



Immigration ADVISORY ■

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Employer Verification and H-1B Cap Lottery Season: 2022 New Year Action Items and Tools

by [Eileen Scofield](#)

As we know, much of January is consumed by closing out the prior year. Begin your year with these helpful action items and resources.

Download the E-Verify User Report

Employers registered for E-Verify are advised to annually download and save their E-Verify data.

The federal government's system retains records for only 10 years. Older records are regularly destroyed. When required to produce evidence of E-Verify compliance, including for those employees hired 10 or more years ago, you do not want to be dependent on the federal government as your system of record. We advise you maintain your own records even if you process E-Verify via a third party or designated agent.

A Recipe to Avoid an Immigrant and Employee Rights Section Investigation, EEOC Investigation, and Other Valuable Benefits

Importantly, a simple manipulation of the E-Verify User Report or electronic Form I-9 data, and proper expert analysis of the same, can reduce or eliminate a potential Department of Justice (DOJ) Civil Rights Division Immigrant and Employee Rights Section investigation, settlement, and fines. Perhaps even more importantly, you can improve legal compliance, reduce potential fines, facilitate your onboarding process, and broaden the scope of available U.S. workers. Do what the government does, but before the government has a reason or need to. Typically, if we receive data in the right format, within an hour or so we can perform an initial assessment, identify potential issues, and suggest improvement or cures. Non-E-Verify employers with paper Forms I-9 have the option as well, but the collection process takes longer. We suggest performing this analysis annually.

Employment Verification Toolbox: 2022

We suggest every employer provide an employment verification toolbox to those people responsible for the hiring, onboarding, and employment verification processes. Send an annual email with the updated toolbox and a reminder to review the contents. Why annually? For example, the DHS Handbook for Employers M-274, a 100-plus-page instruction

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manual for completion of the two-page Form I-9, is now electronically maintained by the Department of Homeland Security (DHS). DHS, unbeknownst to almost every employer, regularly changes the M-274.

We send highlights of substantial changes throughout the course of the year, but it is also a best practice for an employer to recirculate once a year with those people within the organization responsible for hiring, onboarding, and employment verification. And a reminder that if during the year any new person joined that division of the organization, the most current toolkit should be provided to them as well.

LOAD (List of Acceptable Documents) – NOT!

Unfortunately, the Form I-9 page 3 List of Acceptable Documents is incomplete. There are more and different types of documents that are acceptable but not listed on page 3 of Form I-9. Even though Congress and DHS say employers need not be immigration law or document experts, DHS, DOJ, EEOC, DOL, and plaintiffs' lawyers often think otherwise. We work to maintain a running comprehensive list. Please feel free to contact us for guidance, especially before turning away an individual who tells you that their documentation is valid even though it is not clearly listed on the Form I-9 page 3 List of Acceptable Documents.

Policy

Have an employment verification policy, know where it is, read it, and use it. If able, integrate a generic, simple draft into your system and process – or ask us for help.

Training

We can provide training sessions via the web. Even so, we cannot stress enough the value of a live, in-person training. We always see a greater willingness to ask critical questions and open discussions, which benefits everyone.

We can make these presentations as short as 23 minutes, 2 hours, or 2 hours followed by unlimited Q&A. All helpful. In many cases, in our experience, a live, in-person training is most beneficial. Below are sample training topics we can cover:

- Employment Verification Basics: Form I-9 Basics, Process, and Pitfalls.
- Employment Verification & Discrimination: Deeper Dive – What are they, how to connect the dots, and what to do when the dots are connected.
- Obligations and Issues of Verification Impacting M&A, Diversity, PII, Business Operations, Contractors, Resurrected Fingerprints, Global Travel, TSA, and Other Matters Outside the Onboarding Process – For instance, if your company is a financial institution with an excellent onboarding process that is handled by expert software companies but has issues related to customers because your company is regularly notified by the Social Security Administration that your customer numbers don't match the name or other Social Security records, does the company have any obligation to do anything? We also address FICA/FUTA compliance.
- Knock, Knock: The Government Is Knocking at My Door – What do you do? What do you produce? When do you produce it? What issues are worthy of note?
- Employment Green Card: Process, Timeline, and Key Takeaways for HR, Recruiters, SME Managers, and Employees.

