

## **Big Law Redefined Podcast – Immigration Insights Miniseries – Episode 12**

Kate: Hi everyone, and welcome to the Immigration Insights Podcast. We are thrilled today to talk to you about I-9 compliance. It's a huge issue right now with the new administration and many companies want to know what are the compliance requirements, how they can ensure that they are doing things [00:00:30] correctly and in conformity with the immigration rules as the headlines talk about this all the time. I'm thrilled to be joined with Miriam Thompson today from our Atlanta office. She's a shareholder there and a very valuable member of our team. Miriam, hello and thank you for joining us.

Miriam Thompson: Hi there, Kate. Thank you so much for having me today.

Kate: So you do a lot of work on I-9s, as we do in our different offices [00:01:00] with companies across the country, and many companies don't realize that this has actually been a requirement for some time introduced through the Immigration Reform and Control Act of 1986 and non-compliance is a huge problem for them. It can lead to civil penalties and in really egregious situations, even criminal penalties. So tell us a little bit about what is an I-9 [00:01:30] and what are the requirements to complete it?

Miriam Thompson: So a form I-9 is something that every employer has to complete upon hiring a new employee. There are certain timeliness requirements for the I-9, specifically section one of the I-9 has to be completed by the employee at the date of hire and section two of the I-9 has to be completed by the company within three business days from the date of hire. [00:02:00] So that is one of the initial issues we oftentimes see untimely completion, because section one was completed later than the date of hire and section two was completed later than three business days from the date of hire.

So if the date of hire is on a Monday, section one would need to be completed on Monday and section two would need to be completed by Thursday. The process to complete the I-9 is that section one must [00:02:30] be completed by the employee. Then the employer should review the employee's input in section one and complete section two based on the employee's choice of documents to provide for section two. So section two of the I-9 will require documentation from the employee. The employee must be given the choice what to present. And Kate, you talk a little bit [00:03:00] more about what documents are typically accepted.

Kate: Absolutely. So there's a list A, B, and a C that employers provide to the employee. So it's very important to keep in mind as an employer, you can't tell an employee what document to provide. You can print off the USCIS website the list of acceptable documents. So a list A document typically verifies both the identity of the employee [00:03:30] and their employment eligibility, like a US passport, like a foreign passport with an accompanying work authorization document from the USCIS or B and C are usually separate documents that show identity and work eligibility. So it's very common for employees, for example, to select from the list B, a driver's license, list C, a social security card that's endorsed for work authorization, [00:04:00] right? If it says not valid without

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DHS work authorization, you're dealing with a foreign national and that they have to show you something else.

And this is very important. Sometimes people will come, maybe they're foreign, maybe they're American because the I-9 requirements apply to everyone and they give you something and it's not valid. You as an employer can't say, no, no, no, give me this because not only does USCIS and ICE, the enforcement [00:04:30] arm of immigration have jurisdiction over I-9, the Department of Justice does too, and telling employees what documents to give can be considered discriminatory. So we really want to stay away from that. What we recommend employers to do is to provide the list to their employees in the verification process and let them choose. And if they don't have it on them, they can come back to you. This is why you're given three days to complete the I-9 process. Now, one of the interesting things [00:05:00] to keep in mind is during COVID, the government for the first time introduced flexibilities in this process.

It had to previously be done only in-person and during COVID they allowed remote verification. So you could sit with an HR person or whoever does the verifications at your organization and be on Zoom with your employee and verify the documents that way. After COVID ended, the government has extended [00:05:30] the COVID flexibility to allow remote verification if the employer is a member of E-Verify. E-Verify is the government's voluntary electronic verification system. Now it's voluntary for the federal government. It's mandatory if you're a federal contractor. And it's also become mandatory in many states because many states are concerned with allowing only authorized people in the US [00:06:00] to be employed. So last year, for example, Florida instituted a law that said if you have over 25 employees, you need to be a member of E-Verify.

And previously we had been a little bit cautious about encouraging employers to join E-Verify because when you join E-Verify, you're entering into a memorandum of understanding with immigration and Customs Enforcement and you're basically agreeing to be audited at any [00:06:30] time you're opening up your books to the government. But the truth is, by joining E-Verify, you're actually getting a safe harbor from the government because you're running the employees through their system. And the system will actually tell you whether they're work authorized, if they're not work authorized, or if there's a tentative non-confirmation that has to be resolved. So Miriam, can you talk a little bit about when the non-confirmations occur with E-Verify and how [00:07:00] employers can resolve them?

