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Hundreds of thousands to be affected

Administration announces end to DACA; ABA president urges action on legislation

ABA President Hilarie Bass urged Congress this month to quickly pass legislation to provide “a fair, orderly and safe way ahead” for those participating in the Deferred Action on Childhood Arrivals (DACA) program, which President Trump has announced will end in March 2018.

DACA, established through executive action by President Obama in 2012, allows undocumented youth who were brought to the United States as children to stay temporarily in the country if they meet certain criteria.

The nearly 800,000 individuals who have participated in the program have been allowed to go to school, work, and serve in the military without fear of deportation.

The announced suspension of the program without a ready legislative solution “threatens the future of thousands of deserving people to pursue their dreams, places them in danger of deportation, and threatens the country’s access to a wealth of human potential,” Bass said in a [statement](#) issued Sept. 5.

She noted that an open letter signed by hundreds of top business leaders pointed out that DACA participants, known as Dreamers, would contribute \$460.3 billion to the gross national product and \$28.6 billion in Social Security and Medicare tax contributions over the next 10 years.

In addition, sending Dreamers back to a foreign country they do not remember is inconsistent with American values, she said.

Attorney General Jeff Sessions announced that the decision to end DACA was made because the program was “implemented unilaterally after Congress failed to approve legislation to provide for those who were brought here illegally as children.” He said the administration believes the program would be found unconstitutional.

Congress now has until March to pass legislation to continue the program. Pending legislation includes the DREAM Act, — introduced as S. 1615 by Sen. Lindsey Graham (R-S.C.), Sen. Richard Durbin (D-Ill.) and eight others in the Senate — and H.R. 3440, introduced by Rep. Lucille Roybal-Allard (D-Calif.) and Rep. Ileana Ros-Lehtinen (R-Fla.) and 192 cosponsors in the House. The legislation would allow individuals to earn lawful permanent residence and eventually U.S. citizenship if they:

- are longtime residents who came to the United States as children;
- graduate from high school or obtain a General Education Diploma (GED);
- pursue higher education, work lawfully for at least three years, or serve in the military;

see “DACA,” page 4

LEGISLATIVE BOXSCORE

LEGISLATIVE ISSUE	HOUSE	SENATE	FINAL	ABA POSITION
<p>Criminal Justice. S. 330 and H.R. 969 would establish a federal Defender Office for Supreme Court Advocacy to ensure right to counsel. H.R. 1809 and S. 860 would revise and reauthorize the Juvenile Justice and Delinquency Prevention Act (JJDPA). H.R. 2480, H.R. 2473, S. 1311 and S. 1312 are aimed at combating human trafficking. H.R. 510 and S. 139 would establish a system for the use of Rapid DNA.</p>	<p>H.R. 969 was referred to the Judiciary Cmte. on 2/7/17. House passed H.R. 1809 on 5/23/17. House passed H.R. 2473 on 5/23/17. Judiciary Cmte. approved H.R. 2480 on 6/28/17. House passed H.R. 510 on 5/16/17.</p>	<p>S. 330 was referred to the Judiciary Cmte. on 2/7/17. Senate passed S. 860 and H.R. 510 on 8/1/17. Senate passed S. 1311 and S. 1312 on 9/11/17.</p>	<p>President signed P.L. 115-50 (H.R. 510) on 8/18/17.</p>	<p>Supports JJDPA and Second Chance Act reauthorization. Supports funding for federal and state indigent defense programs. Supports certain civil asset forfeiture reforms. Supports bills to combat human trafficking. Supports prompt collection and testing of DNA evidence. See pages 5 and 8.</p>
<p>Immigration. The president issued executive orders on 1/25/17, and 1/27/17 followed by a revised executive order 3/6/17 on border security, immigration enforcement, and visa and refugee programs. Federal judges temporarily blocked the orders nationwide that suspended entry from majority-Muslim countries, but Supreme Court allowed refugee ban to go forward with certain exceptions. The president announced he is phasing out the Deferred Action on Childhood Arrivals (DACA) program by March 2018.</p>				<p>Supports improvements in the immigration court and adjudication system. Opposes mandatory detention and supports alternatives to detention. Supports access to counsel and due process safeguards. See front page.</p>
<p>Legal Services Corporation (LSC). President's FY 2018 budget issued on 5/23/17 included no funding for LSC, which is currently funded at \$385 million under P.L. 115-31 (H.R. 244).</p>	<p>House approved \$300 million for LSC on 9/14/17.</p>	<p>Senate Approps. Cmte approved \$385 million for LSC on 7/27/17.</p>	<p>President signed P.L. 115-31 (H.R. 244) on 5/5/17.</p>	<p>Supports an independent, well-funded LSC.</p>
<p>Tort Reform. H.R. 1215 would preempt state medical liability laws to impose caps on non-economic damages and place limits on contingency fees. H.R. 985 would limit the ability of victims to file class action lawsuits. H.R. 720 would require mandatory monetary sanctions against lawyers who file non-meritorious lawsuits.</p>	<p>House passed H.R. 1215 on 6/28/17. House passed H.R. 985 on 3/9/17. House passed H.R. 720 on 3/10/17.</p>			<p>Opposes the bills. Opposes preemption of state medical liability laws and the bypassing of the Rules Enabling Act to amend the Federal Rules of Civil Procedure.</p>

