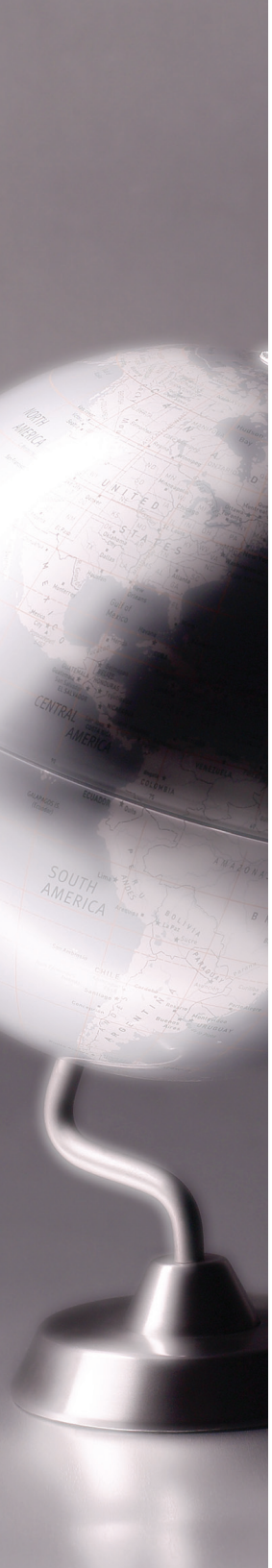

Immigration Compliance Requirements and Challenges

by

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a chapter from

Inside the Minds: Employing International Workers

published by Aspatore Books

Segal McCambridge

Segal McCambridge Singer & Mahoney

INSIDE THE MINDS

Employing International Workers

Leading Lawyers on Understanding Recent Immigration Trends, Navigating the Visa Process, and Meeting Compliance Requirements

2010 EDITION

ASPATORE

First Printing, 2010
10 9 8 7 6 5 4 3 2 1

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Introduction

When employing international workers, there are certain questions that normally come to the minds of employers, such as: Will the company have to sponsor the employee for a work visa? What documents will the company need to review when completing the initial hire document, Form I-9? And possibly, will the employee request that the company sponsor him or her for permanent residence in the United States? The employer that is asking these questions is on the right track. However, once these initial questions are answered, the employer cannot rest easy in the belief that their work is complete and compliant. In fact, these questions only scratch the surface of the compliance challenges facing the employer. The intent of this chapter is to peel back the compliance curtain just a bit, so that the reader can glimpse for a moment the uncertain and foreboding world of compliance that begins prior to the time of hire and does not end, in some cases, for many years beyond the date of termination. We are pointing out three areas of immigration compliance involved in: the initial hire of an employee; the sponsorship of the employee for one type of employment visa (the H-1B visa); and one method of sponsoring an employee for permanent residence. The compliance measures involved in these processes are often shrouded in mystery for employers, since they are often unaware of the measures that need to be taken to be deemed to be in full compliance. Lack of compliance in these areas can be a costly mistake for any employer, and we hope this chapter helps remove some of the mystery surrounding these areas.

Three Immigration Compliance Challenges

The most difficult laws with which to comply when employing international workers are the lesser-known laws. These laws are often related to document retention procedures involved in certain non-immigrant and immigration filings. Some of the most important immigration-related compliance procedures are performed and documented by employers with no oversight from the government and are often never seen by U.S. Citizenship and Immigration Services (USCIS) or the Department of Labor (DOL) unless an audit is performed on the employer.

Form I-9: Document Retention and Discrimination Issues

Form I-9, which must be completed for all employees within three days of hire, is never sent to USCIS. Compliance with maintenance, tracking, re-verification, and purging regulations is difficult for the employer because, without proper training and re-training, employers are unaware of compliance mistakes that can become the norm over time. Employers may also require information from new employees that exposes the companies to discrimination charges. Failure to comply with I-9 regulations can lead to hefty civil fines and/or criminal sanctions, including imprisonment.

