Legal Matters®

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Immigration reform raises questions for many employers and workers

President Obama's recent executive actions on immigration have opened the doors to potentially millions of workers, at the same time as they have made things much more legally complicated for employers. Both sides may now need legal help understanding how these actions affect their rights and responsibilities.

In particular, employers need to be very careful because there are a lot of uncertainties about how to legally treat workers who may be affected by the changes.

First, here's some quick background: Back in 2012, President Obama put in place a program known as "Deferred Action for Childhood Arrivals," or DACA. This program allowed certain young, undocumented immigrants to receive temporary permission to stay and work in America.

Under DACA, undocumented workers who were born after June 15, 1981 and were under 16 when they came to the U.S. could stay and work here as long as they had a high school diploma or G.E.D. or were working toward one, or were serving in or had been honorably discharged from the military. They also needed a clean criminal record.

This past fall, President Obama announced an expansion of DACA as well as a new program called "Deferred Action for Parental Accountability," or DAPA. These changes are expected to expand protection to as many as five million more people.

Under DAPA, the government will no longer seek to deport undocumented immigrants who have been in the U.S. for at least five years and are parents of U.S. citizens or permanent residents. Instead, these people will be able to stay and obtain a work permit that will be valid for three years (and may be renewed).

The process is still being worked

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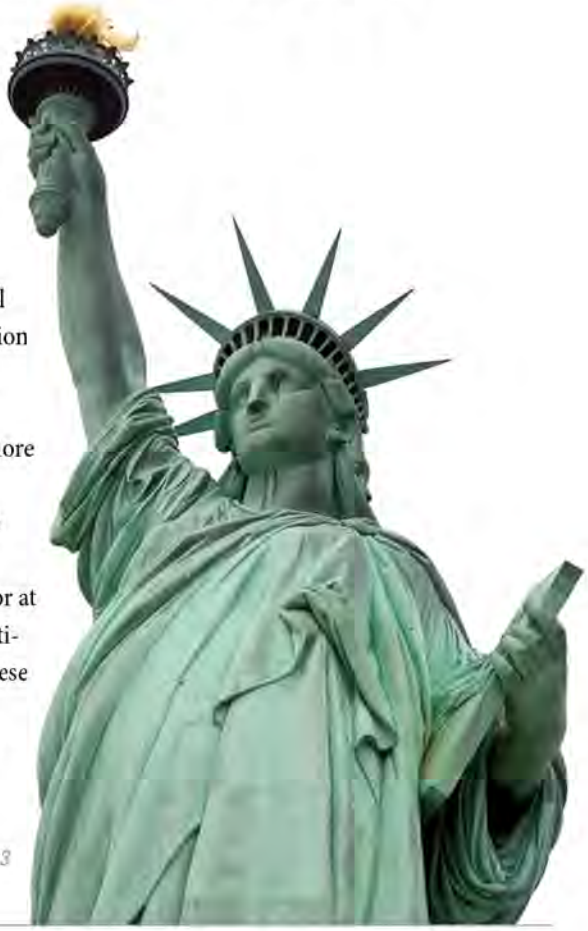

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English-only rules can be illegal discrimination

Can employees be required to be fluent in English? The answer is yes … but only if speaking English is truly necessary for them to do their jobs safely and effectively. Otherwise, a company that has an English-only policy could get into legal trouble.

That's what happened to a plastics manufacturer in Wisconsin that laid off 22 workers who lacked English language skills. The workers – most of whom were Hmong and some of whom were Latino – had apparently received good annual evaluations and didn't need to be able to speak, read or write English to do their jobs.

The company claimed it targeted these workers for layoffs due to their "overall comparative skills, behaviors and job performance over time."

But the federal Equal Employment Opportunity Commission didn't buy the company's explanation. The commission sued the company for discrimination and is seeking not only lost wages to compensate the workers, but also additional damages to punish the company for its behavior.

Company that 'forgave' worker doesn't have to do it again

A business that turned a blind eye to past misconduct doesn't have to do so indefinitely, a court says.

