

CLIENT NEWS BRIEF

Rescission of DACA: What Public Agencies Need to Know

On September 5, 2017, the Trump Administration announced plans to end the Deferred Action for Childhood Arrivals (DACA) program. The program temporarily permitted some 800,000 undocumented immigrants who arrived in the United States as children to lawfully stay, attend school, and work in the U.S. without the threat of deportation. The Administration is phasing out the program over a six-month period that will end on March 5, 2018, unless Congress enacts legislation extending DACA's protections.

The Department of Homeland Security's (DHS) official memorandum rescinding the program provides the following:

- **New Initial DACA Applications:** New initial DACA applications will no longer be accepted.
- **Pending Initial DACA Applications:** Pending initial DACA applications submitted before September 5, 2017 will still be adjudicated and processed on a case-by-case basis.
- **New DACA Renewal Requests:** Requests for DACA renewals from current beneficiaries whose benefits expire between September 5, 2017 and March 5, 2018 are eligible for a two-year extension, but the applications must be sent in by October 5, 2017. For individuals whose renewal date is after March 5, 2018, the individual's current work permit expiration date will be his or her last day of DACA status and employment authorization—no renewals will be allowed.
- **Pending DACA Renewal Requests:** Renewal requests from current beneficiaries that were accepted by DHS as of September 5, 2017 will still be adjudicated and processed on a case-by-case basis.
- **Existing DACA Beneficiaries:** DHS will not terminate previously issued DACA removal protections or revoke work authorization for the remaining duration of their validity periods.

The Administration's decision has raised many concerns. According to an August 2017 report by the Migration Policy Institute, the vast majority of DACA recipients are employed or attending school, with one quarter of recipients juggling both college and work. Thus, the end of DACA is poised to have significant impacts on both public employers and schools. Below we highlight some of the implications for public agencies, and note a few measures that agencies can take now to prepare for the upcoming changes.

Implications for Employers

Proving Authorization to Work

Federal law prohibits employers from employing an individual when the employer knows that the individual is not authorized to work in the U.S. Within

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Number 57



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three days of hire, all employees must fill out an employment eligibility verification Form I-9, regardless of the employee's immigration or citizenship status, in order to verify identity and employment eligibility. DACA beneficiaries granted work authorizations are issued Employment Authorization Documents (EADs) by U.S. Citizenship and Immigration Services (USCIS). An EAD card issued to a DACA recipient is one of the acceptable identification and work authorization documents listed on Form I-9. EADs are issued to foreign nationals with different types of legal status (e.g., refugees and asylum recipients), not just DACA beneficiaries, and employers are not permitted to ask employees for specific details regarding their immigration status.

Reverification

Once an employee has completed Form I-9 or the E-Verify work eligibility process, an employer should not ask to see the employee's work permit or other identity or employment eligibility verification documents until the document the employee provided expires or is about to expire. When an employer asks to see such a document again, the process is called "reverification." Based on [USCIS guidance](#), in order to continue to employ an individual whose EAD has expired, employers will need to reverify the employee no later than the date of expiration. If the reverification process is not completed by the expiration date, the employee may not continue to work and should be put on leave of absence or terminated, in accordance with the employer's policy.

Avoiding Discriminatory Practices

Although it is unlawful to continue to employ DACA recipients after the expiration of their EADs, it is also unlawful to subject them to greater scrutiny than other employees for reverification purposes, or fire them prematurely based on having a permit that will expire in the future. Under both the federal Immigration and Nationality Act (INA) and Title VII of the Civil Rights Act, employers are prohibited from discriminating against work-authorized individuals based on their nationality or their citizenship or immigration status. It is unlawful, for example, for an employer to selectively reverify the employment eligibility of one employee or a group of employees based on their country of origin, citizenship or immigration status. Employers are also prohibited from discriminating in the verification and reverification process by requesting additional or different documents than are required for verification, demanding a specific document, or refusing to accept a document because of an unfounded suspicion that a document is fraudulent. In addition, authorized workers are protected from intimidation, threats, coercion and retaliation for having filed a discrimination charge against their employer.

Employers should have an established, periodic practice of internally reviewing their employees' Form I-9 paperwork in order to ensure compliance with federal laws. A best practice is for employers to keep track of all temporary work authorizations that are about to expire and then give employees advance notice that they will soon need to show proof of updated work authorization when their permits are about to expire. USCIS suggests establishing a calendar notification system for employees whose EADs will expire and providing those employees with at least 90 days' notice prior to the expiration date. Employers without a current practice of internal reviews should consider implementing such a practice.

Implications for Schools

Public schools have an obligation to provide K-12 students a free public education, regardless of their citizenship or immigration status. The rescission of DACA does not change a public school's obligations to educate and provide a safe learning environment for all students. In addition, undocumented students are afforded protections under the Family Educational Rights and Privacy Act (FERPA) and the McKinney-Vento Homeless Assistance Act. Under FERPA and California student records laws, schools may not provide information from a student's education record to federal immigration agents unless they obtain parental consent or receive a warrant, court order or lawfully issued subpoena for the information. Immigrant students may also be protected under the federal McKinney-Vento

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Number 57

Homeless Assistance Act, which provides certain educational rights for displaced and migrant children. For college students, undocumented status does not affect a student's ability to attend California colleges, qualify for exemptions of non-resident tuition, or to apply for financial aid. Thus, the rescission of DACA has minimal impact on students' eligibility for school attendance and financial aid.

Takeaways

While pending federal lawsuits and various companies and organizations are actively urging the reinstatement of DACA, the future for DACA beneficiaries remains uncertain. As public agencies wait for further guidance from Congress and the courts, there are some proactive measures that employers and schools can take now, including:

- Avoid discriminatory practices, such as engaging in unfair verification and reverification; prematurely terminating employees before work authorization expires; treating individuals differently based on their nationality, immigration or citizenship status; or intimidating or retaliating against employees for having filed discrimination charges;
- Have an internal practice of consistently tracking work authorizations, and provide an employee with at least 90 days' notice prior to the expiration of his or her work authorization that he or she will need to show proof of updated authorization; and
- Inform students and parents of DACA students' education and privacy rights, which include the right to attend college and the right to apply for financial aid, regardless of immigrations status.

If you have any questions about the federal government's rescission of DACA or its impact on public agencies, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#) or download our [Client News Brief App](#).