

GOING, GONE, GLOBAL: WHAT IN-HOUSE ATTORNEYS NEED TO KNOW ABOUT IMMIGRATION LAW

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CLARK HILL

TODAY'S PRESENTER



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- Over 20 years of immigration law experience
- Recipient of 2013 Edith Lowenstein Award for Excellence in Advancing the Practice of Immigration Law
- Ranked in Chambers USA, recognized in Best Lawyers in America, Super Lawyers, International Who's Who Among Corporate Immigration Lawyers, and Washington Magazine's Top Lawyers

DISCUSSION TOPICS

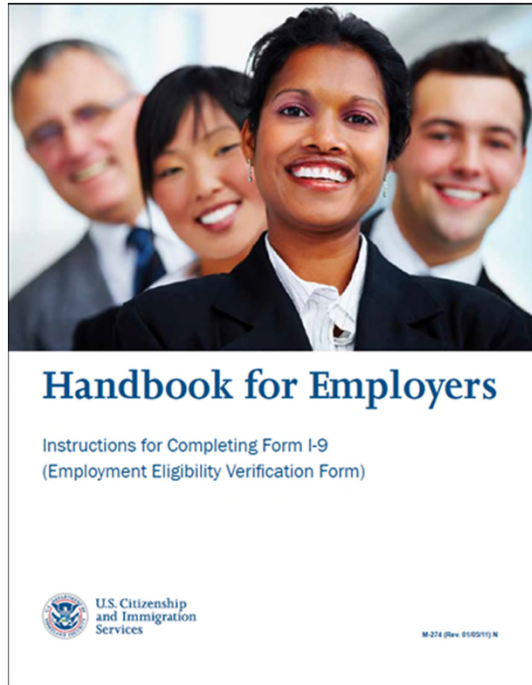
- I-9 liability and best practices
 - I-9 basics
 - Historical I-9s – Company liability
 - Audits and fines
 - Ground rules for ICE audits/raids
 - E-Verify & best practices
- H-1B visa liability
- Staffing personnel on H-1Bs
- Misc. comments on other visa categories
- New developments

I-9 BASICS

I-9 is required for every employee

- Employers must complete one for all employees hired – starting November 7, 1986
- Current Form I-9: <https://www.uscis.gov/sites/default/files/files/form/i-9.pdf>
- Employee completes section 1 on or before **first day of hire**. Can be completed up to 30 days prior to start date. But section 1 should never be completed before the employee has accepted a job offer
- Employer has three business days, after the day of hire, to complete Section 2 and examine original documents (four day rule)
- Employer, or its agent, reviews original documents and completes Section 2
- Must use 03/08/2013 version of Form I-9 until new edition is issued. No longer permits expired documents. Some limited exceptions to certified copies of birth certificates and if the expiration date shown on the face of the document has been extended, such as individuals with temporary protected status. See I-9 Instructions 03/08/13 version
- Must not hire persons who lack valid work authorization

A FAIRLY COMPLEX LITTLE FORM



69 pages

for a



one page form

I-9 DOCUMENTATION – IS IT GENUINE?

- Employer reviews candidate's documents to ensure they "reasonably appear on their face to be genuine and relate to the person presenting them"
- Must not over-document or discriminate during the I-9 process
- Resources – M-274 Handbook – new version released on April 30, 2013: <https://www.uscis.gov/sites/default/files/files/form/m-274.pdf>
- E-Verify confirms if Federal documents are genuine, but E-Verify does not confirm if the document matches the person
- I-9 Central: www.uscis.gov
- Acceptable documents: <https://www.uscis.gov/i-9-central/acceptable-documents>

HISTORICAL I-9S – COMPANY LIABILITY

Every employer should periodically audit their I-9s

- Are new I-9s being completed properly?
 - No blank fields?
 - Were originals examined?
 - Proper/valid documents reviewed?
 - Using E-Verify if applicable?
 - How to audit – should the person who completed them check their own work? Training? Proper corrections?
- Are I-9s stored properly?
 - Separate from personnel file? Can you pull them together in three days?
 - Destroy old I-9s **after the employee is gone** – one year after termination or three years after date of hire - - whichever is **longer** (see page 27 of Handbook for Employers 2013 edition)

HISTORICAL I-9S – COMPANY LIABILITY (CONT.)

