PRESIDENTS' ALLIANCE | ON HIGHER EDUCATION AND IMMIGRATION

FAQS ON IMMIGRATION ISSUES IN THE CAMPUS CONTEXT

Miriam Feldblum, Presidents' Alliance on Higher Education and Immigration

Topics:

Introduction

With the rescission of DACA on September 5, 2017 and the failure to pass any legislative solution since then to provide DACA recipients and other undocumented students with a pathway to residency or citizenship in the United States, it has been important for colleges and universities to reaffirm their full commitment to enroll, educate, and support Dreamer students.

The purpose of these FAQs is to provide Presidents' Alliance members with an overview of critical immigration issues, including:

1. Higher education access and undocumented students
2. Employment authorization, including expirations or lapses in work authorization
3. Non-employment-based opportunities for educational experiences and other funding
4. Policy guidance and practical advice regarding ICE raids and site visits.

These materials provide information that can be adapted to an institution's context and prioritized depending on the institution's needs. Some institutions already have taken up one or more of these issues, while others may be looking at these issues for the first time. **Each topic is covered in a separate briefing so those on campus may focus on specific issues as needed.**

These FAQs were prepared in collaboration with Leigh Cole and Felicia Reid of the higher education law firm, Hirschfeld Kraemer LLP.

Institutions of higher education are subject to immigration law in their several capacities as employers, educational institutions, and approved sponsors of international students (F-1) and scholars (J-1). These FAQs will address topics in all three categories

Caveats:

- Some states have enacted immigration requirements that apply to some or all employers or educational institutions in that state -- and the various state requirements enacted from time to time are outside the scope of these FAQs.
- These FAQs provide overviews that are applicable to all institutions and do not provide detailed analysis on particular issues or talking points specific to any particular institution. Before

adopting any policy or issuing guidance, each campus should conduct its own review and analysis given the specific state and institutional context.

- While these FAQs are written primarily for campus leadership and the staff and faculty who are working to support immigrant and international student populations, they can be shared with students and others on campus.

FAQs on HIGHER EDUCATION ACCESS and UNDOCUMENTED STUDENTS

The purpose of this set of FAQs is to address some questions that have arisen regarding enrollment, recordkeeping, and support. For more information and links to an array of resources on access to higher education, see the *Informed Immigrant* website, and its section on "Access to Higher Education and Campus Safety for Students."

Are there any prohibitions against the enrollment of undocumented students?

Federal immigration law does not prohibit education of undocumented immigrants, and does not prohibit undocumented students from enrolling in public school or private school. In the absence of a state law to the contrary, public and private educational institutions may enroll undocumented students.

Several states have enacted laws or rules that affect access to public education by undocumented students, though DACA recipients may continue to have access. You can review state policies on the *ULead* website.

Should institutions ask about the immigration status of enrolled students? How can Institutions support undocumented students while being mindful of their privacy?

Some institutions of higher education do not inquire about immigration status during the application and admission process or gather immigration information from enrolled students. The major exception is that institutions authorized to sponsor F-1 international students and/or J-1 exchange visitors are required to maintain detailed information for F-1 students and J-1 participants.

Advocates and researchers recommend that, to the extent possible, colleges and universities should make their institutional and state policies visible to prospective and current undocumented students, while proactively providing support for those students. This includes information on websites about relevant institutional and state policies or financial assistance for prospective students. Developing staff support or centers for undocumented students, appointing key staff liaisons and campus committees or taskforces on immigration support, establishing peer support programs, creating informational websites, providing or identifying legal assistance, and ensuring regular communications with that subset of students are examples of sustained, visible support. Campuses that would like individualized consultations about their support structures can contact the Presidents' Alliance for information and suggestions (info@presidentsimmigrationalliance.org).

With the primary exception of F-1/J-1 sponsor requirements, information regarding students' immigration status is covered by FERPA (Family Educational Rights and Privacy Act), as is other

non-directory, personally identifiable information. Institutions should ensure they have clear procedures in place to protect student privacy (for FERPA protections and immigration status, also see these ACE FAQs.) Depending upon the state and local context, it may be recommended that an institution not retain unit level documentation about undocumented or DACA students within their campus populations.

F-1 and J-1 programs are subject to extensive compliance requirements. The institution's F-1 and J-1 compliance requirements are the responsibility of the institution's F-1 Primary Designated School Official (PDSO) and any alternate Designated School Officials (DSOs), and J-1 Responsible Officer (RO) and alternate ROs. The DSOs and ROs on campus work with international students and scholars and immigration regulatory agencies on a daily basis.

Students may enroll in US institutions in many other immigration status categories, if they are living in the United States as dependents of temporary workers or government or diplomatic staff with work visas. Some institutions consider their population of "international students" to include all non-US nationals, while others only include those in F-1 or J-1 status sponsored by the school.