H-1B and Public Records

The popular H-1B visa category requires that the employer prepare and maintain a public access file for each employee that contains important prevailing wage and actual wage information used by the employer and certified by the DOL. The public access file is never sent to the DOL, but it must be made available for inspection by the public upon request. Failure to prepare and maintain a public access file can lead to fines, the payment of back pay to H-1B employees, and/or disbarment of the employer from future immigration approvals.

The PERM Process and Full Documentation

Similarly, when an employer sponsors an employee for permanent residence in the United States, the most common process followed is the Program Electronic Review Management (PERM) process. Employers must enter a recruitment phase during which they must document all recruitment efforts and prepare the recruitment results in a file ready for inspection by the DOL. The employer then makes important attestations as to the recruitment efforts undertaken and the results of the recruitment efforts. Once again, the employer is operating without oversight from the DOL and is required to maintain documentation ready for inspection upon request by the DOL. Failure to properly prepare and maintain the recruitment file can lead to fines, suspension, and/or disbarment of the employer from future approvals.

Non-compliance with immigration-related record retention procedures can have an adverse effect on other areas of the employer's business, including

full-scale business interruption (in the event of an immigration raid) and/or unanticipated expenditures, both of which can be devastating to employers small and large. At a minimum, employers need to meet immigration compliance requirements in the three examples set forth above (I-9 compliance, H-1B public access file compliance, and PERM compliance). Employers must recognize that there are likely compliance areas of which they are completely unaware. Secondly, employers must recognize that compliance does not end when the initial process is over. Third, employers need to know that non-compliance can be extremely detrimental to the health of their company.

The I-9 Employment Eligibility Verification Process

Complying with the requirements governing the I-9 employment eligibility verification process is a challenging component for any employer who maintains an international workforce. Specifically, an employer's practices for the completion and retention of Form I-9 are important to insulate it from government inspections and penalties for unlawful employment practices.

Basic Form I-9 Compliance

Form I-9 must be completed for every new hire, regardless of citizenship or residential status, except people who are:

1. Hired prior to November 7, 1986, are continuing in employment, and have a reasonable expectation of employment at all times
2. Employed for casual domestic work in a private home on a sporadic, irregular, or intermittent basis
3. Independent contractors
4. Providing labor to you while employed by a contractor providing contract services

Upon completion of the I-9, employers are required to retain the form using one of three methods: paper, electronic, or on microfilm/microfiche. The completed form must be retained for all current employees. For employees who are separated from the employer, the employer is required

to maintain the completed form for the longer of three years from the date of hire or one year after the employee's employment ends.

Employers choosing to retain their completed I-9 forms in paper format must do so in a manner that enables the employer to present the completed forms within three days of an audit request by the Department of Homeland Security (DHS), the Office of Special Counsel for Immigration Related Unfair Practices, or the DOL. Increased effort by the government to ensure proper maintenance of compliance documentation is a clear signal to employers that they should maintain their completed forms in a logical and readily accessible indexing system for retrieval and re-verification.

Electronic Retention: Special Requirements

Employers retaining completed forms electronically must implement a security program that ensures use only by authorized and trained personnel and provides for appropriate backup and recovery processes. Additionally, the security program must document each creation, access, view, update, or correction of a record by an individual and must create a secure and permanent record that establishes the date of access, the identity of the individual who accessed the electronic records, and the particular action taken. Moreover, employers choosing to retain their completed I-9 forms in an electronic generation or storage system must do so utilizing a system that has:

1. Reasonable controls to ensure the integrity, accuracy, and reliability of the electronic storage system
2. Reasonable controls designed to prevent and detect the unauthorized or accidental creation of, addition to, alteration of, deletion of, or deterioration of an electronically completed or stored I-9, including the electronic signature, if used
3. An inspection and quality assurance program evidenced by regulator evaluation of the electronic generation or storage system, including periodic checks of electronically stored I-9s, including electronic signature, if used
4. A retrieval system that includes an indexing system that permits searches by any data element
5. The ability to reproduce legible and readable hard copies

Finally, for each such electronic system, the employer must make available, upon request, complete descriptions of the systems and procedures, the indexing system for retrieval of records, and the business process utilized to create, modify, and maintain the completed forms. The employer must establish the authenticity and integrity of the completed I-9s.

