Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

5 Employer Tips For Responding To End Of DACA Program

By **Elizabeth Espín Stern, Paul Virtue and Lisa Pino**

Law360, New York (September 7, 2017, 11:09 AM EDT) -- On Sept. 5, 2017, U.S. Attorney General Jeff Sessions announced that the Trump administration will end the Deferred Action for Childhood Arrivals (DACA) program implemented in July 2012 by the Obama administration. According to the attorney general's announcement, the program will remain in place for nearly six months, until March 5, 2018. The U.S. Department of Homeland Security will phase out the program in its entirety over the next two years. A memorandum issued Tuesday by Acting Homeland Security Secretary Elaine C. Duke clarified the following points:

Elizabeth Espín Stern

Paul Virtue

Lisa Pino

- DHS will process initial requests for DACA and work authorization received on or before Sept. 5, 2017;
- DHS will not accept new initial requests for DACA benefits after Sept. 5, 2017;
- DHS will process applications for extension of DACA benefits from current beneficiaries whose benefits will expire on or before March 5, 2018, that have been accepted by DHS as of Oct. 5, 2017. Thus, a current beneficiary whose DACA benefits will expire March 6, 2018, or later is ineligible to file for an extension;
- DACA recipients with current work authorization will remain authorized to work until the expiration date on the employment authorization document (EAD), unless their status is revoked; and
- DHS will not approve any new applications for advance parole (travel document) under the DACA program, although it will generally honor the validity period for previously approved applications for advance parole. Pending applications for advance parole will be administratively closed and the fees will be refunded.

The DACA program has provided work and temporary residency authorization for

nearly 800,000 beneficiaries who were brought with their families to the United States as children.[1] DACA has allowed these young people — known as the Dreamers — to work and study in the United States free from the threat of deportation. It has been reported that over 97 percent of the beneficiaries are in the U.S. work force or in school.

DACA Renewal Eligibility As of September 5, 2017

DACA Status Expires **On or Before March 5, 2018**	If the DACA recipient is eligible to apply for an EAD renewal by Oct. 5, 2017, then U.S. Citizenship and Immigration Services will grant a new two-year EAD period of DACA eligibility. (Ctrl)
DACA Status Expires **As of March 6, 2018 or Later**	DACA status will be protected through the end of the previously issued two-year EAD period but USCIS will no longer grant further renewals.

How Employers Should Respond

1. Do not refuse to hire an applicant solely because they present a valid EAD that will expire in the future.

DACA recipients are issued EADs with two-year validity. Employers must be careful not to discriminate against DACA beneficiaries simply because they present an EAD that will expire in the future. In this regard, the Immigrant and Employee Rights Section (IER) of the Civil Rights Division at the U.S. Department of Justice advises employers that they "cannot refuse to hire an individual solely because that individual's employment authorization document will expire in the future. The existence of a future expiration date does not preclude continuous employment authorization for a worker and does not mean that subsequent employment authorization will not be granted. In addition, consideration of a future employment authorization expiration date in determining whether an individual is qualified for a particular job may constitute an unfair immigration-related employment practice in violation of the anti-discrimination provision of the INA [Immigration and Nationality Act]."

2. Do not review I-9 records to validate which employees are DACA beneficiaries.

Unlike H-1B, L-1 or other skilled worker visa holders, DACA beneficiaries are not sponsored by employers. Employers with DACA workers in their population accordingly have no inherent means to detect which workers are covered. The only vehicle likely to yield this information is their I-9 records database. But employers can run afoul of anti-discrimination provisions of the immigration laws by using I-9 information to validate who is a DACA holder.

The INA places limitations on the use of I-9 information. In general, an I-9 and "any information contained in or appended " to the I-9 "may not be used for purposes other than for enforcement of the [INA] and sections 1001, 1028, 1546, and 1621 of title 18 " of U.S. Code. INA §274A(b)(5); 8 C.F.R. §274a.2(b)(4). Indeed, the IER (formerly called the "Office of Special Counsel for Unfair Immigration Employment Practices") has opined that providing I-9s to third-party vendors to process payroll, for example, may violate this provision. (See TA Letter, Nanda, Deputy Special Counsel, Unfair Immigration Employment Practices (May 30, 2013).)

Using information from the I-9 for DACA verification may also be viewed as violating the E-Verify Memorandum of Understanding, which provides in Art II, C.13 that the information may only be used to

confirm employment and may not be disseminated to any person "other than employees of the Employer who are authorized" to conduct E-Verify. Id. Accordingly, we recommend that the I-9 not be used for purposes of identifying those employees who are working pursuant to a DACA-based EAD, other than to comply with the I-9 and E-Verify requirements. Such use could be considered an “unfair immigration employment practice ” under INA §274B.

