



What the Supreme Court Ruling on DACA Means for Employers

By Roy Maurer

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The June 18 ruling by the U.S. Supreme Court preserving the Deferred Action for Childhood Arrivals (DACA) program provides relief not only for the hundreds of thousands of young undocumented immigrants it covers, but also for the organizations that employ them—but only temporarily.

The court ruled that the Trump administration lacked a clear rationale (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/supreme-court-daca-ruling.aspx) for ending the DACA program protecting the group known as "Dreamers"—undocumented immigrants brought to the United States as children—from deportation. The administration can still attempt to rescind the program but must offer well-supported reasons for doing so.

The ruling means that Dreamers can keep their DACA benefits, including temporary work permits and relief from deportation, and may give employers more confidence in hiring DACA program participants (www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/some-employers-are-still-unsure-hiring-dreamers.aspx).

"The court's decision on DACA provides Dreamers a huge lifeline, albeit temporary, and it gives U.S. employers the ability to keep existing Dreamer employees employed," said Ian Macdonald, co-chair of Greenberg Traurig's immigration and business compliance practice, based in Atlanta.

"Feedback from employers has been positive," Macdonald said. "The ruling allows them to start to plan for the continued employment of DACA employees rather than get ready for difficult conversations about letting them go."

The ruling, however, is not the final word on the program. Acting Department of Homeland Security Secretary Chad Wolf said the nearly 650,000 people currently protected by the program will not be deported, but the administration will again try to eliminate DACA.

The Society for Human Resource Management supported the court's decision. "As we pivot to reskilling and upskilling the unemployed, it remains a business imperative that we keep in the talent pool all workers educated and trained in the U.S. so that their needed skills can contribute to the American economy," said Emily M. Dickens, SHRM corporate secretary, chief of staff and head of government affairs. "This decision to uphold the DACA program helps us meet a critical talent need in our workplaces."

What is DACA?

The program was established in 2012 to protect undocumented immigrants who were brought to the U.S. as children from deportation and allow them to work legally in the country.

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To be eligible, applicants had to have arrived in the United States before age 16 and have lived in the country since June 15, 2007. They could not have been older than 30 when the policy was first enacted. Recipients are required to renew their protections every two years. The program does not provide permanent protection or a pathway to citizenship.

There are 649,000 DACA recipients, 80 percent of whom are from Mexico, while nearly 9 percent are from Central America, according to U.S. Citizenship and Immigration Services data. The average age of the DACA population is 26 and most DACA recipients live in Southwestern states. California has the highest number with nearly 185,000, followed by Texas with around 107,000.

The Migration Policy Institute, a think tank in Washington, D.C., estimates that about 66,000 young undocumented immigrants have become newly eligible for the program since the government stopped processing new applications in Sept. 2017. Overall, the organization estimates that about 1.3 million people are eligible for the program. Of those who have enrolled, 370,000 are employed as of March 31, mostly in California and Texas.

According to the Center for American Progress, 202,500 Dreamers are considered essential workers as the U.S. confronts COVID-19. DACA recipients are currently working in critical health care professions, as well as food service and education.

"DACA has been a life-changing program for [at one point] more than 800,000 Dreamers, strengthening their futures and that of the country as a whole," said Candy Marshall, president of TheDream.US, the country's largest college scholarship program for immigrant youth. "This has never been clearer than through this pandemic. As a result of DACA and the ability to legally work, Dreamers are working on the front lines to save lives and meet Americans' essential needs."

What the Ruling Means for Employers

Put simply, employers with DACA employees should follow the popular adage to "keep calm and carry on," said Samuel Mudrick, an attorney in the Washington, D.C., office of Squire Patton Boggs.

Macdonald stressed compliance basics and recommended that employers "proactively identify DACA holders on payroll, track the expiration dates of their work authorization documents to ensure I-9 compliance, and remind all DACA holders to file work authorization renewal applications as soon as possible."

He added that employers will need to assess how they can legally identify DACA recipients in their workforce. "Once a DACA employee's work authorization expires, and without a renewal, employers must terminate their employment," he said. "The ruling creates uncertainty for employers struggling with identifying their DACA workers and messaging to those workers in a legally permissible way without falling into a discriminatory behavior challenge."

Mudrick explained that recent court cases have shown that treating DACA recipients differently than other job applicants or employees could result in violations of anti-discrimination provisions of the Civil Rights Act of 1866. He noted that Procter & Gamble recently lost a judgment when a Florida federal judge ruled that barring DACA job applicants from an internship program is a discriminatory violation of the law.

"DACA employees and job applicants should be treated the same as all others," he said. He added that DACA job applicants will likely provide an employment authorization document upon hire, but it's important to remember that applicants are free to use any qualifying I-9 documents. "Employers should never demand a particular document from job applicants and should always take precautions to timely re-verify expiring documents and follow relevant rules related to employment with pending document extensions," he said.

Macdonald said that the negative reaction from USCIS to the Supreme Court decision and the uncertainty of whether new applications or renewals will be accepted by the agency has "put employers on the back foot" when it comes to workforce planning and hiring DACA recipients.

Marshall urged companies to continue to hire and retain Dreamers with work authorizations.

She added that employers with DACA employees should share their successes through social media and encourage other employers within their industries to hire and retain dreamers.

Macdonald said, "some of our clients are paying application fees for their DACA employees to promote retention and loyalty and stepping forward with their DACA-related policies to show their support for these workers."

Marshall recommends that workers renew their DACA status and employment authorization now, even if it expires in the next 12 months, "so that you have as long a runway as possible," if the program is temporarily halted or eventually shut down. Extension petitions may be filed up to 150 days in advance of an applicant's DACA end date.

It's still uncertain whether the administration will accept renewals or new applications for eligibility, but some legal analysts believe the Supreme Court decision clears the way for both, Mudrick said.

What's Next for DACA

The ultimate fate of the DACA program remains unclear. The Trump administration could issue a new order to end it anytime, Mudrick said. "Of course, any new attempt will be constrained by the court's ruling and face significant legal and administrative hurdles."

A long-pending lawsuit led by the state of Texas challenging DACA is now set to restart.

Legislative solutions for Dreamers have long been proposed in Congress. The most recent of these passed the House of Representatives in 2019 but was not taken up by the Senate and did not have the support of the White House.

Additional "factors effectively push any practical end to DACA beyond the November elections, meaning the results of the election in November may determine the future of DACA," Mudrick said. "DACA supporters are rallying political support behind [presumptive Democratic nominee] Joe Biden, who has promised to support Dreamers' efforts to gain a long-term, regularized status."

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