

Exceptional Service: Restaurant Immigration Compliance for Employers

By Felice B. Ekelman & Amy L. Peck

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Meet the Authors



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Transcript

INTRO

Restaurant operators and employers may likely face significant challenges in hiring and retaining their workforces under the new administration.

On this episode of We get work®, we discuss increased I-9 enforcement and inspections, along with practical steps restaurant employers can take to prepare for potential audits, investigations, and worksite enforcement actions by proactively ensuring their workforce eligibility status complies with federal regulations.

Our hosts today are Felice Ekelman, co-leader of the Restaurant Group, and Amy Peck, co-leader of the Immigration Group, and principals, respectively, in Jackson Lewis's New York City and Omaha offices.

Felice and Amy, the question on everyone's mind today is: As President Trump embarks on his second term, how can restaurant employers best prepare to comply with changing immigration regulations, and how does that impact my business?

CONTENT

Felice B. Ekelman

Principal, New York City

I asked Amy to join me today because Amy, so many of our restaurant clients, are asking what they can be doing now in anticipation of changes that the new administration may bring with regard to compliance with our immigration laws.

First and foremost, restaurant clients, in particular, are asking about I-9s. They are asking whether they should conduct an audit and whether they should consider the E-Verify program. I was hoping you could help unravel some of these issues for employers in this industry. So, those are my first questions.

Amy L. Peck

Principal, Omaha

All right, Felice, let's get started. So, the I-9 is foundational to any compliance program. And yes, restaurants should be looking at their I-9s. An internal I-9 audit is essential, particularly in the next few years.

Now, when I say internal I-9 audit, what I'm talking about is not self-surgery in the sense that you look at your own I-9s and determine whether they're compliant. It is something that you want outside help on because you don't want to perform surgery on yourself. It's always a bad idea. It's a good idea to have an independent judgment on those I-9 forms. It can be such a big liability if you are audited---up to \$2,700, \$2,800 per I-9 for fines if you make mistakes.

Ekelman

Hold on, hold on, let me make sure I heard you, Amy. \$2,700 or \$2,800 per I-9, that is the financial liability for mistakes?

Peck

That's right. It can be devastating for a business. If you're using paper I-9s, it would not be unusual to see a 50% error rate. So, those fines really rack up. Yes, step one in a compliance program would be to have a professional I-9 audit done on your I-9s. If you're thinking, well, I don't have the budget for my entire organization, a spot audit can always be done which is a 'how are we doing' type of audit. So, that's something that should be done immediately.

Ekelman

If an employer sees with this spot audit and with outside help that there are errors or omissions, is it possible to make corrections and improve compliance?

Peck

It is and that's the wonderful thing. Remediation of an I-9 often will fix the errors. It'll fix the errors and reduce the liability. There are some types of errors, like timeliness violations, where maybe you're late on that I-9. That has a statute of limitations that might be associated with it. But everything else, as soon as you fix it, they can no longer fine on it. So, it's a good idea to do that.

The other reason to do a professional I-9 audit is remediation is done on the form itself. Therefore, if it's done incorrectly, you can invalidate the form. There are over 600 variables to remediation rules like how to fix the I-9. So, it's important to do it right the first time so that the form isn't invalidated, or you make it worse.

Ekelman

So, I'm understanding that the first step might be to just make sure you have I-9s. The second step would be have someone take a look at them, at least a spot check. Then, the third step would be to come up with a remediation program, a fix-it program, if there are errors and omissions. Do I have that right?

Peck

Yes, you do. And let's layer E-Verify on top of that because you did ask about that.

Ekelman

Can you explain to our audience what the E-Verify program is? Because I want to make sure that everyone who's listening has an understanding that's accurate.

Peck

You bet. E-Verify is a government system that is used to verify information that is on Form I-9. In some instances, it's used to verify the photograph on certain documentation that's presented like a U.S. passport.

It can be an addition to and an enhancement of your compliance program. As long as you're doing E-Verify well, it can also be a deterrent to ID fraud, although it is not in any way perfect because the E-Verify validations can be beaten through ID theft, ID borrowing or something like that. But it can be an enhancement. It's not always a good idea for every client to use E-Verify; however, because it takes additional resources and training. If there's high turnover in your HR roles, it might not be a good idea for you. Although it is mandatory in certain states, that's something you'd want to look at.

Ekelman

So, is there a cost to enrolling in the E-Verify program?

Peck

There's no external costs.

