

I-9 and E-Verify: Modern Day Siblings

By Benjamin C. Lau

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Benjamin C. Lau

Principal

Benjamin.Lau@jacksonlewis.com

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Jackson Lewis P.C. · I-9 and E-Verify: Modern Day Siblings



Transcript

Alitia (00:06):

Welcome to Jackson Lewis' Podcast, We get work™. Focused solely on workplace issues everywhere and under any circumstances, it is our job to help employers develop proactive strategies, strong policies, and business oriented solutions to cultivate a workforce that is engaged, stable, and diverse. Our podcast identifies the issues dominating the workplace and it's continuing evolution and helps answer the question on every employer's mind. How will my business be impacted?

As the COVID-19 workplace begins its third year, employers working on federal contracts must understand updated I-9 compliance and their I-9 and E-Verify responsibilities when employees relocate or work remotely. On this episode of We get work™, we discuss employers' immigration compliance requirements in obtaining visas for international personnel, avoiding common I-9 pitfalls and the importance of reviewing your return to work policies when an employee relocates. Our host today are Zain Abidi and Ben Lau, associates in the Los Angeles office of Jackson Lewis and members of the firm's immigration group. Zane's practice is focused exclusively on federal immigration cases for large corporations, startups, and high net worth individuals in a variety of employment and investment based immigration matters. Ben represents employers in corporate law matters including global mobility issues and developing internal immigration policies. Back for the second time behind the We get work™ podcast mike, Ben and Zain. The question on everyone's mind today is, what are the immigration compliance requirements for employers working on federal

contracts and how does that impact my business?

Ben Lau (01:54):

Hi, my name's Ben Lau. I'm an attorney in the Immigration Department at Jackson Lewis' office in Los Angeles.

Zain Abidi (02:01):

And I'm Zain Abidi and I'm also an attorney in the Los Angeles office of Jackson Lewis.

Ben Lau (02:06):

And we're here today to talk about I-9s and E-Verify. With the passing of the recent infrastructure bill, we have been receiving questions from our clients, both big and small ones that have contracts, one that want to bid on these federal contracts about rules and regulations that they want to know about in order to bid on these contracts. This has inevitably led to a whole slew of other questions about compliance, how to ensure that there are no surprises that should come up once they open their company up to this additional federal oversight. So Zain and I have put together a short podcast to discuss some of the basic information about E-Verify and I-9s and how companies can best position themselves to avoid future surprises. So to start just a little explainer about the E-Verify program and I-9. E-Verify program is a web-based system that allows employers and other participants to confirm the eligibility of newly hired employees to work in the United States by electronically matching information on the employees Form I-9 against records available to the Social Security Administration and the Department of Homeland Security.

The form I-9 is a United States Citizenship and Immigration Services form that was mandated by the Immigration Reform and Control Act of 1986. The form is used to verify identity and legal authorization to work in the United States. Now I'm not going to lie Zain, before I started working in immigration, I had no idea what the form I-9 was, why I had to complete this every time I started a new job and why my employer was always asking for my Social Security card and my driver's license. Before you started working with companies on I-9 questions, did this ever come up to you? Did you ever think about it?

Zain Abidi (03:46):

No. Just very surface level thoughts because every job like most of you that you ever held, you're asked to bring in your I-9 verification documents on your first day of work. And now that we're on the compliance side and that we're advising companies on how to navigate the minefield of I-9 regulations and rules, it's become clear to me how important this is. Essentially companies get one shot at I-9 compliance. If you mess it up, you're forever liable. Now there's ways you can mitigate that liability. So it's important that companies get it right the first try.

Ben Lau (04:18):

Yeah. And on that mitigating liability and doing it right the first try, I know USCIS implemented some temporary rules at the beginning of COVID, because of all the

work from home issues and the inability to verify documents in person. Can you go over some of those changes?

