Employer Update

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December 2017

Complying with Immigration Law Following the DACA Rollback

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On September 5, 2017, Attorney General Jeff Sessions announced that the Trump Administration would cease implementation of Deferred Action for Childhood Arrivals, the federal government program more commonly referred to as "DACA." Currently, the legality of the DACA rescission is being litigated in federal district courts across the country.[1] Nevertheless, in the absence of Congressional legislation or a federal court order prior to March 6, 2018, the DACA rollback will go forward and DACA beneficiaries' work authorizations will begin to expire. Accordingly, employers should prepare for these changes by: a) reconfirming their Form I-9 practices and procedures to ensure compliance with federal immigration law; and b) ensuring that their employees are authorized to work in the United States.

Navigating this area can be tricky. Federal immigration law imposes severe penalties on employers for employing unauthorized aliens,[2] as well as for engaging in discriminatory hiring practices, for example, by refusing to hire a person whose work authorization has an expiration date. As employees' work authorizations begin to expire, employers would be well served by confirming that their policies are in full compliance in regard to verification of their employees' work authorizations.

Background

On June 15, 2012 Homeland Security Secretary Janet Napolitano issued a memorandum establishing DACA, a federal program that would permit individuals who came to the United States as children and who meet certain criteria to apply for deferred action. Deferred action is a form of prosecutorial discretion by which the United States Citizenship and Immigration Service ("USCIS") grants an alien temporary relief from deportation. Under DACA, beneficiaries could renew their work authorization every two years. Perhaps most significantly, DACA beneficiaries could apply for Employment Authorization Documents ("EADs") permitting beneficiaries to work in the United States for the duration of the two years.

On September 5, 2017, the Trump Administration announced that it would begin to phase out and ultimately end DACA. The rescission memorandum issued by Attorney General Jeff Sessions stated that: (1) The Department of Homeland Security would no longer accept first-time DACA requests and associated applications for EADs, effective immediately; (2) DHS would no longer accept DACA renewal requests from current beneficiaries, effective October 5, 2017; and (3) beginning March 6, 2018, DACA recipients whose applications have expired will permanently lose DACA status and benefits. *See* Notice of Availability for Memorandum on Rescission of Deferred Action for Childhood Arrivals, 82 Fed. Reg. 179, 43556 (September 18, 2017). Once a beneficiary loses DACA status, he or she is no longer authorized to work in the United States and is at risk for deportation.

Absent action by Congress or by the courts, starting on March 6, 2018, tens of thousands of beneficiaries will begin to lose DACA status, and their EADs will expire. *See* here. As of September 5, 2017, less than 10,000 of the current DACA beneficiaries had submitted requests for renewal, meaning the vast majority of DACA recipients will lose their authorization to work in the next two years. The DACA rollback, therefore, signifies that commencing next spring employers who employ DACA recipients will be vulnerable to government enforcement action because of their employment of unauthorized workers.

Compliance Risk

The end of DACA poses compliance risks for employers because employers bear the responsibility of ensuring that all of their employees have authorization to work in the United States. The government presumes that an employer knows at the time of hiring or afterward that an individual was an alien not authorized to work in United States. *See* 8 U.S.C. §1324a. The employer may rebut this presumption by presenting clear and convincing evidence that the employer did not know (and could not reasonably have known) that the individual was an alien not authorized to work in the United States.

The DHS or an administrative law judge may impose monetary penalties on an employer for failing to produce an original Form I-9 (discussed *infra*) for inspection by Immigration and Customs Enforcement ("ICE"), and even greater fines for knowingly hiring and continuing to employ unauthorized aliens. *See* 8 U.S.C. §1324a. Penalties for failing to produce a Form I-9 range from $100 to $1,000 per unauthorized alien, and monetary penalties for knowingly hiring and continuing to employ unauthorized aliens range from $375 to $16,000 per violation. *See* 8 U.S.C. §§1324a(e)(4)-(5). Criminal sanctions also may be imposed on "any employer engaged regular, repeated, and intentional employment of unauthorized aliens," including fines of up to $3,000 for each unauthorized employee, and even imprisonment for up to six months. 8 U.S.C. §1324a(f).

Compliance Procedures

Employers can avoid these penalties by following procedures to ensure each employee is authorized to work in the United States. Pursuant to the Immigration Control and Reform Act of 1986, employers must verify the identity and employment authorization of each person hired after November 6, 1986 at the time of hiring by completing and retaining Form I-9, Employee Eligibility Verification. Employers who have not already done so also should consider implementing a process for periodically performing I-9 compliance audits to confirm compliance with the immigration law not only for new hires, but for current employees.

