

January 18, 2017

Beyond the Wall—Immigration, Employers, and the Trump Administration (Part 2)

By [Holly Jones](#), JD, Senior Legal Editor

How might employers be impacted by immigration-related policies and practices under the Trump administration? In [part 1 of this article](#), I looked at areas such as Immigration and Customs Enforcement (ICE) enforcement, mandatory E-Verify, and changes to employment-based/H1-B visas. Here we take a look at more potential changes to legal immigration-related actions the Trump administration could take, as well as some "Dos and Don'ts for employers preparing for such changes.

Murky Future for NAFTA, Obama-Era Regs



The availability of streamlined treaty visas, such as the TN visa established by the North American Free Trade Agreement (NAFTA), may change or be eliminated entirely. President-elect Trump has been particularly critical of NAFTA, suggesting U.S. withdrawal from or complete renegotiation of the treaty.

Any changes to that agreement would also affect the related visas that allow Canadian and Mexican professionals to live and work in the U.S. on a temporary basis. Holders of these visas (and their employers) may have to consider alternate, more difficult-to-obtain guest worker or permanent resident options.

Higher wage requirements, a more stringent vetting process, and the repeal of certain Obama-era regulatory expansions may also come to temporary work authorizations granted to foreign students. For example, the U.S. Department of Homeland Security regulations finalized under President Obama that grant an additional 7 months of optional practical training (OPT) time for certain STEM students could be scaled back or repealed.



Elimination of DACA, Loss of Temporary Work Authorization Possible

During his campaign, President-elect Trump also took a firm stance against the federal Deferred Action on Childhood Arrival (DACA) program. This program, which President Obama established via executive order in 2012, provides temporary legal status and work authorization to undocumented persons who initially came to the U.S. as children.

Trump initially vowed to abolish the program completely, and may still do so. Yet, in recent weeks he has also expressed intent to “work something out” for some 750,000 DACA registrants who would be left without valid employment authorization documents and protection from deportation if the program were eliminated.

If, at the time these workers’ temporary authorizations expire, they are unable to present renewal paperwork or alternative authorization, their employers will be forced to terminate employment.

Bottom Line

Unfortunately, the advice to “wait and see” isn’t going away any time soon. Employers can still prepare for potential changes by conducting documentation audits and by understanding how (or if) the above noted changes would affect their workforces. Yet, as difficult as it can be not to take proactive steps, employers must refrain from taking adverse employment decisions based on immigration changes that *may* occur.

Employer Dos and Don’ts

Do: If you haven’t already done so, brush up on the [new Form I-9](#), which must be used for all employment verification occurring on or after January 22, 2017.

Though most of the changes to the new form were simply enhancements to allow for more accurate completion, the form *has* changed—plus, fines for documentation and retention errors nearly doubled last year. The combination of a new form, heightened enforcement, and increased fines—added to a method of documentation that can allow errors to lie dormant for years—could create a perfect storm of liability.

Don’t: Be careful not to go too far and risk national origin discrimination or document abuse while conducting employee verification, re-verification, or document audits.

Consistency and fairness are key. If any part of your process changes based on whether or not you believe someone to be a U.S. citizen (requesting additional or specific documentation from certain workers; auditing I-9s based on factors such as last name, accent, or skin color; etc.), then your workplace is at risk. Consult with legal counsel before proceeding further.

Do: Employers who encounter temporary employment authorizations should devise a consistently applied reminder system to alert them in advance of the expiration dates, leaving a reasonable amount of time for reverification.



If and when an employee's employment authorization does expire, then the employer should reverify that worker using Section 3 of Form I-9. If, at that time, the employee cannot produce extended or new employment authorization, then employment should be suspended or terminated until such authorization can be produced.

Don't: Don't refuse otherwise valid documents on the basis of their temporary nature or the concern that the visa or program behind them may expire in the new administration.

If a new hire presents valid, **unexpired** employment authorization documentation as permitted by List A or List C of Form I-9, then the employer *may not* refuse this document or request additional or alternative documentation. As long as the document is unexpired at the time of verification, then the fact that it will expire in the future is not a valid reason to refuse employment or request alternative documentation.

Related Resources:

- [Immigration Topical Analysis](#)
- [Visas Topical Analysis](#)
- [Which Employer Mandates Are on Trump's Chopping Block?](#)
- [One Form, Two Form, Here's A New Form: More Details On the New I-9](#)
- [It's Time to Cozy Up to the New I-9](#)
- [Training: Immigration and Hiring—What Supervisors Need to Know](#)



Holly K. Jones, JD is a Senior Legal Editor for BLR's human resources and employment law publications. She understands the existing and emerging needs and challenges of human resources professionals thanks to several years of experience managing, writing, and editing key legal and compliance publications for BLR. Prior to joining BLR, Ms. Jones worked for the Tennessee Legislature's Office of Legal Services.

She graduated *magna cum laude* and Phi Beta Kappa with a BA in English Rhetoric and Writing, Political Science, and Psychology from the University of Tennessee in Knoxville, Tennessee, where she also received a 2001 Citation for Extraordinary Academic Achievement. She received her law degree from Vanderbilt University Law School and is licensed to practice law in Tennessee.



IF YOU HAVE QUESTIONS, YOU MAY CONTACT AN eESI HR BUSINESS PARTNER

AT HR@eESIpeo.com