



Weathering the Storm: Limiting Immigration Exposure in a Climate of Aggressive Enforcement

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About Angelo



- Certified Immigration Law Specialist, State Bar of California
- Founder and immediate past President of the Alliance of Business Immigration Lawyers, a 40-member worldwide alliance of leading immigration firms.
- Rated three times as the World's Leading Corporate Immigration Lawyer in annual peer rankings of the International Who's Who of Corporate Lawyers, and as a Star Individual in Immigration Law – the highest rating – by Chambers and Partners in 2011 and 2012.
- Co-Editor, The Immigration Compliance Book, (ILW, 2010), co-author of the Immigration Column for the New York Law Journal, and blogger at www.NationOfImmigrators.com.

Recent immigration enforcement trends



- U.S. Immigration and Customs Enforcement (ICE) opens Employer Compliance Center to handle large-volume audits
- ICE issues thousands of Notices of Inspection to employers nationwide

Recent ICE enforcement trends



- Recent ICE Investigations
 - Not hesitant to fine for minor errors
 - Less willing to negotiate/settle than in past
 - May approve an employer-proposed immigration compliance plan to avoid business disruption and economic hardship

Recent ICE enforcement trends



- ICE Activities in Fiscal Year 2012:
 - 520 criminal arrests tied to worksite enforcement investigations (240 of these were owners, managers, supervisors or human resources employees).
 - Served 3,004 Notices of Inspection and 495 Final Orders, totaling \$12,475,575.00 in administrative fines.
 - ICE debarred 376 business and individuals for administrative and criminal violations.

Potential fines, criminal sanctions, and other liability



I-9-Related (Civil) Penalties	
Paperwork (I-9) Violations	\$110-\$1,100 per worker, depending on the company's history of violations
Knowingly hiring, recruiting, referring for a fee, or continuing to employ an unauthorized worker	\$375 - \$16,000 per worker, depending on the company's history of violations
Document Abuse	\$110-\$1,100 per individual
Unfair immigration-related employment practices (discrimination based on national origin or citizenship status)	\$375-\$16,000 per individual, depending on the history of violations, plus back pay
Document Fraud (knowingly forging, counterfeiting, altering, using, possessing, obtaining, accepting, or receiving a falsely made document for purposes of satisfying I-9 requirements)	\$275-\$6,500 per violation, depending on the history of violations.

Criminal Penalties



- Pattern or practice of “knowingly” hiring or continuing to employ unauthorized workers
 - Fines of up to \$3,000 per individual, plus up to 6 months in prison
 - This is in addition to, not instead of, civil penalties
- Harboring/trafficking also carry felony penalties

Recent immigration enforcement trends



- DOJ Office of Special Counsel for Unfair Immigration-Related Employment Practices
 - Aggressively pursues discrimination and document abuse investigations
 - Seeks settlements in which Civil Money Penalties are imposed

Office of Special Counsel



- Penalties can be assessed for discrimination and/or document abuse
 - Creates tension between anti-discrimination efforts and desire to fully document employment authorization
 - Employers must not request specific documentation for I-9 purposes or request more documentation than the minimum required for I-9 compliance

Office of Special Counsel



- Penalties can be assessed for discrimination and/or document abuse
 - Employers must not discriminate on the basis of national origin or citizenship status in hiring, firing, recruitment
 - Employers must not retaliate against employees who file charges with the OSC or who otherwise question employment practices as in violation of the anti-discrimination provisions

Recent immigration enforcement trends



- U.S. Department of Labor Wage and Hour Division investigates claims of immigration-related labor violations
- U.S. Citizenship and Immigration Services (USCIS) expands role of the Fraud Detection and National Security Directorate

Recent immigration enforcement trends



- USCIS conducts E-Verify “Desk Reviews”
- USCIS releases new Form I-9 (Employment Eligibility Verification)

Comprehensive immigration reform proposals affecting employers



- Enhanced employee verification system to protect American workers, prevent identity theft, and provide due process protections
- E-Verify to be mandatory nationwide

Comprehensive immigration reform proposals affecting employers



- Franken amendment: "Office of the Small Business and Employee Advocate" (the SBE Advocate)
- SBE Advocate also empowered to help larger businesses resolve I-9 and employment authorization problems.

Comprehensive immigration reform proposals affecting employers



- SBE Advocate can issue an Assistance Order:
 - to cease any action, take any action, or refrain from taking any action under the I-9 provisions of the immigration laws;
 - to determine whether any employee is or is not authorized to work in the United States; or
 - to abate any penalty under such laws that the SBE Advocate determines is inappropriate or excessive.

