

## DACA and Your Workplace Rights: Frequently Asked Questions

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By Advancing Justice – ALC, United We Dream, and National Immigration Law Center

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The legality of the Deferred Action for Childhood Arrivals (DACA) program remains in flux as the legal challenge to DACA by a group of states, led by Texas, in the case *Texas v. U.S.*, continues to wind its way through the courts. (For more information on the status of the litigation, please see the [National Immigration Law Center's website](#).) The continued lack of certainty around the future of DACA bears heavily on the ability of DACA recipients to plan for their future, including planning around their future employment and investing in their future careers.

In light of the ongoing uncertainty about the future of DACA, the updated questions and answers below provide background on your workplace rights as a worker with DACA.

▶ **How do I know when my work permit expires?**

**The expiration date on your employment authorization document (EAD), often referred to as a work permit, is listed on the right-hand side of the document.** The expiration date on your work permit is the same date that your DACA expires. If you have lost your work permit, you can find the date of expiration by checking when your DACA expires on your Form I-797 Notice of Action.



- ▶ **Are there any limits on my employer’s ability to reverify my work authorization?**

**If your employer singles you or a certain group of fellow employees out for reverification without having some legitimate reason – such as the expiration of your document – the employer may be engaging in illegal reverification.**

Under immigration law, it is unlawful discrimination for an employer to selectively reverify the employment eligibility of certain employees on the basis of their country of origin, citizenship, or type of immigration status. If employers reverify workers, they must treat those workers the same regardless of their citizenship, immigration status, or national origin. If the employer treats workers differently, such as by reverifying some of them but not others, the employer’s action could be unlawful.

It is also unlawful for an employer to request more or different documents than are required by the I-9 Form to verify employment eligibility, to reject reasonably genuine-looking documents, or to require certain documents over others. If your employer is engaging in this kind of unlawful conduct, you can call the free worker hotline at the [Immigrant and Employee Rights Section](#) (IER) of the Department of Justice at 1-800-255-7688. The IER offers a mediation-type process designed to quickly resolve disputes with employers; if that process fails you may file a formal complaint. Information from IER for DACA recipients can be found [here](#).

- ▶ **Can my employer fire me?**

In general, unless you are covered by a union or other employment contract, employment in the U.S. is considered “at will” and an employer can fire an employee at any time, as long as the employer is not impermissibly discriminating or retaliating against you. **Thus, even if you do have a valid work permit, your employer may still legally choose to fire you.**

- ▶ **Is there anything else I can do to keep my job if my DACA and work authorization expire?**

**Your employer will most likely lay you off when your work authorization expires, since you will no longer have legal authorization to work.** In some situations, you may be able to negotiate with your employer to be placed on a leave of absence until you can show you are authorized to work again (if your DACA and work authorization are renewed, a clean legislative solution is passed, or you gain work authorization some other way). Your employer could then give you your job (or a comparable job) back when you receive your new work permit. If your employer is willing to place you on a leave of absence, request that any reinstatement to your previous position be with the seniority that corresponds to your original hire date. Note, however, that your employer is not obligated to do any of this.

- ▶ **What happens if my work permit expires and my employer fails to request a new work permit?**

**If you continue to work for your employer after your work permit has expired, and your employer does not request further proof of your eligibility to work, you will be working without authorization.** You do not have an affirmative duty to tell your employer that your work permit has expired if your employer fails to request a new work permit. Your employer may, if and when it realizes your work authorization has expired, terminate your employment at any time.

But if your employer fails to check and you simply continue to work for the same employer after your work permit expires, without making any false statements about your status, eligibility for employment, or identity in order to keep working and without providing any false documents, then, in general, there should be no additional immigration or criminal consequences beyond those you may already be subject to on account of your immigration status. But you should consult a qualified immigration attorney to assess any risks specific to your personal situation.

- ▶ **If my work permit expires, what happens to my employer if they fail to request a new work permit and continue to employ me?**

**Your employer may be audited by the Homeland Security Investigations unit (HSI) of the Department of Homeland Security (DHS), which is responsible for enforcing the law prohibiting unlawful employment.** Nationally, ICE targets approximately 5,980 employers for I-9 inspections [each year](#). If your employer is audited and is found to have knowingly continued to employ you after your authorization to work has ended, your employer may be subject to liability under federal immigration law. [Financial penalties](#) for knowingly continuing to employ an unauthorized worker range from \$573 to \$4,586, per violation, for first time offenders. DHS considers numerous factors in determining financial penalty amounts, including the size of the employer and the history of any previous violations.<sup>1</sup>

- ▶ **What should I do if my employer offers to pay me under the table after learning my work authorization has expired?**

**Generally, an individual does not have authorization to work after their work permit expires.** As noted above, however, simply working without authorization generally does not result in additional immigration or criminal consequences beyond those associated with being undocumented. (Falsely claiming to be a citizen, assuming a false identity to secure and keep employment, or presenting false documents to work, on the other hand, may result in additional potential immigration and criminal consequences.)

As for being paid under the table, accepting wages in the form of cash payments is not, by itself, unlawful. Generally, you are not responsible for an employer's failure to report or pay required employer-side payroll taxes.

