy of not hiring DACA beneficiaries, as long as it implemented it consistently. So far, none of the U.S. government agencies mandated to enforce antidiscrimination provisions have spoken on this issue. Note that USCIS warns in its Handbook for Employers (Form M-274) on Page 9 that: "Considering a future employment authorization expiration date in determining whether an alien is qualified for a particular job, may constitute employment discrimination." Therefore, counsel should be consulted if an employer is considering such a policy.

Conclusion

In summary, DACA has implications for all employers. The politics of immigration policy will continue to have consequences with regard to maintaining, hiring, and firing an employee population.