

Immigration Panel Compliance in the Trump Administration Era

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Overview

- Immigration compliance in the Trump Administration Era – an Update on I-9 Employment Eligibility Verification
- Corporate Immigration Audits, Compliance and Recordkeeping for H-1B, L-1 and PERM cases
- End of Deferred Action for Childhood Arrivals (DACA) – effect on I-9 records and workforce.

President Trump and Immigration Enforcement

- Increased enforcement and compliance
- Immigration arrests surged 40% this year
- ICE Chief says companies that hire illegal immigrants are the next target:
 - Increased targeting of companies that hire illegal immigrants
 - » “We’ve got to get rid of these magnets for immigration”
 - Fourfold increase in workplace enforcement operations
 - » E.g. recent paperwork audit at Chicago bakery that supplied buns for McDonald’s – resulted in firing of 800 workers

LA Times, December 6, 2017



ICE Worksite Enforcement Efforts

- Created a “comprehensive worksite strategy”
- Three-pronged approach:
 - Inspections / Fines / Debarments
 - Arrests of Employers & Employees (Criminal and Admin)
 - Outreach and Education through IMAGE
- Predicators of ICE actions:
 - Previous criminal or administrative actions by ICE / DOL
 - Existence of complaints against employers
 - Being part of a “high-risk” industry or sector of the economy



ICE “Operations” Path Ahead

- “Each worksite enforcement investigation is unique”
- Including the following factors:
 - Knowingly hiring unauthorized workers
 - Evidence of trafficking, harboring, fraud, money laundering, mistreatment of employees
 - Threats of deportation, coercion, substandard wages, unsafe working conditions



Potential Mitigating Factors for Employers

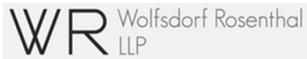
- “Level of cooperation” with ICE & HSI Agents
- Employers who seek assistance through ICE, including participation in IMAGE
- Participation in DHS E-Verify program
- Existence of a robust internal immigration compliance program



I- 9 Penalties

EMPLOYERS WHO VIOLATE THE LAW MAY BE SUBJECT TO:

- Civil fines
- Criminal penalties (when there is a pattern or practice of violations)
- Debarment from government contracts
- A court order requiring the payment of back pay to the individual discriminated against
- A court order requiring the employer to hire the individual discriminated against



Civil Penalties

Civil Violations	First Offense		Second Offense		Third or Subsequent Offense	
	MINIMUM	MAXIMUM	MINIMUM	MAXIMUM	MINIMUM	MAXIMUM
Knowingly hired or knowingly continued to employ an unauthorized alien in the United States	\$539 for each unauthorized alien	\$4,313 for each unauthorized alien	\$4,313 for each unauthorized alien	\$10,781 for each unauthorized alien	\$6,469 for each unauthorized alien	\$21,563 for each unauthorized alien
Failing to comply with Form I-9 employment verification requirements	\$216 for each form	\$2,156 for each form	\$216 for each form	\$2,156 for each form	\$216 for each form	\$2,156 for each form
Committing or participating in document fraud	\$445 for each document	\$3,563 for each document	\$3,563 for each document	\$8,908 for each document	\$3,563 for each document	\$8,908 for each document



Civil Penalties (Cont.)

Civil Violations	First Offense		Second Offense		Third or Subsequent Offense	
	MINIMUM	MAXIMUM	MINIMUM	MAXIMUM	MINIMUM	MAXIMUM
Committing document abuse	\$178 per violation	\$1,782 per violation	\$178 per violation	\$1,782 per violation	\$178 per violation	\$1,782 per violation
Unlawful discrimination against an employment-authorized individual in hiring, firing, or recruitment or referral for a fee	\$445 per violation	\$3,563 per violation	\$3,563 per violation	\$8,908 per violation	\$5,345 per violation	\$17,816 per violation
Failing to notify DHS of a Final Nonconfirmation (FNC) of an employee(s) employment eligibility	\$751 per violation	\$1,502 per violation	\$751 per violation	\$1,502 per violation	\$751 per violation	\$1,502 per violation

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Criminal Penalties

Criminal Violations	First Offense	Second Offense	Third Offense
Engaging in a pattern or practice of hiring, recruiting or referring for a fee unauthorized aliens	Up to \$3,000 for each unauthorized alien		
	Up to 6 months in prison for the entire pattern or practice		

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Updates to Form I-9

- I-9 revision with date **(07/17/2017) on bottom left** corner of all pages is now current.
- Employers must use the new form.

