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Labor & Employment ADVISORY ■

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# What the Media Didn't Tell You About President Obama's Executive Action on Immigration Reform

## Background

On November 20 and 21, 2014, President Obama announced his "immigration accountability executive action," which includes a series of measures that will provide temporary legal status to millions of unauthorized immigrants and other immigration reforms. The press focused on the politics of immigration reform when discussing the executive action, but the reality is that latent employer-related issues lurk in the background. Two initiatives of the executive plan have been highly publicized: (1) the creation of the Deferred Action for Parental Accountability (DAPA) program and (2) the expansion of the Deferred Action for Childhood Arrivals (DACA) program. Two more initiatives of the executive action have not been well-publicized: (3) the extension of immigration options for victims of certain crimes who cooperate in government investigations and (4) the creation of an interagency working group, including the Department of Labor (DOL) and the National Labor Relations Board (NLRB), to identify policies and procedures to promote consistent enforcement of labor, employment and immigration laws. All four of these initiatives will particularly affect employers in unpublicized ways.

## Background on the Four Initiatives

First, DAPA will provide temporary relief from deportation and work authorization to unauthorized parents of U.S. citizens and lawful permanent residents. Under DAPA, an undocumented individual living in the U.S. who has a child who is a U.S. citizen or lawful permanent resident as of November 20, 2014, may request temporary relief from deportation and employment authorization if they have continuously resided in the U.S. since before January 1, 2010, and are not convicted criminals or other immigration law violators. DAPA grants will last for three years. U.S. Citizenship and Immigration Services (USCIS) expects the DAPA program to begin accepting applications approximately 180 days from November 20, 2014.

Second, President Obama's executive action expanded the current DACA program, which provides temporary relief from deportation and work authorization to certain unauthorized young people brought into the U.S. as children. Unauthorized individuals who came to the U.S. before their sixteenth birthday and who began residing here before January 1, 2010, are eligible under the expanded version of DACA. In addition, the expansion extends the period of temporary relief from deportation and work authorization to three years from the current two years. USCIS expects

the expanded DACA program to begin accepting applications for those eligible under the new criteria within 90 days of November 20, 2014.

Third, the DOL's Wage and Hour Division (WHD) will expand its role in certifying that individuals who have been victims of human trafficking or certain other crimes can establish eligibility for special visas that provide them with legal status. U visas provide legal status to victims of an enumerated list of "qualifying criminal activities," including false imprisonment, involuntary servitude and trafficking. To be eligible for a U visa, a victim must possess information concerning the crime and be likely to be helpful to law enforcement or government officials. T visas are provided to certain victims of human trafficking who assist law enforcement officials in the investigation or prosecution of trafficking crimes. Beginning in 2015, the WHD will certify certain victims of extortion, forced labor and fraud in foreign labor contracting for U visas. It will also certify for T visas certain individuals it determines to be victims of human trafficking.

Fourth, the interagency working group, which is spearheaded by the DOL, will consist of the DOL, Department of Homeland Security (DHS), Department of Justice (DOJ), Equal Employment Opportunity Commission (EEOC), and NLRB. The group will review two main topics: (1) promoting worker cooperation with enforcement authorities without fear of retaliation based on immigration status; and (2) ensuring that employers do not use federal agencies to undermine worker protection laws by introducing immigration authorities into labor disputes.

## Considerations for Employers

While the initiatives outlined above will predictably have a large impact on U.S. immigration law and policy, they will also affect public and private employers obligated to abide by federal and state labor and employment laws and regulations. The following is a non-exhaustive list of latent issues for employers to consider in light of the President's recent executive action.

**The DAPA and DACA initiatives contradict the Immigration Reform and Control Act (IRCA).**

IRCA is a federal law that makes it unlawful for an employer to knowingly hire a person who is unauthorized to work in the U.S. and for an employer to continue employing an unauthorized person if the employer knows that the person is unauthorized for employment. Actual knowledge is not required under IRCA. Instead, an employer violates IRCA if it has *constructive* knowledge that an applicant or employee is unauthorized for employment. According to relevant federal regulations, constructive knowledge is "knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about the certain condition." Employers that violate IRCA may be subject to civil fines and even criminal penalties.

