

Practical Implications of Immigration Enforcement Activity on Retirement Plans

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The second Trump administration is intensely focused on enforcement of U.S. immigration laws. Understandably, employers are concerned about immigration visits and Form I-9 compliance, and human resource professionals are bracing for potential workforce disruptions and increased scrutiny of hiring procedures. Retirement plan administrators should also consider the consequences of undocumented workers participating in company retirement plans.

How an Undocumented Worker Becomes a 401(k) Plan Participant

In spite of an employer's Form I-9 process, employees can provide incorrect, misleading, or false documentation as evidence that they are legally allowed to work in the U.S. If the employer does not have adequate systems in place to verify the documentation provided, then such employee can, nevertheless, become a participant in the employer's 401(k) plan in accordance with the plan's eligibility terms. For example, an employer may automatically enroll new employees in its 401(k) plan at three percent of compensation. The employer may also provide a matching or nonelective contribution on a payroll-by-payroll basis. Under this scenario, an unauthorized worker could relatively quickly begin accruing an account balance as a participant under the 401(k) plan. The same result could occur for undocumented workers under the eligibility terms of most retirement plans.

Plan Language Regarding "Employee" and ERISA

Most retirement plans define "employee," "eligible employee," or "participant" without reference to immigration status. For example, a common definition of "employee" could be similar to –

Employee means an individual who is reported on the payroll records of the Employer as a common-law employee.

While it may seem counter-intuitive, undocumented workers are indeed protected under the Fair Labor Standards Act (FLSA), which is enforced by the Department of Labor (DOL). Interestingly, the DOL also enforces the Employee Retirement Income Security Act (ERISA), which does not address the immigration status of employees. In other words, an individual is a covered (protected) employee under ERISA whether documented or not. So employers should proceed with the understanding that

a plan participant – without regard to immigration status – is entitled to the benefits earned under a retirement plan.

It is important to distinguish undocumented workers from the “nonresident aliens” exclusion from eligibility that is contained in many retirement plans. Nonresident aliens without United States source income are often expressly excluded from retirement plan participation. According to the Internal Revenue Service, an alien is any individual who is not a U.S. citizen or U.S. national. A nonresident alien is an alien who has not passed the green card test or the substantial presence test. Because undocumented workers have U.S. source income, that exclusion under the retirement plan does not address issues that may come up related to undocumented workers.

With the assistance of counsel, employers may consider whether it is feasible to amend the plan to expressly exclude undocumented workers – i.e., employees who do not provide documentation that they are legally allowed to work in the U.S. Care should be taken in order to make sure such amendment can be properly administered without triggering any unintended consequences. Moreover, the amendment should not inadvertently violate applicable employment discrimination laws.

Distributions to Deported and Terminated Undocumented Workers

If an undocumented participant is deported or is absent from work for an extended period without notice, then the employer may terminate their employment. In such cases, like any other participant, an undocumented participant is entitled to receive distributions of vested benefits under a retirement plan upon termination of employment. The issue becomes how to process the distribution when the employer’s Form I-9 records include an incorrect or false individual tax identification number (ITIN) or Social Security number (SSN). Employers – plan recordkeepers, in particular – require a correct ITIN or SSN in order to properly report a retirement plan distribution on Form 1099-R. Obtaining this information from an undocumented participant may be challenging because they may be in custody, living in a different location, or intentionally avoiding contact. In these circumstances, the employer should designate them as “missing or lost participants” and take actions consistent with the DOL’s best practices for handling such participants (see our previous articles related to missing participants in retirement plans [here](#) and [here](#)).

Keep in mind that the employer should consider the DOL guidance whether the distribution is a small balance cashout, an automatic rollover to an IRA, or a series of installment payments. After the employer has exhausted its responsibilities under the DOL guidance, it may be able to transfer certain small distributions (\$1,000 or less) to state unclaimed property funds as described under the recent [Field Assistance Bulletin 2025-01](#).

Distributions to Those Seeking to Help Deported Family Members

Employees affected by immigration enforcement efforts may be interested in accessing their retirement accounts to provide financial assistance to deported friends and family. If the employer sponsors a 401(k) plan, then the plan may allow loans or penalty-free in-service distributions (if the participant has reached age 59½).

In addition, as permitted under SECURE 2.0, a 401(k) plan may be amended to allow employees to take penalty-free distributions up to \$1,000 (or smaller amounts that leave at least \$1,000 of vested benefits in the account afterward) if they certify the amount is for a personal or family emergency. Such emergency distributions must be repaid to the plan within three years of receipt in order to

remain penalty-free.

Action Steps

1. *Assess Risks.* Based on workforce demographics, proximity to immigration enforcement activity, and other related factors, consider the likelihood that immigration enforcement agencies will select the employer for an on-site review or worker deportation. If so, consider whether to amend the 401(k) plan to permit emergency distributions for those wishing to provide financial assistance to deported family members.
2. *Audit.* Human resource, payroll, and benefits professionals should collaborate to determine whether undocumented workers are currently eligible for retirement plan benefits (or any other employee benefits offered by the employer). Consider whether it may be appropriate to engage a background screening service to verify Form I-9 employee authorization documentation.
3. *Review DOL Missing Participant Best Practices.* Review and document the procedures and processes used to locate missing participants, including those who may be at risk for deportation.
4. *Consult Plan Recordkeeper.* Contact the recordkeeper to inquire what procedures it has in place to process distributions and Forms 1099-R when there is an incorrect ITIN or SSN (or none at all).
5. *Seek Legal Counsel.* Ask legal counsel whether it is feasible to amend the retirement plan to expressly exclude undocumented workers.

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