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<sup>1</sup> See: 2019-06745.pdf (<https://www.govinfo.gov/content/pkg/FR-2019-04-05/pdf/2019-06745.pdf>) at page 13502

You should confer with a tax expert or accountant about the taxes you may owe and/or tax filing that may be required for any cash payments you receive.

▶ **Can I work as an independent contractor?**

**Businesses are not required to check if an independent contractor has work authorization.** Generally, a Form W-9 is used by businesses for independent contractors. The independent contractor is required to provide their correct name and Social Security Number (SSN) on the W-9, although workers who are not eligible for an SSN may instead use an Individual Tax Identification Number (ITIN). If the worker does not have an SSN or ITIN, they can apply for an ITIN and in the interim, fill out “Applied For” in the space on the W-9 for the tax identification number and leave the W-9 certification blank.

**However, regardless of whether you are an employee or independent contractor, individuals are not permitted to work in the United States without work authorization.** Nor may businesses contract for labor with someone who the business knows is unauthorized to work.

▶ **If I lose my job, am I entitled to be paid out my vacation and paid sick leave balances?**

**Generally, yes, but it may depend on applicable state laws, some of which distinguish between accrued paid vacation and paid sick time and require that you be paid out the vacation, but not the sick time.** You will need to check the laws of the state in which you were employed and performed the work to determine precisely which types of accrued paid time off the employer is obligated to pay you upon termination. For more information, see <https://www.workplacefairness.org/> and <https://www.lawhelp.org/>.

▶ **If I lose my job, do I qualify for unemployment benefits?**

**No.** To be eligible for unemployment benefits, a person must be ready, willing, and able to work. If you are not authorized to work, then you cannot meet the requirement of being “able to work.”

▶ **If I lose my job, can I request the funds in my employer-sponsored retirement account?**

**Any vested portions of an employer-sponsored retirement account will remain yours after your employment ends.** If you have “vested” savings in your employer-sponsored retirement account, when you leave your employment you are entitled to take out all of your contributions and your employer’s contributions to your account. If you have not yet vested, at a minimum you are entitled under law to take out your contributions to the account (but may not be entitled to your employer’s contribution). This assumes you have a “defined contribution” retirement plan, which the vast majority of U.S. private sector employees have. Some private sector employers, and many government agencies, maintain “defined benefit” retirement plans, which will be governed by different rules and you should consult your human resources department or union representative for information about withdrawals under such a plan.

It bears mention that most savings plans do not require that you withdraw the funds in your account when you leave employment. If you leave the savings in your employer-sponsored account, the account will continue to accrue interest but no additional contributions will be made by your employer. If you chose to take out the savings in your account as cash, you will lose a significant amount of your savings due to penalties and taxes. In order to avoid these penalties, you can open your own retirement account such as an Individual Retirement Account (“IRA”) and “roll over” the money from your employer-sponsored account to your personal account.

- ▶ **What benefits should I try to negotiate for with my employer upon my termination from employment?**

**There are several steps your employer can take to support you if your work authorization ends.** These include:

- ▶ severance pay
  - ▶ paying out all accrued leave balances (this may be required in certain states, see above)
  - ▶ providing you an opportunity to be reinstated to your prior position if you obtain work authorization in the future
  - ▶ providing a positive reference, and/or
  - ▶ contributing to a legal defense fund in the event you need immigration legal defense in the future
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- ▶ **What can my employer do if she wants to support her workers with DACA?**

**You can encourage your employer to call her representatives in Congress, and/or join a statement of businesses,** to express her support for DACA and call on Congress to pass permanent protections for undocumented workers like a “clean” version of the DREAM Act (with no additional immigration enforcement or border security provisions). Additional resources for employers are available [here](#).

- ▶ **What happens to my Social Security number?**

**Your Social Security number is yours for life even if you no longer have legal authorization to work.** For example, you should use your Social Security number to file income tax returns going forward. However, your Social Security number may not be used for employment purposes if you do not have a valid work permit. If you receive work authorization in the future, you will be able to go back to using your Social Security number for employment purposes.



► **Can my employer call ICE about me?**

**An employer can call ICE to try and report your immigration status. But ICE is not required to respond to the call.** Context can also matter. If the employer made the report because you were engaged in protected activity (like filing a legal claim against the employer, taking protected leave, organizing coworkers to improve working conditions, or some other exercise of your workplace rights), then the report may be unlawful. In limited cases, the employer’s retaliatory reporting may be grounds for a U visa.

ICE has also entered into an [agreement](#) with various federal labor law enforcement agencies in which ICE agrees not to engage in investigations or immigration enforcement actions at worksites where an ongoing labor dispute exists or that are being investigated by a federal labor agency.

**In addition, in January 2023, [announced](#) a streamlined and expedited process for immigrant workers who are victims of, or witnesses to, the violation of their labor rights, to request deferred action.** This is a basis to request deferred action that is different and distinct from DACA. For more information about requesting labor-based deferred action, see the [National Immigration Law Center’s website](#).

**If approached by an immigration officer, you should remember that you do not have to answer questions. You should not run away or give false information.** You can ask if you are free to leave and walk away if you are not under arrest. You can say that you want to first consult with an attorney and then seek legal assistance before answering any questions.



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Please note that the information in this FAQ is not legal advice. It is merely informational. Federal employees may have different obligations. Obligations may also vary according to the terms of any applicable employment contract. To get legal advice specific to your situation, consult a qualified immigration and employment attorney.