Employers conducting a compliance audit should take the following steps, adhering to guidance issued by USCIS, *see* U.S. Citizenship and Immigration Services, Handbook for Employers M-274 (2017), https://www.uscis.gov/book/export/html/59502/en; *see also* U.S. Citizenship and Immigration Services, "I-9 Central," https://www.uscis.gov/i-9-central. Employers should start by carefully reviewing *all* I-9s for each current employee for work authorization expiration dates. *See* I-9 Central. If an employee's work authorization has an expiration date, that date should have been recorded by the employee in Section 1 of the I-9 and verified by the employer in Section 2 of the

I-9. *See* Handbook at §4.1. The expiration date should be an exact match to the date printed on face of the work authorization document provided by the employee—i.e. the EAD (Form I-766)—at the time the employee completed the I-9. *See id.* If the expiration date provided by the employee in Section 1 and the expiration date on the document recorded by the employer in Section 2 do not match, the employer must use the earlier date to determine when reverification is necessary. *See* I-9 Central.

The employer must reverify an employee's work authorization on or before the date of expiration by completing Section 3 of Form I-9. Handbook at §5.0. Upon reverification, the employee must present a document of his or her choice from the lists provided on the I-9 that shows either an extension of his or her initial work authorization, or new work authorization. *Id.* at §4.1. The employee may present the same documents as he or she did when completing Form I-9 initially, or the employee may choose to submit different documents. *Id.* at §4.0.

Upon initial completion of the I-9 and upon reverification, employers have the responsibility of reviewing and affirming the employee's identification and work authorization documents. *Id.* The employer must physically examine the documents at the time of submission to confirm that they are authentic. *Id.* If the documents reasonably appear to be genuine on their face and relate to the person presenting them, the employer must accept them. *Id.* If an employer suspects a document may be fraudulent, the employer may, but is not required to, report the incident to Immigration and Customs Enforcement ("ICE"). *See* I-9 Central. Finally, if an employee fails to produce the required documentation within three business days of the date employment begins, the employer may terminate the employee's employment. Handbook at §4.3.

Employers may use various tools to notify an employee when his or her authorization is ending. For instance, an employer may invest in a tickler system which alerts employers when an employee's work authorization is about to expire. Employers also may choose to use E-Verify, an electronic employment confirmation system sponsored by USCIS. *Id.* at §1.2. Employers may use E-Verify to notify themselves automatically when an employee's work authorization is set to expire.

Employers also may use E-Verify to assist in the re-verification process. E-Verify works by comparing an employee's Social Security Number ("SSN") from Form I-9 to government records. While an employer using E-Verify must obtain a SSN from each newly hired employee, employees need not provide a SSN on an I-9 unless the employer participates in E-Verify. If the employee has applied for, but has not yet received the SSN, the employee may leave this field blank and continue to work while awaiting his or her SSN. Handbook at §3.0. Even where employees must provide a SSN in connection with the E-Verify process, the E-Verify Memorandum of Understanding states the employers may use I-9 information only to confirm employment authorization. *See* Dep't of Homeland Security, E-Verify Memorandum of Understanding for Employers (2013) §15. An employer cannot use E-Verify to selectively verify the employment eligibility for current or newly hired employees. *Id.* at §11.

Practice Tips

While the requirements of Form I-9 are fairly straightforward, federal immigration law places limits on an employer's inquiry into when and how an employee's work authorization will expire. For example, an employer may not consider a future expiration date in determining whether an individual is qualified for a particular job. *See* 8 U.S.C. §1324b(a)(1). Doing so may constitute unlawful employment discrimination. *Id.* The employer must notify the employee only of his or her expiring work authorization, and the employee must be given a chance to present an extension or a new work authorization document. *See* 8 U.S.C. §1324b(a)(6). Also, employers should not take any preemptive actions in anticipation of an employee's expiring work authorization. *Id.* Where an employee's I-9 indicates an expiration date, employers should provide at least 90 days notice, so that the employer is prepared to re-verify the employee's work authorization as necessary. *See* I-9 Central. Finally, an employee is

not required to disclose, and an employer should not inquire about, the employee's DACA status. *Id.*

Conducting regular, internal I-9 audits will allow employers to confirm that all employees are authorized to work in the United States and ensure compliance with immigration law following the DACA rollback. For more information on how to conduct an I-9 audit, see ICE's guidance, available at: https://www.ice.gov/sites/default/files/documents/Document/2015/i9-guidance.pdf.

[1] Major cases pending include: *State of New York et al. v. Donald Trump et al.,* No. 17-05228 (E.D.N.Y. Nov. 20, 2017); *Regents of the University of California et al. v. United States Department of Homeland Security et al.,* No. 17-72917 (9th Cir. Nov. 16, 2017); and *NAACP v. Trump,* No. 17-1907 (D.D.C. Nov. 8, 2017).

[2] 8 U.S.C. §1324h(3) ("the term 'unauthorized alien' means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed").

Employer Update is published by the Employment Litigation and the Executive Compensation & Benefits practice groups of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, www.weil.com.

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