

Immigration laws profoundly affect the workplace

Immigration laws complicate managing employees in the workplace. Individuals can work if they are a U.S. citizen or non-citizen national, a lawful permanent resident or an alien authorized to work. Employers play a vital role in ensuring only workers with the legal right to work do so. That role includes monitoring non-citizen workers to stay in compliance with immigration laws. It's complicated, with a lot of moving parts. Immigration raids occur regularly, accompanied by I-9 audits. Workers with Deferred Action for Childhood Arrivals (DACA) work certificates require careful monitoring to ensure their permits don't lapse. Employers find it hard to retain workers with temporary visas as the Green card process has ground to a halt.

Here's how to best manage your workforce when it includes workers without permanent residency rights.

IRCA and the I-9

The Immigration Reform and Control Act of 1986 (IRCA) is the primary immigration law that applies to employers. IRCA dictates that an employer verify a worker's legal permission to work. Employers must have each new employee complete an I-9 form. The I-9 documents the employee's status to legally work in the United States. It tells employers to get specific identification documents and other names the employee may have used in the past. Employers must ensure the I-9 form is completed on the employee's first day of work.

Fortunately, you don't have to be a forgery expert when reviewing I-9 documents. However, you do have to be on the lookout for obviously doctored documents. You also have to make sure that employees you put in charge of filling out the I-9 aren't committing fraud.

I-9 forms are not filed with the federal government, but employers are required to produce them should immigration officials ask. Retain a paper or electronic copy for at least three years after hire or a year after termination, whichever is longer. While the federal government does offer an I-9 in Spanish, it may only be used by employers in Puerto Rico.

Required I-9 documents

The instructions accompanying the I-9 form lists various documents the worker can provide to prove the right to legally work. These include:

- An unexpired U.S. passport or passport card issued to a U.S. citizen or U.S. national;
- A permanent resident card (AKA Green card);
- An unexpired foreign resident card;
- An unexpired foreign passport stamped with U.S. work visas such as student, H1-B and other work authorizing visas; and
- An unexpired DHS issued Work Authorization document (Such as DACA).

There is a long list of other documents that can establish that the worker is the same individual in the document

listed above. You can find the I-9 instructions [here](#).

I-9 penalties

The Department of Homeland Security (DHS) is responsible for I-9 enforcement. DHS's Immigration and Customs Enforcement (ICE) routinely inspect employers' records. During the Trump administration, ICE records inspections have increased. ICE considers five factors when setting penalties. These are employer size, good faith effort, the seriousness of the violation, whether unauthorized workers were employed and previous enforcement actions.

These are the most common violations of ICE fines:

- **Simple Form I-9 violations:** The minimum fine is \$224 and the maximum \$2,292 per Form I-9 violation for first violations. They go up for subsequent violations. These penalties are for technical violations. For example, if a new worker doesn't completely fill out the form, that's a violation. Always double-check all forms to make sure the worker didn't skip any questions. If challenged, employers have ten days to correct simple violations. After that, fines apply.
- **Unlawful Employment of Unauthorized Workers:** For the first offense, the minimum fine is \$573 and the maximum \$4,586 per worker. Subsequent violation fines escalate sharply.

There are also criminal penalties. Employers engaging in a pattern or practice of hiring, recruiting or referring for a fee unauthorized aliens may be imprisoned.

Immigration raids

ICE has dramatically stepped up immigration raids. Take, for example, the massive immigration raids at Mississippi chicken processing plants this past summer. Photos and videos showed hundreds of workers led away by ICE agents. ICE alleged it received multiple tips from individuals inside the facilities, including video and audio recordings. These purportedly revealed that some managers may have knowingly hired workers without work permits. According to one CNN report, a source within ICE told it that some managers appeared to have received payments. These ranged between \$500 and \$800 for each undocumented worker the manager hired.

