



A New Dawn for Immigration and Employment Compliance

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A New Dawn for Immigration and Employer Compliance

ROBERTO SCALESE: Good afternoon. The Association of Corporate Counsel and SmartPros Legal and Ethics welcome you to today's webcast, A New Dawn for Immigration and Employer Compliance.

[The instructions provided here were intended for attendees of the live webcast when it was originally broadcast. You may submit questions and comments regarding the content of this course using the Questions and Comments link on the left side of your screen below the video.]

Our presentation today will be moderated by Beverly Stuart, senior counsel at Kaiser Foundation Health Plan. She's also a member of the Coordinating Committee and the Executive Committee of The National Employment Law Council. Beverly will introduce our topic and today's speaker, Sean Hanagan.

BEVERLY STUART: Thank you. Welcome everyone. My name's Beverly Stuart, and I'll be the moderator for today's presentation. I'm located in the Pasadena, California office of the Legal and Government Relations Department of Kaiser Foundation Health Plan.

Our presenter today is Sean Hanagan, a partner in the law firm of Jackson Lewis LLP. And Sean will be presenting about a wonderful immigration topic and employer compliance regarding the I-9s as well as government audits and visas.

Mr. Hanagan is located in the Jackson Lewis White Plains, New York office, where he specializes in corporate immigration. He provides guidance to employers on securing employment visas for critical foreign staff, advises on I-9 IRCA best practices and dealing with government audits, addresses Social Security issues, and facilitates the worldwide transfer of employees.

Mr. Hanagan received his law degree from American University Washington College of Law in Washington, D.C., and studied Japanese and international law at Temple University Japan in Tokyo. He speaks fluent Japanese.

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ROBERTO SCALESE: Thank you. I would now like to turn the show over to Sean, who will begin his presentation. Take it away, Sean.

BEVERLY STUART: Before Sean begins, Roberto, could we have the first poll on how many people are working with I-9s?

ROBERTO SCALESE: OK. For our audience members, please select one of the answers. We will close the poll in a few seconds and display the results.

Beverly, as you can see, we have 83% of our respondents [who] said yes, they have experience completing the I-9 form.

BEVERLY STUART: Thank you very much. So go ahead, Sean.

SEAN HANAGAN: Can you hear me now?

BEVERLY STUART: Yes, now I can hear you.

SEAN HANAGAN: OK. All right, thank you everybody for your attendance here. The immigration field is one of a lot of activity and change and discussion these days. We'll talk a little bit about some of the latest policies and actions by the Department of Homeland Security, especially as they relate to workplace law and employment of foreign staff.

I want to take you through sort of a survey today on the world of immigration, where we were, where we are now, some of the key topics that you're likely to encounter in your work, including work site enforcement, the I-9 form—the deceptively simple seeming form which seems to actually be designed to get everybody into trouble. We'll talk about that.

We'll talk about E-Verify [for] a bit; the new system which is designed to close some loopholes and the question of: Is somebody, in fact, legal to work or not?

We'll go into the related issue of Social Security no-match letters and no-match notifications and how to deal with that; where the government is on their new rules. And then, if we have time at the end, we'll also touch on sort of visa sponsorship issues. That's not the main focus of this webinar, but I do have a couple of slides there, and we can talk about reductions in force for visa holders if we get there, if we need to.

So, starting out in 2007, there was a serious effort to reform the immigration system. It was recognized by the government and by business that there were some significant problems, the most obvious one being the fact that the border is not secure, and so we have approximately 10-12 million illegal aliens in this country, many of whom are working.

Now, there was a big push by the Bush administration to get support for some significant change. It was supported somewhat by business, but, unfortunately, as we all know, we did not get immigration reform. There was a real division, in terms of some of the issues like security and job security for Americans, as well. Unions did not have a unified take on it either, so, again, there just not enough support to get that reform through.

And so, we had sort of the status quo, and President Obama, in his campaigning, made immigration one of his campaign points; that he did want to revisit the reform discussion. He chose the former governor of Arizona, Napolitano, to be his new Department of Homeland Security head, partially due to her experience in this area as the governor of Arizona, hoping to sort of reignite the discussion here.

He also postponed a couple of the early regulations. There were some things pending, in terms of the federal contractor rules and the Social Security no-match rules—which we will speak about in a little more detail later—but those were both postponed, as you can see on the slide here.