Comprehensive immigration reform proposals affecting employers



- 11 million unauthorized immigrants to be granted legal status with work permission
- Improvements to the employment-based legal immigration system for “best and brightest” and for lower skilled workers.



Employment Eligibility Verification

Department of Homeland Security
U.S. Citizenship and Immigration Services

USCIS

Form I-9

OMB No. 1615-0047
Expires 03/31/2016

► **START HERE.** Read instructions carefully before completing this form. The instructions must be available during completion of this form.

ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work-authorized individuals. Employers **CANNOT** specify which document(s) they will accept from an employee. The refusal to hire an individual because the documentation presented has a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Attestation *(Employees must complete and sign Section 1 of Form I-9 no later than the first day of employment, but not before accepting a job offer.)*

Last Name (Family Name)		First Name (Given Name)		Middle Initial	Other Names Used (if any)	
Address (Street Number and Name)		Apt. Number	City or Town		State ▼	Zip Code
Date of Birth (mm/dd/yyyy) □□-□□-□□	U.S. Social Security Number □□□-□□-□□		E-mail Address		Telephone Number	

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

I attest, under penalty of perjury, that I am (check one of the following):

- ☐ A citizen of the United States
- ☐ A noncitizen national of the United States *(See instructions)*
- ☐ A lawful permanent resident (Alien Registration Number/USCIS Number): _____
- ☐ An alien authorized to work until (expiration date, if applicable, mm/dd/yyyy) _____. Some aliens may write "N/A" in this field. *(See instructions)*

For aliens authorized to work, provide your Alien Registration Number/USCIS Number OR Form I-94 Admission Number:

1. Alien Registration Number/USCIS Number: _____

OR

2. Form I-94 Admission Number: _____

If you obtained your admission number from CBP in connection with your arrival in the United States, include the following:

Foreign Passport Number: _____

Country of Issuance: _____ ▼

Some aliens may write "N/A" on the Foreign Passport Number and Country of Issuance fields. *(See instructions)*

Signature of Employee:	Date (mm/dd/yyyy):
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3-D Barcode
Do Not Write in This Space



New I-9 p. 1.
Effective Now –
Grace Period
ended May 6,
2013

New I-9



Preparer and/or Translator Certification *(To be completed and signed if Section 1 is prepared by a person other than the employee.)*

I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.

Signature of Preparer or Translator:		Date (mm/dd/yyyy):	
Last Name (Family Name)		First Name (Given Name)	
Address (Street Number and Name)	City or Town	State ▼	Zip Code



Employer Completes Next Page



New I-9 p. 1. Effective Now – Grace Period ended May 6, 2013

Section 2. Employer or Authorized Representative Review and Verification

(Employers or their authorized representative must complete and sign Section 2 within 3 business days of the employee's first day of employment. You must physically examine one document from List A OR examine a combination of one document from List B and one document from List C as listed on the "Lists of Acceptable Documents" on the next page of this form. For each document you review, record the following information: document title, issuing authority, document number, and expiration date, if any.)

Employee Last Name, First Name and Middle Initial from Section 1:

List A Identity and Employment Authorization	OR	List B Identity	AND	List C Employment Authorization
Document Title:		Document Title:		Document Title:
Issuing Authority:		Issuing Authority:		Issuing Authority:
Document Number:		Document Number:		Document Number:
Expiration Date (if any)(mm/dd/yyyy):		Expiration Date (if any)(mm/dd/yyyy):		Expiration Date (if any)(mm/dd/yyyy):
Document Title:		<div>3-D Barcode Do Not Write in This Space</div>		
Issuing Authority:				
Document Number:				
Expiration Date (if any)(mm/dd/yyyy):				
Document Title:				
Issuing Authority:				
Document Number:				
Expiration Date (if any)(mm/dd/yyyy):				

Certification

I attest, under penalty of perjury, that (1) I have examined the document(s) presented by the above-named employee, (2) the above-listed document(s) appear to be genuine and to relate to the employee named, and (3) to the best of my knowledge the employee is authorized to work in the United States.

The employee's first day of employment (mm/dd/yyyy): _____ (See instructions for exemptions.)

