



## **President Obama's Executive Action on Immigration: Pitfalls and Perils for the Employer**

On November 20, 2014, President Obama announced a series of "Executive Actions" regarding immigration. There were several changes to Administration policy included in this series of memos from the Department of Homeland Security (DHS), but the most significant elements for employers involve deferred deportation for certain immigrants who entered or remained in the U.S. without authorization, and a shift in enforcement priorities for USCIS. The Actions address the impact deportations of family members have on US citizens or legal permanent residents, and the desire to target enforcement resources on border security rather than workplace raids and I-9 audits.

Under the Actions, an individual who entered or remained in the country without legal authority prior to January 1, 2010, who has resided continuously in the country since that date AND who is the parent of a US citizen or legal permanent resident is eligible to apply for deferred deportation. If found to qualify after a background check and verification of family relationship, the individual will be given a document evidencing authority to remain and work in the United States for an initial period of three years.

Under the Actions, enforcement personnel are directed to use discretion in the apprehension of individuals beyond the border region and several previous enforcement directives are rescinded. The Actions indicate that enforcement will be targeted toward discovery and apprehension of terrorists, criminal aliens and individuals seeking unauthorized entry at the borders and ports of entry.

With the announcement of these Actions, the first inclination for many is to rush out and "do something" for your workers. Our initial advice to employers: restrain yourselves until the government provides guidance for employers with regard to its view of how these actions interface with the work authorization requirements of existing law. Over the next 180 days, DHS and the Department of Justice (DOJ) will be implementing these Actions through guidelines and memoranda. Ideally, the guidelines will include methods of protection for employers faced with the perils outlined below. We will be engaged in discussions with these agencies to highlight the need for that protection and will provide updates as additional information becomes available.

Technically, the Actions should have no visible impact on the current workplace. Under existing law, all employers must verify the authority of their workers to work in the United States or face penalties. This is accomplished by the I-9 Employment Verification process. Assuming the employer has dutifully complied with the I-9 requirements, there should be nothing to suggest that the Executive Action would apply to any current worker. Until

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further guidance is provided by the government and its legal ramifications evaluated, employers must be aware of the following pitfalls.

**Pitfall #1:** DO NOT ASK and do not reach out to your current workforce regarding their potential eligibility for deferred action status. You do not want to know that a current worker is unauthorized to work in the U.S., or the legal consequences of “actual knowledge” of hiring an unauthorized worker may befall you.

**Pitfall #2:** If an employee asks for copies of employment records, DO NOT ASSUME why they are asking, and do not seek clarification, or the peril of constructive knowledge of continuing to employ an unauthorized worker may befall you. Employment records are needed and may be requested for a variety of reasons-loans, school residency, leases, etc., not just for qualifying for the deferred action under discussion. Bottom line – if asked for such records, “don’t ask, don’t tell” with respect to the underlying reason for the request.

**Pitfall #3:** Several months from now an employee comes forward to present an identity and work authorization card with information that does not match that provided at the time of hire. DO NOT SHRUG. Update the I-9. DO NOT THROW AWAY THE ORIGINAL I-9, or the peril of a non-compliant paperwork audit will befall you. Complete a new I-9 with the newly provided information and attach it to the old one. Ensure that your information on the worker for various reporting requirements, particularly tax reporting, is updated. Document the reason for the completion of a new I-9 Form and updated tax and social security information is because the employee informed you that he/she has obtained work authorization under the new Executive Order and provided proof of such.

**Pitfall #4:** Perhaps you have been the subject of an I-9 audit and have been issued a notice of suspect documents related to some of your employees who have informed you that they have an application pending for deferred action, or they may qualify for deferred action when the application period opens, or they have been granted deferred action along with work authorization. DO NOT TERMINATE because of past unauthorized status or the peril of a discrimination lawsuit by aggressive worker advocate lawyers may befall you. Request an extension of time before making a determination decision to well after the beginning of the Deferred Action application process in writing to DHS, and cite the Action as justification.

There are undoubtedly other perilous scenarios that could impact an employer in the wake of announcement of these Actions. Many employers are also concerned that workers who may in fact lack proper work authorization may be taken advantage of by unscrupulous *notarios*, consultants, or attorneys and may receive bad advice. In some areas there may be credible organizations that can provide individuals with legal and other guidance without the employer's involvement and outside the context of the workplace.

DHS and DOJ guidance may be forthcoming in the near future that addresses these concerns. In the meanwhile, exercise caution.

*This overview was prepared by Lynn Jacquez, Esq. and Monte B. Lake, Esq., of CJ-Lake LLC, and ACIR co-chairman Craig Regelbrugge. It is intended as general and preliminary guidance only.*