E-Verify: There was a discussion of making a requirement for employers that received TARP [Troubled Asset Relief Program] funds that they sign up for E-Verify. That did not go through. There was a huge increase in the E-Verify budget, however, designed really to increase bandwidth on the system and allow for much broader employer participation. This is sort of in anticipation of the new federal contractor rules, which should be coming down later this year. Again, we will see further discussions on the comprehensive reform effort.

The other issue that's come really to the fore is work site enforcement. In 2006, there was sort of a policy move by the

Department of Homeland Security to increase their enforcement efforts—not solely in the work site area, but work site was one of the important areas they were looking at.

Their reasons for doing this are multiple, but they want to stop illegal immigration. Is that realistic? Nobody can say, but coming down on the employers will at least put a check on illegal immigration. If the jobs are not here, then, the theory goes, fewer people will come in.

Stopping egregious employment practices. So, stories of people being paid lower than the minimum wage, not good for those foreign workers but also not good for U.S. workers whose wages are going to be affected as well. Not good for employers who have to try to compete with people using illegal labor.

Deterring smuggling, harboring, document fraud. Those are also related areas where ICE [Immigration and Customs Enforcement] and the Department of Homeland Security have sort of refocused their efforts.

So, in terms of the new secretary, she came into office and said she wants to increase the focus on ensuring that employers of unlawful workers are prosecuted. So, in terms of the transition from the Bush administration to the Obama administration, we're seeing a slight shift in focus. It's still enforcement—still workplace enforcement—but there's a subtle shift here to look at or point the finger at the employer as the bad actor, whereas before we saw more of a focus on the employee as the bad actor. It's obviously easy to identify an illegal alien as somebody who's in the wrong, and we will see, in a couple more slides, in terms of some of the arrest numbers and the fines, that there have been a lot of illegal aliens arrested, but the changes in how the government is dealing with you all; with employers.

One of the thoughts behind sort of closing the loop or making it harder to employ illegal aliens is sort of the cost of doing business. In days gone by, if Immigration [and Naturalization Service] were to come in or the Department of Labor were to come in and do an audit and find that there might be employees without the proper identification or the proper work authorization, there would be an administrative fine. There were very rarely criminal prosecutions of the employer. We see now, on this slide, a number of the new tactics and the new legal theories under which the Department of Homeland Security is going after employers.

Increased I-9 audits: That is really sort of the same introductory method to get access to the company's records and identify when there may be problems. But the new part of it is criminal indictments; grand juries. We read about some large scale raids. I'm going to move over to the next slide so you have a couple of examples there. Publicizing of the raids and indictments: There have been some record settlements and some multi-hundreds—and, in some cases, up to a thousand—arrests of employees and employers at sites where there has been a pattern or practice of illegal employment identified. You can see here a few of the fines and the settlements that companies are being really sort of forced to pay.

The other legal theory under which some of these raids and investigations are being carried out under is—one of them is RICO [Racketeer Influenced and Corrupt Organizations Act], where the government is saying, “OK, employer, you've been using illegal labor, and it's sort of a concerted effort—an organizational effort—here. We are going to characterize your revenues and/or your profits— some part of those profits—as illegally derived profits, as if it were a criminal organization. The government has actually been going in and seeking asset forfeiture from companies where there is a really blatant disregard for the law.

The other tool that they've had available—but they haven't used until recently—is federal contract debarment. They published that there were seven companies debarred from participating in federal contracts last year due to immigration violations, and that's something that's been available. It hasn't been used, though, until now. They've sort of really made it—put some teeth behind the regulations, and really, in a sense, thrown the book at employers when there have been problems.

I don't want to scare you too much because this isn't what's going to happen if the government comes in and finds a few firms with information missing or wrong. These are sort of the extreme cases where there's been a significant problem. The standard that is applied to employers is that they knew or they should have known that there was an issue with somebody's

ID for work authorization. And when we're talking about a \$20–\$30 million settlement, that type of case is one in which there is significant evidence of company knowledge—and perhaps even company support—of illegal staff in, for example, getting false ID.

The government does still have and they do still use the administrative fine format when it's more of a minor issue and there's good faith by the company that they tried to comply with the law but had some mistakes, so, really, two different worlds here that we have to think about and differentiate.

So, the next slide here is about how do these investigations get started. ICE is the enforcement arm of the Department of Homeland Security: Immigration and Customs Enforcement. [There are] a number of ways: Sometimes an illegal employee might be picked up on a driving charge, arrested for something like that, and there's a discussion with law enforcement about the person's status in the United States.

Local law enforcement has been getting increasingly involved in immigration issues. There is a push to help train and deputize local law enforcement officials on the federal immigration laws, so there have been cases where a minor infraction by an illegal alien turns into an investigation of that person's company.