Should undocumented students be classified as "international" students or "domestic" students?

Having grown up and been educated in the United States, undocumented students and DACA recipients don't fit into either of the above-mentioned categories (F-1/J-1 sponsored students and scholars or "all other" non-US nationals). As noted in poll data, for the majority of Americans, undocumented or "Dreamer" students are considered American in all but legal status. It can be important for institutions to provide specific state and institutional information for undocumented students, and not group them with international students for the purposes of admission, financial aid, and other kinds of campus support. At the same time, international students services staff are often useful experts and important resources regarding immigration regulations for Dreamer students, and, given the issues facing international students, key members of campus committees related to immigration support.

Over 20 states provide access to in-state tuition (at the state, institutional, or system level) to undocumented students who meet residency requirements, and at least 5 states provide some state financial assistance.

A growing number of private institutions treat undocumented students as domestic students for the purposes of admission and financial aid. With the rescission of DACA, it is important that institutions review if the eligibility for institutional or other funding is dependent on a student's eligibility for DACA, and, if so, to revise accordingly if possible (so eligibility is not reliant on DACA status).

FAQs on EMPLOYMENT AUTHORIZATION

The purpose of this set of FAQs is to address some questions that have arisen regarding employment authorization and DACA. For more information and links to an array of resources on work authorization issues, see the *Informed Immigrant* website, and its section on "EAD and Employment Rights."

Introduction

Employment authorization documents (EADs or work permits) are granted under US immigration law for a variety of immigration programs, including applicants for permanent resident status, international students in F-1 status and Deferred Action for Childhood Arrivals (DACA). Holding an EAD does not necessarily mean a person is a DACA beneficiary.

The I-9 employment eligibility verification process protects DACA recipients from discrimination. Employers are not allowed to request different or additional documentation from individuals who look or sound like they were born abroad. Employers are not allowed to reverify the I-9 unless it expires or a routine audit shows there was a mistake. DACA EADs do not have language that the holder is a DACA beneficiary, and employers are not allowed to ask how an employee or new hire obtained an EAD. International students in F-1 status have EADs with a restriction for optional practical training or curricular practical training only, and the I-9 instructions explain that employers must also request the student's I-20 and I-94 admission record.

These rules can be confusing for employers, and yet employers face fines and penalties for I-9 violations including both lack of compliance and being overly zealous in the I-9 process. Employers going beyond what the I-9 rules allow can be charged with unlawful employment practices, employment discrimination and document abuse in the I-9 process.

What are the obligations of employers with regard to employees' work authorization?

Employers are required to track I-9 expiration dates and reverify I-9s when they expire. Employers may remind employees that their I-9 will expire soon but they are not allowed to take any adverse employment action until the I-9 expires and then only if the employee can't present other I-9 documentation within a reasonable period of time. The employee may have become an approved permanent resident with a green card already and the employer has no way to know that until the I-9 is reverified.

Individual supervisors on campus should not ask individual employees about their 1-9 expiration date. The Human Resources office can provide reminders to all student employees and other employees holding EADs that when their 1-9 authorization expires, they need to present updated documentation. The HR office can also provide information on options if the employee cannot present updated documentation. See below.

Employers should ask all job applicants at the first opportunity in the recruitment process whether immigration sponsorship will be needed at time of hire or in the future. Employers aren't required to extend offers of employment to candidates who will need immigration sponsorship now or in the future. The need for immigration sponsorship applies to those individuals with limited duration visas; it does not apply to DACA recipients, as DACA is currently configured.

But once an offer of employment is made, employers are not allowed to turn away a new hire who presents an EAD for I-9 purposes even if it expires soon and can't be renewed.

If an employer knows or has reason to know that an employee doesn't have lawful employment authorization, the employer is required by law to terminate the employee. Employers can be charged with serious immigration and employment law violations for basing adverse employment actions on rumor or innuendo.

Always give an employee a reasonable opportunity to present document of lawful employment authorization before terminating employment on that basis. Terminating an employee who has lawful employment authorization can violate immigration law and civil rights law and subject the employer to substantial fines and penalties.

If a DACA recipient experiences a lapse in work authorization, what options can the college or university as the employer consider?

If the employer reasonably believes the employee will present updated I-9 documentation shortly, the employee may be placed on unpaid leave until the updated documentation is presented.

What are the rights of students or employees with regard to their work authorization?

Employees do not have an affirmative duty to inform their employers that they have DACA, or that their work authorization has expired or will soon expire. However, DACA recipients should be aware that working without work authorization may adversely impact them during any future immigration status adjustments.