New child welfare data collection process will strengthen system

Final rule brings process in line with statutory changes

The ABA recently expressed support for a final rule issued by the Administration for Children and Families (ACF) regarding the Adoption and Foster Care Analysis and Reporting System (AFCARS).

In [comments](#) prepared by the ABA Center on Children and the Law and sent on Aug. 29 to ACF, Governmental Affairs Director Thomas M. Susman laid out three major points regarding the rule.

First, he highlighted that the ABA generally supports the changes made by the AFCARS final rule, highlighting their importance to ensuring that child welfare agencies are gathering data on all critical child and family-related outcomes to ensure safety, permanency and well-being of children.

“The Final Rule brings child welfare data collection in line with several decades of statutory changes and requirements enacted since 1993,” he explained. “These changes were long overdue and will now provide accurate and consistent data across states on key outcome areas.”

Second, Susman emphasized that the collection of information proposed in the rule is necessary for the proper operation of ACF and the improvement of programs within the agency. Susman also noted that three areas – education, the Indian Child Welfare Act (ICWA), and LGBTQ – are critical to future child welfare data collection.

The maintenance of data collection, he said, ensures not only compliance with the Fostering Connections to Success and Increasing Adoptions Act and the Every Student Succeeds Act, but also is crucial for meeting the educational needs of children in foster care.

He added that data collection will be required for cases that come under the ICWA to ensure that the

law is being followed, and a new standardized method of collecting information about a child’s self-reported sexual orientation will help understand these youth, who are over-represented in the child welfare population.

Finally, the letter suggested ways to minimize the burden that information collection has on respondents, emphasizing the importance of child welfare and education agencies working together to share data across systems. ■

ABA supports steps to address impact of OTH discharges on veterans with invisible trauma

Outgoing ABA President Linda A. Klein advocated Aug. 15 for the improvement of outcomes for veterans who receive other than honorable (OTH) discharges in cases where invisible trauma may have played a role.

In a [letter](#) to Attorney General Jeff Sessions, Klein explained that having an OTH discharge can lead to a servicemember not receiving care for the same trauma that led to the circumstances for which they were discharged. Traumas correlated to specific types of misconduct resulting in OTH discharges include post-traumatic stress (PTS), traumatic brain injury (TBI) and military sexual trauma (MST).

During the Annual Meeting in August, the ABA House of Delegates passed a policy that, among other things, supports improving and reforming the processes by which discharge petitions are reviewed. Klein said the ABA believes there may be a role for the Trump administration to play in the limited exercise of clemency in such cases to prevent an unjust result.

