



# What Does DACA Rescission Mean For Employers?

Insights

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Attorney General Jeff Sessions announced earlier today that the Department of Homeland Security will immediately “wind down” the Deferred Action for Childhood Arrivals (DACA) program. This action will affect almost 800,000 young people in the United States by ending their temporary protection under deferred action and their ability to hold proper work authorization. This announcement has received widespread attention in the news media, but what does it mean for the nation’s employers?

## What Is DACA?

Implemented in 2012 during the Obama administration, DACA provided temporary relief from deportation and temporary work authorization to those children brought to the United States before they were 16 years old and who resided in the U.S. for at least five years before June 15, 2012. Applicants also needed to be under the age of 31, be enrolled in school or have already graduated, and have no criminal record.

Receiving “deferred action” did not provide lawful status, but was a form of prosecutorial discretion to defer removal action against an individual for a certain period of time. This, therefore, allowed applicants to remain in the country without fear of deportation and with the ability to enroll in school and seek employment. Status was granted in two-year increments; currently, there are approximately 800,000 DACA recipients in the country.

## Why Is DACA Being Rescinded?

On June 29, the attorneys general of Texas and several other states sent a letter to Attorney General Jeff Sessions asserting that the DACA program is unlawful. They asserted the same rationale used by the 5th Circuit Court of Appeals and several district courts in opinions regarding a proposed expansion of the DACA program and the now-rescinded program known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). The attorneys general threatened they would move to amend the DAPA lawsuit to include a challenge to DACA if the Department of Homeland Security (DHS) did not rescind the June 2012 DACA memo by September 5, 2017.

Yesterday, Attorney General Sessions sent a letter to DHS Acting Secretary Elaine Duke articulating his legal determination that DACA “was effectuated by the previous administration through executive action, without proper statutory authority and with no established end date, after Congress’ repeated rejection of proposed legislation that would have accomplished a similar result. Such an open-

ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch.”

The letter further stated that because DACA “has the same legal and constitutional defects that the courts recognized as to DAPA, it is likely that potentially imminent litigation would yield similar results with respect to DACA.” Nevertheless, given the administrative complexities that would arise from ending the program in which almost 800,000 young people are enrolled, Sessions recommended that the DHS “wind down” the program in an efficient and orderly fashion. Because DACA was implemented through an executive action and not legislation, the current administration has broad authority to end or change the program.

### **What Does This Mean For DACA Beneficiaries?**

As a result of today’s rescission, no new DACA applications will be accepted after September 5, 2017. Any current applications filed before September 5, 2017 and currently pending will be processed normally by the United States Citizenship and Immigration Services (USCIS). More specifically, current DACA recipients will be permitted to retain both the period of deferred action and their employment authorization documents (EADs) until they expire, unless terminated or revoked. DACA benefits are generally valid for two years from the date of issuance.

DHS has confirmed that, “[d]ue to the anticipated costs and administrative burdens associated with rejecting all pending initial requests, USCIS will adjudicate – on an individual, case-by-case basis – all properly filed DACA initial requests and associated applications for EADs that have been accepted as of September 5, 2017.” Further, for those DACA beneficiaries with DACA and EAD cards expiring between September 5, 2017 and March 5, 2018, USCIS will accept requests for renewal received as of October 5, 2017. Any and all requests to renew DACA and associated applications for EADs filed after October 5, 2017 will be rejected.

While current law does not grant any legal status for the class of individuals who are current DACA recipients, they are granted the protection of having their grounds for removal deferred. Under the rescission, when the period of deferred action expires or is terminated, the person’s removal will no longer be deferred and they will no longer be eligible for lawful employment. They will be deemed unlawfully in the United States and subject to removal.

DHS has, however, stated that “information provided to USCIS in DACA requests will not be proactively provided to ICE and CBP for the purpose of immigration enforcement proceedings, unless the requestor meets the criteria for the issuance of a Notice To Appear or a referral to ICE under the criteria set forth in USCIS’ Notice to Appear guidance.” The agency has also confirmed that no travel authorization will be granted to DACA recipients after September 5, 2017. Those with previously approved travel authorization (Advance Parole) should generally be able to travel, but should exercise extreme caution anytime leaving the country and only after talking to immigration counsel.

### **What Should Employers Do Now?**

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After today's announcement, the Trump administration called on Congress to enact legislation that would preserve DACA protections before recipients begin losing their protection on March 5, 2018. While it is possible that a legislative solution could be reached before that time, the future is uncertain.

At this time, we recommend you review work authorization records to determine if you have employees with DACA EAD cards expiring before March 5, 2018. These employees would be eligible to apply for a two-year renewal. For all other employees working on a DACA associated work authorization card, it is advisable to review whether those employees have other options to obtain legal status. Otherwise, you need to prepare for the fact that their employment may need to be terminated if Congress does not enact legislation to replace the DACA program. Please consult with your immigration and employment counsel before you terminate a DACA employee. It is also important for DACA recipients to talk to counsel before traveling outside the country as they may encounter difficulties returning to the United States even if traveling during the validity period of the DACA status.

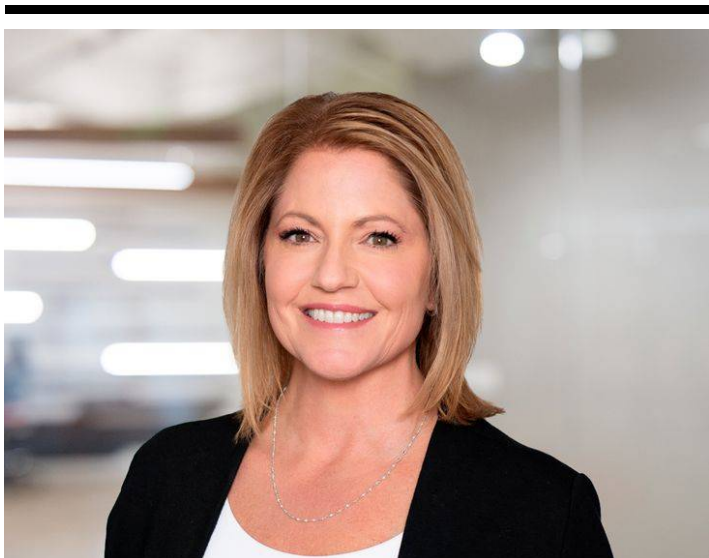
We will continue to monitor the status of the DACA program and provide updates as additional actions are taken, or information is provided, by the federal immigration agencies, the White House, Congress, and the judicial system. Please be sure to regularly review our [Cross Border Employer Blog](#) for updates about these and other developments.

If you have any questions about this development or how it may affect your business, contact any member of our [Global Immigration Practice Group](#), or your regular Fisher Phillips attorney.

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*This Legal Alert provides an overview of a recent executive action. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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