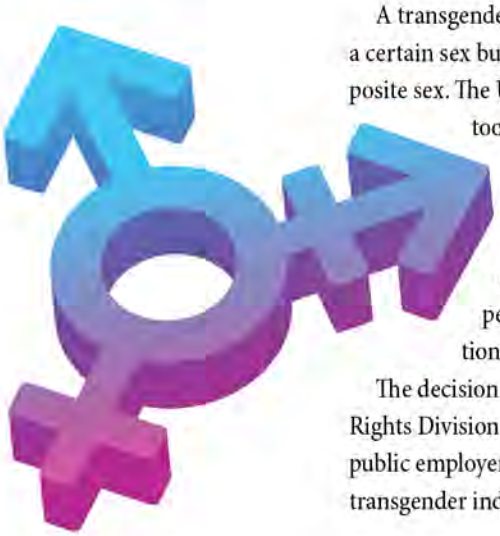
Even though a company let an employee who engaged in hostile and abusive behavior "slide" and didn't punish him, it can still fire him if he does it again, says a federal appeals court.

The case involved a sewer worker in North Las Vegas who had a long history of threatening and abusive behavior. The worker requested an accommodation for a hearing disability. A short time later, he was placed on leave after an incident where he swore at a co-worker. After an investigation of the incident, he was fired.

The worker sued, claiming he was discriminated against because of his disability. He said the city's investigation of the swearing incident was just a pretext for discrimination, because he had engaged in similar misbehavior many times in the past and had gotten away with it.

But the court sided with the city. It said the city was justified in firing the worker for his misbehavior, and the fact that it had turned a blind eye to his misconduct in the past didn't mean that it was required to do so indefinitely.

Transgender discrimination is illegal, says U.S.



A transgender person is someone who was born a certain sex but identifies with and lives as the opposite sex. The U.S. Department of Justice recently took the position that job discrimination against transgender people is illegal.

Specifically, the government says discrimination against transgender people amounts to "sex discrimination," which is prohibited by federal law.

The decision means that the Department's Civil Rights Division will be able to sue state and local public employers for discrimination on behalf of transgender individuals.

The Department can't sue private employers. However, the federal Equal Employment Opportunity Commission can sue private employers, and it took the same position in a recent ruling.

The courts have been split on the rights of transgender people. However, many employers are being proactive in trying to prevent lawsuits, and are reviewing their discrimination, harassment, and dress code policies in response.

In a 2011 survey of transgender people, 90% said they had been harassed, mistreated or discriminated against on the job, and 47% said they had been fired or denied promotions because of their gender identity.

Immigration reform is raising many questions

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out, so it's not entirely clear exactly how people will go about applying for DAPA, what the procedure will be, and how long it will take.

It's important to know that there's an older federal law on the books called the Immigration Reform and Control Act, or IRCA. This law prohibits employers from knowingly hiring illegal immigrants.

In theory, there's a conflict here. Under DACA and DAPA, the government is choosing not to deport certain people and even to give them a work permit, yet under IRCA, it's illegal for an employer to hire them.

In practice, it's hard to imagine that the government would go after an employer who hired someone with a work permit. The real problem is if an employer hires someone who is in the process of applying for a permit under DACA or DAPA. What if the person's application is rejected?

Federal law also says that employers who discover that a current employee is undocumented are required to fire the person. So what happens when workers who are applying for DAPA protection ask their employer for documentation to prove their work history? At that point, the employer will be on notice that the employee is, at least for the time being, undocumented. Does the employer have to fire the person?