The agency believes some workers were hired more than once by the same managers, using different names each time. Others provided social security numbers belonging to dead individuals. Still others apparently wore ankle bracelets because they had pending immigration cases elsewhere. Individuals with pending deportation cases are not authorized to work. Perhaps most shockingly, one investigator reported that some of the individuals with ankle bracelets were traced to the workplaces using GPS coordinates from the devices.

All employers should have a contingency plan in place for an ICE raid. Talk to your attorneys now about what to say and do if ICE agents show up.

DACA

700,000 young adults whose parents brought them illegally to the United States as children have a fragile residency right. That's because the Obama administration issued an executive order permitting them to stay and work temporarily. Those who applied for Deferred Action on Childhood Arrivals (DACA) residency/work permits had to show that they arrived young. They also had to prove they have no significant criminal history. Plus, they can't have left the country and returned again. In other words, they must have stayed out of trouble and in the country continuously since arriving. If so, they received permission to both stay and go to school and work.

That all changed when the Trump administration revoked the executive order, citing it as an overreach of presidential power. If you employ or want to hire a (DACA) certificate holders, you should be on high alert. Once the Trump administration revoked the order, the American Civil Liberties Union and others sued and won deportation reprieves. The Trump administration then appealed to the U.S. Supreme Court. It accepted the case, held oral arguments in early November and is expected to decide the case in early 2020.

Lawyers following the case believe indications are that the Supreme Court may rule 5-4 against the DACA certificate holders. Should that happen, employers face an immediate problem. They will have to terminate DACA covered employees. Lawyers expect the court may include a phase-out period, which may help. For example, they could decide that DACA holders can remain employed until their current certificates expire.

Employers should take stock of how many DACA holders they have and when their certificates expire. Check the I-9 information the workers provided. You have copies of the DACA certificates with those forms. The Department of Homeland Security (DHS) is still processing renewals. Your DACA workers should keep renewing their work permits until the court issues a ruling. They cannot apply for renewal until 150 days before the current certificate expires but should do so as soon as possible.

Work visas, Green Cards and Employment

There is a long list of DHS issued visas that allow foreign nationals to work temporarily in the U.S. Some are of minimal duration for those attending professional conferences and the like. Others last for the duration of education and a bit beyond graduation. Still others allow foreign spouses to work when accompanying another foreign work visa holder. There are even special work permits for new arrivals awaiting hearings on refugee status and victims of human trafficking. If in doubt about a particular applicant's permission to work, consult an experienced immigration lawyer.

Of temporary visas, the most common is the H-1B. An H-1B visas authorizes an individual to hold a specific job for a specific time frame. It is not an immigration visa. It authorizes the individual to work for a sponsoring employer. If the job ends (or the worker is terminated) he or she must promptly find another sponsoring employer. The duration is three years, renewable for up to six years. Employers must certify that they cannot find a U.S. citizen or permanent resident to perform the job in order to obtain the visa. The proposed employee must generally have a bachelor's degree or equivalent. If the employee applies for a Green card (See below), the H-1B can be renewed beyond six years.

At the other end of the spectrum, H-2A visas are issued to agricultural guest workers. These visas are only valid for up to ten months a year. Workers may leave the country and return during the visa's term.

Green card crisis

Many foreign nationals who work under an H-1B or other special visas want to stay permanently. They have established lives, bought homes and perhaps had U.S. citizen children. The most common avenue for permanent residence is the so-called Green card and its eventual path to citizenship. However, as many employers are discovering, getting a Green card is increasingly difficult. As a result, some highly skilled workers are leaving rather than wait. One reason – their foreign-born children can only stay on a parent's H-1B visa until they reach 21.

Currently, there is a backlog of 800,000 Green card applications. There are just 140,000 employment based Green cards available per year. Many of the applications are from Indian nationals. The problem is that U.S. immigration law caps the number of Green cards by country. Indian nationals currently face up to a 50-year wait. This prompted many employers to push Congress to pass the Fairness for High-Skilled Immigrants Act. It would eliminate per-country caps, reducing the wait for Indian nationals, but extending it for others. Other bills would also raise the overall cap on yearly Green cards available.