



Employer Compliance in the Current Immigration Climate

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September 24, 2019



Elimination of Work Visa Programs

- H-4 EADs for spouses of H-1B visa holders
 - Publication of new rule forthcoming – pending at OMB
- DACA (Deferred Action for Childhood Arrivals)
 - DACA EADs still valid while case in litigation
- Temporary Protected Status (TPS) ended for nationals of El Salvador, Haiti, Nicaragua and Sudan
 - Temporary stay due to pending litigation
- Travel ban upheld by U.S. Supreme Court



Tightening of Work Visas

- H-1B petitions
 - Off-site employment or consulting
 - No deference to prior petition approval
 - Increase in Requests for Evidence (RFEs) and denials
 - Specialty occupation and specialty field issues
 - Changes to H-1B cap selection process for FY-2021
- L-1 petitions
- B-1 visas for temporary visitors for business purposes
- Extreme Vetting of Visa Applicants at U.S. Consulates

Administrative Site Visits

- Increase in site visits for H-1B and L-1 employees
 - Conducted by Fraud Detection and National Security (FDNS) unit
 - Companies with 15% or more of U.S. workforce in H-1B status
 - Positions involving off-site employment and high-tech consulting companies
- STEM OPT site visits
 - Conducted by ICE rather than FDNS
 - 48 hours advance notice
- Recent surge of ICE worksite enforcement

Preparing for Unexpected Site Visits

- Establish company policy for handling site visits
 - Prepare reception – notify HR immediately upon arrival of inspectors
 - Follow checklist of how to respond to site visits
- Ensure immigration and HR records up to date and easily accessible
- Prepare H-1B and L-1 employees and review job description as presented in H-1B or L-1 petition
- Immigration counsel may be present during site visit
- Employers are not required to give inspectors business or personnel information not relating to H-1B petitions (i.e., employee's personnel file and payroll records)

I-9 Compliance Employers must...

- Complete and retain an I-9 form for every employee
- Have employee complete Section 1 on 1st day of employment (no earlier than acceptance of offer)
- Complete and sign Section 2 within 3 days of hire
- Complete Section 3 within 3 years of re-hire or upon reverification of expiring documents
 - Do not re-verify documents of USCs, permanent residents, asylees and refugees
 - Do not re-verify List B documents such as driver's licenses
- Use the current I-9 form (dated 7/17/2017; expired 8/31/2019 – new form not yet available)

I-9 Compliance

- I-9 violation occurs upon:
 - Failing to complete or incorrectly completing I-9 records
 - Knowingly hiring or continuing to employ an unauthorized alien
- Knowledge can be actual or constructive
 - The term “knowing” includes not only actual knowledge but also **knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition...** also know as constructive knowledge

I-9 Compliance

- Properly completing I-9 does not absolve employer from liability if employer knows worker not authorized
- How to deal with Social Security no match letters
- Safe harbor procedures
 - Notify employee within 30 days; complete new I-9 within 63 days

I-9 Penalties and Fines

- Paperwork violations
 - **First offense:** Civil fine of \$275 to \$2,200 for each worker
 - **Second offense:** Civil fine of \$2,200 to \$5,500 for each worker
 - **Third or more offense:** \$3,300 to \$11,000 for each worker
- Substantive violations (knowingly hiring or continuing to employ unauthorized alien)
 - **First offense:** \$573 - \$4,586
 - **Second offense:** \$4,586 - \$11,463
 - **Third or more offense:** \$6,878 - \$22,972
 - **Pattern and practice:** fines of up to \$3,000 for each worker and/or imprisonment of up to 6 months
- Risk of alien smuggling or harboring illegal alien charge



I-9 Audits

- Ask ICE agent for warrant
- Notice of Inspection
 - Employer has 3 days to respond
 - Always request extension and seek counsel
 - Subpoena for additional business documents (payroll, corporate formation, licensing)
- Inspect Forms
- Find Violations
- Define Violations (Technical vs Substantive)
- Deliver Notices (Warning/Intent to Fine Notice)
- Enter OCAHO Hearing or agree to settlement



Employers Must

- Treat all individuals the same during the interview, offer, onboarding, hiring and firing process
- Refrain from discrimination against individuals based on actual or perceived knowledge of national origin, citizenship, or immigration status
 - Knowledge that an employee is unauthorized may not be inferred from his or her foreign appearance or accent.
- Examine and accept original documents if they appear reasonably genuine and relate to the employee
- Avoid demanding different or additional documents than those listed on the List of Acceptable Documents

Employers Should

- Refer to Form M-274 Handbook for Employers
- Use HR software that automatically processes and stores I-9s
- Enroll in E-Verify (optional in Washington State)
- If you do not have HR software system, maintain I-9 notebook of current employees, do not include in personnel file
- Conduct I-9 Self-Audits on regular basis
- Store I-9 forms separately from other personnel files (implement policy for I-9 form storage and retention)
- Purge old I-9s (3 yrs from date of hire or 1 yr from termination, whichever is later)
- Be consistent on whether to keep copies of documents

Thank you.

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