

UNITED STATES

FIVE WEEKS OUT: HOW U.S. COMPANIES SHOULD PREPARE FOR THE POSSIBLE END OF THE DACA PROGRAM



January 30, 2018

After a determination by Attorney General Jeff Sessions that the Deferred Action for Childhood Arrivals (DACA) program was an “unconstitutional exercise of authority by the Executive Branch,” the Department of Homeland Security (DHS) announced that it would stop renewing DACA applications that expire on or after March 6th, 2018. With less than 25 business days before the program terminates and no clear path for legislative relief for DACA beneficiaries, companies should begin preparing for the increasingly likely outcome that they will need to terminate key employees in the weeks and months ahead.

BACKGROUND

Created by the Obama administration in 2012, DACA allowed undocumented immigrants who came to the United States as children and meet certain eligibility criteria to request a period of deferred action from the government and apply for authorization to work in the U.S. DACA benefits are generally valid for two years from the date of issuance. According to the Migration Policy Institute (MPI), approximately 1.5 million individuals may be eligible for the program and more than 800,000 have received DACA approvals since the program was launched. Though a grant of DACA represents the government’s decision not to take action to remove a person from the U.S., it does not impart any legal immigrant or nonimmigrant status. An estimated 700,000 DACA recipients are currently working for U.S. employers.

When will the DACA program end?

DHS stopped accepting DACA renewal applications on October 5th, 2017, and will not renew any DACA applications that expire on or after March 6th.

Can a company continue to employ a DACA beneficiary during the validity period of his or her current Employment Authorization Document (EAD)?

Yes.

Will a DACA beneficiary be subject to removal (deportation) during the validity period of his or her current DACA EAD?

An individual should not be removed (deported) from the country based solely on his or her DACA status. Note that DACA is discretionary and DHS could terminate a DACA grant and remove (deport) an individual if he or she no longer meets the DACA criteria (e.g., criminal conduct).

After his or her EAD expires, however, the employee will not have any legal basis for being in the U.S. and would be subject to removal (deportation) at any time.

FREQUENTLY ASKED QUESTIONS (FAQS)

Must a company terminate the employment of a DACA beneficiary when his or her EAD expires?

Yes, unless the individual has secured another lawful basis to work in the U.S. Federal law prohibits employers from employing an alien knowing that he or she is not authorized to work in the U.S., and from continuing to employ an alien in the U.S. knowing the alien is or has become unauthorized. Civil fines for violations range from \$539 to \$4,313 per unauthorized worker for a first offense. Engaging in a pattern or practice of violations can give rise to criminal liability.

Beginning March 6th, 2018, it is expected that each day approximately 1,700 DACA beneficiaries will lose work authorization.

Can a company refuse to hire a DACA beneficiary because his or her status will expire in the future?

No. The anti-discrimination provisions of the Immigration and Nationality Act provide that an employer may not refuse to hire an individual solely because his or her work authorization will expire in the future. An employer who does so could face civil penalties that range from \$375 to \$16,000 per violation.

Can a company provide ongoing financial or other support to DACA beneficiaries after the expiration of their EAD?

Employers should consult counsel on this issue. It is a violation of law for any person to conceal, harbor, or shield from detection in any place, including any building or means of transportation, any individual who is in the United States unlawfully. The harboring statute is broad and arguably includes any conduct that tends to substantially facilitate an individual remaining in the U.S. illegally. The Trump administration has stated that it may utilize the harboring criminal provisions against politicians or other officials who seek to protect unlawful immigrants from deportation.

So while a company may be inclined to keep a DACA beneficiary on payroll or on a benefits plan or offer a general severance package, such actions should be reviewed carefully to evaluate whether the company may be placing officials at risk of prosecution under the harboring statutes.

Once an individual's DACA expires, will their case be referred to ICE for enforcement purposes?

DHS states that information provided to USCIS in DACA requests will not be proactively provided to U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) for the purpose of immigration enforcement proceedings, unless the requestor meets the criteria for the issuance of a Notice To Appear (NTA) or a referral to ICE under the criteria set forth in USCIS' Notice to Appear guidance (<https://www.uscis.gov/NTA>). It is worth noting, however, that this policy is discretionary and DHS may change the policy at any time and without notice.

Will DACA recipients still be able to travel outside of the United States while their DACA is valid?

USCIS has stopped approving any Form I-131 applications for advance parole (travel) under standards associated with the DACA program.

Those with a current advance parole validity period from a previously approved advance parole application will generally be able to travel until it expires. However, CBP will retain the authority it has always exercised in determining the admissibility of any person presenting at the border. Further, USCIS retains the authority to revoke or terminate an advance parole document at any time. Individuals are encouraged to consult with counsel before departing the country.

FREQUENTLY ASKED QUESTIONS (FAQS)

If Congress passes legislation that provides relief for DACA beneficiaries, may a company continue to employ the individual?

It is too early to say whether or how Congress will provide relief to DACA beneficiaries. Because the program will expire in five weeks, and because it takes the government an average of ninety (90) days to process an application for an EAD, Congress will need to provide for interim work authorization to avoid any disruption in the work authorization of current DACA beneficiaries. Absent that action, many DACA beneficiaries will have to stop working until such time as they are eligible for the legislative relief—a process that would likely take months.

ADDITIONAL RESOURCES:

- U.S. Department of Homeland Security, Memorandum on Rescission of Deferred Action For Childhood Arrivals (DACA): <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca#>
- U.S. Department of Homeland Security, Frequently Asked Questions: Rescission Of Deferred Action For Childhood Arrivals (DACA): <https://www.dhs.gov/news/2017/09/05/frequently-asked-questions-rescission-deferred-action-childhood-arrivals-daca>
- U.S. Department of Homeland Security, Fact Sheet: Rescission Of Deferred Action For Childhood Arrivals (DACA): <https://www.dhs.gov/news/2017/09/05/fact-sheet-rescission-deferred-action-childhood-arrivals-daca>
- Migration Policy Institute (MPI), “Deferred Action for Childhood Arrivals (DACA) Data Tools.” <http://www.migrationpolicy.org/programs/data-hub/deferred-action-childhood-arrivals-daca-profiles>; “DACA at Four: Participation in the Deferred Action Program and Impacts on Recipients.” <http://www.migrationpolicy.org/research/daca-four-participation-deferred-action-program-and-impacts-recipients>
- Cato Institute, “How DACA Will End: A Timeline of Expiration.” <https://www.cato.org/blog/how-daca-will-end-timeline-expiration>; “What Will Happen If Trump Kills DACA: A Timeline of Expiration.” <https://www.cato.org/blog/what-will-happen-trump-kills-daca-timeline-expiration>