The policy also urges Congress to allocate new and adequate funding to support Department of Defense (DoD) special panels for correction of military records in OTH cases and provision of counsel for petitioners, and to identify new sources of funding to be administered by the Department of Veterans Affairs (VA) and the Legal Services Corporation to support civil legal services and pro bono organizations for delivering free legal assistance to petitioners.

In her letter, Klein applauded recent initiatives by DoD and the VA to address OTH discharges and mental health, including a VA initiative recently announced by VA Secretary David Shulkin that would make mental health services available to those in crisis even if they received OTH discharges.

During her one-year term as ABA president, Klein elevated Veteran Legal Support to a priority and pledged that the legal needs of veterans will continue to be a top issue for the association going forward.

ABA supports legislation exempting lawyers' litigation activities under FDCPA and CFPB Oversight

The ABA is supporting legislation that would restore traditional state court regulation and oversight of creditor lawyers who file legal actions to collect debts owed to their clients.

H.R. 1849, known as the "Practice of Law Technical Clarification Act of 2017," would exempt creditor lawyers engaged in litigation activities from the Fair Debt Collection Practices Act (FDCPA) and from Consumer Financial Protection Bureau (CFPB) regulatory jurisdiction under the Dodd-Frank Act.

In particular, the bill would amend the FDCPA to exclude licensed attorneys and law firms engaged in litigation activities from the definition of "debt collector" and would also expand the existing "practice of law exemption" in Section 1027(e) of the Dodd-Frank Act to include the litigation activities of creditor lawyers.

The FDCPA, when first enacted in 1977, contained a broad exemption for "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client" because attorneys are already subject to standards of professional conduct and are regulated by the highest court of the state in which they are licensed. Even though Congress voted in 1986 to eliminate the lawyer exemption to allow regulation of creditor lawyers' non-litigation activities, the courts have subsequently ruled that the FDCPA also applies to creditor lawyers even if they are engaged in litigation. In addition, the Dodd-Frank Act, enacted in 2010, granted the CFPB broad authority to regulate both lawyer and non-lawyer debt collectors and to enforce the FDCPA.

The House Financial Services Subcommittee on Financial Institutions and Consumer Credit exam-

ined H.R. 1849 along with several other financial reform bills during a Sept. 7 hearing.

An ABA [position paper](#) entered into the hearing record by subcommittee Chairman Blaine Luetkemeyer (R-Mo.) explains that the association supports H.R. 1849 because:

- state courts, not the CFPB or other agencies, are in the best position to regulate lawyers and the legal profession;

- the legislation is consistent with Congress's original intent not to regulate creditor lawyers engaged in the practice of law, including those lawyers' litigation activities;

- the bill is narrowly tailored and would only exempt creditor lawyers' litigation activities, and it would not create a broad exemption for those lawyers' other debt collection actions; and

- the Federal Trade Commission (FTC) has repeatedly recommended that the FDCPA be clarified to exempt creditor lawyers engaged in litigation and that Congress should reexamine and amend the definition of "debt collector" to exclude such lawyers from the statute;

During the Sept. 7 hearing, Anne P. Fortney, a partner emerita with the Hudson Cook law firm who is a former associate director of the FTC's Bureau of Consumer Protection, agreed with the ABA position.

She [testified](#) that "H.R. 1849 would relieve collection attorneys who are engaged in litigation of unnecessarily burdensome compliance obligations and supervisory interference that inhibit their ability to zealously advocate for their clients." Fortney also concluded that the bill is a "narrowly-tailored, practical solution" that would "retain regulation and oversight of debt collection attorneys engaged in non-litigation activities." ■

DACA

continued from front page

- pass security and law enforcement background checks and pay a reasonable application fee;
- demonstrate proficiency in the English language and a knowledge of United States history; and
- have not committed a felony or other serious crimes and do not pose a threat to our country.

The ABA, which has long supported the DREAM Act and is urging Congress to preserve DACA, applauded DACA when it was created in 2012 and believes that immigration reform should include a path to lawful permanent residency or U.S. citizenship for undocumented persons who have significant ties to the United States while displaying good moral character and passing security screenings.