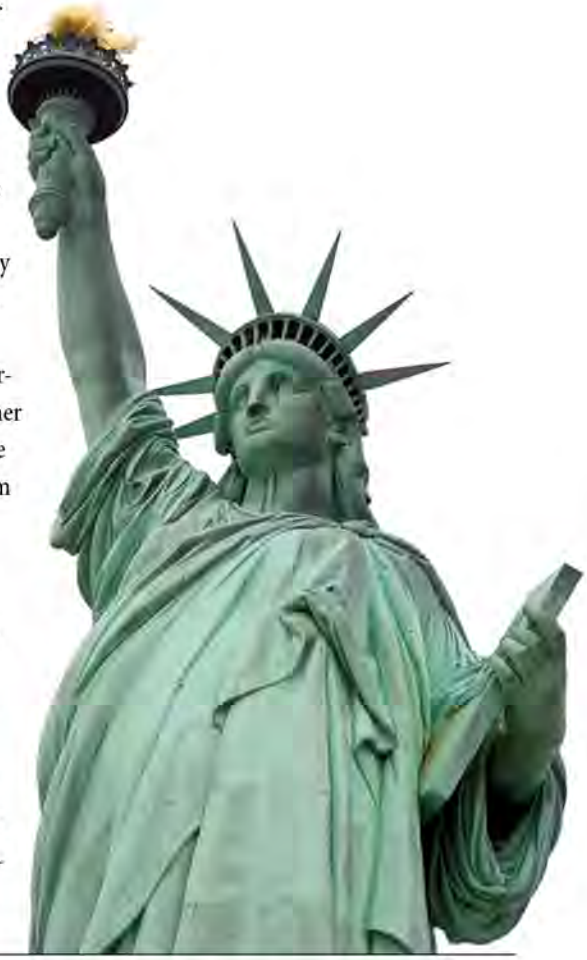
The answer is unclear. Again, it seems unlikely that the government would object if the employer kept the person on the payroll, but it's probably technically illegal to do so.

Also, some companies have an "honesty policy" that says employees cannot lie to the company, and if they do, they will be terminated. Must a company fire an employee who steps forward as DAPA-eligible, since this means they lied about their immigration status when they were first hired?

An employer could choose to "forgive" such an employee, but if another worker is later fired for violating the honesty policy, he or she could claim that the policy was being applied in an unequal and discriminatory manner.

Of course, it's also still illegal for businesses to "profile" their workers and try to guess who might be undocumented.

Because the law is unclear and the rules are rapidly developing, it's a good idea to consult your employment attorney with any questions.



U.S. slams local bakery for poor Spanish translation

A bakery in Chicago was facing a union election, and it warned its employees that if they joined a union and held a strike, it would "exercise our legal right to hire replacement workers." It then translated this message for its Spanish-speaking employees, but the translator goofed. The translation said, in effect, that if the workers held a strike, the bakery would "exercise our right to hire legal replacement workers."

The bakery won the election by a vote of 20-16. But the federal government set the result aside and ordered a "do-over." Why? Because the poor translation could have been understood by the Spanish workers as an improper threat concerning their immigration status.

There was no suggestion that the poor translation was anything other than an honest mistake, and there was no other reference to immigration in the union campaign. But the government said this didn't matter; the bakery was still responsible for its wording.

The moral of the story for employers is that if anything is being translated that is of legal significance, it's worth making an extra effort to ensure accuracy.

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Companies can't limit e-mail to 'business purposes only'

A company that gives its employees access to its e-mail system can't limit their use of the system strictly to "business purposes only." That's the word from the National Labor Relations Board.

The Board's decision applies to both unionized and non-unionized workplaces.

However, the ruling is fairly limited, and it doesn't mean that employees now have an unrestricted right to use company e-mail for humorous banter or idle chit-chat.

The issue arises because federal law allows workers to communicate with each other to address legitimate workplace concerns and grievances. Thus, a company can't stop employees from using workplace e-mail to address these issues.

The case involved a sign-language interpretation business called Purple Communications. The company had a policy that

employees could use its e-mail system only for business purposes. Specifically, employees could not send "uninvited e-mail of a personal nature," or use e-mail "on behalf of organizations or persons with no professional or business affiliation with the company."

According to the Board, this policy went too far, because it could prevent workers from e-mailing each other over legitimate workplace problems or asking for outside help with such problems.

Interestingly, the Board had issued a decision back in 2007 that said businesses *could* limit employees' use of e-mail, because the e-mail system was the property of the business. But the Board now says that times have changed, and that e-mail has become such a pervasive part of corporate life that a new rule is needed.

The Board noted that a company isn't under any obligation to give employees access to e-mail in the first place – but if it does so, it must obey the new rule.

Also, a company is still permitted to monitor employees' work e-mail. Although workers can use a company e-mail system to discuss workplace issues, they do not have a right to privacy in their messages.