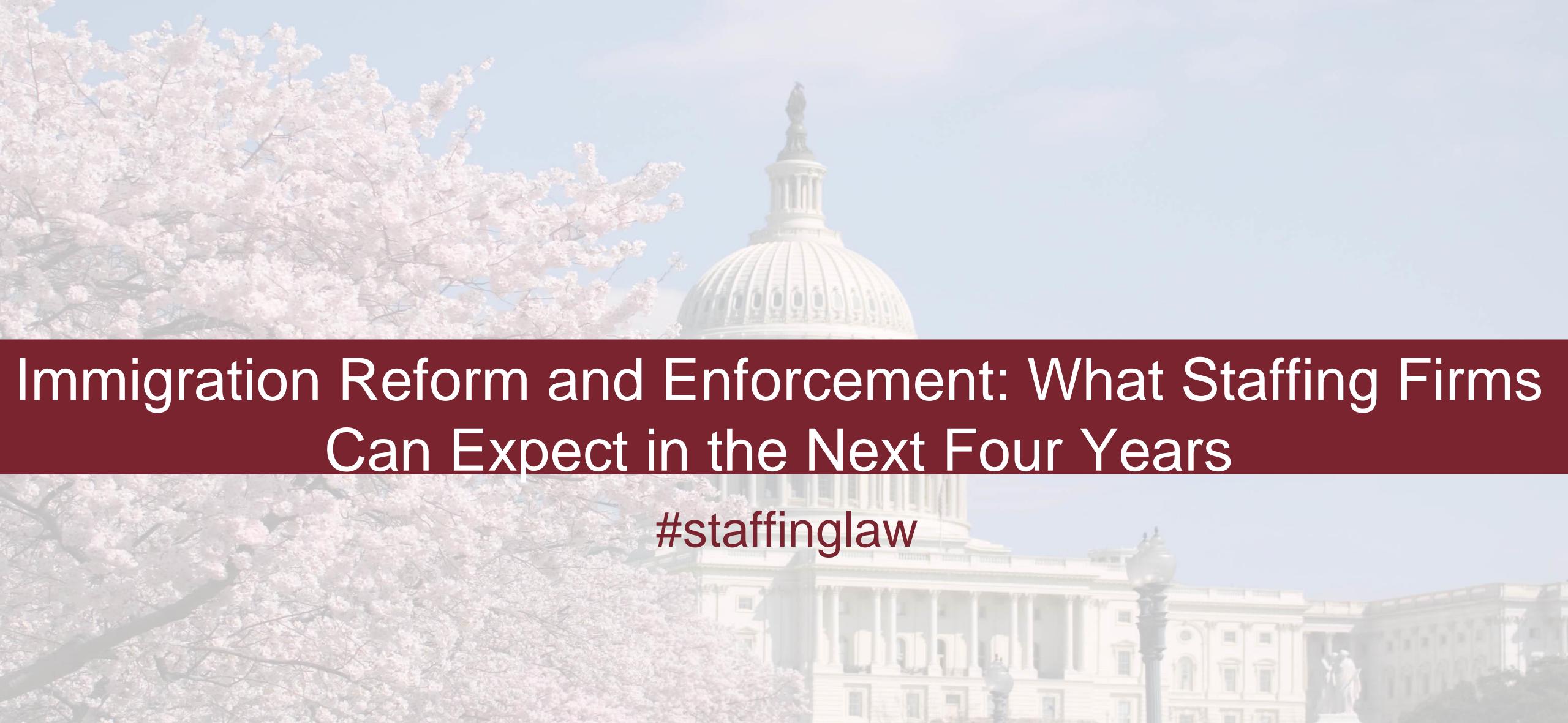


STAFFING CONFERENCE APRIL 29-30

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Immigration Reform and Enforcement: What Staffing Firms Can Expect in the Next Four Years

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Legal Disclaimer

This presentation has been prepared for informational purposes only. The material discussed during this webinar should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The content is intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have.





Agenda

- Legal vs. Business Perspective on
 - Form I-9 completion and investigations
 - H-1B Processing

Covid and change of administration implications for each





Form I-9s

Virtual I-9s (thanks to Covid)

- Starting March 2020, allowed to review supporting documents virtually, if
 - Have remote operations because of Covid; and
 - You do a **second** "in person" inspection of documents once you "resume normal operations."
- To avoid a two-step process, would have to rely on a designated agent to review documents "in person."





Virtual I-9s

Status of Virtual I-9s

- Policy extended through May 31, 2021
- Added language that says
 - The current extension includes guidance for employees hired on or after April 1, 2021, and work exclusively in a remote setting due to Covid-19-related precautions. Those employees are temporarily exempt from the physical inspection requirements associated with the Employment Eligibility Verification (Form I-9) until they undertake non-remote employment on a regular, consistent, or predictable basis or the extension of the flexibilities related to such requirements is terminated, whichever is earlier.





Polling Questions

- Did you rely on virtual I-9 verification when it was first announced in March 2020? (Yes or No)
- Are you still relying on virtual I-9 verification? (Yes or No)





Business Perspective

- Virtual vs. Designated Agent
 - Which option(s) did you choose?
 - Did you make a change along the way?
 - Change in "normal operations"
 - Response to administrative burden of a two-step process
 - Any other concerns?





