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The future for “Dreamers”: What their employers need to know

By Will Krasnow
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Who are the “Dreamers”? This term is used in popular culture to refer to the children who were brought to the United States without immigration status, often by their parents. Although they are not legally in the United States, the Dreamers have spent most of their lives here and have little, if any, knowledge of their parents’ nations of origin. Many of them are now adults who are in the U.S. workforce.

In 2012, after Congress failed to address the status of Dreamers, President Obama instituted the Deferred Action for Childhood Arrivals program by Executive Order. The DACA program allowed 800,000 beneficiaries deferred action from deportation, the right to employment authorization, and the right to travel abroad and to return to the United States.



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For all of those (DACA) that are concerned about your status during the 6 month period, you have nothing to worry about - No action!

8:42 AM - 7 Sep 2017

On Tuesday, the Trump administration announced that DACA was ending and, as stated by Acting Secretary Elaine Duke of the Department of Homeland Security, would be terminated “in an orderly fashion that protects beneficiaries in the near-term while [the Trump Administration would be] working with Congress to pass legislation.” According to the DHS, there were two rationales for this decision. First, Attorney General Jeff Sessions believed that DACA was implemented by an unconstitutional exercise of Presidential power that circumvented immigration laws and the legislative process. Second, six states had successfully challenged a similar Executive Order issued by President Obama, the Deferred Action for Parents of American and Lawful Permanent Residents, or “DAPA.” The attorneys general of these states said that they would “amend [their] DAPA lawsuit to include a challenge to DACA” if DACA was not rescinded by this past Tuesday.

Whether DAPA and DACA are constitutional exercises of Presidential power remains a hotly debated issue, as evidenced **by the U.S. Supreme Court’s**



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4-4 deadlock in the DAPA case. (The Supreme Court tie left in place a decision by the U.S. Court of Appeals for the **Fifth Circuit**, which **struck down** DAPA.)

How will DACA be phased out?

On Tuesday, the DHS issued a **Memorandum on Rescission of DACA**, outlining the manner in which DACA will be phased out.

A DHS Press Release, by stating “no current beneficiaries will be impacted before March 5, 2018 merely six months from now...” might lead one to assume DACA would end next March for all beneficiaries.

That assumption is not correct. DACA beneficiaries could remain protected for up to two and a half more years. The period of protection depends on the date a DACA beneficiary’s deferred action and work permit expires. However, for those with deferred action and work permits expiring after March 5, 2018, **no extension is permitted.**

Applying these phase-out guidelines, the DHS will

1. Adjudicate, on an individual, case-by-case basis, properly filed pending DACA applications that have been accepted as of September 5, 2017 (**all DACA applicants are eligible for a two-year period of approval**). This includes initial DACA requests, and associated applications for Employment Authorization Documents.
2. Adjudicate, on an individual, case by case basis, properly filed pending DACA renewal requests and associated applications for EADs from (a) current beneficiaries that have been accepted by DHS as of September 5, 2017, and (b) current beneficiaries whose benefits will expire between September 5, 2017, and March 5, 2018, that have been accepted by DHS as of October 5, 2017.
3. Reject all DACA initial and renewal requests and associated applications for EADs that are not filed as specified in paragraphs 1 and 2, above.
4. NOT terminate or revoke, based solely on the DACA rescission, grants of deferred action that were previously granted or EADs, while they remain valid.
5. **NOT approve new applications for travel authorization.** However, the validity period in a previously-approved application will generally still be honored.
6. **Administratively close all pending applications for travel authorization.**
7. Retain the authority to revoke or to terminate travel authority.

Finally, U.S. Customs and Border Protection will retain the authority to determine whether to admit a

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about persons whose DACA authorizations have expired? Will the information provided to the DHS in filing DACA be used against applicants? Although this is not supposed to happen, some commentators have expressed concern based on this response to a question in the DHS “Frequently Asked Questions” section:

Generally information provided in DACA requests will not be proactively provided to other law enforcement entities (including [Immigration Customs and Enforcement] and [Customs and Border Protection]) for the purpose of immigration enforcement proceedings unless the requestor poses a risk to national security or public safety, or meets the criteria for the issuance of a Notice To Appear or a referral to ICE under the criteria.

(Emphasis added.) The DHS’s use of the qualifier “Generally” indicates that this may not be an absolute rule.

An uncertain future

President Trump has indicated that he would like to see Congress address the status of Dreamers. He tweeted that he would “revisit” the issue if Congress did not enact legislation in six months. It is not clear what that means. For now, the future of DACA beneficiaries is uncertain.



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Congress now has 6 months to legalize DACA (something the Obama Administration was unable to do). If they can't, I will revisit this issue!

7:38 PM - 5 Sep 2017

Constangy’s Immigration Practice Group will continue to follow this important issue and will provide updates as the situation develops.

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