ICE has been known to offer individuals in that situation deals. "We'll let you stay here, and we'll actually get you authentic work authorization. We'll help you legalize if you cooperate with us in an investigation of your employer." So, there have been situations where people have gone back into the company as witnesses to help to gather evidence against the company.

Tips from employees or the public. Unions are becoming more of a source of tips to ICE as well, although, again, with unions, there's something of a division in that some unions seem to be very supportive of aliens and even illegal aliens. I've seen some documents that they've distributed to people saying, "Don't let the employer discriminate against you. We'll help you, and, therefore, you should support us, etc." But some unions are uncomfortable with these people being on payroll and have sent in their own tips to immigration.

Social Security no-match, which we'll talk about again a little bit later: If there has been a history of ignoring the Social Security notices, ICE will take that into consideration when they're reviewing a company's records. I mentioned the concept of good faith, and, for ICE, trying to deal with Social Security no-match issues is a sign of good faith. Failure to do so is a sign of bad faith. So, they will look at that history. Have you had no-match letters in the past? If so, how did you deal with them?

We've seen a little bit more cooperation between the Department of Labor, Social Security, and the IRS in terms of sharing of records and sharing of information. They don't quite have a formal system yet, so it's been somewhat informal to date. They're trying to get the Department of Motor Vehicles photo databases hooked up with Immigration so that employers can check a photo ID.

We'll talk a little bit about E-Verify and their systems as well, but [there are] numerous ways that an investigation can happen. The last one I'll mention, because this can also be a critical entry point for the government to come in and look at a company, is temporary worker providers. [In] one of those large cases that was mentioned in an earlier slide, the problem really originated with contracting a cleaning crew. And the client retailer was not actually employing the illegal individuals directly; they had hired a cleaning crew, and the cleaning crew brought on some illegals. But the retailer was not protected, because the government went in and investigated [and asked], "Well, did you know? What did you know about this contractor's hiring practices? How much did you know and what did you do about it?" The feeling was, and the evidence was, that the retailer knew, or should have known, and they did not take remedial action. So, they were tagged as having known that the cleaning crew which was coming in to clean the stores was using illegal workers.

BEVERLY STUART: Sean, just a question here. What should the company have done in that situation if the company suspected that the contractor was using illegal aliens?

SEAN HANAGAN: That's a good question. What I advise clients to do whenever they're engaging in temporary worker providers is, first of all, to have a strong agreement—a strong written agreement—which lays out the terms of the agreement in, specifically, the hiring practices and the employment practices that the temporary worker provider adheres to. I've gone so far as to actually send an I-9 employment eligibility verification policy statement that the client company can ask the temporary worker provider to sign off on, where it sort of goes into some detail about what the temporary worker provider will and won't do.

Now, as discussed, that may not provide you with full protection if the temporary worker provider is not following the policies that you've agreed to together. So, when you get information on a possible violation of the agreement and the policy, my suggestion is that the client company sit down and have a really serious discussion with the temporary worker provider.

It's going to be important to assess whether the issue is an isolated one—an inadvertent oversight—or whether it's indicative of something deeper; a deeper problem in terms of the temporary worker provider's appreciation for this part of the law. And if it turns out that it was a mistake, then maybe just a review of the policy and a review of the relationship is going to be enough. If it turns out or if it appears that this may be a company that's really sort of flouting the law, then a deeper consideration of whether the company may need to go to a different provider should probably take place.

BEVERLY STUART: So, then, in the contract, then, perhaps the company should have as a ground for termination the fact that the temporary worker company is not following the immigration laws.

SEAN HANAGAN : That would be a valid point to consider putting in there.

BEVERLY STUART: Maybe this is a good time to poll our audience in terms of which ones of them have experienced government audits of their I-9 forms.

ROBERTO SCALESE: OK, we would ask everyone to take a moment and select yes or no: Have you ever worked through an I-9 audit by the government?

As you can see, 71% of our participants have not worked through an I-9 audit.

SEAN HANAGAN: OK, thank you. So, we'll spend a little more time on audits. I've got a few slides here on how to prepare yourself so that, were there to be an audit, you're going to be in the best shape possible before the government steps foot in your organization.

I have a slide up here [that is] illustrative of the transition in the administration, and it holds out a little bit of hope—at least in terms of the way Immigration is going to approach audits and raids in the future—but basically there was a raid where the new secretary of the Department of Homeland Security was not notified that this was happening. And there were 28 employees at this location arrested, and it resulted in really strong community backlash. Some of these people were parents; they had U.S. citizen children who now were going to be, perhaps, threatened with becoming public wards, and just questions about sort of the targeting of the employees and the treatment of the employees in this situation.