Signature of Employer or Authorized Representative	Date (mm/dd/yyyy)	Title of Employer or Authorized Representative	
Last Name (Family Name)		First Name (Given Name)	Employer's Business or Organization Name
Employer's Business or Organization Address (Street Number and Name)		City or Town	State ▼
			Zip Code



New I-9 p. 2.
Effective Now –
Grace Period
ends May 6,
2013

New I-9



Section 3. Reverification and Rehires <i>(To be completed and signed by employer or authorized representative.)</i>		
A. New Name <i>(if applicable)</i> Last Name <i>(Family Name)</i> First Name <i>(Given Name)</i> Middle Initial		B. Date of Rehire <i>(if applicable)</i> (mm/dd/yyyy):
C. If employee's previous grant of employment authorization has expired, provide the information for the document from List A or List C the employee presented that establishes current employment authorization in the space provided below.		
Document Title:	Document Number:	Expiration Date <i>(if any)</i> (mm/dd/yyyy):
I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.		
Signature of Employer or Authorized Representative:	Date (mm/dd/yyyy):	Print Name of Employer or Authorized Representative:

Form I-9 03/08/13 N

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New I-9 p. 2. Effective Now – Grace Period ended May 6, 2013

New I-9



- What changed?
 - Instructions are more detailed:
 - Instructions indicating that border commuters from Canada and Mexico may use foreign addresses in Section 1 (but that all other employees must use U.S. addresses).
 - Confirmation that P.O. Boxes are not acceptable.
 - A statement that the SSN (for employers who do not use E-Verify), e-mail, and telephone number fields, are optional.

New I-9



- What changed?
 - Instructions are more detailed:
 - Instructions regarding which foreign nationals must provide passport information in Section 1.
 - The addition of instructions for minors and disabled employees.
 - In-depth instructions relating to the use of receipts for lost, stolen, and damaged documents.

New I-9



- What changed?
 - Instructions are more detailed:
 - Instructions say that fields which do not apply to an employee (or where employees choose not to provide optional information) should be marked “N/A.”
 - While USCIS may find such instructions helpful, employers may find they are making “mistakes” and worrying about possible fines for noncompliance with seemingly arbitrary rules.

New I-9



- What changed?
 - Deadlines are clearer for form completion, review and recordation of document information, reverification, and photocopying of documents.
 - The form is updated to look more “official” and include the DHS seal and formatting changes to help employees understand that the I-9 is an official government form signed under penalty of perjury.

New I-9



- What changed?
 - New fields have been added for employees to record telephone numbers and e-mail addresses. These fields are optional.
 - The government has indicated that many commenters praised the addition of these fields and that they may make it easier to contact employees in the event of E-Verify tentative nonconfirmations.

New I-9



- What changed?
 - Terminology has changed to:
 - make the form more user-friendly, reflect a better understanding of cultural norms (“Family Name”), and
 - make fields more gender-neutral (“Other Names Used” instead of Maiden Name).

New I-9



- What changed?
 - Fields have been added for certain foreign nationals to provide passport information in Section 1 of the form.
 - This relates to plans by U.S. Customs & Border Protection for automation of the I-94 card.
 - Only foreign nationals who obtained their I-94 documents upon entry to the U.S. (as opposed to having received a tear-off I-94 card as a part of a USCIS approval notice) should provide this data. Others are instructed to write “N/A” in these fields.

New I-9



- What changed?
 - “Alien #” has been changed to “Alien Registration Number/USCIS Number.” This may cause confusion.
 - Note: the numbers are the same, but some government-issued documents use different terms to refer to the same number.

New I-9



- What changed?
 - A 3D barcode box has been added to the form.
 - Unclear what the government plans to do with it.
 - Perhaps, USCIS may create a “smart” I-9 that employers can complete electronically, and that may allow for electronic reading of the form data.

New I-9



- What changed?
 - Additional dedicated fields for recording “extra” List A documents have been added.
 - These fields may prove helpful to employers who struggled with the correct ways to document work authorization for foreign students, others with employment authorization, and permanent residents who have not yet received their green cards.

New I-9



- What changed?
 - The employer's attestation has been changed.
 - Employers are not necessarily attesting to the employee's start date.
 - Helpful when an employee is scheduled to start work in the future, avoiding concerns about attesting to an event that has not yet occurred.

New I-9



- What changed?
 - Section 3 is rephrased as “Section 3, Reverification and Rehires” to make clear that there is no requirement that employers update the form for employee name changes.
 - Recording name changes may continue to be a best practice, but only if handled in such a way as to prevent document abuse claims (requesting documentation *for I-9 purposes* in connection with a name change may be risky).

New I-9



- What changed?
 - The List of Acceptable Documents have been updated to make the rules regarding “restricted” Social Security cards are clearer.
 - The List states that employers must not accept cards noted as “not valid for employment,” “valid for work only with INS authorization,” or “valid for work only with DHS authorization.”