Completing the I-9

Completion of the I-9 requires the employee to fill in certain information and provide certain documentation for the employer to review. The employee may fill in the form on their own or with the assistance of a translator who must then complete the "Preparer/Translator Certification" block on the I-9. Section 1 of the form will require the employee to provide their name, current address, and date of birth. A Social Security number may be provided, but is only required if the employer verifies employment eligibility through the USCIS E-Verify program. The employee must then attest, under penalty of perjury, to their immigration status and sign/date the form.

Upon completion of Section 1 of the form, the employee must present the employer with original documents establishing identity and employment eligibility within three business days of the date employment begins. The form details different categories of documents that can be used. "List A" documents are those that establish both identity and employment eligibility. Examples of List A documents include a U.S. passport or a permanent resident card. "List B" documents are documents that only establish identity. List B documents include a driver's license or a voter registration card. "List C" documents are documents that establish employment authorization only. List C documents include a U.S. Social Security card or certification of birth abroad issued by the Department of State. The employee completing the form is permitted to choose the documents they wish to present in conjunction with the completion of the form.

The employer is charged with reviewing and examining the documents provided by the employee (either a List A document, or one document each from List B and List C). The employer cannot require the employee to provide certain documentation that will impinge upon the employee's right to choose their documents to submit. When reviewing the documents, the employer must accept documents that reasonably appear to be genuine and

relate to the person presenting them. Upon the employer's review, they must record the title, issuing authority, number, and applicable expiration date of the documents. The employer must then complete the form with the date of hire, certification block, and signature line provided on the form.

If an employee's List A or List C documents expire while still employed, the employer must re-verify the employee's eligibility to work. The duty to re-verify does not extent to expired List B documents. To re-verify, an employer may either use Section 3 of the I-9 or use an entirely new I-9 in which the employer writes the employee's name in Section 1 and completes Section 3. If using a new I-9, the new form must be retained with the original form. If, upon re-verification, the employee cannot provide proof of current work authorization (List A or List C documents), the employer cannot continue the employment of that person.

Avoiding Discrimination and Penalties

Anti-discrimination laws have evolved to encompass document abuse in relation to an employer's I-9 compliance practice. The anti-discrimination document abuse provisions preclude an employer from:

1. Rejecting documents that appear to be genuine
2. Demanding more documents than required
3. Requesting specific documents to establish identity and/or work authorization for employment eligibility purposes

The government may impose hefty civil penalties on employers who engage in document abuse, and the penalties are assessed for each person discriminated against. In addition to the civil penalties, the Department of Justice may impose sanctions that could include reinstatement, back pay salaries, and attorneys' fees to a successful complainant.

Document abuse can be prevented by following very simple guidelines. An employer must institute uniform policies with regard to the treatment of its entire workforce. Accordingly, all people responsible for the completion of the I-9 should undergo training with regard to proper policies and procedures. All such people should be trained to know the list of satisfactory documents and to understand that the employee has complete discretion regarding the documents they present.

Document Retention to Counter Discrimination Charges

In addition to putting practices into place to avoid discrimination, practices to readily prepare a company for an audit of their I-9 forms should be utilized. A company should institute a clear document retention program in accordance with the governmental regulations found at 8 C.F.R. § 274a.2. The documents should be maintained, indexed properly, and should be in a readily accessible manner so that a company is well positioned to establish its compliance with the law. As enforcement efforts increase, periodic internal audits of I-9 forms should be completed to ensure that the employer would withstand strict governmental scrutiny.

Penalties for Unlawful Employment

The DHS may impose penalties if an investigation reveals that an employer has knowingly hired or continued to employ an unauthorized alien, or has failed to comply with the employment eligibility verification requirements, with respect to employees hired after November 6, 1986.

The DHS will issue a notice of intent to fine when it intends to impose penalties. Employers who receive such a notice may request a hearing before an administrative law judge. If an employer's request for a hearing is not received within thirty days, the DHS will impose the penalty and issue a final order, which cannot be appealed.