Miriam Thompson: Yeah, so there's a very specific process on how to resolve a so-called tentative non-confirmation and E-Verify, and there can be two types of tentative non-confirmations. One is related to the Social Security Administration and the employee will need to connect with the Social Security Administration to resolve it or one that is related to DHS. [00:07:30] And to resolve the DHS tentative non-confirmation, the employee will need to call DHS. There is a ten-day process by when the employee must let the employer know that they want to contest the

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tentative non-confirmation, and then the employee will need to take action to resolve it either with DHS or with the Social Security Administration.

Then once the employee has resolved [00:08:00] it oftentimes for DHS tentative non-confirmations, we oftentimes see that these are resolved fairly quickly oftentimes, and E-Verify the case status then updates with an automatic case closure that the employee is R authorized. So typically first step is let the employee know about the tentative non-confirmation, they will then take action, they [00:08:30] will sign the related notice, and once they took action, the case will either be resolved or that the case status may change into a final non-confirmation. So Kate, what are the employer's action items once that case status changes to final non-confirmation?

Kate: Well, you can't employ an employee of course, if they aren't [00:09:00] able to show that they're work authorized in the United States. So it's very important to take steps immediately to get them off payroll and because they haven't been able to verify their ability to work in the US. And the reason we're talking about E-Verify is yes, some states have made it mandatory. So if employers have operations around the country, you may be required to do it in some of your work locations and you may want to expand it nationally so you have a uniform process in place [00:09:30] for verifying employees. The other great benefit of E-Verify is that it gives an extension of OPT, which is work authorization that students get after graduation if they're in a STEM field.

So it's science, technology, engineering or math. And this is a really valuable tool for employers because we have a shortage of H-1B numbers and there's more demand and there's availability. Many employers [00:10:00] have been signing up for E-Verify so they can retain student workers on their workforce by registering for E-Verify. Plus, it makes the verification process easier. Now, in addition to E-Verify, we have many companies we work with that have transitioned from paper I-9s and there are retention requirements associated with the I-9. So it has to be kept [00:10:30] at least for one year past the date of termination or three years from the date of hire, whichever is earlier or later, Miriam?

Miriam Thompson: Later.

Kate: That's right. But paper I-9s, especially when you have a large workforce, they take up a lot of room. So a lot of our companies have been transitioning to electronic I-9 systems even if they don't join E-Verify. And can you tell us a little bit about that?

Miriam Thompson: Actually, electronic I-9s have a lot of benefits. [00:11:00] Our team does a significant amount of I-9 reviews in connection with mergers and acquisitions. And typically when we review a target company's I-9 sample and the I-9s were electronically completed with an electronic software, we overall see a smaller number of errors, deficiencies on the I-9s. However, an electronic I-9 system must [00:11:30] include certain features such as reasonable controls to control

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access, to have an audit trail as to who accessed the I-9s in order to meet DHS's electronic I-9 requirements. Now the guidance of DHS as to electronic I-9s is somewhat vague. I believe their most recent concrete guidance is 10 plus years old. So technology has [00:12:00] advanced significantly. So many scenarios are not addressed in the most recent concrete DHS guidance. However, the reasonable access controls the audit trail and then of course also to be able to reproduce readable copies in the event outside an I-9s audit. Those are some of the general requirements.

Kate: I think it's very important when we work with clients, [00:12:30] we help them to evaluate the different electronic I-9 options. There's many of them out there, and as Miriam said, not all of them are compliant. So it's very important to speak to counsel in making that choice. Now we get on to the not so fun part of this discussion, which is penalties. Many clients think of the I-9 as just a throwaway form. It doesn't matter. It's back to being one [00:13:00] page with some addendums. But the truth of the matter is, if it's not completed correctly, it can really add up for your business if it's not retained correctly, if it's not completed correctly, if it's not done timely. All of these things really, really add up. So Miriam, walk us through the penalties associated with the I-9.

Miriam Thompson: Yeah, so there are two general types of penalties. [00:13:30] The first one being called a penalty for a technical violation and the second one being called a penalty for a substantive violation. Now a technical violation is one that is, I describe it as a minor paperwork error. It is something that can be corrected. And in the event of a government ICE audit, I-9 audit, the employer will get 10 days to correct these technical violations. [00:14:00] Now, substantive violations are major violations that cannot be corrected. For example, the most common one is timeliness, that the I-9 wasn't timely completed within the one or three business days.