Zain Abidi (04:37):

Yeah. Both on the I-9 side and generally with immigration and as a whole, USCIS and ICE implemented a slew of changes to respond to the remote work situations that came out of the COVID-19 pandemic. And in an I-9 context, one of those things was remote verification. So employers that had the majority of their employees working remotely were allowed to verify section two, I-9 documents using email, fax or Zoom video conference. They've continued to extend that since March 2020 and the current extension lasts until April 30th, 2022, so that's still applicable.

Now, the big problem with that was that when employers resumed in office operations, they were required to physically inspect the documents within three days of normal business in office, business operations resuming. And so that's obviously a problem for employers that have hired thousands and thousands of remote employees throughout the COVID-19 pandemic and over the last two years. So it's important that employers have a plan before they reopen their offices on how to address these I-9 compliance issues and how to properly ensure that they're physically inspecting the documents in a timely manner once the office operations resume.

Ben Lau (05:53):

Right. And I think actually there's a current rule working its way through that they may make these temporary remote verification of documents, a permanent thing, which would actually be excellent and really compared to basically bring everything up to the 21st century, more of this physical verification of documents.

Zain Abidi (06:14):

Yeah. These are welcome changes by the immigration law community. USCIS and ICE always push back against remote working prior to the COVID-19 pandemic, whether it was in the I-9 context or in the H1B context with just remote work sites. And so we welcome any change that brings the regulations into the realities of the 21st century workplace.

Ben Lau (06:35):

Yeah. And to go along with the compliance thing, I always thought that I-9s were not very complicated. There's three lists of documents, pick your documents from the list, satisfy the requirements. I didn't understand why this was so difficult, but I know you just got through conducting a rather large audit for a company that they asked for. And aside from getting just records organized, why would a company want to spend the time and money to have a lawyer come in, look at all these paper I-9 forms to figure out if they are in compliance? Why would they want to do that?

Zain Abidi (07:09):

Yeah. As noted earlier, it's important that employers recognize you really only have one shot to getting the I-9 right. You can't mess up the I-9 on day one of the employees hiring and then go back a week later and fix it. Now, as we'll get into it,

there are mitigating factors that can be completed via an audit. So it's important that employers, right from the get go, minimize these mistakes and doing an internal audit is key to recognizing common mistakes that the employer is having. And generally what I'll see is that certain HR personnel or certain personnel that are verifying these I-9s tend to have the same types of mistakes.

So person A will usually have three mistakes that are repeated through all the I-9s. Person B will have three different mistakes that are repeated through the I-9s that differ from person A's mistakes. And why that's important is that these fines can total in the hundreds of thousands of dollars. And if an internal audit is conducted and ICE sees that you made a good faith effort to fix your I-9s and to address common mistakes, then those fines might be mitigated.

Ben Lau (08:15):

All right. Can you just give an example of a common mistake you would see on an I-9 form?

Zain Abidi (08:20):

Yeah. I think one of the most common ones is not having the employees fill out section one by the first date of hire. Usually sometimes it's done on the second day of hire, and that's more common now with the hybrid work situations. That's kind of where we're getting into some gray area. And that's why it's important to talk to your attorney, if you have I-9 questions coming up with a hybrid work situation. Another issue is the wrong document number, especially as it pertains to employment authorization documents, it's not immediately clear what the document number is on those documents.

And so it's pretty common for employers verifying someone who's a non-immigrant or who's not a citizen or permanent resident, verifying their employment with the wrong document number. One question that I get is that if a company is enrolled in E-Verify, do they still have to complete an I-9? Do you mind talking about E-Verify and why there are two separate requirements?

Ben Lau (09:10):

Yeah. As you're saying, there are two separate requirements just because you're doing E-Verify. Does it mean you've satisfied the I-9 requirements, you have to do both. While the documents are similar, they're definitely two completely separate processes. And while I think probably the biggest difference is that while E-Verify is a voluntary system, I-9s mandatory. So as you were discussing Zain, companies have to do, I-9 there are certain documents they have to use to validate an employer's work authorization. Whereas E-Verify currently is still a voluntary system for the most part.