Civil Penalties

Employers who hire or continue to employ unauthorized aliens face significant penalties. The DHS may order employers it determines to have knowingly hired unauthorized aliens (or to be continuing to employ aliens knowing that they are or have become unauthorized to work in the United States) to cease and desist from such activity, and pay a civil money penalty as follows:

- First offense: not less than $275 and not more than $2,200 for each unauthorized alien
- Second offense: not less than $2,200 and not more than $5,500 for each unauthorized alien

- Subsequent offenses: not less than $3,300 and not more than $11,000 for each unauthorized alien

The DHS will consider an employer to have knowingly hired an unauthorized alien if, after November 6, 1986, the employer uses a contract, subcontract, or exchange entered into, renegotiated, or extended to obtain the labor of an alien and knows the alien is not authorized to work in the United States.

Failing to Comply with Form I-9 Requirements

Employers who fail to properly complete, retain, and/or make available for inspection Form I-9 as required by law may face civil money penalties in an amount of not less than $110 and not more than $1,100 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, the DHS will consider: the size of the business of the employer being charged; the good faith of the employer; the seriousness of the violation; whether the individual was an unauthorized alien; and the history of previous violations of the employer.

Enjoining Pattern or Practice Violations

If the attorney general has reasonable cause to believe that a person or entity is engaged in a pattern or practice of employment, recruitment, or referral in violation of § 274A(a)(1)(A) or (2) of the Immigration and Nationality Act, it may bring civil action in the appropriate U.S. district court requesting relief, including a permanent or temporary injunction, restraining order, or other order against the person or entity, as deemed necessary.

The Good Faith Defense

If the employer can show that they have in good faith complied with the I-9 requirements, the employer has established a "good faith" defense with respect to a charge of knowingly hiring an unauthorized alien, unless the government can show that the employer had actual knowledge of the unauthorized status of the employee. A good-faith attempt to comply with the paperwork requirements of the Immigration and Nationality Act may be

adequate notwithstanding a technical or procedural failure to comply, unless the employer has failed to correct the violation within ten days after notice from the DHS, or the employer is engaging in a pattern or practice of violations.

Criminal Penalties

An employer engaging in a pattern or practice of knowingly hiring or continuing to employ unauthorized aliens (or continuing to employ aliens knowing that they are or have become unauthorized to work in the United States) after November 6, 1986, may face fines of up to $3,000 per employee and/or six months imprisonment. Employers engaging in fraud or false statements, or otherwise misusing visas, immigration permits, and identity documents; or using fraudulent identification or employment eligibility documents or documents that were lawfully issued to another person; or who make a false statement or attestation for purposes of satisfying the employment eligibility verification requirements, may be fined, imprisoned for up to five years, or both. Other federal criminal statutes may provide higher penalties in certain fraud cases.

The H-1B Non-immigrant Visa Application Process

An H-1B non-immigrant visa is reserved for a foreign national who:

1. Enters the United States to perform services in a "specialty occupation" (i.e., an occupation that requires the theoretical and practical application of highly specialized knowledge requiring, at a minimum, a baccalaureate or higher degree (or its equivalent) for entry into the United States in that occupation)
2. Possesses a bachelor's degree or equivalent

The H-1B petition process involves three major steps:

1. The employer applies to the DOL for certification of the labor conditions application (LCA)
2. The employer files a petition with USCIS for H-1B visa classification for the foreign national beneficiary, whether for a petition for initial H-1B classification, an application for extension

of status, or an application for change of non-immigrant status to that of the H-1B
3. If the foreign national is outside the United States, or is in the United States at the time of approval but travels abroad and will need to reenter, the foreign national generally must submit his or her H-1B visa application to a U.S. consular post abroad

Filing the LCA

The process begins with filing the Form ETA-9035 Labor Condition Application for H-1B Non-immigrants (LCA) with the DOL. By filing the LCA with the DOL, the employer attests to, among other things, the following:

1. The employment of the H-1B foreign national will not adversely affect the working conditions of workers similarly employed
2. The employer will pay the H-1B worker the higher of the prevailing wage level for that occupational classification by all employers in the geographic area of intended employment, or the actual wage level paid to all other individuals with similar experience and qualifications for the specific position, and will offer benefits on the same basis as U.S. workers
3. The employer will retain documentation regarding the basis it used to establish the wage. The wage being offered to the prospective H-1B employee must meet or exceed the prevailing wage

