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Worksite Compliance in the Age of COVID-19 – Mighty Fine for a Faulty I-9!

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- I. **Introduction.** We are now in the 35th year of the effort to make junior immigration cops out of employers. The overall goal of minimizing illegal immigration has led the government to attempt to develop a culture of compliance where employers feel the legal and ethical duty to avoid hiring unauthorized workers outweighs the constant need for reliable labor. To some extent the effort has been successful, but the uneven enforcement coupled with the economic laws of supply and demand have not quashed illegal immigration or forced all employers to buy into a culture of compliance. The following is an attempt to outline the current issues that lawyers should be aware in the context of I-9 verification and worksite enforcement.
- II. **Verification Issues.** Verification violations are often called paperwork violations and refer to mistakes made on the Form I-9 itself. Mistakes can be considered substantive or technical/procedural. The following are a few of the current I-9 verification issues lawyers may encounter.
 - a. **Remote Verification.** The issue of how to verify employees in the field or at secondary locations has been an issue for the past ten years and COVID-19 has temporarily brought the issue to a head. The ICE position has steadfastly been that the same person representing the employer must present the I-9 to the employee in person and review the documents in a tactile manner with the employee present. *See* 8 U.S.C. § 1324a (b). While electronic I-9 software is available for completion of the I-9 as well as storing it, the in-person review of the person and his documents is required. Arguments have been made over the years that the statute and regulations neither require that the same person must sign the I-9 as well as review the documents nor prohibit remote verification (e.g. person at HQ reviews the documents via Zoom or FaceTime). ICE takes the position that only legislation, not regulatory change, can remedy the situation. Their primary concern is the possibility of fraud. The COVID-19 shutdown and continuing effort by employers to allow employees to work from home caused the three-day rule for in-person I-9 verification to become impossible. ICE issued a thirty day grace period beginning March 19, 2020 to permit remote verification. This initial verification must be followed by in-person verification of the same employee at the earlier of the return to normal operations (defined as when the first employees return to work) or the end of the national emergency. *See* ICE announces extension to I-9 compliance flexibility, ICE News Release, September 14, 2020, *available at* <https://www.ice.gov/news/releases/ice-announces-extension-i-9-compliance-flexibility>. The employer is instructed to use the Additional Information box to add a notation such as “Remote Verification COVID-19”. Since shutdowns have continued in some states and many employers have not returned to “normal” operations, the grace period has been extended several times, most recently until November 19, 2020. However, what if HR continues to work from home but a few employees return to work? According to ICE, that company has returned to normal operations and the employees must be verified in-person within three days. *See* DHS announces flexibility in requirements related to Form I-9 compliance, ICE News Release, March 20, 2020, *available at* <https://www.ice.gov/news/releases/dhs-announces-flexibility-requirements-related-form-i-9-compliance>. Also, no fixed date has been set for the end

of the national emergency. Employers should be advised to determine when normal operations have resumed and begin to call in employees formerly verified remotely. Chaos could ensue if the government declares a certain end date and the employers have three days to verify all remotely completed I-9s. Many lawyers have advised employers to avoid remote verification and identify agents to verify employees. (NOTE: anyone can be an agent of the employer. Be cautious when using relatives or persons whose relationship to the employee is close as fraud could be suspected). Hopefully, ICE will have a phased in allowance to verify employees after the end of the national emergency to avoid a pile up of the three-day rule.

- b. **Restricted drivers' licenses.** What if the state's driver's license has a restriction on it such as "NOT VALID FOR FEDERAL LAW PURPOSES"? ICE has taken the position that the federal law governing what constitutes a valid driver's license (e.g. photo and valid identifying information) trumps any restriction placed on the document by the state and it may be accepted as a B Document.
- c. **Acceptable Receipts for Certain Documents.** Section 4.3 of the M-274 outlines the types of documents from Lists A, B and C for which a receipt can be presented in lieu of the actual document. This is to be followed by presentation of the actual document within ninety days. COVID-19 closures may cause delays of more than ninety days, so unless there has been an auto extension by ICE (or a state auto extension of a driver's license), the employee must present other documentation to satisfy the identity or employment authorization that is missing. Many states, including Texas, have auto extended the driver's license until the agency fully reopens, and ICE will accept a notation in the Additional Information box of the I-9.
- d. **Employment Authorization Documents (EAD, Form I-766).** Generally, the only persons who do not need an EAD are U.S. citizens, Legal Permanent Residents, H-1B and L-1 visa holders. EAD's can take six months or more to be issued, so special rules pertaining to automatic extensions apply. For certain categories of renewal filers, a timely filed I-765 automatically extends the EAD for 180 days from the date the prior EAD expires. See USCIS Handbook for Employers M-274, Section 4.4 at <https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274/40-completing-section-2-of-form-i-9/44-automatic-extensions-of-employment-authorization-documents-eads-in-certain-circumstances>; see also <https://www.uscis.gov/working-in-the-united-states/information-for-employers-and-employees/automatic-employment-authorization-document-ead-extension>. Confusion exists regarding whether L-2 or E-2 dependents are employment authorized by their status or must apply for an EAD. In order to avoid future problems for the foreign national, it is best to apply for the EAD and use the incident to status argument only if forced into a defensive position.

On July 22, 2020, a lawsuit was filed on behalf of approximately 75,000 class action members, seeking issuance of EADs on approved applications. On August 19, 2020, USCIS announced on its website that individuals will be permitted to provide certain original Forms I-797, *Notice of Action*, showing approval of their Form I-765,

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