

25TH LABOR & EMPLOYMENT SEMINAR



LIVE STREAM

*Virtual for
2020*

Recent Updates in Employment-Related Immigration: Gazing into the Crystal Ball at the Year Ahead

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Today's Session will cover:

- Presidential Proclamations and National Interest Exemptions
- New Department of Labor and Department of Homeland Security Regulations
- H-1B Electronic Registration
- Proposed Regulations affecting F and J students
- Immigrant Petition "reclassifications"
- Premium Processing Fee Increases
- Posting Requirements during a pandemic
- Update on I-9 and Compliance Issues

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Presidential Proclamations on Immigration



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- ❖ Proclamation 9993 of March 11, 2020– applies to Immigrants and Nonimmigrants
- ❖ Suspends entry of an individual seeking to enter the US who has been physically present in the Shengen Area, UK, Ireland, China and Brazil within the immediately preceding 14 days prior to their arrival in the US
- ❖ Students with valid F-1 and M-1 visas do not need to obtain an NIE to travel and can obtain visa stamps (if their embassy is open)
- ❖ Business Travelers – may travel with valid visa or ESTA may obtain an NIE to travel

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Presidential Proclamations on Immigration

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- ❖ Proclamation 10014 of April 22, 2020 – applies to Immigrants
- ❖ Suspends entry of an individual seeking to enter the US who is
 - ❖ Outside the U.S. on the effective date of the proclamation;
 - ❖ Does not have a valid immigrant visa on the effective date of the proclamation; and
 - ❖ Does not have a valid official travel document, such as a transportation letter, boarding foil, or advance parole document on the effective date of the proclamation, or issued on any date thereafter

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Presidential Proclamations on Immigration

- ❖ Proclamation 10014 of April 22, 2020 – the following categories are exempted
 - ❖ Lawful Permanent Residents
 - ❖ Physicians, nurses or other healthcare professionals coming to the U.S. to work to treat and combat the spread of COVID-19 or to perform medical research or other work intended to combat the spread of COVID-19
 - ❖ EB-5 investors
 - ❖ Spouses of citizens
 - ❖ Children of citizens under the age of 21
 - ❖ Individuals who would further important US law enforcement objectives
 - ❖ Members of the US armed forces and their spouses and children
 - ❖ Individuals whose entry to the U.S. would be in the national interest

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Presidential Proclamations on Immigration

- ❖ Proclamation 10052 of June 24, 2020 – applies to Nonimmigrants
- ❖ Suspends entry of an individual seeking to enter the US who is seeking entry pursuant to a(n)
 - ❖ H-1B visa and any foreign national accompanying or following to join them;
 - ❖ H-2B visa and any foreign national accompanying or following to join them;
 - ❖ J visa, to the extent the foreign national is participating in an intern, trainee, teacher, camp counselor, au pair, or summer work travel program, and any foreign national accompanying or following to join them; and
 - ❖ L visa, and any foreign national accompanying or following to join them.

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Presidential Proclamations on Immigration

- ❖ Proclamation 10052 of June 24, 2020 – applies to Nonimmigrants
- ❖ Exemptions
 - ❖ Lawful Permanent Residents
 - ❖ Spouses or children of US citizens
 - ❖ Individuals seeking entry to provide temporary labor essential to the U.S. food supply chain
 - ❖ Individuals whose entry would be deemed to be in the “national interest”

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National Interest Exemptions

- ❖ H-1B applicants
 - ❖ Healthcare professionals treating or performing research on COVID-19
 - ❖ Travel supported by requests from US Government Agencies
 - ❖ Travel by applicants seeking to resume ongoing employment in the US in the same position with the same employer in the same visa classification
 - ❖ Travel by technical specialists, senior level managers, and other workers whose travel is necessary to facilitate the immediate and continued economic recovery of the U.S.