To satisfy the document retention and public access requirements, within one working day of filing the LCA, the petitioner must make available for inspection by the DOL the following documentation:

1. A copy of the certified LCA
2. The specific wage to be paid to the H-1B worker
3. The employer's salary system used to determine the actual wage for the occupation, including periodic increases the system may provide
4. Evidence of notice provided to individual employees, including the dates and locations where the notice was posted, or the date the notice was provided to the CBR
5. Evidence that the working conditions of similarly employed U.S. workers are not affected

The employer must retain each document included in the public access file for one year beyond the end of the period of employment specified on the LCA or one year from the date the LCA is withdrawn. If a timely complaint is filed, the documentation must be retained until the complaint is settled.

Maintaining the LCA Documentation

By filing the LCA, the petitioner agrees to develop and maintain documentation supporting each labor condition statement. At a minimum, this includes the following documentation:

1. Payroll records for all employees in the H-1B foreign national's occupation, starting with the date the LCA is submitted and continuing throughout the period of employment. This payroll information must be retained at the place of employment for three years from the date of the creation of the records (or, when a timely complaint is filed, they must be retained until the complaint is resolved). The payroll records for each employee must include:

    a. Employee's full name, home address, and occupation
    b. Rate of pay
    c. Hours worked each day and each week if paid on other than a salary basis, or if the prevailing wage is expressed as an hourly wage
    d. Total additions to or deductions from pay each pay period
    e. Total wages paid each pay period, date of pay, and pay period covered by each payment

2. Documentation of the prevailing wage level—the prevailing wage determinations or documentation on the prevailing wage as determined by an independent authoritative source, or other legitimate source
3. Documentation of the actual wage for the job position
4. Copies of the notice posted for employee notification (i.e., a copy of the LCA and the required notice regarding complaints)

The regulations also suggest that employers maintain the following additional documentation regarding working conditions. In the event of a

complaint, this additional information will assist the employer who will have the burden of proving compliance. Documentation to support the working conditions attestation is required, and the employer must be able to show that the working conditions of similarly employed workers were not adversely affected by the employment of an H-1B non-immigrant.

Penalties for Violations of LCA Rules

Under 20 C.F.R. § 655.810, failure to comply with LCA requirements, including proper preparation and maintenance of the public access file, can result in fines ranging from $1,000 to $3,5000 per violation and/or disbarment from future approvals for at least twelve months. If a determination is made that the employer did not pay the required wage (which is documented in the public access file), the employer can be ordered by the DOL to pay the deficiency or provide back pay to the employee. 20 C.F.R. § 655.810(a). Under this rule, the DOL will consider the following when determining a penalty:

1. Previous history of violations by the employer
2. The number of workers affected by the violations
3. The gravity of the violations
4. Efforts made by the employer in good faith to comply
5. The employer's explanation of the violations
6. The employer's commitment to future compliance
7. The extent to which the employer achieved a financial gain due to the violations, or the potential financial loss, potential injury, or adverse effect with respect to other parties

Compliance for the PERM Process

The PERM system is a program that was implemented in March 2005 and was designed to minimize the complications and delays experienced in the processing of applications for alien employment certification. The PERM process certifies an employer's offer of employment so that a foreign national employee may apply for permanent resident status in the United States. Under the PERM process, the DOL certifies that an offer of employment is for a position for which there is a demonstrated shortage of

qualified U.S. workers. The employer must be able to verify that there are no qualified U.S. workers available, willing, and able to fill the position being offered. To do this, the employer must enter a period of recruitment for the position, which is not the subject of this chapter.