What happened was: The 28 employees were released and granted deferred action, basically meaning they would be provided with work authorization and with the possibility of legalizing in the U.S. So, sort of a mistake in terms of how this was executed. We anticipate it's going to be smoother in the future and go more along in the lines of Secretary Napolitano's comments on focusing on the employer as opposed to the employee so much.

OK, the new I-9 form: We'll take you through [the form], but it's important to understand the significance of the I-9. It's a one-page form. It's got information on the back in terms of the acceptable documents and a couple of pages of instructions, but it's a very unintimidating piece of paperwork. People don't take the form seriously. It seems, in some situations, to get

delegated down to the level at which it can no longer be delegated. There's nobody further that can be given this task.

So, I've had, for example, a situation where I went into a company and I asked about the I-9s and who signs off on these, and everything was handled by a manager, and then the forms would be sent to another location where a secretary was asked to simply sign off on the certification section that, yes, these documents are accurate. So, that was not out of any desire to break the law or fail to comply with the regulation. [It was] more out of a sense of not understanding how important this form is.

In my opinion, this is your primary defense to accusations of knowing employment of an illegal alien. If your paperwork is in good shape—in good order—and there's no further evidence that there may be a problem, then, as the employer, you're pretty much off the hook.

The standard, in terms of the document review, is that the document needs to appear to be authentic and it needs to appear to relate to the person presenting it. Employers do not have to be document experts, but they do have to complete the form in good faith, get the information that's required, and store the forms, [and] maintain the forms properly. If they don't do that, it becomes a potential tool to be used against the employer. So, one way to think about it is that it's a prosecution tool. It's evidence, and the person signing off on the form is a potential defendant.

So, what do we do? How do we prepare for this change—prepare for this ratcheting up in terms of the consequences of failing to follow the I-9 rules properly? One issue, which you're doing a little bit today, is reacquainting yourself with the I-9 process. Training your staff; getting them information on how they need to be doing the I-9 forms, how they need to be stored, etc. Thinking about setting up a system of internal audits, so that your staff are conducting an annual—or once every two years, once, at the latest, every three years—audit of your I-9 forms. This is critical if you have I-9s being done in different locations—or being stored in different locations—because the most common reason for problems with the I-9 is user error—just the person doing the form didn't understand something, and now it's been done improperly. So, that's where you are going to reduce potential liability, if you have uniform policies, procedures, and training.

The no-match history I touched on earlier. Sometimes these Social Security no-match letters—I'll just spend a few minutes—when a company files a W-2 form with the IRS, Social Security is taken out of the person's paycheck and reported on the W-2. When Social Security is unable to match that information with their database, they will inform the employer that there's an issue. This can be due to a typo, [it] could be a name change, or it could be a legality. But it's important to know whether the company's gotten no-match letters or notifications in the past. They may have gone to payroll. They may have gone to HR. They may have gone to legal. Don't assume that you necessarily know. You may need to do a little bit of checking to see if any of these have come in.

They haven't been sending them out recently; we'll talk about that in a second. Even if there was one, say, from 2007 [or] 2006, it is probably a good idea, if action was not taken, to consider taking action now.

Preparing for the audit freeze: This is about if Immigration were to come in and audit your I-9 forms. Do you have them centrally located? Is it going to be easy to access them? Sometimes Immigration will ask to be provided some space at the company so that they can conduct their audit there. Other times they may say, "Look, we're going to take these with us back to our office and get back to you." But it can be an administrative challenge to accommodate an audit, especially if you're with an organization with a lot of employees. It probably makes sense to have sort of a plan in place for who is going to be the main contact with the Immigration officer. How are the logistics going to be handled, etc?

Some questions to think about: Do you have written policies? Do you have an I-9 policy? Is that provided to employees who will be responsible for completing the I-9? Have you given those people any training in the I-9 area?

Does payroll—the number of people on payroll—does that equal the number of people you have I-9 forms for? That can be a little bit deceptive because the I-9 came into existence in 1986 and you don't need an I-9 for anybody who was hired before November 7, 1986. So, your numbers may not match exactly, but if you have a very longstanding employee, they may not be subject to this law, so it's OK not to have an I-9 for that person. But this is a good sort of initial screen to make sure that,

“OK, we’ve got [10,000] employees on payroll and we’ve got 9,990 I-9s, so we’ve got 10 people we’ve got to follow up with. Were they hired pre-IRCA—pre the I-9 law—or are we missing their documents?”