- But legacy I-9s are the “ticking time bomb”
 - New enforcement strategies put the employer’s old I-9 practices at risk
 - Most companies did more hiring years ago – old I-9s are a liability in the event of an ICE audit
- Fines
 - Failing to Comply with Form I-9 Requirements (\$110 to \$1,100 per form)
 - Committing or participating in document fraud – knowingly hiring unauthorized aliens or continuing to employ aliens knowing that they are or have become unauthorized to work in the US (\$375 to \$6,500 per worker)
 - Discrimination against employment authorized individual (\$375 to \$16,000 per violation)
 - Hiring or continuing to employ worker knowing he or she is not work authorized (\$375 to \$16,000 per worker)
 - Fine chart: <http://www.ice.gov/news/library/factsheets/i9-inspection.htm>

ENFORCEMENT

I-9s continue to be a “hot topic”

- No complete statistics for 2015, but ICE reported that only 360 audits were conducted by June 2015
- Commentators have referred to this as “silent raids”, as worker firings and deportations were increasing from 2009 to 2012
- ICE audits come in the form of a letter, with a dramatic decrease in raids (though raids still occurring)
- ICE audits were up, and fines were up 500% in 2012. However, the number of audits seems to decline in recent years
- From 2009 to 2013, the highest number of inspections was 3127 in 2013. The decline began in 2014, when ICE conducted 1320 audits resulting in more than \$8.5 million in fines and 172 arrests
- Criminal penalties down, but still high – 194 indictments in 2014; 39 indictments and 60 convictions by June 2015. But criminal penalties against HR professionals and business owners continue
- Increased activity from DOJ’s OSC – more charges, fines, and settlements against employers for discrimination. OSC has become increasingly aggressive

NEW GOVERNMENT INITIATIVES UNDER OBAMA

All federal agencies have increased I-9 capabilities

- Every agency involved in the I-9 process has additional funding and resources dedicated to I-9 compliance (DHS, ICE, USCIS, DOL, and DOJ's OSC)
- ICE is the enforcement arm of DHS, conducts employer audits and raids. Five year plan confirms aggressive civil and criminal penalties against employers
- OSC is part of the US DOJ, and their focus is unlawful discrimination:
<http://www.justice.gov/crt/about/osc/htm/Webtypes2005.php>
- DOL can conduct I-9 audits
- USCIS is responsible for managing the Form I-9 changes and immigration status

BASIC I-9 AUDIT AND RAID GROUND RULES

Below are some basic ground rules in the event of an I-9 audit

- ICE calls and confirms they are dropping off a letter. The ICE letter will provide Employer with three business days to prepare for ICE officers to come to workplace and pick up the original I-9s
- ICE may give you a small extension for some of the information that is needed (payroll records)
- Can you review your I-9s, and make copies so they can take the originals, in three days? Are your people trained to do it?
- Do not destroy any documents, including attachments, old I-9s, or any company records
- **Hire counsel**

Below are some basic ground rules in the event of an ICE raid

- When the officer arrives, you may ask to see a warrant
- Never obstruct. Be polite. Smile
- Does your Receptionist (or branch employees) know what to do?
- Do not destroy any company documents
- Hiring experienced immigration counsel is critical. Hiring criminal counsel may also be necessary

HOW BAD CAN THE FINES BE?

Name another section of law where human resources professionals are criminally prosecuted?



PURPOSE OF E-VERIFY AND HOW IT WORKS

- E-Verify builds on top of the I-9 process – almost identical rules apply on I-9s
- “Backs” into DHS/SSA/DOS/CBP databases. Two responses issued
- Employee must have a social security number - normally voluntary - but can be hired, complete I-9 within three days, and submit E-Verify later (a new SSN Card rule of 2015 makes it easier to obtain a new or replacement SSN card without having to submit documentary evidence)
- Designed to ensure that the documentation presented is valid
- Does not confirm that the documents presented are for that person (employer can use free E-Verify system to make sure the SSN card belongs to the person presenting it: <http://www.worksite-compliance.com/library/files/M-396.pdf>)
- Must complete E-Verify within three days of hire; date of hire dictated by the certification box on the I-9
- **Not for current employees** – government contractor rule is the exception (only affects Federal contractors who were awarded a new contract on or after the effective date of the rule, September 8, 2009)
- Anti-discrimination rules apply and cannot fire for tentative non-confirmation
- Cannot use E-Verify or I-9s to screen new hires
- Once enrolled, must run all new hires through E-Verify for that worksite
- Photo Tool - passport, passport card, permanent resident card, employment authorization card
- Electronic storage of I-9s – difficult system to build on your own, select an off the shelf program

I-9 BEST PRACTICES

- Company compliance policy and training
- Provide candidates with I-9 list of acceptable documents prior to hiring (A list document or a combination of B and C list documents)
- Destroy old I-9s of ex-employees after employment ends - three years after date of hire or one year after employment ends – **whichever is longer**
- Audit early and often. External is best. E-Verify doesn't cure I-9 violations
- Electronic system for completing I-9s – facilitates tracking and error proof I-9s – avoid building your own
- Decide whether to sign up for E-Verify. If so, use for new hires
- The free E-Verify system is passive – no tracking
- Build a “dummy proof” system