During and following the recruitment phase of the PERM process, the employer must document important compliance requirements. The employer must maintain a summary of the recruitment efforts undertaken and maintain these documents for inspection. The PERM audit file is prepared by the employer without oversight by the DOL, and it must include important information regarding the recruitment steps taken and the results of the recruitment, including, among other things, the number of hires and the number of U.S. workers who were rejected for the position. The reasons for rejection must be carefully documented and must be for job-related and lawful reasons. Under 20 C.F.R. § 656.31, failure to comply with the PERM process, including important document retention and compliance procedures, can result in suspension and/or debarment from the process. Penalties for severe violation of the PERM process can include imprisonment.

Conclusion

These three compliance examples are introductory; they are not an exhaustive demonstration of immigration compliance requirements undertaken by an employer. Instead, the examples demonstrate one potential process from each stage of an international employee's potential tenure with an employer: initial hire, non-immigrant sponsorship, and permanent residence sponsorship. Each process entered into by an employer on behalf of international employees from the initial hire, non-immigrant visa sponsorship, and permanent residence sponsorship is unique in their compliance requirements. Many of these requirements involve complex document preparation and retention procedures that are not supervised by the government.

The lack of oversight does not, in any way, suggest that the employer is relieved of the responsibility of meticulous recordkeeping. In fact, the penalties for non-compliance can be quite severe. Non-compliance can lead

to civil and criminal sanctions, which can be devastating to a company and prominent officials within a company. The U.S. government expects employers to be vigilant and compliant, notwithstanding the size of the company, the nature of the business of the company, or the location of employment. Turning a blind eye to compliance requirements can be a devastating mistake.

The U.S. government has made a concerted effort to let the public know that it considers employment to be the leading factor drawing non-documented foreign labor to the United States. In an effort to stem the illegal employment of non-documented workers, the government is holding employers responsible for immigration compliance at an unprecedented level. Since 2005, the government has increased enforcement assets and efforts exponentially and has recently started adding H-1B and PERM auditing to its previously documented I-9 auditing on a regular and recurring basis. These are areas where employers must be prepared to demonstrate compliance at a moment's notice.

Peter J. Strelitz *is a partner with Segal McCambridge Singer & Mahoney Ltd. He has handled an extensive employment law docket, including cases defending companies, individuals, universities, and state agencies. He has successfully tried several cases to verdict in both state and federal court. He also counsels clients on employment law issues and has assisted in drafting employment policies and handbooks for large companies. Additionally, he has acted as defense counsel for companies defending class actions in federal court. Mr. Strelitz has been appointed trial counsel in cases defending the office of the Texas governor and has testified before the Texas House of Representatives in regard to his defense of state healthcare programs litigated in federal court. He handles a wide variety of complex litigation defending large corporations, products manufacturers, and trucking companies as lead Texas counsel. He manages statewide litigation for clients regularly sued on premises liability claims, and he defends litigation related to injuries sustained during the operation of heavy equipment and machinery.*

Mr. Strelitz earned his B.A., with honors, from the University of Texas at Austin and his J.D. from the University of Houston Law Center. He is a member of the American Bar Association, a member of the Austin Young Lawyers Association, and a founding member of Young Texans Against Cancer. He is a regular speaker and author.

James E. Morrison *is of counsel with Segal McCambridge Singer & Mahoney Ltd. He focuses his practice on business immigration. He advises clients in a variety of international industries and disciplines on domestic and global immigration-related issues, including inbound and outbound compliance, worldwide movement of personnel, mergers and acquisitions, document retention compliance, government audits and raids, and legislative matters. He has represented Fortune 500 companies, investors, foreign diplomats, private foundations, professional athletes, musicians, artists, entertainers, and celebrities. Mr. Morrison leads the representation of corporate and individual clients in all types of non-immigrant and immigrant visa applications and petitions, and he leads the performance of immigration-related due diligence for merger and acquisition projects. He leads targeted corporate compliance audits of I-9 processes and procedures, as well as visa-specific retention policies for corporate clients throughout the United States. He actively represents foreign nationals with demonstrated national or international acclaim for designation as people of extraordinary ability for both non-immigrant status and permanent residence in the United States.*

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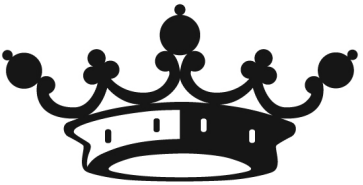

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