Meanwhile, 15 states and the District of Columbia filed a lawsuit Sept. 6 to protect DACA recipients. The lawsuit claims that the administration's end to the program violates equal protection and due process under the Fifth Amendment.

DACA recipients fear that information they provided to the government to participate in the program, meant to remain confidential, could now be used to deport them and members of their families.

Oral arguments scheduled for Oct. 6 in ABA PSLF lawsuit

The U.S. District Court for the District of Columbia is scheduled to hear arguments Oct. 6 on the lawsuit filed last year by the ABA and four individual plaintiffs maintaining that the Department of Education (ED) abruptly rescinded eligibility for the Public Service Loan Forgiveness Program (PSLF) without providing an explanation.

The lawsuit was filed after the department began enforcing in 2015 an eligibility criterion for qualifying employment for PSLF purposes that does not appear in the statute or regulations. As a result, the ABA no longer met the requirements as a public service employer under the program.

PSLF was established in 2007 to forgive federal student loans for individuals who work in a wide range of public service jobs, including jobs in government and non-profit charitable organizations. The program provides forgiveness of remaining debt after 10 years of eligible employment and 120 qualifying loan payments, and the first group of public service workers are eligible for forgiveness this year. Those eligible for PSLF include prosecutors, public defenders and legal aid lawyers.

The department reiterated in its most recent filing in the case Sept. 8 that even though borrowers had received Employment Certification Form (ECF) notices over the past few years assuring them that they were on track to receive loan forgiveness under the program, the decisions issued by FedLoan Servicing, the government contractor, do not reflect a final agency action on the borrower's qualification for PSLF.

The contractor has issued formal determinations of eligibility under the department's established process to those seeking such determinations since 2012.

"The department's position that its ECF decisions are merely provisional and tentative – and are not reviewable until the ultimate loan forgiveness decision is made (after at least 10 years) – defies common sense, logic and the law," the ABA stated in a brief filed in August.

The department just recently released the form necessary for student borrowers to apply for forgiveness under the program, saying for the first time that PSLF applies only to jobs with organization with

a "primary purpose" of public service or public education. Also released was the employment certification form citing the same requirement. No test for determining an organization's primary purpose is provided, however.

In its brief, the ABA maintained that the department's interpretations are inconsistent with the PSLF statute and regulations and that the department failed to follow adequate process and procedure in changing its interpretations. ■

ABA president urges reauthorization of JJDPA

ABA President Hilarie Bass urged Congress to quickly enact juvenile justice legislation now that both the House and Senate have approved bipartisan bills to reauthorize the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA).

"The ABA strongly supports the JJDPA, which has provided states and localities with federal standards and support for improving juvenile justice and delinquency prevention practices and contributed to safeguards for youth, families and communities for more than 40 years," Bass wrote to the [House Education and the Workforce Committee](#) and the [Senate Judiciary Committee](#) Sept. 5.

The Senate passed its version of juvenile justice legislation, S. 860, on Aug. 1, and the House bill, H.R. 1809, received House approval May 23. Both bills were passed by voice vote. Bass wrote that when the House and Senate conferees meet to resolve differences between the two bills, the ABA urges them to work efficiently "to finally reauthorize the JJDPA and reaffirm a national commitment to the rehabilitative purpose of the juvenile justice system."

It has been 13 years since the JJDPA was reauthorized, and new research has changed the methods for dealing with juveniles in the criminal justice system. Bass emphasized that the reauthorization of the act is critical to protecting juveniles and ensuring that federal funding focuses on programs that have been shown to "improve outcomes for these young people."

The ABA, she said, specifically supports provisions in both bills that would extend protections that limit youth contact with adult offenders and phase out use of the valid court order exception that currently causes youth to be jailed or securely confined for "status" offenses, such as truancy or running away from home, that would not be crimes if committed by adults.

Such treatment of status offenders results in juveniles being exposed to potentially dangerous influences while in a confined setting when access to other youth services outside a detention facility would be more appropriate, she warned.