Where are the no-match letters, if there are any? SSNVS. We don’t have a poll question for this, but that is the Social Security verification system where employers can call or e-mail Social Security to check on whether somebody’s number matches their records. I don’t really recommend this system, because it’s sort of like creating your own no-match letter, or your own no-match notification. You’re going to the government to ask them for this information. As we’ll see in the later part of the talk, a no-match situation right now is difficult to resolve, so I don’t advise employers to use the Social Security online system at this point.

Supervisors and HR: These are the people who are going to be most likely to know of an issue with an employee. Sometimes the recruiter or the line manager; that person’s main objective is to keep the line going, to keep people in the factory floor and keep business going. They’re, just by their nature, going to be less concerned about paperwork. HR is going to be obviously concerned about the paperwork, but they may hear things. There may be statements by employees about, you know, how “I really love working here and I can’t wait to get my green card,” something like that, where it may be an innocent statement, but it may be a flag that there could be an issue with an employee. If somebody shows a green card when they’re hired, and then they’re later mentioning, “I can’t wait to get my green card,” then it calls the documentation they presented into question. So, HR needs to be aware of these issues so that they can follow up or escalate an issue when it comes to their attention.

Supervisors need to understand that they can’t be joking about people [by saying things like] “I’m going to go down and talk to the illegals, ha, ha, ha.” That type of a joke can be used later in an investigation to say, “Well, you knew, or you should have known.” That type of comment is going to come back to haunt the whole company.

BEVERLY STUART: Sean, we have one question about audits. Are they usually the entire company or just a specific location if you have multiple locations? What have you seen there?

SEAN HANAGAN: Good question. I’ve seen both. It really sort of depends on the severity of the issue. Usually a government audit is going to start at one location. They may get information about the hiring practices at one location, come in, audit those forms, and decide from there from the evidence they gather whether to expand the audit beyond that location. I’ve seen both.

The government is pretty savvy in this area about maximizing their resources. They have limited resources. If they’re convinced that this is a local issue, the likelihood is the audit will not spread beyond that one location. If they find an indication that this is bigger, then they’re going to ask to expand the audit.

BEVERLY STUART: OK, thanks for that response. I understand that there’s a new I-9 form that just came into effect. Could you talk a little bit about the changes?

SEAN HANAGAN: Sure. So, the new I-9 form is in effect as of April 3 [2009] and expires [June 30, 2009]. For years and years, they did not update the form and the law changed about acceptable documents, and the form was not updated and not updated. Finally, they’ve got it into a groove where they are updating the form. For some reason, this time they only made it valid through June 30. A new form is online at this address on the slide, and Immigration on Friday said employers should continue using that form until the new one is up.

They’re still working on the new one. But what they did in terms of changes are—the main one is that, in the past, you could accept expired documents to demonstrate identity. So, if somebody had an old driver’s license, expired, but you could still tell that biographic information appears to match, you could accept that. Now they are requiring that at the time of hire all documents must be valid and not expired.

They took out some old versions of some of the employment cards. They added the U.S. passport card, which is a special

card used for border crossing, and they sort of formalized the acceptability of a foreign passport with some U.S. work visa. They also added Micronesia and the Marshall Islands because those are U.S. territories. So, nothing too significant on the changes, but do keep in mind that all documents now need to be valid at the time of hire.

BEVERLY STUART: We're getting some questions about the maintenance of the support documents. Since we're talking about support documents now, maybe this is a good time to address those questions. And actually, we've got another poll here about maintaining the support documents. Could we have that?

ROBERTO SCALESE: OK, I would ask the attendees at this time to answer yes or no: Do you keep copies of the support documents presented by the employee for the I-9?

OK, and we have 73% of our attendees [who] say yes, they do keep the support documents.

SEAN HANAGAN: OK, that's great. That's a big percentage.

The slide we have up now turns to some of the base obligations for I-9s. One of the issues is: Do you keep backup documents? The federal law says that employers may keep backup ID documentation with the I-9, but they do not have to. It's a policy decision, and there are two schools of thought about it.

On one side, the thinking goes that, "Well if we have the copies of the documents, that shows good faith. We've tried our best. The government, if they come in and look, are going to see [that], OK, we took the documentation copies. Basically, we've got nothing to hide and this is very complete."

On the flip side, some people have a concern that if an employee passes a questionable document when they're hired, if the review is not done thoroughly enough or if the person doing the review and the certification is not familiar enough with this process, that you could actually be adding evidence, in terms of potentially knowing or should have known that there was a problem.