Post-COVID-19 – The New Remote Work World

Issues to know and address: Unemployment taxes, visa violations/compliance, state registration/doing business, permanent establishment (PE), and the very long arm of tax law. For instance, if your company decided to close a consolidated IT office and allowed everyone to work from home instead, will this impact your operations? Will the company now have created a PE in other states or countries? Will the company now be subject to taxes there? Does the company need to register in those states, counties, or countries as doing business there? Can the company obtain a business license? Will those workers need any work visa authorization, or amendments to the company's immigration filings, in order to work from home?

Diversity & Immigration and Compliance

If the company's CEO thinks the company needs a more diverse workforce, and after considering the new earnings per share guidance, the company decides to import diverse talent, what is the process for bringing in workers from abroad? Are there any issues related to bringing them in to fulfill diversity requirements or goals? How complex is the process? How much will it cost per person? Is there an alternative?

Global Travel 2022

Looking forward at least for 2022, how should we advise senior management? Are there other situations where different protocols may or should apply? What should you expect when you do travel?

Be Heard

DHS recently posted the comments of Eileen Scofield and Alston & Bird on the employment verification process. Feel free to share or send your comments and suggestions to also share with DHS.

H-1B Cap Lottery Season/FY2023: Action Items & Timeline

U.S. Citizenship and Immigration Services (USCIS) announced that the initial registration period for the FY2023 H-1B cap will open from March 1, 2022, at noon ET through March 18, 2022, at noon ET. Below is a summary of the spring 2022/FY2023 H-1B annual cap registration process and information needed to proceed.

Background

The H-1B filing season officially opens April 1 for the filing of new H-1Bs that become available October 1 each year. The annual H-1B allocation/cap is 65,000 H-1Bs and an additional 20,000 H-1Bs for individuals with a U.S. master's degree. First, during March, the employer completes an online registration, and then, in early April, USCIS conducts a random, electronic lottery selection from the completed registrations. If selected, USCIS will direct the employer to file the H-1B application.

Action Items

List and timeline

If you wish to commence the H-1B visa process for any current or proposed employees, we recommend gathering the necessary documentation as early as possible. We ask that the employer and applicant/employee complete and provide the immigration questionnaire and all the requested supporting documentation to us before the end of February 2022. More specifically, to assess and proceed with the H-1B filing, we will need the following documentation:

From the company/employer

- Completed Employer Questionnaire. This is to be completed by the company to provide us with information about the position in the U.S.
- Proposed job description.*
- Copy of signed offer letter.
- Organizational chart reflecting the proposed position and its location within the organization and/or department, including any managers, co-workers, and subordinates.

* USCIS continues to issue an increased number of Requests for Evidence. It is essential that complete information about the position be provided, including specific and detailed job duties evidencing the complex nature and any technical requirements/aspects of the position, as well as information about the company's normal degree requirements for the particular position.

From the applicant/employee

- Completed Application Questionnaire. This is to be completed by the employee/applicant to provide us with their background and biographical information.
- Copy of detailed resume.
- Copy of passport identification pages.
- Copies of any prior visa stamps, approval notices, EAD cards, I-20 forms, etc. (if applicable).
- Copies of any educational documents (including diplomas and transcripts).
- Copies of any professional training certificates and reference letters, if applicable.
- Copies of any professional licenses, especially if required for the position.
- If working on optional practical training (OPT), provide the dates employed with each OPT employer and copies of pay statements/W-2s for entire period of OPT employment.
- Copies of passport identification pages of any spouse and children, marriage certificate, and birth certificates of any children.

Review

We will review all information to see if the applicant appears qualified and note if there are any potential concerns before registering each applicant. In addition, we will review and proceed to obtain prevailing wage information and prepare the necessary LCA postings. Once the registration period opens, we will submit the registrations for H-1B applicants. Once registrations are submitted by us, we will then provide you with instructions for logging into the registration portal and verifying and confirming the registrations, as well as signing the electronic G-28. This must be completed before midnight, March 18, 2022.

USCIS announced that it intends to complete the random, electronic lottery selection process and notify all selected registrants by March 31, 2022. If an employer/applicant's registration is selected for filing their H-1B petitions, we will be provided a filing window when the H-1B petition must be submitted to and received by USCIS. We will notify you of those selected applicants and begin the process of preparing the H-1B petitions (forms and documentation) for filing with USCIS.

If you have any questions, please let us know. We are looking forward to another successful H-1B cap season.

Toolbox

Useful references:

- [Handbook for Employers M-274](#) | USCIS
- [Form I-9](#), current version | USCIS
- [Comments of Eileen Scofield to DHS on Reformation of the Employment Verification Process](#) | Regulations.gov

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If you have any questions or would like additional information, please visit our [Immigration Team](#) or contact any of the following:

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