

# HR Heads-up

PERIODIC UPDATES ON IMPORTANT HR LEGAL ISSUES

JULY 1, 2020

## ***DACA Lives On***

On June 18, 2020, the Supreme Court issued a major immigration decision, *Department of Homeland Security v. Regents of the University of California*, regarding the Deferred Action for Childhood Arrivals (“DACA”) program.

DACA is an immigration program started by President Obama’s administration in 2012 that deferred deportation for certain undocumented immigrants who came to the United States as children, granted these individuals work authorization, and gave them access to public benefits. The over 700,000 DACA participants must renew their status every two years. DACA never was and still is not a path to permanent immigration status (i.e. a green card or citizenship), but instead offers temporary relief to undocumented young people who had been present in the United States since childhood. Regardless, the DACA program provides a significant benefit to undocumented individuals who may not otherwise be eligible to apply for a legal immigration status in the United States.

In 2017, the Department of Homeland Security (“DHS”) issued a Memorandum at the direction of the U.S. Attorney General terminating the DACA program. DHS’s action was legally challenged by a variety of individuals and 15 states, and since then has been making its way through the federal courts, up to the Supreme Court. In the meantime, participants in the DACA program were allowed to renew their status, but United States Immigration and Citizenship Services (“USCIS”) did not accept new applications nor were DACA holders able to apply for permission to travel abroad without losing their status.

In a 5-4 decision, the U.S. Supreme Court held that the Trump administration’s attempt to end DACA through the 2017 DHS Memorandum was unlawful. Importantly, this case was not about whether the Trump’s administration could revoke DACA; the President ultimately has the power to continue or terminate the program. Instead, this case was about whether the Trump administration followed the proper administrative procedure for revoking DACA. The Administrative Procedure Act (“APA”) lays out procedures for agencies in the executive branch, like DHS, to make, amend, or rescind regulations. The APA exists to ensure that the executive agencies are accountable to the public.

In this case, the Court ultimately found that the Trump administration violated the APA by failing to follow the correct legal process for ending the DACA program. The APA requires that an agency provide

a “reasoned explanation for its action” and directs courts to set aside any agency action that is “arbitrary” or “capricious.” An action is “arbitrary” or “capricious” when it is not “reasoned decision-making.” The Court held that DHS’s action terminating DACA was “arbitrary and capricious” because the 2017 Memorandum explaining the reasons for that decision was deficient. That Memorandum simply indicated that DHS was ending DACA because it believed that the program was unconstitutional. The 2017 Memorandum “entirely failed to consider” whether the DACA program could continue to offer relief from deportation to undocumented young people while no longer offering public benefit eligibility. It also failed to address whether participants’ “legitimate reliance” on the program outweighed the public policy reasons for terminating it. Essentially, the Supreme Court held that the Trump administration should have given more and better reasons in the 2017 Memorandum for terminating DACA and failing to do so made DHS’s attempt at DACA termination unenforceable and unlawful.

What does this mean for employers?

- Employees with unexpired DACA status and unexpired work permits may continue to work legally in the United States.
- Individuals with unexpired DACA status cannot currently be deported solely because of their immigration status, but rather are allowed to remain in the United States for the time being. DACA recipients still must renew their DACA status every two years.
- Employers may not know if an employee or potential employee has DACA status, and it is generally inappropriate to ask, especially during the hiring process. As a reminder, employees may provide any of the documents listed on the I-9, and it is impermissible for employers to demand certain I-9 documents over others. In addition, employers may not reject documents for an I-9 that are currently valid but may expire in the future.
- Employers should continue to monitor legal developments surrounding DACA, particularly any additional attempts by DHS to terminate the program.

Employers with questions about the impact of DACA on their organizations should consult with a member of the Boardman Clark Labor & Employment team.

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