Now, there are certain situations where an employer is required to have you verify. This would be if state law requires it, and there are about 24 states that require that varying levels of employers in that state have E-Verified everything from all public and private employers to simply companies working on state contracts. The other situation where a company is required to be enrolled in E-Verify is if they are working on federal contracts. You bid on a federal project, you got that federal project, now, any individual, any employee for that company working on that project has to be

verified through, through E-Verify.

Zain Abidi (10:27):

And so essentially, any company that wants to bid on any project funded by this infrastructure bill would have to be enrolled in E-Verify.

Ben Lau (10:34):

So you're not required to be enrolled in order to bid on a project. So let's say there's an infrastructure project you've identified that you're going to want to work on. You're not required to be enrolled in E-Verify at the time you bid. But however, within, I believe it's within 30 days of being awarded the contract, your company needs to be enrolled in the E-Verify. Now, it is important to note that E-Verify lets a company roll out the program slowly based on work site. Let's say a company has its headquarters in Florida, employs, has work sites in Georgia and California, it can if it wishes, only enroll their Georgia work site within E-Verify. And at that point, any new employee hired at that Georgia work site, needs to go through the E-Verify program when they're hired. But, employees working at the California work site or the Florida work site are not required to be validated through even E-Verify.

It comes with a very important point when a company is thinking about whether or not they're going to do E-Verify, how are they going to roll it out? Because the other thing that comes up, aside from what work site, is that once the company is enrolled in E-Verify, you have to use it. This is not a, "Oh, I'll enroll with it and then maybe we'll do it in the future." No, once you're enrolled, you have to implement it and to not implement it, is now bringing that company in potential liability or definite liability from the government and it would impact their ability to one, qualify for E-Verify in the future, which would in this case, impact their ability to bid on federal contracts or state contracts for that matter in certain situations. And then also possibly bring in an I-9 audit from ICE, from Immigration and Customs Enforcement, because they're already violating the E-Verify rules, so now they're on the government's radar.

There are a couple other issues that want to come up, when a company's thinking about whether or not they should enroll in E-Verify, but those are the big ones. One, you need to make sure that you're committed to the program. Two, that you have the administrative support staff necessary to execute the program requirements and that you're willing to put the training and the time and effort in to getting your HR team set up to accurately and effectively roll out that program. Because like you were saying, Zain, people make the same mistakes on I-9 forms, you can't be making these mistakes on the E-Verify system, so proper training's required.

Zain Abidi (13:15):

So, just to clarify, why would a company want to voluntarily enroll in such a program?

Ben Lau (13:21):

Companies want to do E-Verify mainly to get in these federal contracts. You want to work for the federal government. You want to work on jobs for the federal government. You have to be enrolled in E-Verify. And as I said, certain states make it a requirement. I believe it's, let me see here, some of the states that have varying levels

of requirements for E-Verify, you're looking at Alabama, Arizona, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, Utah, Florida, Indiana, Missouri, Nebraska, Oklahoma, Pennsylvania, and Texas, Idaho, Virginia, Michigan, New York, Oregon, and Washington and then finally Colorado, Louisiana, and Minnesota.

All of those at the very least, if you are working on a contract for that state, you have to be an E-Verify company. The other one would be for recruiting purposes. There is a specific visa category, F1 students who have a STEM degree, which is a science, technology, engineering or mathematics degree. They are eligible for an additional 24 months of work authorization after they graduate. But that's only for a company that's enrolled in E-Verify. With the current job market as it is and I know that there's a lot of tech companies trying to hire these STEM degree graduates, being able to recruit and having that extra 24 months of work authorization is beneficial to both the company and to the employee.

Zain Abidi (14:43):

And that's because it gives them more shots in the H1B lottery, right?

Ben Lau (14:46):

Yeah. Which is a whole other issue, which would probably be a podcast on its own. But yeah, basically it gives these students the best chance at having a long term career in the United States.

Zain Abidi (15:01):

And it's critical to ensuring that these tech companies and other companies can fill gaps in skilled labor, its so needed in the United States.

