



Developments in Immigration Policies Affecting Employers

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BOSTON HARTFORD NEW HAVEN STAMFORD WHITE PLAINS WOBURN

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I-9 Compliance

The law:

All U.S. employers must complete an employment verification procedure for every new employee who is hired by that employer to perform labor services in the U.S. in return for wages or other compensation.

(Some exceptions apply, e.g. independent contractors.)

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I-9 Verification Procedures

- Employers must complete the I-9 verification procedure within 3 days after commencement of employment, but the process should be started on the employee's first day.
- Make sure to use the latest I-9 edition, dated 07/17/2017. Failure to use the new I-9 edition may result in civil fines, penalties, debarment from government contracts, and other court actions.
- Employee fills out Section 1 of the I-9 Form, and signs it on the first day, then has 3 days to bring in acceptable documentation for the Employer to examine. Once the employer's representative has examined the documents (and made copies) he or she fills out Section 2 of the I-9, and signs the form.
- What are acceptable documents?
 - 1 Document from List A: or
 - 1 Document from List B and 1 Document from List C.

Helpful Tip: Form is easier to fill out electronically and streamlines certification for certain foreign nationals (specifically, some EAD card holders)

List A Documents - Automatic proof of status and employment authorization

- U.S. Passport or Passport card
- Green card
- EAD card
- Foreign passport with I-94 which allows employment incident to status
- Many others (full list on USCIS website)– almost any document that proves immigration status and has a photograph for identification purposes



List B Documents (Not exhaustive list)

- U.S. Driver's license, or state photo ID
- Military ID
- Voter Registration Card
- School or medical records (for those under 18)
- If List B document shown, then also need to provide List C document (see next slide)



List C Documents (Not exhaustive list)

- Unrestricted Social Security Card
- Original or certified copy of U.S. birth certificate
- Certification of Birth abroad



Retention and Storage of I-9 Records

❖ General Rule for Retention:

I-9 records must be maintained by the employer for the full period of employment, plus one year. At a minimum, each I-9 form must be kept for three years from the date of hire.

❖ General Rule for Storage:

I-9 records should be maintained by the employer in a separate I-9 file, apart from other personnel records.

How Can Employers Protect Themselves?

- Have a standard, written I-9 compliance policy
- Designate an officer in charge of I-9 compliance
- Consult with counsel before making immigration-related hiring/firing decisions
- Conduct regular I-9 audits through competent counsel

E-Verify

- Voluntary internet-based system that provides an automated link to government databases to help employers determine eligibility of new hires (only about 3% of the total employer population is enrolled)
 - Mandatory for companies seeking to employ F-1 students in STEM fields of study who are eligible for a 24-month extension of Optional Practical Training (OPT)
- Employers enter the information provided on the I-9 and the system returns an “Employment Authorized” result or, in case of a mismatch, a “Tentative Nonconfirmation” result, at which time the employee can contest the mismatch and has 8 work days to resolve the problem.
- If E-Verify returns a “Final Nonconfirmation” result, the employer is required to terminate the employee or risks knowing hire violations.

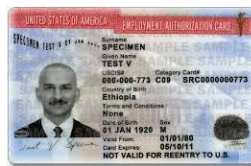
Regulations Set Forth by the Departing Obama Administration

- New DHS regulations took effect on Jan. 17, 2017 and made several changes to the rules surrounding employment of certain foreign nationals
- Most changes sought to clarify prior practices and ensure uniformity in adjudication of employment-based immigrant and nonimmigrant applications with USCIS
- For the most part, new regulations aimed to help business needs and facilitating employee mobility

New Regulations for EAD Holders

New regulations allow certain EAD holders to continue employment with an expired EAD card for 180 days as long as:

- Timely filed EAD renewal;
- EAD renewal falls under category acceptable for automatic extension (e.g. C09 category);
- EAD category on current card matches EAD category on new USCIS receipt notice;
- Your new EAD card doesn't arrive prior to the expiration of current EAD
 - If all conditions are met, then expired EAD card with USCIS receipt notice (Form I-797) will meet employment eligibility requirements for I-9 purposes