OTHER UPDATES/REMINDERS

- Prospects for Comprehensive Immigration Reform (CIR) unknown
- All signs point to continued push for E-Verify – state and federal level
- State laws requiring E-Verify continue to expand
- ICE raids down – but an increase in I-9 audits and employer civil/criminal penalties
- New employee self check option launched on March 21, 2011
- OSC discrimination investigations on the rise
- E-Verify includes state driver's license information (RIDE)
- IMAGE is starting to look like a best practice (still in existence, questions can be directed to image@dhs.gov)
 - I-9 audit
 - 50%+ of violations results in fines
 - Two years no I-9 audits

H-1B VISA LIABILITY

What is an H-1B?

- Allows professionals to work in the US – bachelor degree or higher possessed by employee and necessary to perform the job
- Valid for three years initially, with a max of six years
- Only 85,000 “new” H-1Bs available per fiscal year
- H-1B cap for 2016 was reached on April 7, 2015; for the filing period from April 1 to April 7, USCIS received 236,000 petitions
- On April 13, 2016, USCIS conducted H-1B Lottery to select the required 85,000 H-1B petitions. After H-1B master’s degree lottery and after 6,800 for Singapore and Chile, remains 206,200 petitions - the probability of winning the lottery is ~ 28%. No official data for FY 2017 yet
- File wage attestation with DOL – Labor Condition Application

What are the requirements for H-1B Compliance?

- Pay the employee prevailing wage and advertised wage – no “leveling”
- No “roaming” – 60 days or less per year working offsite in the US (generally)
- No “material changes” to job duties or pay without filing an amendment

H-1B VISA LIABILITY (CONT.)

When does risk occur?

- Employee terminated (not quits)
- Temporary layoffs
- Salary reductions
- Change in work location
- Reputation for using H-1Bs

Best practices?

- Upon firing, notify employee, notify USCIS, provide airfare home
- Cancel H and LCA when employment ends (quit or fired)
- No “benching”
- Pay for return flight - employee only, not family or belongings
- Do not use for jobs with extensive domestic travel
- Pay only from US payroll
- Do not recoup H-1B filing fees or attorney costs

STAFFING COMPANY EMPLOYEES ON H-1BS

Direct financial risks?

- Generally not on the hook for pay, outside of normal EEOC/ERISA/FLSA co-employment issues

Reputation risks?

- End customers are named in complaints against staffing company
- Infosys case
- Unauthorized workforce

Disruption to projects based on contractor int'l travel

- USCIS hostility to staffing company H-1Bs
- H-1Bs routinely denied or a waiting admin processing at US Consulates
- Avoid L-1Bs

STAFFING CO. EMPLOYEES ON H-1BS (CONT.)

Best practices

- Avoid layering
- Know your supplier
- Require E-Verify
- Prepare end-customer letter
- Risks and benefits of I-9 and employment practice audits?
 - All on site, or just a sampling?
 - Constructive knowledge for I-9 issues?
 - Better to know if FLSA violations?
 - May ensure no visitor or L-1B employees
 - Case by case assessment
- E-3s are the same as H-1Bs from a liability perspective

MISC. COMMENTS ON OTHER VISA CATEGORIES

- B-1 – not for “work” in the US. Tougher to get – India
- F-1 – international student, generally is allowed to work only for 20 hours a week on campus; however, may obtain EAD through OPT, which can last up to three years depending on the major, e.g., STEM OPT. Old rule 8 CFR 214.2(f)(10)(ii) remains in effect until May 9, 2016; the new rule will be effective May 10, 2016
- **See Clark Hill alert: DHS Releases Published F-1 Visa STEM-OPT Regulation:**
<http://www.clarkhill.com/alerts/dhs-releases-published-f-1-visa-stem-opt-regulation>
- L-1
 - For intracompany transferees – five to seven per year maximum
 - Employee can be paid abroad, but employee may still incur a US tax obligation
- E-1 or E-2
 - For foreign owned companies – employee has same nationality as Company
 - Employee can be paid abroad, but employee may still incur a US tax obligation
- TN
 - Canadian or Mexican nationals – only for certain jobs
 - No obligation to report end of employment
- O-1 – For preeminent individuals
- Clark Hill website – visa types:
http://www.clarkhill.com/contents/temporaryvisas?parent_id=335

QUESTIONS?



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THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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