Senate passes bankruptcy judgeship legislation

The Senate passed legislation Sept. 5 to extend 14 temporary bankruptcy judgeships for five years and create four new bankruptcy judgeships.

The bill, S. 1107, differs from legislation passed by the House in May. The House bill, H.R. 2266, sponsored by House Judiciary Committee Ranking Member John Conyers Jr (D-Mich.) and committee Chairman Bob Goodlatte (R-Va.), closely followed the recommendations of the Judicial Conference of the United States, which conducted a rigorous needs assessment of the bankruptcy courts.

The Judicial Conference recommended making the 14 temporary judgeships permanent and authorizing four new judgeships. Although bankruptcy filings have been declining nationwide recently, there have been sustained increases in filings in the courts included in the Judicial Conference recommendations.

The ABA supports the use of authorizing legislation to address the issues facing the bankruptcy courts. In a [May 9 letter](#) to the House Judiciary Committee, ABA Governmental Affairs Director Thomas M. Susman explained that Congress has not created a new bankruptcy judgeship since 1992 and has instead been handling the situation through a piece-meal approach with temporary judgeships. Most recently, the current 14 tempo-

rary judgeships were extended for one year as part of fiscal year 2017 appropriations legislation enacted in May.

Susman said that instead of relying on appropriators to temporarily avert the next crisis, the House bill “will restore stability and functionality to the system by addressing the demonstrated need for permanent bankruptcy judgeships in a comprehensive and lasting manner.”

Sen. Chris Coons (D-Del.), who sponsored S. 1107, noted that his bill would give the bankruptcy courts the judges they need to manage pressing caseloads.

“A well-functioning bankruptcy court system is critical for ensuring that individuals and corporations can go through bankruptcy efficiently. When a corporation is restructuring, delays can mean lost jobs and lost revenue,” he said. ■



Sen. Chris Coons

Judicial Vacancies/Confirmations—115th Congress* (as of 9/18/17)

<u>Court</u>	<u>Vacancies</u>	<u>Pending Nominations</u>	<u>Confirmations</u>
US Supreme Court (9 judgeships)	0	0	1
US Courts of Appeals (179 judgeships)	21	11	3
US District Courts (678 judgeships)	115	34	2
Court of International Trade (9 judgeships)	2	0	0
Totals	138	45	6

*Includes territorial judgeships

WASHINGTON NEWS BRIEFS

VETERANS APPEALS: President Trump signed legislation in Aug. 23 to improve notice, clarify options, and increase the potential for expediency for veterans seeking review of disability decisions by the Department of Veterans Affairs (VA). The Veterans Appeals Improvement and Modernization Act [P.L. 115-55 (H.R. 2288)], which was sponsored by Reps. Mike Bost (R-Ill.) and Elizabeth Esty (D-Conn.), creates new procedures for veterans who are dissatisfied with VA decisions regarding their claims for disability benefits. Under the current process, the number of undecided appeals recently has increased significantly, totaling 470,000 pending appeals earlier this year and an average wait of five years for determinations. The new law gives the VA secretary time to test a revised system created by the new law and requires the secretary to develop a comprehensive plan for implementation. The new provisions, if implemented after the test period, would allow claimants to request an immediate higher-level review by a regional office or take advantage of a new streamlined docket, “Fully Developed Appeals,” with the Board of Veterans Appeals. VA decisions also will include more information useful to veterans in understanding the reasons for the decisions and what options are available. The ABA, which supports efforts to address the backlog of veterans appeals, has worked in close coordination with the VA through the ABA Veterans Claims Assistance Network to provide free legal help to unrepresented veterans who have pending claims with the VA.

