



The Invisible Wall: Immigration and I-9/E-Verify Updates You May Have Missed

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 American Staffing Association



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AGENDA

- Agency investigations
 - Immigration and Customs Enforcement (ICE)
 - Immigration and Employee Rights (IER)
 - Department of Labor (DOL)
- Agency interpretations
 - Industrial, clerical, hospitality
 - Professional



AGENCY INVESTIGATIONS

- ICE I-9 Investigations: Notices of Inspection Skyrocket
 - 2,540 issued January-March 2018
 - 2,738 issued July 16-20, 2018



ICE INVESTIGATIONS

- Direct investigation
 - Lookback of a few months to a few years
- Derivative investigation
 - Client identifies you as a subcontractor
 - Look at employees assigned to client on a given day
 - ↳ Can be expanded to include employees assigned at other clients



ICE INVESTIGATIONS—STRATEGY TIPS TO PREPARE

- Client contracts should include a provision that client will notify staffing firm within 24 hours if it is named in response to a Notice of Inspection and/or Immigration Enforcement Subpoena.
 - The staffing firm should expect to receive its own Notice of Inspection within six months but would have time to prepare



STRATEGY TIPS TO PREPARE

- Run payroll and ensure that you have a valid and complete I-9 for all employed personnel
- If you have remote hires, ensure that I-9s are completed and signed only by the employer's agent or representative who physically saw original supporting documents while in the presence of the employee and did not rely on copies of supporting documents to complete Section 2
- If making corrections, always initial a change with the date the correction is made.
 - No back dating.



STRATEGY TIPS TO PREPARE

- If you rely on an electronic I-9 vendor, request immediately a copy of its business practices and processes that outline the indexing system, security, and features of electronic signatures.
- Ensure that electronic I-9 vendors can produce an I-9 audit trail for each and every I-9 required to be retained in the system



IER INVESTIGATIONS

- Focuses on application and onboarding process
 - Looks for ways that employers:
 - ❖ Have a different onboarding process depending on citizenship status or national origin; **OR**
 - ❖ Ask for more or different documents than required by the I-9 process.



IER INVESTIGATIONS

Most common triggers:

- Ask Applicant to bring “two forms of ID”
- Ask permanent residents to show green card
- Direct applicants to bring driver’s license and social security card



IER INVESTIGATIONS


Most recent focus is on staffing firms that hire large numbers of noncitizens:

- Are you preferring foreign workers over qualified U.S. workers?
 - Health care staffing is particular focus here




IER INVESTIGATIONS—STRATEGY TIPS

- Review job applications and onboarding procedures for magic language—“two forms of ID” or “driver’s license and social.”
- If enrolled in E-Verify, determine what percentage of the workforce includes non U.S. workers. If high, be prepared to defend what practices are taken to hire U.S. workers.
- If enrolled in E-Verify, check what documents were presented for noncitizens. If it’s always a List A document, check onboarding procedures to see if document is requested.




DOL INVESTIGATIONS

- Focus—Are employees receiving proper pay:
 - Employee vs. independent contractor
 - ◇ Overtime
 - ◇ Per diem



DOL INVESTIGATIONS

- Recent focus on H-1B:
 - Are they receiving proper pay?
 - ◇ At least what U.S. workers get paid and no less than “prevailing wage”; and
 - ◇ Paid during bench?
 - Includes client holiday/furlough



DOL INVESTIGATIONS

Review worker classification, per diem, and overtime payments to ensure compliance with regulations.



STRATEGY TIPS

- Are H-1Bs getting paid wage on petition?
- If H-1B workers are paid less than full-time wages (presumed to be 40 hours per week), need documentation to support why that is full-time.
- Maintain documentation of all end clients' holiday and furlough schedules to support payment or nonpayment of required wages to H-1B workers.

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AGENCY INTERPRETATIONS

Industrial, clerical, hospitality

- Low-skilled / unskilled positions
 - ↳ Shift work
 - ↳ Physically demanding



AGENCY INTERPRETATIONS

Jobs are primarily filled by immigrant labor, often from humanitarian programs

- DACA
- TPS

These programs are being eliminated. Legal workforce will be decimated.

AGENCY INTERPRETATION – STRATEGY TIP

- Evaluate permanent residence for long-term employees in traditional shortage occupations (truck drivers, sanitation, agriculture, assembly line)
 - Allows employees to remain in the U.S. and continue working legally, preserving the staffing company's revenue stream.

AGENCY INTERPRETATIONS

- Professional Staffing
 - STEM OPT
 - H-1B

STEM OPT

- Eligible for third party placement?
 - Lots of concern about this issue.
 - USCIS and ICE Websites are now consistent – perfectly permissible.

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H-1Bs for Client Sites

- Lots of issues:
 - Third Party Worksite Memo
 - Notice to Appear Memo
 - RFE Memo

All have been misinterpreted.

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Third Party Worksite Memo

February 22, 2018

<https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-02-22-PM-602-0157-Contracts-and-Itineraries-Requirements-for-H-1B.pdf>

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Third Party Placement Memo

Believed to “require” that all MSAs and subvendor agreements must be produced when filing H-1B for third party placement.

Not true.

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Third Party Placement Memo

Must Prove:

- Work is not speculative;
- Requires at least a Bachelor's Degree to perform; and
- H-1B sponsor maintains right to control H-1B while on third party site.

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Third Party Placement Memo

End client letter does ALL of that without producing MSAs or midvendor letters:

- Confirms contractual relationship;
- Job duties for project;
- Requires a particular degree(s) field to perform;
- Project Ongoing; and
- End client does not control; only H-1B sponsor controls employee.

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RFE Memo

June 28, 2018

https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/AFM_10_Standards_for_RFEs_and_NOIDs_FINAL2.pdf

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RFE Memo

Believed to mean that USCIS will no longer issue "requests for evidence" (RFE), but instead will immediately deny H-1B petitions.

Not true.

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RFE Memo

Instead, stated that USCIS has discretion to deny without RFE, **IF** filing fails to include "required initial evidence."

- Outlined in form instructions exactly what that is.
- Does NOT include anything about third party placement.
- Only references an "itinerary" **IF** more than one worksite.

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NTA Memo

June 28, 2018

https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/AFM_10_Standards_for_RFEs_and_NOIDs_FINAL2.pdf

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NTA Memo

- Believed to mean that H-1Bs whose cases are denied will be put into removal proceedings (aka “deportation”).
- It did say that, but they suspended enforcement until they figured out how to do it.
- Now says, as of October 1, 2018, USCIS has discretion to issue NTA for certain non employment based applications that are denied.

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NTA Memo

- Still is very concerning for many people who have no control over the approval of cases:
 - 41% increase in denials
 - 69% of filings get RFEs (vs 17%)

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Strategy Tips

- Do not presume an RFE = Denial.
- Focus on End Client Letters, rather than MSAs and mid vendor documentation.
- Do not be afraid to sue in federal court if case is denied. Many are getting reversed without even having to appear once in court.

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Questions?

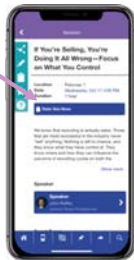


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