



DELAWARE

EMPLOYMENT LAW LETTER

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IMMIGRATION

Coming to America (today!)

by Lauren E.M. Russell

Immigration has been in the news recently, and the issue is not likely to go away soon. The issue has a significant impact on employers, which need guidance on the effects a recent executive action and court cases will have on their workforce.

President Obama's executive action

On November 20, 2014, President Barack Obama announced that he will act on immigration through executive action. Several key aspects of the president's plan will affect employers. The first aspect is a renewed crackdown on the use of undocumented laborers. The president announced that there will be increased efforts to hold employers accountable when they *knowingly* hire undocumented workers. That means that now is a great time to review your I-9 forms and ensure that you are in compliance with federal law. In addition, employers that are considering using E-Verify may have another incentive to join the program.

Employers may be concerned about the president's

announcement that he will suspend the deportation of some undocumented immigrants and provide a path to citizenship for millions of immigrants who are here illegally. Remember that an individual's eligibility for this program has little impact on business practices. Individuals who are eligible for the president's new program must apply to participate, successfully complete all aspects of the program, and obtain legal permission to work in the United States. The fact that an individual is eligible to participate does not make him a legal resident. Consequently, employers should continue to process I-9 forms as they always have and limit employment to individuals who have a right to work, not individuals who may acquire that right in the future.

Recent case law developments

Employers that employ undocumented workers are in a more precarious position than employers that do not. In *Campos v. Daisy Construction Co.*, the Delaware Supreme Court recently held that an undocumented worker who was injured on the job was entitled to workers' compensation benefits. After the worker was placed on disability leave, his employer terminated him when he could not produce a valid Social Security number. The supreme court held that the employer's discovery of the worker's immigration status did not bar the worker from receiving benefits. A contrary holding would provide employers an incentive to overlook undocumented workers' status until they suffer a workplace injury, at which point their status would be "discovered" and used to deprive them of benefits.

The supreme court's *Campos* decision is in line with a previous decision from the Delaware Superior Court. (See "Dearly deported: Illegal worker entitled to workers' comp benefits" on pg. 1 of our December 2012 issue.) The *Campos* decision is also in line with decisions in which courts across the country have refused to permit the deportation of undocumented employees who are in the middle of employment litigation. The courts' purpose is to prevent employers from profiting by employing undocumented workers and having them deported before they can take action on illegal workplace conduct.

Bottom line

The employment landscape is becoming more complicated with regard to immigration issues. While President Obama's recent initiatives are unlikely to have a negative impact on employers that are playing by the rules, employers that know or suspect that they are employing undocumented workers should make sure their I-9s are in order. In addition, employers should be aware that if they become involved in a lawsuit with an undocumented worker, the worker's illegal status will not be a defense. The employer will have to see the case to the end — through settlement or litigation — before the employee will be deported.

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