Enforcement

- Change of administration—effect on enforcement?
 - Don't expect that to reduce. Democratic administrations want to show tough on immigration to maintain I-9 enforcement.
 - Right now, cleaning up the tens of thousands of investigations initiated during the Trump administration.
 - If you had a Notice of Inspection in 2017-2020, you can expect to get resolution this year, which can include "Notice of Intent to Fine."





Enforcement—Notice of Intent to Fine

- Don't be surprised—many will be six figures or higher. No more nuisance settlements.
 - But you can definitely still negotiate a lesser fine
 - Covid impact on business is an excellent avenue to reduce fine based on impaired "ability to pay."
 - Many settlements do come with condition to join E-Verify, or even IMAGE.





Business Perspective—Enforcement

- Lessons learned from living through an I-9 investigation
 - Be prepared for Notice of Inspection at any time (three-day window to produce documents)
 - Make copies of all documents before you produce them
 - The government is not your friend, no matter how nice the officer appears
 - "We tried to comply" will not insulate you from fine
 - Factors that were relevant for the government in securing a favorable settlement





H-1B Visas for Professional Staffing

- Turbulent times during the Trump administration:
 - Skyrocketing denial rates—up to 34% nationally
 - Shortened approvals for a year or less
 - Very high requests for additional evidence—up to 75% of cases filed





H-1B Visas

Big change May 2020

- Several court decisions invalidate the narrow way that the Trump administration was interpreting eligibility for H-1B, especially in the staffing context where employee works at client sites
- Courts also invalidate ability to shorten approvals just because client project is not documented for the full three years requested





H-1B Visas

Since then....

- Denial rates have plummeted
- Consistent three-year approvals
- RFE rates have greatly reduced (not eliminated—but less than 25%)

But then came Covid





H-1B—Covid Implications

- Work from home (rather than client site) is the norm
 - Eliminates focus on whether client is "supervising" your employee
- Might have needed to amend H-1B if employee chooses to work from home in a different metropolitan area than where the client site was located
- Change in client demand?

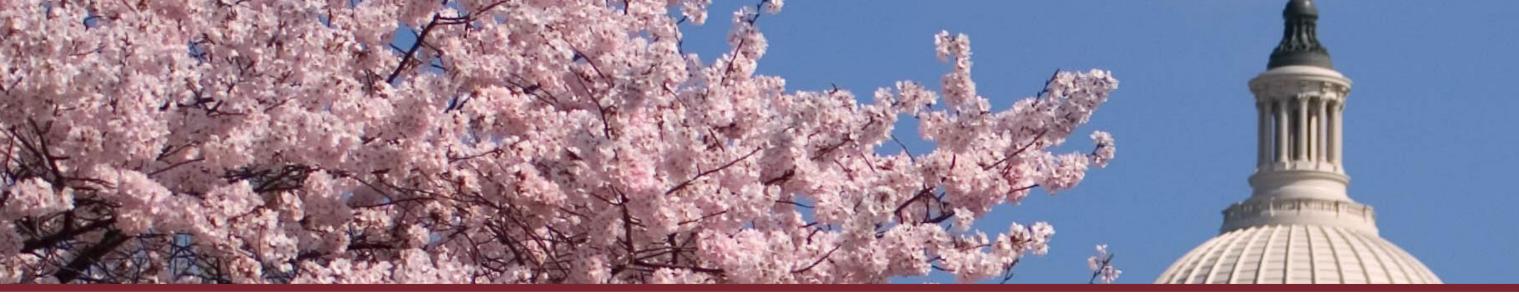




H-1B Prevailing Wages

- Dept. of Labor instituted a drastic change to prevailing wages Oct. 8, 2020 (45% and higher increase in required wage)
 - Multiple courts invalidated the proposed regulations
- Dept. of Labor published new regulations in December 2020 seeking to cure deficiencies the courts noted, but preserving increase in wages
 - Biden administration suspended implementation of "midnight regulation"
 - Deferred any further review for at least 18 months (November 2022)
 - Several court cases still pending to challenge regulations, if enacted





H-1B Lottery

- Filings for H-1B work authorization for those who have never held H-1B before (primarily international F-1 students already working for you using OPT)
 - 85,000 slots available
 - Demand this year was even higher than last year
 - 275,000+ 4/1/20
 - -300,000+4/1/21
 - Odds of selection about 30%





H-1B Polling Questions

- Have you ever filed an H-1B visa application for an employee? (Yes or No)
- Has demand from end clients changed? (Up, Down, or About the Same)
- Did you submit a registration in this year's H-1B Lottery?





H-1B—Business Perspective

- Reliance on H-1B talent (e.g., it and engineering):
 - New H-1Bs (lottery)
 - Transfers (for talent that already holds H-1B with a different employer)

Pros and Cons

- Business considerations
 - Demand from end clients
 - Costs vs. project length and margins
 - Global vs. domestic focus





Role of Outside Counsel

- When is it helpful to include outside counsel in each of these areas?
 - I-9 virtual policy vs. designated agent
 - Understanding the current legal requirements for compliance vs. day-to-day implementation
 - I-9 Notice of Inspection
 - When or if to engage with outside counsel?
 - H-1B processing
 - Understanding current legal climate
 - Staffing and knowledge to process vs. in-house <u>or</u> reliance on experienced outside counsel





QUESTIONS?

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