That is something that cannot be corrected after the fact because at the time the employee was hired, this wasn't completed. So you cannot complete it late. Now as to current I-9 penalties [00:14:30] and these change every year, they're slightly adjusted for inflation. Currently, they are between 288 and two \$2,861 for each uncorrected technical violation and for each substantive violation. And these penalties are per I-9. Now, Kate, there's also a matrix that ICE uses in an I-9 audit where [00:15:00] they adjust penalties somewhat based on certain statutory factors. Can you speak to those a little bit?

Kate: We are actually super successful as a practice group in representing clients in I-9 audits, and we have been able to get them significantly reduced or even completely waived when we can show that there's been an attempt at good faith compliance. So what is good faith compliance? One, it's proving that you haven't been [00:15:30] trying to circumvent the I-9 requirements purposefully. You haven't been looking to hire unauthorized employees. You have been completing forms and maybe you've had training issues that you have addressed. So we start with advising clients to do an internal audit. In the internal audit, which we work on them with, we will correct I-9 errors that we

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see. We can actually go in, correct them, date them, because when ICE does an [00:16:00] I-9 audit, they actually do forensics on it. So you can't backdate things, you can't do things like that. You have to do it as a correction.

But again, the point is, we are showing, look, we took proactive measures, we corrected it before you even came in ICE, we took the measures that were necessary. So we will remediate the I-9s, we will call in employees. Were required to redo section one if they have done it incorrectly. Where we can't call in the employees because perhaps they've [00:16:30] left the company, we will note that in a memo to file, we will make sure that we are adhering to the retention requirements. So we will purge I-9s if we're holding them longer than we're supposed to. And that's actually something that many clients drop the ball on, but they don't understand that they're liable for each mistake. So if you're holding onto I-9s, that should have been purged and you can get dinged for them. That's something that's very important also to take care of. And then for many of our employers, we [00:17:00] will hold trainings.

We will take the training so that their HR can go back to it time and time again. We will come annually and give them updates on what's going on in I-9s, what changes they've been and what they need to be aware of. And we will also create an employee handbook so they have something when they're onboarding new employees, when they're re-verifying work authorization. For example, you have non-immigrant employees on your workforce [00:17:30] who have to update their work authorization. Periodically we will create an employee handbook, which is usually part of what the employment lawyers have already done for most organizations, that it's just including an immigration component to walk your hiring managers, to walk HR through the I-9 onboarding process. And of course now we have raids. We are working with clients to prepare for raids. We have some clients [00:18:00] that have already been raided by immigration and customs enforcement.

And this is really a top priority for the immigration agency and for this administration to be frank, because it's a way to drive fees to the agency and they are very, very focused as the headlines talk about every single day in ensuring that there are no unauthorized employees working for people. And that includes many companies that may not have anyone who's unauthorized [00:18:30] but are still getting caught up in being raided and investigated. And we will come up in that case with action plans and response bias. So Miriam, can you talk a little bit about how we're organizing clients in case a raid occurs or they get served with a notice of inspection and a warrant?

Miriam Thompson: So this is a very frequent question right now from clients. How do I prepare if ICE shows up with a warrant and [00:19:00] asks to get into the private areas of the business based on the warrant? So as Kate mentioned, you have to have a response plan in place, train your so-called first-line employees, your receptionist, who will be the first individual encountering the ICE agent as to what the company's protocol is in this scenario, who should their receptionist call legal outside counsel, any other internal [00:19:30] points of contact. You're

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also seeing a lot of questions as to what kind of warrant does the government need to have in order to get into the private areas of the business. And that is a judicial warrant. There's a difference between a judicial and an administrative warrant. And administrative warrant does not permit ICE to enter into the private areas of the business except if there is employer consent.

Now an administrative [00:20:00] warrant is typically one that is issued by DHS and signed by a DHS officer while a judicial warrant is issued by a court and is signed by a judge. So if ICE has a judicial warrant, they're permitted to enter the private areas of the business as stated in the warrant. So the warrant will have more information as to what they're authorized to access and what they're authorized to [00:20:30] seize or take with them. So in addition to the protocol, having a protocol in place once ICE shows up, preparation for that obviously is very much key as well ahead of the rate occurring. And that starts with being I-9 audit ready and having your I-9s in order because oftentimes a raid is triggered by something that is found in [00:21:00] an I-9 audit that then makes I come in and raid the workplace.

