

UNITED STATES

IF PRESIDENT TRUMP TERMINATES DACA: FIVE THINGS EVERY U.S. EMPLOYER SHOULD KNOW



There are widespread reports that President Trump may terminate the Deferred Action for Childhood Arrivals (DACA) program. Texas and several other states have threatened to challenge the legality of DACA if the federal government does not take action to terminate the program by 5 September. Though Hurricane Harvey has created uncertainty about that deadline, a decision on the fate of DACA may be imminent.

BACKGROUND

DACA allows 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. 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. However, DACA grantees may apply for authorization to work in the U.S., and an estimated 700,000 DACA recipients are currently working for U.S. employers.

If President Trump does elect to end DACA, he must also decide whether to phase out participation (e.g., not renew DACA grants), phase out the program at a future date, or terminate DACA immediately.

1. A company may not know it employs DACA beneficiaries.

A company may not know which of its employees, if any, are present in the U.S. on DACA. Employers are required to complete and retain a Form I-9 (Employment Eligibility Verification) for each individual they hire for employment in the United States. As part of the Form I-9 process, the employer must review document(s) presented by the employee that demonstrate work authorization. If an employee who is authorized to work under DACA presented acceptable documentation during the I-9 process, the basis of the employee's work authorization may not have come to the company's attention.

DACA beneficiaries who are granted work authorization receive an Employment Authorization Document (EAD). U.S. Citizenship and Immigration Services (USCIS) deems this document acceptable as a List A document, as it demonstrates both identity and employment authorization. Since the EAD is granted for a limited period and has an expiration date, the employer must "re-verify" the employee's employment authorization by the date the current EAD expires.

Should companies try to find out how many DACA beneficiaries they employ? This is a complicated question, as it is necessary to balance the desire to plan and assist affected employees with certain risks that may arise from such knowledge.

2. A DACA beneficiary may not be able to work even if his or her Employment Authorization Document remains valid.

Whether an employee can continue to work depends on how the government terminates the DACA program. There are two primary ways the termination could take place. The government could end DACA effective immediately, revoking DACA grants

FREQUENTLY ASKED QUESTIONS (FAQS)

and invalidating all EADs issued under the program. This scenario would result in termination of employees' work authorization as of that date. So even if the EAD is valid prima facie, the company could not employ the individual.

Alternatively, the government could "phase out" the DACA program, and terminate it by refusing to renew DACA grants and corresponding EADs. If the government takes this route, your employee will remain authorized to work in the U.S. until his or her current EAD expires.

3. If the program is terminated, continuing to employ a DACA beneficiary could result in civil or criminal penalties.

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 result in criminal liability.

4. There is no prohibition against transferring DACA beneficiaries to overseas offices.

If the DACA program is terminated, companies could certainly explore options for employing affected individuals outside the U.S. There are times when DACA beneficiaries can complete the process of obtaining overseas work options from within the U.S., and the fact that they are out of status in the U.S. may not impede their ability to move to other countries. Our firm has developed strategies for multinational companies facing similar scenarios.

5. Companies should consult counsel before providing ongoing financial or other support to DACA beneficiaries.

Employers should consult counsel on this issue. Providing benefits (beyond legal services) could create exposure under other laws intended to prevent illegal immigration, including the prohibition against harboring unauthorized individuals. So even if it is permissible under I-9 laws to pay someone after he or she has stopped working, there are risks associated with that practice under other laws. Companies should consult with counsel before proceeding.

CONCLUSION

DACA is a large program that has benefitted approximately 800,000 individuals. The likelihood that a company employs a DACA beneficiary may be higher than many people realize, and termination of the program will negatively impact DACA beneficiaries, their families, their colleagues, and company projects.

BAL is working closely with multiple trade associations to ensure that policymakers understand how DACA beneficiaries contribute to their communities and the economy, and the firm will provide additional analysis as information becomes available.