For example, there have been some fake green cards and employment cards done with typos. And in something as small as the Department of Homeland Security, a typo in the word "security" that honestly you might notice and you might not notice. So, for those people who say, "I don't want to keep copies," that may be a compelling reason not to [do so]. It may end up hurting us in some way.

The other concern with keeping documents is that with the I-9 form, it's pretty strict here in terms of what you should view and what you should keep for I-9 purposes. The rule is one List A document, or a List B and a List C. With keeping of copies, sometimes an employer needs to see a driver's license in addition to employment documents because this job involves driving for the company.

So, let's just say, for example, somebody at the time of hire they provide their U.S. passport. That's a List A document, so for I-9 purposes the review is complete. But we still need to see their driver's license to make sure that they're able to drive in good standing, and the HR person or the line manager may ask to see the license at the same time the I-9 is being completed.

If the license, which is a List B document, is added to the form, either written in on the front of the form or copied along with the passport—a List A [document]—then we have the situation of overdokumentation. Overdokumentation is not as bad as underdokumentation, but it's bad nonetheless, the reason being that it can be used in a discriminatory fashion.

I had a person once at a seminar say, "I'm very conscientious about completing the I-9 properly, getting all the proper documentation. I make sure what the person is giving me is on the list, and if they look foreign, I also make sure I get their green card." So, that's a clear violation of the I-9 rules in terms of (a) demanding a specific document; we can't do that. We

have to give the person the list of acceptable documents and let them make the choice. But (b), obviously, singling out certain employees based on their characteristic: their race or their nationality. So, copying is OK. It needs to be done carefully so that you don't have too much information on your copies, even if you have the exact amount of information on your I-9 form.

BEVERLY STUART: Isn't there at least one state that requires copies to be kept?

SEAN HANAGAN: Yes, good point. This whole discussion is modified by the fact that we now have various state laws which are also impacting the I-9 practice and whether an employer needs to use E-Verify. So, I believe it's Colorado where their state law says they want employers to keep copies of all of the ID for their Colorado employees.

So, employers can't simply rely on the federal rules. They now also have to look at the state rules, and it's basically complicating the situation. We do have now—and we'll go into those slides in just a minute—we do have a patchwork of different rules at the state level which are concerning hiring and documentation.

BEVERLY STUART: And then what about the E-Verify rule of keeping copies of documents that were used for the photo tool? Maybe this is a good time to go into the E-Verify process.

SEAN HANAGAN: OK, sure.

BEVERLY STUART: Why don't we put up the poll first and see if any of our listeners are enrolled in E-Verify.

ROBERTO SCALESE: Once again, we would ask our attendees to please select yes or no: Do you use E-Verify?

SEAN HANAGAN: While you have that up, I've got the electronic I-9 information here for those of you interested in that. We don't have to spend a lot of time on it. I know we're coming up towards the end of our hour, but for those interested there are a couple of guidelines there on the electronic I-9. Just so you know as well, there are several providers out there who will help to manage your electronic I-9 system if you want to go paperless.

ROBERTO SCALESE: OK, and to finish the poll, we have 63% of our respondents said they do not use E-Verify.

SEAN HANAGAN: OK, great.

BEVERLY STUART: There are some definite advantages to using those electronic I-9s though, right?

SEAN HANAGAN: There are. The programs—and I can't obviously endorse any single program—but the ones that I've heard about and seen and read about seemed to be designed well. The main benefit is that if you don't complete the form properly as you're going through it, it won't let you go to the next section. These systems also store the form electronically. You don't need to keep paper copies anymore. You can scan in or you can actually complete the forms online, so it is, I think, a more convenient way to prepare and maintain I-9s.

BEVERLY STUART: Great. Why don't we go into the E-Verify process then?

SEAN HANAGAN: Sure. So, E-Verify used to be called the Basic Pilot Program. With the I-9, it's an imperfect system. So, if somebody provides you with fake documentation, if it's a good fake you're not going to be able to tell. You're going to hire them and you may not ever realize that the person is not legitimate, in terms of their work authorization.

E-Verify was designed to sort of close the loop. When you sign up for E-Verify, basically it's an agreement between the

employer, Social Security, and the Department of Homeland Security, in terms of how you're going to use the system. It does not do away with the I-9 form, so we still have the I-9 as our first intake of new employees. We still do the same ID review and certify the I-9.