So I'd be advised employers at this time frequently about establishing a so-called I-9 audit ready file. And in that audit ready file, employers should now prepare certain documents to have them available if the government requests them. Because oftentimes there's [00:21:30] a very short timeline in between when the employer receives the notice and then three business days later, usually the I-9s and any other documents often requested in a subpoena will need to be turned over. So Kate, what do you typically advise employers to have in an I-9 audit ready file?

Kate:

We definitely have all of our documentation in place and it's very [00:22:00] important I just want to add, that you reach out to counsel because yes, you have three days to turn over the I-9s, but many times when we get involved, we can call the special agent in charge, we can reach out to ICE and we can get an extension of that. That is critical, especially if you have multiple locations with I-9s across the country, you need time to gather them. Now if you've done an audit, you're in a good place and you have corrected your I-9s, but if you haven't done the audit and [00:22:30] maybe you've done a snapshot audit, so you may be audited 10% of your I-9s, but you haven't gotten to correcting the rest of your I-9s, that time is incredibly valuable because we will try to correct what we can. And when we do this, we're working.

Miriam knows 24/7 without sleep, we come with a big team and we really will try to correct as much as we can before we have to turn over the bills because we want to show the government, we [00:23:00] are a good faith employer. We are in compliance and many times these audits are coming, as Miriam said, maybe there was an I-9 audit in the past, but maybe they're coming from a disgruntled employee who wants to be a whistleblower. Maybe they got terminated and they want to get some kind of revenge on the company. And unfortunately it happens and then we have to deal with it. It's also important that we're to note that we're in a very interesting time [00:23:30] in compliance

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and raids and I-9 enforcement, many of you have probably seen the headlines that they've now deputized individuals and officers from other agencies like Department of State, like DOJ, to conduct raids and audits and to even apprehend unauthorized employees, which has usually been under exclusive purview of ICE.

So this just really talks [00:24:00] to the climate that we're in right now and how important it is to get the audits done before the good government shows. Miriam, I know that you've been involved in a lot of raids and audits, but that's not the only thing that we do. We also really closely look at I-9 compliance when we're assisting our partners in our M&A group in closing a big M&A deal. So what are the factors? Why is it important to look at the [00:24:30] I-9 when we're doing an M&A deal? Most people don't think about an immigration lawyer at all in the M&A context, but they really should.

Miriam Thompson: So we're getting looped into more and more deals with our corporate team where we're representing a buyer and we're diligencing a target company. And in addition to the, I would say, usual diligence area such as L&E, tax, IP and so on, immigration [00:25:00] has become more and more of an important item to look into. We have a certain list of initial diligence requests. We look at all the requests from the target company initially, and one of those items on the list is a sample of the target company's forms I-9. Typically, we ask for about 20% of their I-9s across I-9s from current employees and [00:25:30] former employees whose I-9s still remain within the required retention window.

And then we look at these I-9s and see how many technical substantive violations are there, is there an appearance that the target entity may be employing unauthorized workers, which would be subject to a whole separate set of penalties. We also look at E-Verify [00:26:00] requirements and that could trigger separate penalties and fines for the specific state. And then based on the findings in the sample I-9s, we can extrapolate exposure across the full population of the target companies I-9s that are currently subject to retention, which is the all current employees and all former employees with the later date of either one year [00:26:30] from termination or three years from the date of hire.

Kate: Absolutely. It's so important to do this and we're involved in an M&A deal right now where the company that's being acquired doesn't want to turn over their I-9s. And the whole deal may just blow up because of this issue because it's raised red flags. Why don't they want to give the I-9s? Why are they refusing to give the I-9s? Now, it might be that they are getting erroneous advice from counsel, but it might be that there's a real problem and [00:27:00] the buyer just doesn't know. So it's very, very important to note these issues. We at GT are going to keep reporting to you on them, reporting on compliance trends and counseling our clients both in raids and internal audits and in developing robust I-9 compliance programs. Miriam, thank you so much for joining Immigration Insights today. It's always a pleasure to work with you and we're very lucky to have you as a member of our immigration group.

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