Ben Lau (15:09):

Right. And as we're talking about this, how companies can recruit and basically attract talent, I know remote work has become an issue. Does moving an employee or having remote work, does that impact when a company needs to do an I-9 re-verification or anything? Let's say, the person was working in the office, COVID happened, now they're working at home. Do they need to do anything?

Zain Abidi (15:32):

No. Even if you're switching work sites, you generally don't have to do a new I-9. However, if you're moving the employee from a parent company to a subsidiary or essentially a company with a different FEIN, different tax number, you should do a re-verification of that employee because for the government's intents and purposes, it is a new company.

Ben Lau (15:53):

Right. And from the E-Verify sense, same thing. As long as if you have an employee moving within the same FEIN, or the same company, the work site doesn't matter. However, let's say you move that new employee from a non E-Verify work site to an E-Verify work site, and that new work site is a subsidiary, has a different FEIN, then

you would be required to E-Verify that employee. Also, if you happen to be working on a federal contract, then if you move an employee onto that federal contract project, then you would have to do E-Verify again for them. So these are all just the little things with E-Verify that you need to watch out for, if you do enroll your company in that.

How about from an immigration perspective? Let's say we moved someone, they were working in San Francisco, they decided it was too expensive. They bought a house at Reno. Now they're living and working in Reno. Do they need to do any actions?

Zain Abidi (16:50):

Yeah. It'll generally depend on what kind of visa they're here in the United States on. Visas like the L, L-Visa aren't location specific because they do not require a prevailing wage, whereas a visa like the E-3 Visa or the H1B Visa, their location specific. And that's because the compensation in those visa types are tied to prevailing wages, which are set by the Department of Labor. So generally, you'll have to file an amendment if they're changing work sites, especially if it's outside of the same metropolitan area that they were before.

Ben Lau (17:24):

Yeah. That was definitely one issue we had come up a lot was the whole employees moving their work sites. And even when they were moving, I think for us, it was as simple as moving from Los Angeles to Orange County, which could be as easy as moving from LA and now you're working in Anaheim. So while that may not seem far, it had a significant impact on what the company's requirements were from an immigration perspective and what they needed to do to ensure that they remained in compliance with US Immigration Law and that their employee remained in compliance with US Immigration Law.

Zain Abidi (18:01):

Yeah. And it's important that employers know that they should consult their immigration attorneys before they make any moves or an employee transfers, especially if they're not citizens or permanent residents, because they need to understand the consequences of these transfers. And sometimes they can cost the company thousands of dollars. And so it's better to be proactive rather than move an employee or even promote an employee to a new position and then have to deal with compliance issues retroactively.

Ben Lau (18:29):

Yeah. And I think that could almost be a theme for our whole podcast today. It's very important to be proactive in addressing concerns or whether it's I-9, whether it's E-Verify, whether you're moving employees around and you want to check on potential immigration issues, you want to contact your attorney to discuss these matters. If you have concerns about your I-9, it's almost guaranteed, there's some problem in there, because no one's thinking about I-9s, unless there's a problem with it.

And with E-Verify, it is important to talk to your attorney about this, to determine whether your company is willing and able to take on the additional responsibilities of

E-Verify, to ensure that you remain in compliance with that program before committing wholeheartedly to this program, because honestly, the enrollment process takes about 30 minutes. So you can enroll really quick and that quick enrollment can now open your company up to government oversight for years, as long as you're enrolled in that program. And you don't want to be taking such steps without really evaluating the pros and cons. As we wrap up this podcast in, Zain, are there any key takeaways you want to add?

Zain Abidi (19:42):

Yeah, I think it's important that companies are proactive in addressing I-9 and E-Verify issues and immigration issues as a whole. And so number one, ensure that they minimize their liability and number two, ensure that they have the smoothest possible route to obtaining and moving forward with that federal contract that they so desire.

Ben Lau (20:01):

All right. Thank you.

Alitia (20:04):

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