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## **Business Immigration After COVID-19: Navigating Post-Apocalyptic Worksite Issues**

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## **Business Immigration After COVID-19: Navigating Post-Apocalyptic Worksite Issues**

There is no question that the COVID-19 global pandemic has changed the modern workforce and has changed how we approach labor and workplace policies, protocols, and everyday practices. For many, the concept of “worksite” has permanently changed. Businesses, employees and regulators are therefore trying to adapt. U.S. immigration is not immune to these changes. Concepts including “remote” and “roving” employees have become daily considerations for business immigration attorneys faced with trying to fit these concepts into regulations and policies that only previously considered them to be exceptions. This article provides an overview of some common issues facing business immigration attorneys as the U.S. economy struggles to bounce back, including:

- I-9 Verification and E-Verify compliance;
- H-1B/E-3/H-1B1 employees working remotely or on reduced schedules;
- Employees working for U.S. employers while living in other countries;
- Ability-to-pay issues in a struggling economy and businesses in financial distress; and,
- Investor issues for those hoping to build a business in America.

### **I-9 Verification and E-Verify Compliance**

On August 31, 2021, ICE announced its 11<sup>th</sup> extension of the “temporary” flexibility in remote verification of Form I-9. *ICE announces extension to new employee guidance to I-9 compliance flexibility*, (Aug. 31, 2021), available at [ice.gov/news/releases/ice-announces-extension-new-employee-guidance-i-9-compliance-flexibility-1](https://www.ice.gov/news/releases/ice-announces-extension-new-employee-guidance-i-9-compliance-flexibility-1). This four-month extension is the longest of the prior month-to-month extensions that began March 20, 2020. Currently the flexibility is set to terminate December 31, 2021. When the pandemic began no one expected the long-term disruptions in business that have followed. The original concept of the flexibility was that during the shutdown when everyone in a business worked remotely, new hires could first be verified remotely. A second in-person verification must take place upon the resumption of “normal operations” or termination of the policy by ICE, whichever occurred earlier. *DHS announces flexibility in requirements related to Form I-9 compliance*, (Mar. 20, 2020), available at <https://www.ice.gov/news/releases/dhs-announces-flexibility-requirements-related-form-i-9-compliance>. It seemed simple enough but as the months dragged on it became evident that new varieties of “normal operations” were constantly evolving. Some businesses came back to the office, but others became a hybrid of remote and in-office work, which potentially triggered the second in-person verification because “[i]f there are employees physically present at a work location, *no exceptions* are being implemented at this time for in person verification...” *Id.* However, Human Resources personnel often continued to work remotely or did not want to perform in-person, mask off verification. Finally, ICE announced an updated policy to begin April 1, 2021, which allowed an employer from that date forward to use the remote process for any new hires if they worked exclusively in a remote setting due to the pandemic. *ICE announces extension, new employee guidance to I-9 compliance flexibility*, (Mar. 31, 2021), available at <https://www.ice.gov/news/releases/ice-announces-extension-new-employee-guidance-i-9-compliance-flexibility>. A later clarification states that the in-person review can be postponed until the employee undertakes non-remote employment on a regular, consistent, or predictable basis (or

earlier, if the temporary process is terminated by ICE). *Id.* Below we will review the original March 20, 2020, ICE guidance and the March 31, 2021, amendment:

If you have read the above and are very clear on its implications for all the various business arrangements of your clients, you are very unusual!

**Practice Pointer:** Advise clients to address the secondary in-person reviews immediately. Identify agents whom you can trust to verify employees, but it is best to avoid family and friends of the employees to be verified. Otherwise, if ICE does not renew the flexibility after December 31, 2021, your clients will have three business days to conduct in-person reviews of any new hires who came on board over the last 1 ½ years.

The experiment with the temporary flexibility over an extended period of time and with no seeming end to the pandemic begs the question: “Why not make remote verification permanent?” This issue has been kicked around for a dozen years as employers struggle to verify employees in person who may be scattered across the U.S. When the worksite verification law was legislated in 1986 the various methods of electronic communication were not available. Certainly, it makes sense to have a process that minimizes fraud, and in person verification and document review are the best means of minimizing fraud and holding the employer accountable. However, with the changing dynamics of worksites and teams of workers based in multiple locations, maintaining a sustainable process to verify employees within three days of work for pay is very difficult. In addition, when a merger or acquisition takes place and thousands of legacy employees may need to be verified within three business days, the logistics become a nightmare. The government argues that only Congress can change the verification process but that is debatable, especially since we have had a year and a half of remote verification—perpetuated by ICE policy alone—under our belts at present. Employer trade associations as well as the American Immigration Lawyers Association are working to obtain remote verification with mechanisms to prevent fraud.

On October 12, 2021 DHS chief Mayorkas has ordered the agencies in a Policy Statement to focus on protecting the American labor market by uncovering employee exploitation by employers and stopping worksite raids. The various agencies are to report back within sixty days regarding how they will need to change their policies to meet this objective. Exactly how this will affect I-9 audits is unknown at this time. See Addendum.

### **Employees Working for U.S. Employers While Living in Other Countries**

A common trend among U.S. employers that have not returned to 100% on-site employment is a remote workforce that includes employees working from other countries. During the early months of the pandemic, employees were forced to learn how to work from home. For some, “home” is not in the United States, and many foreign employees returned home or to a different country or destination to work remotely. It is likely that some employers do not even know the actual physical location of their employees at any given time. It is also very likely that if they have not told their employer they are not physically in the U.S. or in the same area as their original office location, these workers have not advised their business immigration attorney, either. Changes in work location outside the general area is a “material change” that prompts certain

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