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LABOR RELATIONS

Expert Analysis

DACA, Undocumented Workers, Race Discrimination: Supreme Court Review

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This is the second of two columns discussing U.S. Supreme Court decisions from the 2019-20 term impacting employers. This month we review decisions implicating employment of individuals participating in the Deferred Action for Childhood Arrivals (DACA) program, whether states may use information contained in federal I-9 forms to prosecute undocumented workers, and the applicable burden of proof in race discrimination claims under 42 U.S.C. § 1981 (Section 1981).

DACA Employees

On June 18, the U.S. Supreme Court in *Department of Homeland Security v. Regents of the University of California*, No. 18-587 (June 18, 2020), struck down the Department of Homeland Security's (DHS) rescission of the DACA program. The court found DHS's decision was arbitrary and capricious, as it did not provide adequate justification for terminating the DACA program and, as a result, violated the Administrative Procedure Act (APA). With this decision, the employment authorizations and other benefits available to DACA recipients remain in place.

DACA, created in 2012, allows certain undocumented immigrants, who had entered the United States as minors (i.e., younger than age 16) to apply for forbearance (i.e., postponement) of their deportation in two-year, renewable increments. Those who qualify are eligible for work permits and other federal benefits, such as Social Security and Medicare. Since the DACA program's inception, approximately 700,000 immigrants have availed themselves of these benefits.

> DACA recipients may continue to work lawfully in the United States, their previously issued EADs will remain valid, and they may seek one-year renewals of their work permits.

In September 2017, on the advice of the Attorney General, Acting Secretary of Homeland Security Elaine Duke issued a memorandum to rescind DACA, stating it was an "unconstitutional exercise of authority by the Executive Branch." Multiple groups, including Regents of the University of California, challenged the rescission, arguing the rescission was arbitrary and capricious in violation of the APA and it infringed the equal protection guarantee of the Fifth Amendment's due process clause. Three district courts ruled for the plaintiffs. In response to this litigation, Acting Secretary Duke's successor, Secretary Kirstjen Nielsen, issued a memorandum affirming the Duke memorandum and articulating several new reasons why the decision to rescind DACA was sound.

The district court in *Regents of the University of California v. U.S. Department of Homeland Security*, 298 F. Supp. 3d 1304 (N.D. Cal. 2018) issued a nationwide preliminary injunction requiring DHS to renew the enrollment of DACA recipients, and the U.S. Court of Appeals for the Ninth Circuit affirmed.

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The Supreme Court held, in a 5-4 opinion, while there was no infringement of equal protection, DHS's rescission of DACA violated the APA. The court concluded the Acting Secretary's decision to rescind DACA was arbitrary and capricious because she failed to provide any reasons for terminating the postponement of deportation that DACA provides (i.e., the forbearance provision). The sole justification for rescinding DACA was the Attorney General's letter stating DACA had legal flaws, premised on the availability of benefits under DACA. The court found that while the Acting Secretary was not required to consider all policy alternatives to rescinding DACA, she was required to consider alternatives within the realm of the existing policy, including the potential for a forbearance-only program. The court refused to consider Secretary Nielsen's memorandum because it amounted to "post hoc rationalization."

Notably, the court did not rule on the legality of the DACA program itself. To the contrary, it recognized DHS has the authority to rescind the program if it follows the required APA procedure. Thus, the DHS could try again to end the program by explaining more clearly its reasons for doing so.

On July 28, Acting Secretary of Homeland Security Chad Wolf issued a memorandum in response to the Supreme Court's decision, setting forth departmental action effecting certain immediate changes to limit the scope of the DACA policy pending a full and careful reconsideration of the DACA policy. Following the directives in the Wolf memorandum, U.S. Citizenship and Immigration Services (USCIS) will reject new or first-time DACA requests from applicants; it will accept DACA requests only from applicants who were previously granted DACA status. In addition, USCIS will limit Employment Authorization Documents (EAD) to a period of no more than one year. USCIS also will reject any DACA renewal request received more than 150 days before the current DACA granted period expires.

Employers are advised to pay close attention to new legal challenges and further developments in this area. In the meantime, DACA recipients may continue to work lawfully in the United States, their previously issued EADs will remain valid, and they may seek one-year renewals of their work permits. Accordingly, employers should continue to treat DACA employees and job applicants the same as other employees and job applicants. This is especially true at the I-9 stage where all applicants are free to use any of the qualifying I-9 documents, including the EAD, which a DACA applicant is more likely to use.

The Supreme Court's ruling is a significant victory for employers, as it will be more difficult for Section 1981 plaintiffs alleging race discrimination to prove their claims.

Undocumented Workers

In *Kansas v. Garcia*, No. 17-834 (Mar. 3, 2020), the Supreme Court ruled that federal law does not preempt a state's ability to bring criminal prosecutions against individuals for providing false or fraudulent information in connection with their employment. The decision has broad implications for the prosecution of both immigrants and employers at the state and local level.