DAPA and DACA, by their very natures, will apply to persons who are unauthorized for employment in the U.S. Conflicts between these initiatives and IRCA will arise if and when unauthorized workers request from their employers confirmation of employment or other documentation for the DAPA and/or DACA processes. Those queries alone will likely create constructive, if not actual, knowledge of employees' unauthorized statuses on the part of employers. Employers that continue to employ unauthorized workers after receiving such knowledge will be in violation of IRCA; employers that terminate the employment of any unauthorized workers will inevitably undermine the purposes of the DAPA and DACA programs.

**The DAPA and DACA application processes could uncover employee identity theft, fraud and dishonesty violations.**

DAPA and DACA provide temporary work authorization to individuals who would otherwise be unauthorized to work in the U.S. But, in many instances, unauthorized persons utilize fraudulent identity and/or eligibility documents in order to obtain employment here. Under DAPA and DACA, some of those employees can become eligible to work under their own identities. If those employees inform their employers of their previous fraudulent conduct, or even if they now submit honest and accurate personal information to their employers, those employers will have knowledge of their employees' unlawful, dishonest and fraudulent past behavior. Employers that have strict criminal conduct or dishonesty policies may be obligated by the terms of such policies to take remedial action against those employees. On the other hand, doing so might undercut the goal of DAPA and DACA to provide previously unauthorized workers with temporary employment authorization.

**The extension of the U and T visa program could incentivize some workers to testify against their employers in order to encourage the WHD to find that they are eligible victims.**

The U and T visa programs provide legal status to victims of certain crimes, if those victims are helpful to law enforcement and assist government authorities in the investigation or prosecution of those crimes. By expanding these programs and the types of crimes they cover, the executive action might incentivize certain workers to testify against their employers—particularly in cases of potential employment-related crimes, such as forced labor, fraud in foreign labor contracting and human trafficking.

The expansion of the WHD's role in certifying that individuals have been victims of human trafficking or certain other crimes for U and T visa eligibility creates additional concerns for employers. First, the WHD is a branch of the DOL, and its mission is to enforce federal minimum wage, overtime pay, child labor and related laws. It is not an immigration agency, per se. By giving the WHD increasing immigration-related responsibilities, the President's executive action tasks the WHD with enforcing programs and policies that are generally outside of and unrelated to the WHD's scope of expertise. Second, the expansion of the WHD's role in the U and T visa certification process might encourage the WHD to seek out potential visa-eligible victims. The WHD already closely monitors employers suspected of violating federal minimum wage, overtime pay, child labor and related laws; now tasked with new, but related, responsibilities, WHD agents might be tempted to seek out visa-eligible victims while enforcing federal labor laws.

**The interagency working group is strategically designed to support multiagency investigations and more opportunities for agencies/prosecutors to claim violations of various federal laws.**

Involving so many different federal agencies in the interagency working group—each with a different mission—in an immigration working group concerns employers. There is great potential for contradictions among the agencies and their laws. A realistic example helps illustrate this point. Let's say an employer terminates a worker because of her unlawful immigration status. Analyzed from DHS's perspective alone, such a termination would be appropriate under IRCA. But, what if the fired worker was engaged in union organization at the time of her termination? From the NLRB's point of view, the termination would likely be improper. Now add the various perspectives of the other agencies in the interagency group to the mix. It's not difficult to imagine a situation where they all intersect— and where, on the immigration issue, they contradict.

## Recommendations

It is clear that employer concerns arising out of the President's executive action are numerous, complicated and messy. Moreover, as of now, there are no definitive answers to many of these issues. Nonetheless, employers should take the following steps while awaiting more concrete guidelines from the government:

- Be conscious of the issues. Know and understand the ways employers are implicated by the immigration reforms.
- Have some sort of plan. Do not wait until an issue comes up. Think of various scenarios and map out your best responses.
- If your plan has exceptions to federal laws (e.g., not terminating an employee who asks for his documentation so that he can apply for DAPA), make sure that there is logic to it.
- Work with counsel to make your best assessment and prioritize when the laws and policies conflict. The reality is that the relevant policies and statutes often contradict each other. When they do, use your best judgment to determine which law or policy to prioritize and which to bend a little. Until the federal government works out the kinks, employers will have to make their own logical and strategic immigration-related decisions.

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