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National Interest Exemptions

- ❖ L-1A applicants
 - ❖ Healthcare professionals treating or performing research on COVID-19
 - ❖ Travel supported by requests from US Government Agencies
 - ❖ Travel by applicants seeking to resume ongoing employment in the US in the same position with the same employer in the same visa classification
 - ❖ Travel by a senior level executive or manager filling a critical business need of an employer meeting a critical infrastructure need

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National Interest Exemptions

- ❖ L-1B applicants
 - ❖ Healthcare professionals treating or performing research on COVID-19
 - ❖ Travel supported by requests from US Government Agencies
 - ❖ Travel by applicants seeking to resume ongoing employment in the US in the same position with the same employer in the same visa classification
 - ❖ Travel as a technical expert or specialist meeting a critical infrastructure need



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New Department of Labor and DHS Regulations

❖ DOL Regulations

- ❖ Significantly raises “prevailing wages”
- ❖ Effective October 8
- ❖ Litigation update



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New Department of Labor and DHS Regulations

❖ DHS Regulations

- ❖ Significantly narrows definition of “specialty occupation”
- ❖ Sets maximum validity period of approvals for H-1Bs at third part worksites
- ❖ Requires petitioner to show work is available as of the requested start date
- ❖ Expands on the scope of site-visits
- ❖ Effective December 7, 2020
- ❖ Litigation update



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Electronic Registration for H-1B Petitioners

- ❖ Went into effect for FY2021 cap-subject petitioners
- ❖ Registrations accepted from March 1 through March 20
- ❖ \$10 registration fee
- ❖ Once selected, petitioners have 90 days to file the H-1B petition



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Immigrant Petition (I-140) Reclassifications

- ❖ Per Country Caps
- ❖ October 2020 Visa Bulletin and USCIS Filing Dates Charts
- ❖ Benefits and Risks of “downgrading” from EB-2 to EB-3
- ❖ How does the process work?



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Proposed Regulations affecting F and J Students

- ❖ F and J Students and Exchange Visitors would be admitted for a definite time period rather than D/S
- ❖ 2 or 4 year periods of authorized stay
- ❖ Students will be required to apply for an extension of stay, including the provision of biometrics, in order to continue their activities beyond their initial admission
- ❖ Where F and J students overstay their period of authorized stay, they would be subject to the unlawful presence rules currently in effect for other visa classifications

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Premium Processing Fee Increase

- ❖ Fees increased from \$1440 to \$2500 for most classifications
- ❖ H-2Bs and R-1s increased to \$1500
- ❖ Eligible classifications were not expanded
- ❖ Was effective immediately



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Form I-9

- ❖ Cannot knowingly hire or retain an unauthorized worker
- ❖ Every employer has a legal obligation to verify the identity and work authorization of any and all employees hired after November 6, 1986
- ❖ Failure to properly do so may result in monetary fines and potentially criminal penalties
 - ❖ In FY 2019, employers were ordered to pay \$14.3 million in fines, forfeitures, and restitutions

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Audits and Investigations

- ❖ Huge uptick since 2017
- ❖ 6,456 audits in FY 2019 (at random)
 - ❖ Compared to 5,981 in FY 2018 and just 1,360 in FY 2017
- ❖ 6,812 workplace investigations initiated in FY 2019
 - ❖ Compared to 6,848 in FY 2018 and just 1,691 in FY 2017



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Section 1

- ❖ Must be completed by the employee
- ❖ Timing is critical: must be completed on or before employee's first day of work
 - ❖ Remind employees to bring documents their first day or require completion in advance of first day

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Section 1 Continued

- ❖ Be sure that the employee checks a box
- ❖ Be sure the employee fills in applicable dates and document numbers

I attest, under penalty of perjury, that I am (check one of the following boxes):

<input type="checkbox"/> 1. A citizen of the United States	
<input type="checkbox"/> 2. A noncitizen national of the United States (See instructions)	
<input type="checkbox"/> 3. A lawful permanent resident (Alien Registration Number/USCIS Number):	
<input type="checkbox"/> 4. An alien authorized to work until (expiration date, if applicable, mm/dd/yyyy):	

Some aliens may write "N/A" in the expiration date field. (See instructions)

Aliens authorized to work must provide only one of the following document numbers to complete Form I-9:
An Alien Registration Number/USCIS Number OR Form I-94 Admission Number OR Foreign Passport Number.