EAD Cards for Certain Nonimmigrants

- Certain employment based nonimmigrants (those with employment incident to status) such as E-3, H-1B, H-1B1, O-1, or L-1 may apply for EAD cards in one-year increments if:
 1. They are the principal beneficiary of an approved EB-1, EB-2, or EB-3 IV petition;
 2. Does not have an IV immediately available; and
 3. Can demonstrate compelling circumstances justifying EAD issuance.
- Spouses and children of principal alien may also apply concurrently but cannot be granted an EAD unless the principal's application is also granted

Grace Periods for Certain Nonimmigrants

- New provision provides 10 day grace period for individuals in E-1, E-2, E-3, H-1B, L-1, and TN status and their dependents before and after the petition's validity period
- Up to 60 day grace period, during the period of petition validity, for E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1, and TN classifications who employment has ended (includes dependents) (DHS may also shorten grace period as a matter of discretion)

Other H-1B and Employment-Based Changes

- Allows for easier H-1B portability (change of employer and concurrent employment)
- Clarification on which institutions qualify for cap exemption
- Clarification as to how and when H-1B time may be recaptured after trips abroad
- Clarification and streamlining of H-1B extension petitions past 6 years for those with pending or approved employment-based IV petitions
- Other technical changes to the H-1B and employment-based regulatory regimes that will allow foreign workers more freedom to change employers and provide employers more options for employing such workers

The "240 day rule"

- This rule allows for certain nonimmigrants whose status has expired to continue working in the U.S., provided that the employer timely filed an extension of such status with USCIS
- Rule applies to numerous nonimmigrant categories, including E-1, E-2, H-1B, H-1B1, H-2A, H-2B, H-3, I, J-1, L-1, O-1, O-2, P-1, P-2, P-3
- In practice, USCIS will out of discretion allow employees to work even past 240 days if USCIS is responsible for the delay in adjudicating the employer's extension petition

Newest Regulations and Current Immigration Climate



Internal USCIS Policies Are Making Legal Immigration More Difficult

- We are seeing:
 - More Requests for Evidence
 - More Intents to Deny
 - Longer adjudication time periods for all immigrant and nonimmigrant visa applications, including changes of status

Expanded Green Card Interviews

- October 1, 2017, USCIS announced it would begin conducting interviews for employment-based green cards
- These in-person interviews were almost always waived previously
- Interviews are being conducted to verify info in petition and "discover new information that may be relevant to the adjudication process"

→ Longer Adjustment of Status adjudication process

Expanded Enforcement by ICE

- What does this mean?
 - More worksite visits
 - More Audits
 - More Raids
- Primary worksite enforcement mechanism utilized by ICE is the I-9 audit and administrative fine procedures
- I-9 audits involve a comprehensive review of I-9 forms and payroll records
- Audits may result in civil penalties and lay the groundwork for criminal prosecution of employers who knowingly hire undocumented workers
- Best insulation against administrative fines and/or criminal sanctions is to establish regular in-house audit program with competent counsel

What to Do if ICE Comes Knocking (Employers)

- Like other law enforcement agencies, ICE must first obtain a valid judicial warrant (i.e., a warrant signed by a judge), or affirmative consent, before searching or seizing private property
- ICE can enter public areas of business just like anyone else, but needs judicial warrant to enter private areas
- Administrative warrants signed by ICE officers do not give ICE permission to enter private areas of business or seize property
- Employers should ask to see the warrant and examine it closely before allowing ICE on or into employer private property

What to Do if ICE Comes Knocking (Employees)

- Everyone in the U.S., including the undocumented, have certain constitutional rights
- Right to remain silent– no need to answer any questions about place of birth, status, etc.
- Not required to show identity documents that demonstrate foreign origin (such as passport)
 - DO NOT show false documents
- Employees should remain calm and not run away– employees may attempt to calmly exit but must stop if requested to do so by an officer
- Request to speak with an attorney, even if one has not been retained
- Right to contact foreign consulate
- Right to refuse to sign anything until a lawyer advises otherwise

H-1B Cap Exempt Visas

- Unlimited H-1B at any time throughout the year
- Working for a university of an affiliated entity
- Working for a private company on university premises & with logical nexus to the university's mission
- Columbia Startup Lab, UMass GEIR program, many university incubators/accelerators/R&D spaces



Questions?
Comments?
Concerns?

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