The *Informed Immigrant* website features an excellent set of resources for DACA recipients regarding their rights related to employment. FAQs on the site include:

- *Should I tell my employer if my DACA and work authorization expires?*
- *Can my employer ask to see my work permit again?*
- *Are there any limits on my employer's ability to reverify my work authorization?*
- *Can my employer fire me?*
- *Can my employer call ICE about me?*
- *What happens if my work permit expires and my employer fail to ask me for a new work permit?*
- *If my work permit expires, what happens to my employer if they fail to request a new work permit and continue to employ me?*
- *Can I work as an independent contractor?*

NON-EMPLOYMENT-BASED EDUCATIONAL EXPERIENCE AND FUNDING OPPORTUNITIES

The purpose of this set of FAQs is to address some questions that have arisen regarding opportunities for campus funding that are non-employment based and can be made available in the educational context.

What non-employment-based funding opportunities can be made available to students on campus?

Colleges and universities can develop non-employment work opportunities on campus, tied to their educational mission, as nominally funded fellowships. These "campus fellowships for experiential learning" are basically student internships, which do not entail an employment relationship if the "primary beneficiary" of the relationship is the student (see the January 2018 Department of Labor fact sheet on the factors and contexts that can help determine that). An educational fellowship, unlike an employee position, can provide for scholarship funding and stipends for students, regardless of their

immigration status.

To ensure that the student is the "primary beneficiary" and not serving as an employee in the fellowship position, and that the fellowship is provided to support the student's educational endeavors, we recommend that institutions structure these positions so that:

- The work performed is part of the student's overall educational goals and closely tied to the institution's educational mission. This can include "Student Learning Outcomes" or learning objectives, as articulated by the college or university, or departments or divisions on campus;
- The work is performed, when appropriate, in close collaboration with supervisors, with continued supervision by supervisors;
- Unpolished student work product is not used without significant review and revision by supervisors;
- The fellowship provides nominal funding to defray some of the student's expenses for undertaking the work (such as funding for a fellowship at the level of $500 or $750 per term). Department of Labor guidance generally limits compensation that may be paid without creating an employment relationship to 20% or less of what an employee in the position would be paid.

What should a fellowship description contain?

- An application process, including an essay portion or other means for the applicant to express his or her interest in the field, mission, or educational area covered by the fellowship, and how it is relevant to their life or educational goals, etc.;
- Educational requirements, such as being in good standing or a minimum GPA, and/or demonstration of intellectual interest, whether through curricular or co-curricular educational pursuits;
- Specifically state that no service to the college or university (or staff, faculty members or other students) is required;
- A general description of the position's focus, such as community outreach, scientific research, or something similar. These positions, and position descriptions, should not include duties associated with an employment position, such as shift or desk duties, office support, organizing trips, providing services;
- If supervision is necessary, the student should be closely supervised;
- Funding may be in the form of a stipend, or coverage of tuition or fees, if a student is not already receiving grants or loans covering these expenses, so long as it is nominal.

These fellowship opportunities can be open to all students, regardless of immigration status. The Pomona College *Campus Fellowships for Experiential Learning* website provides examples of opportunities. For further information, you can contact the Presidents' Alliance (info@presidentsimmigrationalliance.org).

Emergency Aid Funds and Grants

Many private and public institutions have developed emergency aid funds to assist students for a variety of needs, and the number of institutions doing so continues to grow. In 2016, the national organization

of student affairs administrators in higher education (NASPA) released a useful report on the variety and structure of emergency aid funds, which is still relevant for campuses looking to expand their funds and fundraising for emergency aid for students.

For information and links to an array of resources on scholarships open to undocumented students, please see the section on grants and scholarships at the *Informed Immigrant* website.

ICE RAIDS AND SITE VISITS

The purpose of this set of FAQs is to address some questions that have arisen regarding the obligations of institutions in the case of ICE raids or site visits, and how campuses can protect members of the campus community. For more information on ICE, campus safety, and immigrant rights, along with links to an array of resources for students, families, and institutions, see the *Informed Immigrant* website.

What is the responsibility of college officials with regard to ICE raids or USCIS site visits?

Immigration officers such as Immigration and Customs Enforcement (ICE) or Citizenship and Immigration Services (USCIS) or others may arrive unannounced to inspect I-9 records, conduct an administrative site visit for a compliance review, request certain documents with a subpoena, or apprehend individuals. Unannounced visits by law enforcement are stressful and employees or occupants generally feel pressure to do whatever law enforcement officers ask of them in the moment.

It's important for individuals who greet visitors to know that they are not necessarily required to do whatever immigration officers request. The tension is alleviated when staff understands in advance that they don't need to give consent and may not even have the authority to give consent. In many cases all they need to do is collect some information from the law enforcement officers and then contact the appropriate person who is authorized to represent the institution in law enforcement situations.