3. In determining the length of approved work authorization, rely exclusively on your I-9 records.

Properly completed I-9 forms will include employee-provided expiration dates of their temporary work authorization, if they are subject to such expiration. Employers should rely on the I-9 expiration date to address the length of work authorization rather than on the announcement about DACA termination. The obligation of the employer is to ensure that it engages in timely reverification of I-9s for workers with time-limited work authorization.

4. Make sure that your I-9 recordkeeping is up-to-date, and that you are properly reviewing your Section 3 reverification obligations.

Properly completed I-9 records will protect employers from employer sanctions violations but only if the employer is closely reviewing the reverification obligations. Employers who have not recently audited their files should do so and institute regularly recurring review of I-9 propriety.

5. Be aware that each DACA case is distinct based on individual circumstances.

Each DACA beneficiary will face a unique set of circumstances, even though the rules as to the length of eligibility or the ability to extend are generalized. The unique circumstances include whether the DACA beneficiary has accumulated time in unlawful presence preceding the grant of DACA, but following their 18th birthday. If so, the DACA beneficiary may be barred from reentry to the United States for up to 10 years. The delicacy of this issue, as well as the personalized circumstances generally, will need to be evaluated closely by counsel for each individual.

On the Horizon

Legislation**:** The six-month extension of the program is reportedly designed to give Congress an opportunity to pass legislation to protect DACA beneficiaries, putting the issue of protecting individuals brought to the United States as children back in the hands of Congress. There appears to be some bipartisan support for humanitarian legislation, such as the BRIDGE (Bar Removal of Individuals who Dream and Grow our Economy) Act. The BRIDGE legislation was introduced in January 2017 by Sens. Lindsey Graham, R-S.C. and Dick Durbin, D-Ill., along with five other senators and by Rep. Mike Coffman, R-Co., and seven other members of the U.S. House of Representatives. The BRIDGE Act would give “provisional protected presence” and work authorization to individuals under the same criteria that were applied for DACA beneficiaries. Unlike the Dream Act, which failed to pass in 2011, the BRIDGE Act would not provide a pathway to U.S. citizenship. Rather, it would allow people eligible for DACA to receive work authorization and provisional protected presence for up to a three-year period.

As for partisan efforts, the Recognizing America’s Children (RAC) Act, introduced in March 2017 by Rep. Carlos Curbelo. R-Fla., and co-sponsored by Rep. Leonard Lance, R-N.J., grants DACA high school graduates conditional immigration status if they lack a serious criminal record and do not rely upon public assistance. Most recently, Rep. Luis Gutierrez, D-Ill., on July 28 introduced the American Hope Act, which is currently co-sponsored by 116 Democrats. Comments from House Speaker Paul Ryan, , R-Wis.,

prior to, and in anticipation of, the administration's announcement to end DACA, appeared to support bipartisan action to protect DACA beneficiaries. But with the full plate Congress faces currently, including action on the federal budget, it is premature to assess whether a congressional solution is likely to ensue before the March 5, 2018, termination of DACA.

Litigation**:** The impetus for the White House announcement on DACA was the threat by plaintiffs (including Texas and other states) to amend their 2014 complaint (Texas v. United States) concerning expansion of the DACA program and to challenge DACA's legality if the White House did not take steps to halt DACA by Sept. 5. In addition, the states of New York and Washington have threatened to sue the Trump administration if it acts to end DACA. New York Gov. Andrew Cuomo is quoted in press reports as saying, "if he moves ahead with this cruel action, New York State will sue to protect the 'dreamers' and the state's sovereign interest in the fair and equal application of the law."

Elizabeth Espín Stern and Paul W. Virtue are partners and Lisa J. Pino is counsel at Mayer Brown LLP in Washington, D.C. Pino is a former presidential appointee under President Barack Obama and previously served as senior counselor to the secretary at the U.S. Department of Homeland Security.

[1] As of the program's launch in 2012, DACA benefits were available to a childhood arrival who:

- was under the age of 31 as of June 15, 2012;
- came to the United States before reaching 16 years of age;
- had continuously resided in the United States since June 15, 2007;
- was physically present in the United States on June 15, 2012, and at the time of making the request for consideration of deferred action with the U.S. Citizenship and Immigration Services;
- had no lawful status on June 15, 2012;
- was in school, had graduated or obtained a certificate of completion from high school, had obtained a general education development (GED) certificate, or was an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
- had not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and did not otherwise pose a threat to national security or public safety

---