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NEW GUIDANCE ON DEFERRED DEPORTATION FOR NON-CITIZEN WORKERS WHO ARE VICTIMS OF OR WITNESSES TO LABOR VIOLATIONS

By Ian Silvers

Employees are fearful of reporting violations of the law, or supporting others who have made such complaints, due to concern that they will be retaliated against or terminated and that this could affect their ability to obtain future employment. This is exacerbated for undocumented/non-citizen workers who are also afraid they will be subject to immigration related retaliation/discrimination and be deported simply for doing the right thing.

In January 2023, the U.S. Department of Homeland Security issued guidance on a new streamlined deferred action process. The process is designed to help protect these workers from being taken advantage of by employers due to their immigration/citizenship status and encourage them to come forward and assert their rights or cooperate as witnesses regarding employment violations. This includes a centralized process to allow them to submit requests to the U.S. Citizenship and Immigration Services and have the USCIS efficiently review the time sensitive requests. The guidance aligns with the Biden administration's commitment to improving workplace conditions and empowering workers regardless of their immigration status. The process applies to undocumented/non-citizen workers who are victims of, or witnesses to, employment violations.

What is deferred action?

Deferred action is a type of prosecutorial discretion where potential deportation is put on hold for a period of time, resulting in temporary deportation protection. The person is then considered lawfully present in the U.S. for a deferment period, which typically lasts 2 years (but can be shortened), and may be able to obtain work authorization during that time.

What do workers need to have complained about/witnessed, and to whom?

The types of disputes needed for the new guidance to apply include disputes between employees and employers regarding rights to fair wages, safety, organizing and discrimination/harassment/retaliation. It is not just an employee complaining to a supervisor, as they will need to make a complaint to a local, state or federal government agency (i.e., DOL, EEOC/DFEH, OSHA, DLSE, NLRB), that is then being investigated by that agency.

What do workers need to do besides filing a complaint with the government agency?

Even if the worker files a complaint with a government agency that is investigating, more is needed. The worker needs to submit a written request to USCIS for deferred action (reviewed



Ian Silvers is an employment and class action lawyer at Bisnar Chase Class Action Employment Attorneys, LLP.

on a case-by-case basis using its prosecutorial discretion) stating the basis for the request. This request needs to include a letter from the government agency asking USCIS to consider exercising its discretion on behalf of workers for the employer identified by the agency as having labor disputes that fall under its jurisdiction. According to USCIS (<https://www.uscis.gov/working-in-the-united-states/information-for-employers-and-employees/dhs-support-of-the-enforcement-of-labor-and-employment-laws>), the letter should also include 1) the enforcement/jurisdictional interest of agency and how it relates to the mission of the agency; 2) workers covered by the letter; and 3) why consideration of prosecutorial discretion supports the agency's interest. It is not yet known what factors such agencies will use in deciding whether to submit letters.

The USCIS website also provides that the following will need to be submitted with the worker's request and be sent to USCIS, Attn: Deferred Action, 10 Application Way, Montclair, CA 91763-1350:

- Evidence showing the worker is within the scope agency letter (i.e., W-2s, pay stubs, timecards, or other evidence showing employment in the relevant time);
- Evidence of any additional factors supporting exercising prosecutorial discretion;
- Proof of the noncitizen's identity and nationality;

- If applicable, documents used to lawfully enter the U.S. relating to the immigration history or status.
- Form G-325A, Biographic Information (for Deferred Action);
- Form I-765, Application for Employment Authorization, with the appropriate fee or fee waiver request; and
- Form I-765WS, Worksheet.

What does this mean for these workers?

It is clear that more will be needed than filing a complaint with a government agency (that is being investigated) or supporting such a complaint as a witness.

Filing a PAGA Notice with the LWDA will likely not be enough. Filing a labor commissioner complaint or a DFEH/EEOC/OSHA/NLRB complaint that is being investigated could be enough depending on the allegations and the agency's view of the employer and allegations. This new streamlined process will help encourage workers to come forward, but the effect of it will take time as we see when government agencies are willing to write a letter for deferred action, and what factors USCIS looks at in deciding whether to exercise prosecutorial discretion.