Typically immigration officers are acting on civil, not criminal, authority. The warrants and subpoenas these officers use to request documents, information and access to a workplace or private property, or to apprehend individuals, generally are administrative warrants signed by someone at their own agency (not judicial warrants signed by a judge).

Administrative warrants do not authorize officers to enter nonpublic areas of the workplace or property, without proper consent of the company or property owner.

Institutional staff are not required to give consent, provide documents, or help federal immigration officers access nonpublic areas of the workplace, property, or campus. In fact, most employees don't have the authority to give consent on behalf of the institution.

But once consent is given and the officers enter nonpublic areas of the premises, even if the person didn't have authority to consent, it can be hard to unwind the damage done.

NOTE ABOUT CALIFORNIA LAW, FOR CALIFORNIA INSTITUTIONS ONLY: *California passed a state law prohibiting giving consent for law enforcement officers to enter nonpublic areas for immigration*

enforcement unless the officers present a judicial warrant (signed by a judge). California law also prohibits release of documents or records to immigration officers unless the officers present a judicial warrant, except for I-9 Notices of Inspection. California institutions need to be familiar with this law and have a protocol for compliance with state law during any ICE visit

NOTE ABOUT TEXAS LAW*: For information regarding Texas SB4 and its current status, please see the Informed Immigrant website; for information regarding the applicability of SB4 to campus police, the University of Houston has provided a set of FAQS on their website.*

What is the Institution's responsibility with regard to ICE making an unannounced site visit with regard to sponsored foreign nationals (including students and scholars in F-1 or J-1 status)?

ICE officers conduct unannounced site visits to confirm that sponsored foreign nationals are employed as described in the institution's approved immigration application, and these site visits do not require a warrant or subpoena. Federal immigration officers generally have no greater access to personnel records than any member of the public unless they have a valid subpoena or I-9 Notice of Inspection.

An important exception is immigration records (not the full personnel file) for foreign nationals sponsored by the institution. F-1 and J-1 sponsoring institutions are required to maintain certain information mandated by law for F-1 and J-1 students and scholars and present this information to immigration officers upon request. This is an exception to FERPA only for students in F-1 and J-1 status and only for the specific information required by law.

Responding to I-9 Notices of Inspection.

If the purpose of the visit is to inspect I-9 records, the employer doesn't have to consent to a same-day inspection. Immigration officers tend to arrive at the workplace and request to inspect the I-9s immediately.

But the law provides employers three days to respond to an I-9 Notice of Inspection. Employers should always request the three days to respond, to have the opportunity to organize I-9 records and respond in an orderly manner without inadvertently allowing law enforcement officers to review personnel records or other information outside the authorized scope of an I-9 inspection.

It's best to send the I-9 Notice of Inspection to counsel for review immediately and to discuss next steps with counsel. Employers may face significant fines for I-9 violations even if they are technical violations on I-9s for U.S. workers.

Responding to Unannounced ICE Visits

Federal law prohibits hiding evidence, concealing individuals who are the targets of law enforcement, or interfering with an arrest. Also it's important for employees to avoid putting themselves in physical danger during any immigration enforcement action at the workplace.

Immigration officers sometimes may exercise criminal enforcement powers or may work with criminal law enforcement officers who may present a criminal arrest or search warrant that gives greater authority to enter areas of the workplace that are not open to the public, without consent.

Identifying “public” and “nonpublic” areas of campus is an important exercise in planning for ICE visits. Institutions with open campuses will need to have a different protocol than closed campuses with restricted access points where ICE officers will have to request access.

A typical protocol involves routing law enforcement officers to the campus safety office. But immigration enforcement is entirely different from criminal enforcement and a different protocol is required. When law enforcement comes to campus seeking a student in connection with a criminal matter, the student will have the opportunity to defend herself in a proceeding and may not even be charged with a crime at all. In immigration enforcement, an individual may have no defense against deportation or may be subject to an order of deportation already. So Immigration custody may be the end of the line and a fast track to deportation, not the beginning of a process to determine whether the student is subject to deportation.

If ICE presents an order of deportation against the student, not a court order or judicial warrant compelling the institution to act in the matter, the institution is not required by law to help ICE apprehend the student.

What are the rights of individuals who may be targets of immigration enforcement actions?

Individuals who are targets of immigration enforcement actions have civil rights under U.S. law regardless of their citizenship or immigration status. For example, individuals are not required to allow law enforcement to enter their residence or nonpublic areas of a property or campus unless the officers have a judicial warrant (signed by a judge).

The American Civil Liberties Union (ACLU) has prepared one-page “Know Your Rights” flyers and offers red cards that individuals can slide under a door to assert their civil rights without opening the door and thus giving consent to immigration officers to enter. Additional information and resource links for both students and educators can be found on the *Informed Immigrant* website.