Updates to Form I-9

- Four-page form
- Employee must now certify whether he/she used preparer and/or translator
- Addendum available if more than one translator was used
- Section 2 has a space for additional information if necessary
- “Smart” form which provides basic field validation, helper text and hover text, error messages, and drop down menus available in addition to the version that is unfillable to decrease common mistakes
 - Must still be printed, hand signed, and retained
 - Does not catch every type of error therefore it is not a safe harbor against ICE fines and penalties

Who Completes I-9?

- Citizens, nationals and non-citizens. U.S. citizens include persons born in Puerto Rico, Guam, the U.S. Virgin Islands and the Northern Mariana Islands.
 - Nationals of the United States include persons born in American Samoa, including Swains Island.
- Exempt groups
 - “grandfathered” employees hired before November 7, 1986
 - Casual domestic workers
 - Independent contractors
 - Providing labor where employed by a contractor providing contract services (e.g. employee leasing or temp agencies)
 - Not physically working on U.S. soil



Common Issues in I-9 Compliance (continued)

- **Original versus photocopies of documents**
 - Must personally examine the original document
 - Even for remote hires – webcam = not permissible
 - Can designate authorized representative to fill out I-9 (no need for specific agreements but you are still liable for violations)
 - Notary public can act as authorized representative (no need to provide notary seal on I-9)

Photocopies not acceptable

- Exception: certified copy of birth certificate



Common Issues in I-9 Compliance (continued)

- **How does an employer know if a document is real?**
 - reasonable test – acceptable if it reasonably appears on its face to be genuine and relates to the individual presenting it
 - Signs of fraud – e.g. if SS number has more than 9 digits or SS number that begins with 000, 800 or 900 (unused)



Should Employer Copy Supporting Documents?

- Past practice – if you copy – reveals mistakes in process
- Current practice - keep copies
 - Critical to efficient review and correction of I-9s during internal audit
 - Useful defense in government audit or investigation against a claim that documents never presented
 - Evidence to show good faith – copy shows that document on its face, reasonably appeared genuine



To Copy or Not to Copy?

- **E-Verify Employers must photocopy if document used as part of the Photo Screening Tool**
 - U.S. passport or passport card
 - Permanent resident card (I-551)
 - Employment Authorization Document (I-766)
- **Don't copy more documents than required**
- **Be consistent across the board (avoid discrim)**



Common Issues in I-9 Compliance

- **Document Abuse – DO NOT**
 - request documents before hire or during interview
 - specify which documents to accept – provide List and let employee choose which documents to present
 - require more documents than required on the List
 - refuse to honor acceptable documents
 - ask to see document listed from Section 1 attestation



Over Documentation = Discrimination

The Immigration and Employee Rights Section (IER) enforces the anti-discrimination provision (§ 274B) of the Immigration and Nationality Act (INA). Federal law prohibits:

- 1) citizenship status discrimination in hiring, firing, or recruitment or referral for a fee,
- 2) national origin discrimination in hiring, firing, or recruitment or referral for a fee,
- 3) document abuse (unfair documentary practices during the employment eligibility verification, Form I-9, process), and
- 4) retaliation or intimidation.



Over Documentation – What to do?

1. Identify the number of over-documented I-9 forms
2. Evaluate those to determine if pattern of non-compliant practice
3. Remediate non-compliance I-9 forms
4. Create organization-wide non-discrimination policy
5. Provide refresher training for all hiring professionals on I-9 processes

[Letter from legacy OSC (now IER) – July 30, 2014 – employer should correct practice upon learning, employee who feels victim of discriminatory Form I-9 practices, has up to 180 days from date of practice to file a timely charge with OSC office]



Common Issues in I-9 Compliance (continued)

- **What if employee is unable to provide the required documents within 3 business days?**
 - Can accept receipt in some circumstances
- **What is “Receipt rule?”**
 - 3 situations qualify

Receipt Rule

The “receipt rule” is designed to cover situations in which an employee is employment authorized at the time of initial hire or reverification, but he or she is not in possession of a document listed on page 6 of the Form I-9.

- A replacement document when the document has been **lost, stolen, or damaged**.
 - The receipt is valid for 90 days, after which the individual must present the replacement document to complete the Form I-9.
 - Receipts showing that a person has applied for an initial grant of employment authorization is NOT ACCEPTABLE.
- Since **January 17, 2017**, a receipt showing that a person has applied or a renewal of employment authorization in the same category plus a copy of the expired employment authorization document is acceptable as their employment authorization will be automatically renewed for up to 180 days from the date of their prior employment authorization expiry.