Document review requirements, tips, and tricks



- The employer must review ORIGINAL documents.
- Photocopy documents are not acceptable
 - Except for *original* certified copy of birth certificate
- Documents containing misspellings, deletions or signs of tampering should be considered suspect

Document review requirements, tips, and tricks



- Documents must reasonably appear to be genuine and relate to the individual
 - No requirement that an LPR present a green card
 - “Alien authorized to work” with time-limited work authorization should *generally* not be able to present a driver’s license and an unrestricted social security card.
 - Exception: Asylees and refugees may present unrestricted SS cards.

Document review requirements, tips, and tricks



- Employer should not ask for specific documents or more documents than required
- Documents may not be expired (for new hires post-April 3, 2009)
- Pre-April 3, 2009, List B documents & U.S. passports were acceptable even if expired

Post-Hire Compliance



- Reverification procedures
 - For expiring work authorization, employee can present any document from current version of List A or List C that demonstrates continued work authorization
 - For a receipt, any document from the category [identity (List A or B) or work authorization (List A or C)] can be presented

Post-Hire Compliance



- Reverification procedures
 - For reverification, only the most recent form revision should be used
 - The employee's name should be written on the form, but otherwise only the reverification section of the new form must be completed. It should be attached to the original Form I-9.

Post-Hire Compliance



- Rehires
 - Employers may use the reverification section of the I-9 when individual is rehired within 3 years of original date of hire
 - Employers may instead complete new I-9s for all rehires

Post-Hire Compliance



- Rehires
 - Policy must be applied consistently
 - No reverification if person is “continuing in employment” rather than being rehired

Post-Hire Compliance



- Social security number no-matches and name changes
 - Potential liability for failure to act
 - Constructive knowledge
 - No turning a blind eye
 - Reasonable and timely procedure

Electronic I-9 and E-Verify Requirements



- I-9 software
 - No “do-it-yourself” approach
 - Choose vendor carefully
 - Audit trails required
 - Interface with E-Verify

Electronic I-9 and E-Verify Requirements



- E-Verify
 - Pilot program before full roll-out
 - NLRA implications
 - Compliance burdens
 - Mergers and acquisitions

Government Investigation Preparedness



- Engage counsel for voluntary self-audit, compliance review and remediation
- Know the government agencies
- Set up a protocol

Government Investigation Preparedness



- Identify internal and external players
- No accidental waivers of 4th Amendment
- Know where records are kept

Dealing with Vendors, Unions, Mergers and Acquisitions



- Vendors: Sgt. Schultz vs. WalMart approaches
- Unions: Distinguish employer's legal duties from union's legitimate role
- M & A/Restructurings: Due diligence, third-party audit, indemnifications & claw-back



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Angelo Paparelli's Immigration Compliance Resources

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"Immigration's Minnesota Nice, Sen. Al Franken, Helps Small Businesses and Regular Folks with the I-9 Process" (May 19, 2013)

"The New I-9: Why Now When We Need Immigration Amnesty for Employers?" (March 10, 2013)

"The Year-End Immigration Roundup for Employers," *New York Law Journal* (December 29, 2011)

"Intubation and Incubation: Two Remedies for an Ailing Immigration Agency," *New York Law Journal* (October, 2011)



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Angelo Paparelli's Immigration Compliance Resources

"Informational Abundance and Scarcity in Immigration Worksite Enforcement," New York Law Journal (June 22, 2011)

"Social Security is Again Sending No-Match Letters," New York Law Journal (April 26, 2011)

"Goldilocks' Lessons for Dealing With Bearish Immigration Police," New York Law Journal (March 4, 2011)



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Angelo Paparelli's Immigration Compliance Resources

"Professional Employer Organizations and Uncharted Immigration Risks," New York Law Journal (December, 2010)

"M&A Lawyers Beware: Immigration Risks Lurk in Your Next Deal," New York Law Journal (October, 2010)

"Lawbreaker, Naïf or Stooge? The HR Representative and I-9 Crimes," New York Law Journal (August, 2010)



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"No Skating on Thin ICE: Using Enforcement Preparedness Policies to Prevent Drowning in Frigid Immigration Waters," AILA's Immigration Practice Pointers (2010-11)

"Immigration Law: Minimizing Immigration Risks From Service Providers," New York Law Journal (June 29, 2009)

"Looking for Fraud in All the Wrong Places—H-1Bs Working from Home," New York Law Journal (August 24, 2011)

Questions & Answers