This case involved three individuals who were convicted of identity theft under Kansas law for using other peoples' social security numbers to gain employment. They provided false Social Security numbers on their I-9 forms and on their state tax-withholding forms. (Under the federal Immigration Reform and Control Act (IRCA), U.S. employers are required to verify a new hire's identity and authorization to work by completing a federal Form I-9 Employment Eligibility Verification and reviewing the acceptable documents provided by the new employee. Information contained in I-9 forms may not be used for purposes other than those set out in the statute, and criminal prosecution for identity theft under state law is not one of them.)

In its prosecutions of the three individuals, the state of Kansas did not rely on the information on the I-9 forms, recognizing that reliance on that information was preempted by federal law. However, the state of Kansas moved forward with the prosecutions, relying solely on the state tax-withholding forms.

The individuals asserted that even if the state of Kansas did not rely on the I-9 forms themselves, they could not rely on the same information found on other forms, because those were filled out as part of the process of obtaining employment and, therefore, were preempted by the IRCA.

In a 5-4 opinion, the court found there is no express or implied preemption of state law by the IRCA. It reasoned that, while states could not rely on information in the I-9 form itself, that did not mean they could not rely on

the same information in prosecuting individuals if the information could be found elsewhere. According to the court, any other interpretation would lead to absurd results because I-9 forms contain so much basic information that is readily available elsewhere, including names, addresses, dates of birth, email, and telephone contact information. Moreover, the court stated use of social security numbers was not preempted by implication under the IRCA, because submitting state tax-withholding forms is not part of the federal employment verification scheme.

The dissent, written by Justin Stephen Breyer, and joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan, contends the three individuals were prosecuted for making misrepresentations to obtain employment and this "fell squarely within the field that ...the federal [IRCA] preempts." Accordingly, the dissent cautioned that "the majority opens a colossal loophole" with these prosecutions.

In light of the Supreme Court's ruling in this case, states now will have additional tools to monitor fraud in the employment verification context. Therefore, employers should expect more requests for all employee records, including I-9 forms. To avoid being connected to individual's criminal prosecution, potentially through allegations of constructive knowledge, employers are advised to be vigilant when completing Form I-9s and more diligent in conducting self-audits on a regular basis. Employers should also be responsive to Social Security no-match letters and pay particular attention to information received from reliable sources, such as payroll or a benefits provider/carrier, should they alert management to any discrepancy with an employee's Social Security number.

Section 1981

In a decision that will have a significant impact on employment litigation, the Supreme Court in *Comcast v. National Association of African American Owned Media*, 140 S. Ct. 2561 (2020), clarified the burden for plaintiffs to meet in discrimination claims filed under Section 1981, the provision of the Civil Rights Act of 1866 prohibiting racial discrimination in, among other things, making and enforcing contracts. The Court held a plaintiff who sues for racial discrimination under Section 1981 must plead and prove that race was the "but-for" cause of injury—meaning that but-for race, the plaintiff would not have been subjected to the complained-of adverse treatment. This differs from Title VII of the Civil Rights Act of 1964, under which it is enough to state a claim for a plaintiff to show racial discrimination was a motivating factor—i.e., one of several reasons in an employer's decision.

In *Comcast*, an African American-owned television network had sought to have Comcast carry its channels. After Comcast refused, the network filed suit under Section 1981 alleging Comcast disfavored African-American owned media companies, motivated by race. Although Comcast cited a lack of programming demand as the reason for its decision, the network alleged that reason was pretext. The district court dismissed the complaint for failure to state a claim because the network failed to plead that race was a but-for cause. The Ninth Circuit reversed, holding a plaintiff need only plead that racial discrimination was a motivating factor.

In a unanimous decision, the Supreme Court reversed the Ninth Circuit and held the "motivating factor" standard under Title VII does not apply to Section 1981. As such, a plaintiff must show but-for causation throughout the life of a discrimination claim under Section 1981. Applying that understanding, the court concluded it was not enough, even at the pleading stage, for the network to plead race was a motivating factor in Comcast's decision.

The Supreme Court's ruling is a significant victory for employers, as it will be more difficult for Section 1981 plaintiffs alleging race discrimination to prove their claims. Employers are advised to review any Section 1981 complaints with this standard in mind and consider whether to seek dismissal based on a plaintiff's failure to plead but-for causation or to establish the but-for causation standard. In addition, employers may want to review and revise their affirmative defenses in Section 1981 cases to include the but-for causation standard.

With the passing of Justice Ruth Bader Ginsberg on Sept. 18, the Supreme Court lost a champion of civil rights, who worked tirelessly for gender and LGBTQ equality, racial justice and workers' rights.

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