PAY EQUITY: A rule aimed at ending wage discrimination has been blocked by the Trump administration. The rule, issued by the Obama administration in 2016, sought to require federal contractors and private companies with more than 100 employees to report pay data by race, gender and identity to the Equal Employment Opportunity Commission (EEOC). Under the proposal, employers who are already required to file annual EEO-1 report would have been

required to submit summary pay data along with the currently required data on the number of individuals employed by race, ethnicity and sex across 10 job categories and 12 pay bands. Reporting of individual salaries of employees would not have been required. In an Aug. 29 letter to the EEOC, the Office of Management and Budget indicated concerns that some aspects of the information collection “lack practical utility, are unnecessarily burdensome, and do not adequately address privacy and confidentiality issues.” The ABA supported the enhanced data collection requirements when they were announced last year. In comments submitted to the EEOC in March 2016, ABA Governmental Affairs Director Thomas M. Susman wrote, “The ABA has long supported, as an indispensable step to eradicating discrimination in the workplace and the justice system, the systematic collection of data to measure the scope of the problem, inform public debate, and develop fact-based remedies.” He explained that wage discrimination remains a present-day widespread and pernicious problem in the workplace and that numerous authoritative studies have concluded that such discrimination is a significant factor in perpetuating the gender wage gap and contributes to wage disparities across various groups.



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ABA backs bills to limit use of money bail for pretrial release

Association passed new policy in August

The ABA expressed its support Aug. 25 for two bills seeking to discourage the use of payment of money bail as a condition of pretrial release in criminal cases.

In letters sent to the judiciary committees in the [House](#) and [Senate](#), ABA Governmental Affairs Director Thomas M. Susman explained that over 450,000 Americans remain in jail while awaiting their trials simply because they cannot afford bail. This, he said, costs state and local governments billions of dollars each year that could be spent on other benefits for residents.

“Financial conditions should be imposed only when no other less restrictive conditions of release will reasonably ensure the defendant’s appearance in court,” Susman wrote, emphasizing that the ABA, which has long supported actions to limit the use of cash bail, reinforced that position at the Annual Meeting in August. The ABA House of Delegates adopted policy favoring the release of defendants on their own recognizance or on unsecure bond and urging that judicial officers be prohibited from imposing conditions of release that would lead to detention of a defendant based simply on inability to pay bail. Susman highlighted that detaining defendants for not paying “interferes with their ability to defend themselves and, in many instances, deprives their families of support.”



Sen. Kamala Harris

The new policy also opposes using “bail schedules” that consider only the nature of the charged offense. Instead, the ABA supports procedures that require courts to make bail and release determinations based on individualized, evidence-based assessments using objective verifiable release criteria that do not have a discriminatory or disparate impact based on race, ethnicity, religion, socio-economic status, disability, sexual orientation, or gender identification.

S. 1593, introduced by Sens. Rand Paul (R-Ky.) and Kamala Harris (D-Calif.), would authorize a \$10 million Justice Department program for three years to provide grants directly to the states to fund bail reform programs tailored to individual state’s specific needs. The states would be required to ensure that their reforms are not discriminatory, to report on their progress, and to institute systems for better data collection.

The House bill, H.R. 1437 – introduced by Rep. Ted Lieu (D-Calif.) and more than 20 cosponsors – would prohibit the Byrne Justice Assistance Grant Program from awarding grants to states that use payment of money as a condition of pretrial release. In addition, the bill, known as the “No Money Bail Act of 2017,” would prohibit the use of bail money for pretrial release in federal criminal cases. ■



Rep. Ted Lieu

The monthly *Washington Letter* reports news of national public interest to the legal profession, including congressional, executive branch and ABA activities concerning the association’s legislative priorities. The newsletter is published by the Governmental Affairs Office as a service to ABA members and national, state and local bar associations. Full text is available on the Internet at http://www.americanbar.org/advocacy/governmental_legislative_work/publications.html. ©2017

American Bar Association. All rights reserved. Please address correspondence to:

American Bar Association, Suite 400, 1050 Connecticut Avenue NW, Washington, DC 20036.
(202) 662-1017

Rhonda J. McMillion, editor; Rhonda.McMillion@americanbar.org
Deanna Falcone, legislative associate; Deanna.Falcone@americanbar.org