Once the I-9 is completed, then the employer inputs information onto the online system and it gets checked against the SSA [Social Security Administration] and the Department of Homeland Security databases. Employers will get an immediate match or a tentative no-match. When the system comes back with a tentative no-match, the employer has to go back to the employee, show them what the issue is, and give them eight business days to address it.

So, the new photo tool has the ability now to check the photo on green cards—permanent resident visas—and on temporary employment cards. So, if the person—the employee—presents one of these documents for the I-9, and then it's being input for E-Verify, it'll trigger this photo verification system. And in those situations, the employer also has to keep a copy of the photo ID.

For people using E-Verify, it's OK to have a policy against keeping ID copies, but just keep in mind that, in that narrow circumstance, you will need to keep copies just for those hopefully few employees that come to you with that circumstance.

BEVERLY STUART: Now my understanding is that they're about to add the U.S. passport to that list of documents for the photo tool. And if they start to add more and more documents to it, that's going to complicate matters, isn't it?

SEAN HANAGAN: Yeah, to a certain point it's going to be easier to simply keep copies, if the company is using E-Verify, especially. In one second we'll go through a couple of the states, but all employers in Arizona now have to use E-Verify. So, it's really a question of balancing the administrative burden of whether it's easier to start keeping copies now of everybody, or you want to sort of just stick with the minimalist view and not keep copies unless we absolutely have to.

BEVERLY STUART: Great. Why don't we go on and go to those state requirements, Sean?

SEAN HANAGAN: So, we've got here sort of a survey. As you see in Arizona, [as of] January 1, 2008 employers had to start signing up for E-Verify, and those who failed to do so could lose their business license, so that's the strictest in the nation.

We're not going to go through all these, as I mentioned. Colorado is on the strict side, as well, here. Most of these are triggered by the employer having state contracts. And some of them have thresholds, in terms of the size of the contract that you have to be bidding on or performing under, before this kicks in. If anybody has questions and is having difficulty figuring out—here is a good example of one—whether this applies to you and your state, we can certainly provide you with some additional information there, but, as you see here, the size of the employer will dictate when the requirement goes into effect.

BEVERLY STUART: We probably should mention the federal contractor E-Verify rule too.

SEAN HANAGAN: Definitely. [The] federal contractor E-Verify rule was postponed again. We're now looking at September 8 [2009]. This is going to be for contracts with the federal government of at least \$100,000 [and] longer than 120 days, and if the company is involved in one of these contracts, they're going to have to register for E-Verify. There's going to be a window of, I believe, about 90 days for employers to sign up there and get registered.

There's also discussion about who does this cover. And the rules, as they're currently written, cover anybody working on a contract. That is a little bit vague, so the government has given a little bit of additional detail, saying somebody in a support role—let's say they're in payroll or somebody working in the mailroom—they may deliver mail to the department which handles this work, but they're not really directly involved. So they have allowed for a distinction between employees, and hopefully that's going to be clarified further.

The rule is six months past the initial considered effective date. Basically, the new administration has said, “We need to review it,” and they just haven’t been able to get to it yet. They keep pushing it back, so we’ll see. I wouldn’t put money on September 8 necessarily being the final implementation date. This could go into 2010 without really too much difficulty. We can cross our fingers and hope it’s clarified before then, but tentatively September 8. Just keep your eyes peeled for updates on that.

BEVERLY STUART: We’re waiting breathlessly to hear about that. Could we pause for a moment now to go to Roberto?

ROBERTO SCALESE: Great. Thank you, Beverly.

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Back to you, Beverly.

BEVERLY STUART: Thank you. Why don’t we move forward with those Social Security no-match letters, if you have anything more to add on that, Sean.

SEAN HANAGAN: Yeah, definitely. I know we’re coming up on our time here, so we’ll go through these a little bit quickly. I did mention how the Social Security letters get generated. We haven’t seen them in a while, because the government is also, on this side, reviewing their new rules. I say “new” because we don’t have them yet, but they were initially announced in 2007 in terms of: What does an employer do when they get a mismatch notification?

It’s been controversial. The letters themselves say, “You may not take personal action solely based on this letter.” There’s been a range of interpretations and actions suggested by business groups, unions, and employers in the absence of regulations.

What we can say is that you shouldn’t start following the new rules until they’re actually passed. They were issued and then withdrawn immediately when there was a lawsuit, so right now we’re still in limbo. If and when they do come out, they were looking at a 90-day notification for the employees, so if you’ve got an issue—a no-match—you would have to advise the employee [and] give them 90 days to come back to you. [It] seems like an awfully long time. The reasons behind this were: The rule initially started out with a 60-day period for the employee to get this fixed, and Social Security said, “We may not be able to resolve questions within 60 days, so 90 days would be more appropriate.” So, the rule as currently drafted is asking employers to give people 90 days to fix the issue. There was a case reported where employees were given three days to fix the issue and then let go. That was considered to be too short.

