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# Employers are cautious about new program affecting undocumented workers

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A new program that allows certain undocumented immigrants to receive temporary work authorization isn't on most employers' radar screens even though they can get into trouble if their employees file under the program.

The program, known as DACA - or Deferred Action for Childhood Arrivals - took effect on June 15.

But most of the guidelines from the Department of Homeland Security have focused on the applicants themselves, not on their employers.

Tamar Jacoby, president of ImmigrationWorks USA, an employer network in Washingtonthat advocates immigration reform, said that the program is "a great opportunity for employers, but it also comes with some risks." Employers must balance obligations to terminate known undocumented workers against illegal profiling of employees or discriminatory firing.

Small employers that do not have a sophisticated I-9 process may be particularly vulnerable to some of the risks.

The latest numbers from the U.S. Citizenship and Immigration Services (USCIS) show that nearly 180,000 undocumented immigrants have applied for DACA. According to the Migration Policy Institute, those who have filed so far represent only 10 percent of eligible applicants.

The types of employers that can expect to see workers file for DACA is diverse and may include highly skilled, college-educated professionals as well as low-skilled workers.

"It's really all over the board," said Greg Siskind, an immigration attorney at Siskind Susser in Memphis, Tenn.

Some states, including California and Texas, have passed laws allowing undocumented immigrants to qualify for in-state tuition at state colleges and universities.

"That means a lot of people are going to college," Siskind said. "It's a message I'm trying to get across - that a lot of people [applying] don't fit the stereotype."

For example, one of his clients applying for DACA graduated from dental school only to learn when he sought his dental license that he is undocumented as a result of his parents bringing him to the U.S. without papers when he was 2 years old.

## The ABC's of DACA

A DACA applicant must meet certain requirements.

He or she must have been under 31 years old as of June 15, 2012, when the program took effect, and must have proof of living in the U.S. as of that date.

An applicant must have been under the age of 16 when he or she arrived in the U.S., and must have been undocumented as of June 15.

"So, if you're here legally, you're not qualified [to apply for DACA]. That's to prevent half a million students from applying, which would expand dramatically the program," said Siskind. An applicant must also show that he or she has been in the U.S. continuously for the past five years.

Anything other than a brief absence can be a problem, Siskind said.

A DACA applicant must have a high school diploma or a G.E.D., be currently enrolled in high school or a qualifying GED program, be a member of the military, or have been honorably discharged.

A clean criminal history is also required, with the exception of minor traffic infractions.

"Motor vehicle violations not involving endangering the public, like running a red light, are not going to bar you from DACA. But driving recklessly or driving drunk ... can be a problem," said Siskind.

The USCIS has indicated that an arrest for driving without a license is not a bar to DACA. This was a major concern given that many states prevent undocumented immigrants from getting a driver's license.

#### 'Don't be too nosy'

One of the major risks for employers is knowing too much.

For example, an employee may ask an employer for documentation to prove employment history and disclose that he or she is filing for DACA.

At that point, an employer is required to terminate the employee.

"If an individual admits he or she has no right to work at present, but will be getting it in the future, an employer has to terminate," said Angelo A. Paparelli, a partner at Seyfarth Shaw in Los Angeles.

Under federal law, an employer cannot hire or continue to employ someone if the employer has actual or constructive knowledge that the person is unauthorized to work.

Similarly, proactive employers who want to take steps to help employees should proceed with caution.

"Don't be too nosy," Siskind advises employers. "If you engage in profiling of employees by assuming that someone might be applying for DACA, you're going to get yourself into trouble."

Employers who want to be helpful should be careful to limit their activity to providing general, bulletin-board type information only.

Once an employee gets approved under DACA and then presents his or her work authorization, an employer must confront a new set of issues.

"This is where employers can run into problems," said Paparelli. "The employer now recognizes that there was a misrepresentation [of the worker's status], and it needs to decide what to do."

Assuming the employee's previous documents appeared to be genuine and the employer didn't have reason to suspect the worker was unauthorized, the employer is not required to terminate the employee and could correct the I-9 information.

However, many employers have policies that punish or terminate employees for lying or giving false information on an employment application.

"A company has a right to discharge an employee who lies on an application about [his or her] status, but many companies don't want to discharge an employee who comes back [with work authorization]," said Ira J. Kurzban, an immigration attorney at Kurzban Kurzban Weinger Tetzeli & Pratt in Miami.

However, But companies could expose themselves to claims of discrimination if they don't implement their policies uniformly.

"We would strongly advise any employer in that situation to do it uniformly, not pick some and not others [to terminate]," said Laura Danielson, an immigration attorney at Fredrikson & Byron in Minneapolis, who spoke from her office in Shanghai.

#### 'Big piece of Swiss cheese'

Many employers are being very cautious given that DACA is a new program and few approvals have been granted so far.

A little over 2 percent of the 180,000 applicants have been approved.

Despite the temporary nature of DACA-approved work authorization, which is good for two years and can be renewed after that, immigration lawyers expect the program to continue indefinitely. They point to other forms of temporary protected status (TPS) for undocumented immigrants, such as the 400,000 individuals who got TPS from Central American countries in the wake of Hurricane Mitch in 1998, and had their status extended long after the disaster.

Still, some employers worry that they could be targeted if their name gets on a list of employers who hired unauthorized workers.

According to Kurzban, when DACA was announced, the USCIS said that nothing prevented it from using information submitted under DACA for an investigation into an employer.

However, Kurzban does not think employers will be investigated under DACA.

"I just don't believe the government will go after an employer simply because it submitted a letter supporting the fact that somebody worked for them that wasn't documented," he said.

Jacoby remains skeptical, given that the Department of Homeland Security has previously said it would only penalize employers for "egregious circumstances" but then cast a wider net than those words would suggest.

Raids on employers have been trending sharply upward, Jacoby noted.

There are also "silent raids," in which employers are audited and ordered to turn over employment records. The number of silent raids shot up from three in 2004 to 4,000 this year, and fines from silent raids have gone from \$0 in 2006 to \$15 million this year, Jacoby said.

"The word 'egregious' has been a very slippery, weasel-y word for the past decade," said Jacoby. "To me, that's a big piece of Swiss cheese."

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