Ekelman

Okay, so the cost is making sure that folks within your organization are trained to use the program accurately, as I understand.

Peck

That's correct, Felice. The data is being collected by the government. If there are certain aberrations in your data or you are doing E-Verify incorrectly, the E-Verify system will alert and sometimes notify other government agencies, and it can actually cause an audit or an investigation. So, that's why if you do choose to do E-Verify or if you're required to do it, you must do it well.

Ekelman

Is it a possibility that employers can try E-Verify on a pilot basis or for just a portion of their workforce? Or is the program all or nothing, so to speak?

Peck

There's no pilot per se, but you can pick and choose the states or even the locations within a state that you want to do E-Verify. For example, if you say well, we're in Florida, so it's mandatory there, we're going to do it there, but we're also in Nebraska, it's not mandatory in Nebraska, so we're not going to do it there, that is perfectly acceptable.

Ekelman

Thanks for that. You mentioned audits and investigations. Are these two different approaches that the government can take? I assume this is the federal government that we're talking about.

Peck

That's right. There are state audits of I-9 documentation or E-Verify. The state cannot audit I-9s unless it's a criminal investigation and the I-9 gets pulled into an investigation. But the federal government has a couple different tools in its toolbox.

The most common tool is the government Notice of Inspection which is an I-9 audit. Those really are driven in terms of numbers by the administration. The Biden administration didn't do very many. Trump's first administration did a whole bunch. We expect that government I-9 audits will be on the increase here in the next four years. We also understand that they are looking at staffing up for that. So, that's why certain industries, certain businesses and certain geographic areas really need to be ready for an I-9 audit to come in your door.

Ekelman

How will an employer know that they are being targeted with an I-9 audit? I assume they get a letter from, is it ICE that would send it?

Peck

It's Immigration Customs Enforcement Homeland Security Investigations, which is a division of Department of Homeland Security. So, they show up.

Ekelman

So, this is something that shouldn't be ignored, I gather?

Peck

Yeah, that's correct. You should alert your folks to look for this. Now, if the government is following the rules, they will show up and personally deliver this. I've had some auditors try to mail them, but they should be personally delivered. One of the tricks that the government does is they say, hey, this is a Notice of Inspection I-9 audit. Why don't you just give these I-9s to us right now? No, no.

Ekelman

You mean hand them over?

Peck

That's right. Now, you are required to hand over the original I-9s, but you have three business days to do that. That's not very much time, but you still, by law, have three days to turn them over, it's rarely extended.

One of the take homes for folks listening to this is to ask yourself, am I ready to produce I-9s in three days? You should take every minute of that to make sure everything's ready and don't take the government up on their 'generous and kind'

offer to hand them over right when they walk in the door. So, that's one.

Ekelman

So, if I am listening to this and I'm hearing three days to turn over my I-9s separately, there's no time for an audit at that point because three days is not enough time. What can I do? What would I do during those three days, just gather the I-9s and hope for the best?

Peck

You call your lawyer to help. Sometimes the Notice of Inspection is actually not correct. So many times, you can call the auditor and say, you got to redo this. Here are all the things that are wrong, like the business name is wrong; it's not a legal entity. In the meantime, you're scrambling like mad to try to get the I-9s ready.

If there is time, you can remediate those I-9s. Often there isn't like you said, but you're making sure you have an I-9 for each employee. There is an administrative subpoena that's often served with the Notice of Inspection, and it will have a number of other documents that they're asking for. You have additional time to produce those documents, like payroll records and things like that. But the three days are the I-9 and the list of acceptable documents like whatever was copied in connection with that I-9. Those must be produced. E-Verify records as well. So, that's something that you need to be ready for.

Ekelman

What you've just described is an audit, not a raid. Is that correct? What are the raids that people are talking about? Is this a real concern for employers?

Peck

Yeah, the word raid is actually not one that the government uses. They say worksite enforcement action. So, to be technically correct, we would call it a worksite enforcement action, not a raid. But raids are, they're typically generated by what the government feels is criminal activity in addition to having folks working at that work site who are not documented.

A raid involves a lot of planning. It involves subpoenas. There's a lot of personnel involved. Typically, the government tips off the media. So, the media is there with cameras. They come to a location, surround the location, come in and arrest the workers and sometimes the management. In certain cases, they serve the subpoenas and grab computers and documents. That is something that we do expect to happen in the next four years because they're flashy. The public is led to believe that the government is doing something about the so-called illegal immigration problem. Even though in terms of long-term impact on any type of compliance or solving the issue of undocumented workers, it's spinning in the wind. But it's flashy and popular with certain administrations.

