

Rescission of DACA Raises Employer Considerations and Legislative Options

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On Tuesday, the Trump Administration announced plans to end the Deferred Action for Childhood Arrivals (“DACA”) program, which allows qualifying, vetted undocumented immigrants who came to the United States as children to remain in the country and obtain temporary work authorization. While some components of the DACA termination will begin to take effect immediately, such as the decision to stop accepting new DACA applications, the Administration announced a six-month phase-out period before full repeal, and has urged Congress to pass legislation relating to DACA’s beneficiaries. As a result of this announcement and DACA’s uncertain future, employers must prepare for compliance with the interim DACA repeal measures, and interested stakeholders may consider engaging with Congress on this issue.

History of DACA

In June 2012, former Secretary of Homeland Security Janet Napolitano initiated the DACA program through a memorandum to the heads of Customs and Border Protection, Citizenship and Immigration Services, and Immigration and Customs Enforcement. DACA protection was extended to certain undocumented immigrants who had entered the United States before their sixteenth birthday. The program utilized prosecutorial discretion to grant beneficiaries with a renewable, two-year period of deferred action from deportation, as well as eligibility for work authorization during that time period.

Termination of DACA

On September 5, 2017, the Trump Administration rescinded the 2012 memorandum authorizing the DACA program. In a document entitled “Memorandum on Rescission of Deferred Action for Childhood Arrivals,” (the “Memo”) the Administration outlined a “wind down” of the program through March 2018.

In the Memo, the Department of Homeland Security (“DHS”) indicated that it will adjudicate all properly filed initial DACA requests and associated applications for work authorization submitted and accepted by DHS as of September 5. All initial deferred action and work authorization requests submitted after September 5 will be rejected. DHS will adjudicate all DACA renewal requests, including associated work authorization requests, for current beneficiaries whose benefits will expire between September 5, 2017 and March 5, 2018, provided they are received and accepted by DHS as of October 5, 2017. All subsequent renewal requests will be rejected. DHS will honor all existing DACA grants for the remainder of their current period of validity. DHS will not grant any new applications for advance parole (permits that allow DACA recipients to re-enter the U.S. after traveling abroad) associated with the DACA program and will administratively close any such pending applications.

Despite his decision to rescind DACA, President Trump indicated that Congress should use the six-month transition period (until March 5, 2018) to pass a replacement for DACA. The President specifically called on Congress to “legalize DACA,” and then suggested later in a tweet that if Congress does not act, he might revisit the issue.

The Uncertain Path in Congress for DACA-Related Legislation

While Congress has been unable to move immigration reform measures for many years, there are a number of bills, some of which are bipartisan, that already have been introduced this year to address DACA. Some are more modest and pragmatic, to address immediate concerns, such as The BRIDGE Act, S.128, introduced by Senator Lindsey Graham (R-SC) and Senator Richard Durbin (D-IL). Others represent a more comprehensive solution, such as the newest form of The DREAM Act, S.1615, (also introduced by Senator Graham and Senator Durbin). Meanwhile, some Republicans also are actively pursuing separate DACA legislative solutions, such as Senator Thom Tillis (R-NC) and Rep. Carlos Curbelo (R-FL). Party leadership and relevant committee leadership will need to be engaged and their legislative priorities will need to be addressed if any of these, or related bills, are to prove to be durable enough to survive a difficult legislative process.

Currently, the two Houses of Congress pose different structural challenges. The House could vote on DACA as a stand-alone measure, perhaps successfully, but likely with many more Democratic votes than Republican votes; the House Republican majority has tended towards considering only those measures with majority Republican support. House Republican Leadership will be under intense pressure only to bring a measure to the House Floor if it can win the support of most Republicans. Senate Leadership faces different challenges. Once an immigration bill such as a DACA-focused bill reaches the Senate Floor, that bill is amendable. Members will likely seek to add other immigration items to it. Those can make for difficult votes, and the amendments that pass can add complications to an already difficult issue. Border security measures, high-skilled immigration issues, restrictions on access to government programs, national security immigration priorities, English language requirements, rules surrounding detention and deportation, reductions in family-based immigration, and changes to birthright citizenship are just some of the many issues that may interest individual senators. Navigating the two chambers, their processes, and politics will require a coordinated, well-thought out effort of stakeholders.

Next Steps for Employers and Outside Stakeholders

While the future of DACA beneficiaries remains uncertain, there are steps that employers and outside stakeholders can take now in order to prepare for changes.

From an employment perspective, employers must be sure to comply with both immigration and anti-discrimination laws. While employers may feel compelled to determine how the announcement will affect their workforce, they must balance those needs with federal law, which prohibits discrimination on the basis of immigration status, citizenship status, and national origin. Therefore, employers should resist the urge to try to identify employees who are DACA recipients by reviewing I-9 paperwork for this purpose or questioning non-citizen employees with temporary work authorizations about their status. Instead, employers may want to circulate a message of support to all employees, indicating that employees may come forward voluntarily to seek immigration support if they so choose or provide links to resources that may be helpful. Employers should follow their regular practice of periodically reviewing employees' I-9 paperwork to ensure compliance, and communicate with employees whose visas or work

authorizations are nearing expiration to ask if they have renewed authorizations. (Employers should be aware that temporary work authorizations—referred to as employment authorization documents—may be issued for various types of immigration categories, including under the DACA program.) Employers who continue to employ employees who do not have current work authorization may face penalties, including for paperwork violations and violations of federal law, if their I-9 documentation is audited. And of course, employers should continue to monitor legislative developments relating to DACA.

From an advocacy perspective, stakeholders interested in helping DACA beneficiaries navigate this difficult moment could not have a more critical time for action. Companies that have equities at stake can benefit on many levels from engaging with Congress on this issue. First, business-friendly legislators will listen to favorable economic arguments about DACA. Second, many companies have workforces, customers, and communities that are very committed to DACA. Effective company actions can have a calming effect on their constituencies, build new goodwill towards the company, improve employee morale, and show leadership. Third, some companies may be able to build stronger relationships with progressive lawmakers with whom they have not always shared close ties or policy agendas. Building goodwill with those lawmakers on an issue that is of such high importance to the Member can have a positive, lasting impact for the company's footprint on the Hill.

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