So, right now, what I tell people is: You should check your records [and] check with the employee. If the information seems to be accurate in your records and the employee says, “Yes, this is my number,” basically ask them to follow up with the agency—go to Social Security, file some kind of an inquiry, and get back to you with an update on, “Yes, this is my number. Here’s some kind of a confirmation,” or, “Social Security is looking into it. Here’s a copy of my inquiry form.” [Get] some indication that they’re taking action.

I hesitate to advise employers to terminate if the issue has not been resolved, again, in the absence of regulations. The cautious route is to treat this as an administrative issue, unless the employee makes some incriminating statements, such as, “Oh, that’s not my number,” or, “Oh, I can’t go and get it fixed.” If that sort of thing happens, then we’re in a different ball game, and we do have more ability to probe further, to [ask], “OK, are you legal?” for example. If we get an admission from

the employee that they're not legal, then obviously they have to be terminated. It's only in these situations where they are stating that this is their number that we have to really give them the benefit of the doubt and be flexible.

BEVERLY STUART: Thank you, Sean. Unfortunately, I think we're going to have to close up now, but we have a little bit of time left for questions. For those of you who asked questions, if we don't get to yours, please e-mail it to splemoderator@smartpros.com, and Sean and I will answer them offline.

One question which I think is a really good one, Sean, that we should probably respond to is: How [should you] handle I-9 verification for remote new hires who are nowhere near a company facility?

SEAN HANAGAN: Good question. As we know, the rule is that [on] the I-9 form, section one, the employee section, is to be completed by the first day of work. Section two, the document section and the certification section, has to be completed by the third day of work, so within 72 hours of the person starting for you.

If you have a situation where you're not going to see the person when they're starting work, my first suggestion is: Are you going to see them for an interview? If you see them at an interview, you can put this proposal to them: "We need to complete an I-9 if we hire you. We're not going to see you; we don't think we're going to see you after today. Therefore, are you willing to complete the I-9 form now and provide your documentation now, before an offer is made or a decision is made on an offer, or do you want to fly back on your own dime so that we can do it when a decision is made and when you're hired?"

The potential danger in doing that is that if you decide not to hire and the person turns around and says, "Well, you didn't hire me because you learned something about me in a protected category from that I-9 procedure," then we could be at risk.

The balancing act we need to do here is: OK, do we accept that potential exposure, or do we not do it and know that we're not going to have the I-9 when we need it? With those two competing evils, I think the lesser evil is advising the person that "Since we're not going to see you again, now is really our only opportunity to review your documentation in person." It's not acceptable to review a faxed copy, an e-mailed copy, or anything like that. It's got to be done in person, at least under the current rules.

BEVERLY STUART: How about using a notary? Could they have the person go to a notary and complete the form there?

SEAN HANAGAN: Sure, that's a fallback. Another idea is, if you can use a notary or an agent, an agent may sign on behalf of the company. The agent could be a personnel firm, a temporary firm. It could be a law firm, an accounting firm, a recruiter, or a generic notary public.

My only caution with using a notary public is that the person is used to simply certifying a signature. If the notary public does not understand the role they're being asked to fill here, they may sign off on an I-9 without, again, doing the I-9 properly. So, it's important that if that's going to be the way it's done that maybe the employee has a letter that they ask the notary to read which explains what's being done here, because it's not exactly what a notary is usually asked to do.

BEVERLY STUART: Thanks very much, Sean, for a really interesting presentation on immigration law. We're going to pass it back to Roberto now to wrap it up.

ROBERTO SCALESE: Great. Thank you, Sean and Beverly. On behalf of the Association of Corporate Counsel and SmartPros Legal and Ethics, thank you to our listeners again for listening to today's program.

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up window, select the desired jurisdiction from the drop-down list and enter any requested data, such as your bar number and the CLE code that popped up while you were playing the archived webcast. (This code is required for New York and Ohio attorneys only.)]

Thank you again to all of our listeners, and have a good day.

BEVERLY STUART: Thank you, Roberto. We do want to remind our listeners about the annual meeting of ACCA, which is being held in Boston, Massachusetts this year. Anyone who'd like to have additional information about the conference can go to the ACC Web site. Thank you.

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