Receipt Rule

List A Identity and Employment Authorization	OR	List B Identity	AND	List C Employment Authorization
Document Title: Receipt (Passport)		Document Title:		Document Title:
Issuing Authority: Dept. of State		Issuing Authority:		Issuing Authority:
Document Number: 123456789		Document Number:		Document Number:
Expiration Date (if any)(mm/dd/yyyy): N/A		Expiration Date (if any)(mm/dd/yyyy):		Expiration Date (if any)(mm/dd/yyyy):

- When you receive actual document, line out “receipt,” and old document number
- insert number from document presented, expiration date, date and initial

Receipt Rule

- Form I-94; temporary I-551 stamp and a photograph of the individual - considered a receipt for the Form I-551, Permanent Resident Card.
 - If I-551 stamp has no expiration date - must present I-551 within one year from the date of issuance
- Form I-94 containing an unexpired refugee admission stamp
 - must present acceptable documentation to complete the Form I-9 within 90 days of hire date or expiration date of employment authorization

Common Issues in I-9 Compliance (continued)

- **Other situations where receipt is one of acceptable documents**
 - AC-21 H-1B portability
 - H-1B Cap-gap for F-1 students on OPT
 - Nonimmigrant visa extensions – e.g. E-1, E-2, H-1B, L-1, O-1, P-1, etc.
 - Timely filing of extension with USCIS automatically grants 240 days of continued employment authorization



Reverification: Common Mistakes

- Do not reverify:
 - U.S. citizens
 - Permanent Residents (green card holders)



Reverification: Common Mistakes

- Do not reverify:
 - Continuing Employees
 - Approved paid or unpaid leave of absence – study, illness, disability, illness, pregnancy, maternity or paternity leave, vacation, union business or other temporary leave approved by employer
 - Promotions, demotions or pay raises
 - Temporary lay-off for lack of work
 - Strikes or labor disputes
 - Transfers to different office
 - Seasonal employment



Organization of I-9s

- Never keep I-9s with personnel files
- Organize in 3 categories
 - I-9s for current employees
 - I-9s for employees with expiration dates that require reverification
 - I-9s for terminated employees that may require purging/destruction at the appropriate time



Retention Rules

- **After termination, must retain until**
 - three years after the date of hire, **OR**
 - one year after the date of termination **WHICHEVER IS LATER**

Example #1

Hired: 3/1/2000

Left: 5/1/2001

3 yrs after hire = 3/1/2003

1 yr after term = 5/1/2002

Retain until: 3/1/2003

Example #2

Hired: 3/1/2000

Left: 8/5/2003

3/1/2003

8/5/2004

Retain until: 8/5/2004

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Common Issues in I-9 Compliance (continued)

- **Correcting mistakes and omissions on I-9s**
 - Never too late to complete I-9s
 - How to correct mistakes and omissions
 - Never delete, white-out, black-out
 - Never backdate

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E-Verify Program

- Program Summary
 - Automated link to federal databases – DHS/SSA
 - Staff members using E-Verify must complete tutorial online
 - Electronic query submitted once I-9 is completed
 - No prescreening
 - Only for new hires, not existing workforce
 - Automated response regarding employment eligibility
 - Follow-up required for “tentative non-confirmations”



Tips (for employee) to avoid Tentative Non Confirmations (TNCs)

- Make sure to use full legal name (if two last/first names – list both; if hyphenate – include the dash)
- If name changed – make sure updated with SSA
- Spelling/DOB error on document – get fixed
- Use Self Check to verify records accurate first?
- Include maiden name



AB 450 – Worker Protection Act Effective January 1, 2018

- Employers may not voluntarily consent to an immigration enforcement agent entering any non-public areas at a place of labor without a “**judicial** warrant”

AB 450 – Worker Protection Act Effective January 1, 2018

- Employer may not grant voluntary consent to an immigration enforcement agent to access, review, or obtain employee records without a “subpoena or judicial warrant”
 - Subpoena can be issued by a court OR administrative agency officials
- Exception - if “immigration enforcement agent” – issues a Notice of Inspection (NOI) of I-9s/other records needing to be maintained under federal immigration regulations

AB 450 – Worker Protection Act Effective January 1, 2018

- Employer must give notice to employees of any immigration review of employment records, e.g. I-9s, within 72 hours = exodus/increased disruption?
- Notice must:
 - » Be posted in language employer normally uses to communicate employment related information to employee
 - » Include name of immigration agency conducting inspection
 - » Include the date employer received notice
 - » Nature of the inspection (to the extent known)
 - » Include a copy of the NOI

AB 450 – Worker Protection Act Effective January 1, 2018

- Upon reasonable request – provide an “affected employee” and any collective bargaining representative a copy of the NOI
- Delivery by hand at workplace, if possible, or by mail/email
- “Affected employee” is one that:
 - » Is identified by the immigration agency inspection to be ‘an employee who may lack work authorization, or an employee whose work authorization documents have been identified by the immigration agency inspection to have deficiencies.’

