



Worksite Compliance in the Time of COVID-19

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Elise Fialkowski has been providing immigration assistance and solutions to leading universities, research institutions, multinational corporations, startups, entrepreneurs and individuals for over 25 years.



Elise has particular expertise in worksite enforcement and leads Klasko's worksite compliance group. She regularly counsels on I-9 compliance, E-Verify, and H-1B LCA compliance. She works with employers to develop proactive compliance programs and assists employers with internal audits and training. Elise has also successfully represented companies facing I-9 and H-1B LCA audits and investigations.

Elise has long been active in the American Immigration Lawyers Association (AILA) and currently serves on AILA's Global Migration Section Steering Committee and on the Philadelphia Customs and Border Protection Liaison Committee. She has served on many other committees at the local and national level.

Elise has been named in Best Lawyers in America ©, Pennsylvania SuperLawyers, The International Who's Who of Corporate Immigration Lawyers and the International Who's Who of Business Lawyers. A Phi Beta Kappa graduate of the University of North Carolina at Chapel Hill, Elise received her law degree from the Villanova University School of Law (J.D., magna cum laude, 1991).

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Andrew Zeltner is an Associate in the Firm's Philadelphia office. Mr. Zeltner handles a wide array of corporate immigration matters including those involving the processing of permanent resident applications (green cards) on behalf of multinational corporate and individual clients, including labor certification applications, immigrant visa petitions and adjustment of status applications.

He has significant experience providing employment-based U.S. immigration services for large corporate clients, including applications for B-1 OCS, E-1/E-2, H-1B, H-3, J-1, L-1, O-1, TN, labor certifications, multinational manager and executive immigrant petitions, outstanding researchers, extraordinary ability aliens, and national interest waivers. He has provided extensive advice to human resources professionals and corporate counsel regarding immigration compliance matters including I-9 and LCA compliance issues.

Mr. Zeltner received a Bachelor of Arts degree in Politics (cum laude) from The Catholic University of America. He earned his J.D. (cum laude) from Quinnipiac University School of Law. While in law school, Mr. Zeltner served as Opinions Editor of the Quinnipiac Probate Law Journal.



Andrew J. Zeltner
Senior Counsel

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Agenda

- New Form I-9 for May 2020
- COVID-19 I-9 Policies
- M-274 Updates
- Increased I-9 Enforcement
- Potential I-9 Fines and Penalties

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New Version of Form I-9 Released

- New form released on January 31, 2020 – Version 10/21/2019
 - Employers can continue using Version 07/17/17 of the Form I-9 through April 30, 2020
 - Must use version 10/21/2019 as of May 1, 2020
- OMB filing classified the new version of the Form I-9 as an “extension without change”
- Nevertheless - some changes to Form I-9 Instructions
 - Clarification for remote/agent: “an authorized representative can be **any person;**”
 - But employer liable for any agent violations
 - New in Instructions: “DHS may also share this information, as appropriate, for law enforcement purposes or in the interest of national security.”

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Background - Basic I-9 Process

- Timing of I-9 Completion
 - Cannot begin the I-9 process until job offer accepted
 - Employee completes Section 1 on (or before) **first day** of employment
 - Employer completes Section 2 within **three business days** of first day of employment
 - Late completion is a violation with no remedy
- Documents must be examined in the employee’s physical presence to determine:
 - Whether the documents relate to the employee; and
 - Appear to be “reasonably genuine”

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I-9 Updates Due To COVID-19

- 3/20/20: DHS Announces Flexibility related to Form I-9 Compliance
- 3/21/20: E-Verify Extends Timeframe for taking action to resolve TNCs
- 4/3/20: USCIS FAQs Related to Temporary Policies for Form I-9 and E-Verify
- 5/1/20: COVID-19 Temporary Policy for List B Documents
- 5/15/20: Form I-9 Requirements Flexibility Extended for 30 days

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I-9 Updates Due To COVID-19 – Enhanced Flexibility

- What stays the same:
 - TIMELINES:
 - Section 1 - no later than first day of employment
 - Section 2 - in 3 business days
 - No changes for non-remote work
- What is different for remote work:
 - Allows physical presence requirement to be deferred to 3 days after “normal operations” resume
 - For remote work – allows for first time “virtual review” over video link, fax or email
 - Full process in 3/20 announcement must be followed

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I-9 Updates Due To COVID-19 – Enhanced Flexibility

- When do you get enhanced “Flexibility”?
- If Employer is “taking physical proximity precautions due to COVID-19”
- “Only applies to employers and workplaces that are operating remotely”
- “If there are employees physically present at a work location *no exceptions* are being implemented at this time for in person verification. . . However, if . . . employees are subject to COVID-19 quarantine or lockdown protocols, DHS will evaluate on a case by case basis”

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Evaluating the Options for I-9 Completion

- Option 1: Basic process in person
- Option 2: Virtual Verification –virtual followed by in-person review of documents
- Option 3: Remote Agent Verification –authorized representative designated to complete the I-9 on the employer’s behalf

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Overview of the Virtual Process

- Confirm employer qualifies
- **1st day** employee completes Section 1
- **By 3rd day** Employer
 - Inspects Section 2 documents remotely over **video, fax or email**; and
 - Obtains, inspects and retains copies of Section 2 documents
- Employer must provide “written documentation of the remote onboarding and telework policy for each employee”
- Implement Procedure for tracking virtual I-9s to meet deadlines
- A physical inspection of I-9 documents must take place within 3 business days of resumption of **normal business operations**
- Once physically examined, employer should add “COVID-19” and “documents physically examined” with the date of inspection (and who conducted) to Additional Information Field. If Reverification and updating section 3, may note “COVID-19 EXT” in the margin or annotate in Add Info field.

