

# PUBLICATION

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## When the DACA Card Shows a Different Identity

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Employers of existing workers who are granted "Deferred Action for Child Arrivals" (DACA) work authorization present challenges to employers who want to keep the workers, maintain "honesty policies" and comply with I-9 and E-Verify requirements. USCIS has announced guidance on the I-9 and E-Verify fronts.

Employers face a quandary when a worker presents new information and documentation about work authorization that calls into question the worker's previously presented information or documents. This came up often as a result of the 1986 amnesty program and since then when the government has implemented new eligibility programs for groups of people such as temporary protected status for nationals of certain countries. The government currently is inviting applications for "Deferred Action for Child Arrivals" (DACA). DACA is an amnesty-like program that suddenly gives opportunity to people who may have been functioning without authorization to become authorized. If the DACA beneficiary seeks new employment, the situation is simple: The employer must complete Form I-9, as with all new hires, and use E-Verify if the company/facility is registered to do so.

But if the DACA beneficiary is an existing employee the quandary arises, particularly if the new information presented in the Form I-766 Employment Authorization Document (the most important product of the DACA application process and an I-9 List A document) is inconsistent with previously provided information and reflective of a past misrepresentation. Many DACA beneficiaries are excellent workers whose continued employment is desirable in general. If, however, the employer has a policy requiring termination of workers who have lied to the employer (such as on resumes about education or other qualifications), then there is a risk of undermining the policy by allowing the worker to continue. A DACA beneficiary is not one of the protected classes under the prohibition for "unlawful immigration-related employment practices" relating to citizenship status (citizens, permanent residents, asylees and refugees), so the legal risk of termination seems small, though national origin discrimination or other protected classes must be kept in mind.

If the employer decides to keep the existing worker who presents a DACA card, the question arises regarding how to deal with I-9 and E-Verify. USCIS has published a guide for employers in this situation, titled "Consideration of Deferred Action for Childhood Arrivals: Guidance for Employers." Under the guidance, if identity information has changed in Section 1 of the previously completed Form I-9 (name, birth date, SSN), the employer should complete a new Form I-9 and, if the employer uses E-Verify, complete an E-Verify query. This seems contrary to the E-Verify policy/rule to limit E-Verify queries to new hires (or in certain situations involving federal government contractors), but ostensibly this is a recognition that while the employee as a human being is not new to the employer, the employee with those data points is new to the verification process and systems and needs to be checked. If the identity information has not changed – apparently even if the new DACA status somehow calls into question the previously presented work authorization documents' validity – the employer has the option to complete only section 3 of the existing I-9, complete section 3 of a new I-9 or complete a new I-9 altogether, and an E-Verify query is NOT to be completed.

The USCIS guidance does not purport to guide an employer about whether to continue to employ the DACA beneficiary who previously misrepresented identity or presented a forged document, but rather only how to complete the verification processes if the employer decides to continue employment.

If you have questions about DACA or any other immigration matter, please contact any of our more than 70 Labor & Employment attorneys located in Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee; and Houston, Texas.