1. Alien Registration Number/USCIS Number: _____ OR 2. Form I-94 Admission Number: _____ OR 3. Foreign Passport Number: _____ Country of Issuance: _____	QR Code - Section 1 Do Not Write In This Space
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Section 2

- ❖ Allow the employee to select which documents to present
- ❖ Accept either: a List A document OR a List B AND a List C document
 - ❖ Be careful not to over document
 - ❖ Best practice to make copies of presented documents

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Section 2 Continued

- ❖ Again, timing is critical: must be completed within 3 business days of employee's start date
 - ❖ Can be completed in advance of start date
 - ❖ E-Verify: confirm receipt of confirmation and retain copies consistently (use of E-Verify is best practice)
- ❖ The person who receives, reviews, and copies the original documents should also complete Section 2
- ❖ Fill out completely, including title and employer information

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Attestation

- ❖ Section 2 does not require the employer's representative actually verify identity or authorization
- ❖ No need to conduct independent research
- ❖ Simply need to confirm that you have examined the documents, they appear genuine, and, based on that, the employee is authorized to work

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Section 3

- ❖ Not required for US citizens, lawful permanent residents, or List B documents
- ❖ Must be completed on or before the expiration date listed
- ❖ Should establish calendar system and reminders to track expiration dates
 - ❖ Recommend touching base with employee well in advance of expiration date

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Common Errors

- ❖ Timing
- ❖ Document Number
- ❖ Scrivener's error
- ❖ Failure to re-verify

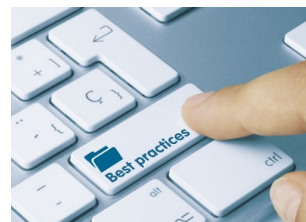


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Best Practice and Resource

- ❖ Internal Audit
 - ❖ Checklist
 - ❖ Allows you to avoid penalties
- ❖ I-9 Handbook for Employers M-274:

<https://www.uscis.gov/i-9-central/handbook-employers-m-274>



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COVID-19 Impact

- ❖ If there are no employees present at a work location and a new employee is working remotely due to COVID-19, employers will not be required to review the employee's identity and employment authorization documents in the employee's physical presence
- ❖ Must inspect the Section 2 documents remotely and obtain, inspect, and retain copies of the documents
- ❖ Should enter "COVID-19" as the reason for the physical inspection delay in the Section 2 Additional Information field once physical inspection takes place after normal operations resume
- ❖ Once the documents have been physically inspected, the employer should add "documents physically examined" with the date of inspection to the Section 2 additional information field on the Form I-9, or to section 3, as appropriate
 - ❖ Complete within 3 days
- ❖ Certain receipts are temporarily acceptable: <https://www.uscis.gov/i-9-central/form-i-9-related-news/temporary-policies-related-to-covid-19>
- ❖ E-Verify time to resolve tentative non-confirmation extended

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Notice Posting - LCA

- ❖ Employers may post notice of an LCA filing electronically using a mode ordinarily used to communicate with its employees about job vacancies or promotion opportunities, including its website, electronic newsletter, intranet, or email
 - ❖ If employees are notified directly, notification is only required once and does not have to be provided for 10 calendar days
- ❖ https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/DOL-OFLC_COVID-19_FAQs_Round%201_03.20.2020.pdf

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Notice Posting Continued

- ❖ If you move H-1B, H-1B1, and/or E-3 visa holders to a new worksite, including home, you may need to file a new LCA
- ❖ If the employee is simply moving to a new job location within the same area of intended employment, a new LCA is not required
- ❖ Employers with an approved LCA may also move H-1B workers to unintended worksite locations outside of the area(s) of intended employment on the LCA using the short-term placement provisions; other visa categories will need to file for a new LCA
- ❖ The employer must provide either electronic or hard-copy notice at those worksite locations meeting the content requirements at 20 CFR 655.734(a)(1) and for 10 calendar days total, unless direct notice is provided, such as an email notice
- ❖ Notice is required to be provided on or before the date any worker on an H-1B, H-1B1, or E3 visa employed under the approved LCA begins work at the new worksite locations
- ❖ Notice will be considered timely when placed as soon as practical and no later than 30 calendar days after the worker begins work at the new worksite locations

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Furloughs and Layoffs

- ❖ Be careful before furloughing, laying off, or otherwise altering the terms and conditions of an employee on an employer sponsored visa in response to COVID-19
 - ❖ May impact status and/or trigger other employer obligations
 - ❖ May be opportunity to switch to “non-productive status” while still complying with regulations



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Questions?

Any questions not answered during today's presentation
will be addressed at our **Advice on Tap** session on
Friday, October 30 at 12:00 Noon Central.

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THANK YOU



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