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Overview of Remote Agent Process

- Employer may designate “any person” as “authorized representative” to examine original documents and complete Section 2 on behalf of organization
- Remember, employer is liable for any violations
- Establish clear procedures and instructions
 - Employee – timeline and who can act as an agent
 - Agent - overview of process and timing – including FAQs (e.g. put “Authorized Representative” as job title”)

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Best Practices for Remote Agent Process,

- Consider webcam review with agent
- Agent must copy/scan documents to employer
- Remember, E-Verify employers will need copies of identity documents and E-Verify needs to be done by employer in 3 days
- Review I-9 completed by agent for errors
- Correct any errors consistent with guidance

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Covid-19 Impact For List B Identity Documents (5/1 guidance)

- What if Employee presents expired List B document **NOT extended by issuing authority?**
- If List B doc is set to expire on or after March 1, 2020, Employer can treat as if Employee presented a valid receipt for an acceptable I-9 document
- Employer should record the document in Section 2 and enter "COVID-19" in the Add Info Field
- Within 90 days of DHS's termination of this temporary policy, Employee must present the valid unexpired document

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Covid-19 Impact For List B Identity Documents

(cont'd)

- When Employee **later presents unexpired document**, enter doc no. etc. in Section 2 Add Info field, initial and date
- When **List B Documents auto-extended by issuing authority** (expired on or after March 1), acceptable NOT as a receipt during extension timeframe:
 - Enter documents expiration date in Section 2;
 - Enter “COVID-19 EXT” in Add Info field
 - Attach a copy of webpage or notice indicating authority is extending the documents
 - NOTE – not required to later present unexpired List B

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Covid-19/E-Verify Considerations

- After remote review of I-9 documents, ER should create an E-Verify case within three business days from date of hire as per current policy
- Must use hire date from I-9 to create the case. If case creation is delayed due to COVID-19 precautions, select COVID-19 from drop down menu
- If a state automatically extends a DL due to COVID-19, ER should enter actual expiration date as printed on the DL when creating the E-Verify case
- **Extension of TNC timing** – no action while in “interim status”

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M-274 Handbook Updates

- USCIS released a revised Handbook on April 27, 2020. Notable changes include:
 - Automatic EAD extensions: Now write “EAD EXT” and the 180-day auto extended date in Add Info field in Section 2. EE no longer must replace “employment authorized until” date in Section 1
 - F-1 STEM OPT extensions: Enter expired EAD in the document title/number fields and then enter date of 180 days from EAD expiration in the expiration date field
- Note “EAD EXT” in the Add Info field. Previous guidance indicated ER should enter EAD expiration date in exp date space.

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M-274 Handbook Updates

(cont'd)

- F-1 Cap Gap Extension-ER may now accept expired EAD, in combination with I-797C receipt as evidence of timely filed H-1B petition. No longer need to inspect Form I-20 recommending cap-gap extension.
- In Section 2, now enter “EAD” in List A column, record Form I797C receipt in the Doc Number field, enter Sept. 30 and the year petition was filed in the expiration date field.
- Be sure to indicate “CAP-GAP” in Add Info field.

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I-9 Retention

- Retain I-9s for all current employees
 - If they're still an employee, keep the I-9
- Retain I-9s for terminated employees for the longer of:
 - Date of hire + 3 years
 - Date of termination + 1 year

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M-274 Handbook Updates

(cont'd)

- 240-Day Extensions: M-274 continues instruction to write "240-day Ext" and the I-129 submission date in the Add Info box in Section 2.
- EE no longer needs to update Section 1 with the 240-extension period in the "alien authorized to work until" expiration field.
- I-9 retention: No change in rule but separate termed employees in two categories: (1) If EE worked for less than 2 yrs, retain their I-9 for 3 years after the date you entered in the First Day of Employment field; (2) if EE worked for more than 2 years, retain the I-9 for one year after the date employment ended.
- Purge when you can!

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Increased Enforcement

- DOJ immigrant and employee rights section (IER)
- FDNS site visits continue! – virtually!
- I-9 Audits and investigations more than quadrupled –
 - Over 5,900 compared to FY2017 1,360 I-9 Audits
- Waves of NOIs issued including many in March
- 3/20 and 5/14 Guidance allows for NOI response extension to June 19

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Form I-9

- New fine structure (increase!)
- Violation Percentage (at 50% > **\$1,948 fine per I-9** - substantive violation)
- Potential for criminal charges for “pattern and practice” of unlawful employment

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Questions?



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