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Dream Act Might Be a Nightmare for Employers

On August 15, 2012, the Immigration Service began accepting applications for deferred action from certain individuals under 31 years of age who arrived in the United States more than five years ago as children under the age of sixteen. Deferred action is a discretionary decision by the Department of Homeland Security not to pursue immigration enforcement (e.g. deportation) for a specific period of time. The deferred action program is commonly referred to as a "Dream Act;" however, what is one individual's dream may turn into a nightmare for an employer.

As part of applying for deferred action qualifying aliens are also eligible for employment authorization. Generally, work permit applications take two to three months to process so by this fall, potentially hundreds of thousands of individuals will receive lawful permission to work in the United States. Some of these individuals might already be employed by your company.

Employees provide at the time of hire documents to confirm their identity and ability to work in the United States (the I-9 requirements). It is not uncommon for undocumented employees to provide false documents to gain employment and which employers unknowingly accept. What is an employer to do when a current employee seeks to provide a new work permit or other document with different information than on the documents provided to complete the I-9 at the time of hire?

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What Should Employers Do?

In this case, the "knee jerk" reaction of many employers is to discharge the employee for lying on an employment application and/or providing false employment documents. And if employers have fired other employees in the past, for falsifying applications, resumes, and similar documentation, employers may be able to do so with limited exposure. The word may is emphasized, however, because no federal agency (neither the Department of Labor ("DOL"), the Equal Employment Opportunity Commission ("EEOC"), the Department of Justice Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC"), nor the National Labor Relations Board ("NLRB")) has commented on the Dream Act or provided any guidance to employers as to what to do when current employees provide the new, lawful work authorizations. This lack of guidance is frustrating because all employees who would have lied on such employment documents will belong to a protected class, and adverse employment actions probably will be scrutinized by the very agencies that have failed to provide a roadmap for compliance.

Notwithstanding, companies should not feel compelled to continue to employ employees who dishonestly gained employment. If an employer believes that it has no choice but to fire an employee, lying or falsifying employment documentation is a facially neutral reason that should be used as justification for all terminations. Employers who have "honesty policy" provisions in employee handbooks or other personnel policies should specifically refer to them in all documentation. Employers who do not have such policies should consider revising their handbooks to include them. Significantly, employers should self-audit their own employee files to ensure that discharge is consistent with past practice. If offenses like this in the past only have led to warnings or suspensions, levying a heftier punishment could lead to an inference of pretext. Finally, employers should not justify any termination decision based on "failure to possess the proper papers." Similar to the problems with "no match" letters, such decisions disparately impact a certain segment of the population belonging to a different national origin, and federal agencies have not been tolerant of such excuses.

For the Dreamer employees who continue in employment, employers are advised to complete a new I-9 form and attach to the initial I-9 created at the time of hire.

Hopefully, some guidance will be forthcoming by the time that employers feel the impact of the Dream Act. Regardless, an employer facing this type of documentary nightmare should consider the immigration regulations as well as state employment laws in charting a course of action. Employers are advised to seek the assistance of legal counsel who can assist in both of these areas.

For More Information

To learn more about the impact of the Dream Act, please contact the authors of this alert or another member of Polsinelli Shughart's Labor and Employment practice group:

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