Ekelman

Do you think we'll see any raids in the hospitality industry or was that just total conjecture?

Peck

Well, it is a conjecture. The hospitality industry is at risk; certain properties may be targets of this administration. We know that. I mean that not in the criminal sense, but I think they have specific people or companies they want to go after within the hospitality industry. It wouldn't shock me at all. Manufacturing and food production are more typical, and agriculture. There were some raids on the last administration of feedlots and food production. But I think the gloves are coming off this time and they're going to widen their lenses.

Ekelman

Some clients have asked whether it's a good idea to avoid this kind of situation with I-9 compliance audits and possible worksite compliance actions by engaging third-party staffing agencies. Is that a quick fix to this problem?

Peck

It is not. We could spend a whole hour on this issue. It is rumored that this administration is going to take a hard look at contractors and staffing agencies in the sense that there is a belief that some are not following the rules and that many undocumented workers are getting work through these agencies. Whether it's true or not, that is the belief.

So, to the extent you are using staffing companies or contractors, make sure that those contracts are shored up and that you have strenuous compliance provisions in those contracts that require those contractors to have vetted the employees. Maybe you add any verified provision and that you have trained your staff that to the extent they hear any rumors of contractors not being lawful, maybe being underage, that information has to go to management and you cannot ignore that.

So, there are a lot of moving pieces, but you can't just blithely and blindly say, we'll just hire contractors. That is not a good idea.

Ekelman

Right, so you can't be sure you can hide behind a staffing agency or independent contractor situation. That's good advice.

Some of our clients have asked if they operate in cities that are designated as sanctuary cities and whether they can expect different outcomes from the federal government because of the designation as a sanctuary city.

Peck

Yeah, you absolutely can.

Ekelman

Can you help us with that?

Peck

There is a belief that sanctuary cities will be targeted. I think there was some

rhetoric actually by the Trump administration folks saying that there would be a focus on sanctuary cities. I don't know. That's certainly a concern, but during Trump one, most of the worksite enforcement actions, AKA raids, were in red states. So, I don't think anyone is safe. I don't think you can sit back and say, well, I'm in a deeply red area or whatever, and we're going to be fine. It doesn't work that way. It didn't last time. If you are in an industry that has a high number of immigrant workers or any number of factors, you could be the subject of one of these enforcement actions or I-9 audits. You just need to take care of your compliance and then whatever happens, happens. But you cannot sit back and say, it's not going to be me.

Ekelman

At this point, all of our hospitality clients would be well served to assume that they could be subject to some kind of review by the federal government. So, I guess we're back to what we started with, which is the I-9, making sure that competent staff are handling the I-9s and that they are being retained, right?

Peck

That's right.

Ekelman

Even terminated employees, their I-9s have to be retained for three years post termination?

Peck

It's one year or three years, depending on the date of hire. There's an algorithm there, but yes, they must be retained for a certain period of time after the termination. And all active employees need I-9s.

Ekelman

So, it's never too late to do a self-audit.

Peck

That's right. That's right.

Ekelman

If there are missing I-9s?

Peck

It's never too late to do a new one. In fact, you should. Felice, you mentioned that at the beginning. Make sure everyone has an I-9. That's like step one. You don't need a lawyer for that. Just get those I-9s executed for any employee who doesn't have one.

Ekelman

So, any other words that you would offer to our industry clients with restaurants on this issue?

Peck

It's time if you haven't been paying attention to compliance, which needs to move to the very top.

The thing is about compliance, it sits in the background in the corner. It's something that gets pushed aside because all these other things are going on, right? You're trying to find people to work, you're doing a hundred different things, and then compliance is there, and it pounces. When it does, it hurts really bad. So, move it to the top, deal with it, make sure you've got your house in order, and then you can forget about it again for a while.

If you do a spot audit and you find out your I-9s aren't very good, training needs to be moved to the top. I-9 training only takes about an hour or so, and it reaps huge benefits for you.

But I would say just deal with it and then you can go on to more important things. Even though it's really important, you it's you've got a million, a million, bigger and better things.

Ekelman

Well, thank you, Amy. Amy is one of the leaders of our Immigration Practice and Compliance Group. She helps clients in all industries all across the country. So, thank you, Amy, for your expertise and wise words.

OUTRO

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