AB 450 – Worker Protection Act Effective January 1, 2018

- **Except as otherwise required by federal law**, cannot reverify the employment eligibility of a current employee at a time or in a manner not required by federal law
 - Violations = civil penalties up to \$10,000
- No more good faith/voluntary internal audits??
- Constructive knowledge? (State v Federal)

AB 450 – Worker Protection Act Effective January 1, 2018

- Failure to provide notices:
 - First violation - \$2,000 - \$5,000
 - Subsequent violations - up to \$10,000
 - Recovered by the California Labor Commissioner
- Labor Commissioner or state's AG can initiate civil actions to enforce its provisions? CA state courts decide whether actions are required by federal immigration law??

USCIS Fraud Detection and National Security Directorate (FDNS) Workplace Site-Visits

- April 3, 2017 – More targeted approach
 - (i) USCIS cannot validate employer's basic information
 - (ii) H-1B dependent employers (with high ratio of H-1B:U.S. workers; companies with under 25 employees, more than 7 H-1B; companies with 26-50, more than 12 H-1B; companies with 50+ employees, 15%+ H-1B employees
 - (iii) Employers petitioning H-1B workers who work off-site
 - (iv) Email address for the public to submit tips, alleged violations, etc.
- Site visits randomly on H-1B and L-1 petitions (after adjudication) and R-1 petitions (before adjudication) – triggers?



USCIS Fraud Detection and National Security Directorate (FDNS) Workplace Site-Visits

- FDNS officers make unannounced visits to collect information as part of a compliance review to verify the truthfulness of petitions and continuing eligibility
- Process includes researching information in government systems, reviewing public records and evidence accompanying the petition, and interviewing the petitioner and beneficiary
- **Participating in a site visit is voluntary, but failure to cooperate may have negative effects on the compliance review – right to counsel?**



FDNS Workplace Site-Visits

- At any point, if the petitioner/beneficiary is unwilling to participate, inspector will terminate the visit, and complete the report using the data available
- The compliance review will usually include a follow-up with the petitioner and beneficiary by phone, fax or email – advise do not respond without consulting counsel!
- Inspectors record their observations on a Compliance Review Report, which are submitted to USCIS for appropriate action, including revocation and further investigations
- Site inspectors are not adjudicators and do not make decisions on applications



Strategies for Site-Visits

Be prepared and have a strategy!!

- Designate in advance which employer representative will handle site visit (and backup)
- Inform other staff members they are not authorized and should refer any investigators to responsible person
- Employer representative should be familiar with the contents of petitions or have easy access to them (if number of petitions are voluminous)
- Ensure supervisors of H-1B/L-1 employees know they must update the primary contact person in the event of ANY changes to terms and conditions of employment. Be proactive!
- Go offsite – Starbucks?



Strategies for Site-Visits

Be prepared and have a strategy!!

- Provide the beneficiary with a copy of the petition and have them review typical questions
- Check officer's credentials and document them (FDNS "intake")
 - Business Card
 - Date
 - Location
 - Agent's name
 - Badge Number
 - Agency
 - Contact Information – telephone/Email
 - Reason for Visit
 - Beneficiary name

Strategies for Site-Visits

Be prepared and have a strategy!!

- Always accompany the officer while onsite, if wants to take a tour or photograph or interview beneficiary (preferably primary contact)
- Take detailed notes of visit, specifically any questions answered and any documentation submitted
- Outsourced petitions?

Questions

Advise not to answer questions unless sure of the answers. Rather, inform the officer that they would need to check on the information first. DO NOT GUESS.

Standard list of questions:

- About the petitioner: type of business, revenues, number of employees, locations
- About the petition: position title/duties, salary, work location, job requirements, hours per week, payment of petition's fees
 - If L-1, will ask about the management functions or specialized knowledge
- About the beneficiary: confirmation of continued employment, qualifications, hire date



Changes During Employment

- Minor changes, no new petition (salary increase, some promotions, etc.)
- Change in employee location (not already included in LCA, MSA?)
- Material changes, new petition required (hours, wages, job duties, non-productive employment, corporate restructuring)
- Termination



End of DACA? I-9 problems?

- September 5, 2017 – rescinded as of March 5, 2018
 - No initial applications
 - Jan 13, 2018 – renewals ok again!
- Valid EAD = still authorized to work legally (LIST A) – may not request anything else
 - EAD code – c33
 - Employee under no duty to affirmatively tell employer that work authorization will be expiring
- Once DACA EAD expires – must re-verify and potentially terminate



Questions?

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