



# Immigration Update: *What In-House Lawyers Need to Know about Immigration Law Right Now*

Presented by Sarah Kadel (Chicago)

# Speaker

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# Agenda

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## Immediate Action: I-9

- New form updates – must be used starting Nov. 1
- Alternatives to Physical Document Examination & FAQs
- Recent Enforcement Activities

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## On the Horizon: Immigration Consequences of a Possible Federal Government Shutdown

3



## Looking Ahead: USCIS Fee Increases for 2024?

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## Q&A

# I-9 UPDATES

# New Form I-9

- Effective August 1, 2023, but prior edition **no longer valid** for use come October 31, 2023.
- Compatible with tablets and mobile devices and downloaded easily.
- Reduced length and links to the handy M-274 Employer Handbook.
- Removed requirement to add N/A in certain fields.



**Employment Eligibility Verification**  
Department of Homeland Security  
U.S. Citizenship and Immigration Services

**USCIS  
Form I-9**  
OMB No.1615-0047  
Expires 07/31/2026

**START HERE:** Employers must ensure the form instructions are available to employees when completing this form. Employers are liable for failing to comply with the requirements for completing this form. See below and the [instructions](#).

**ANTI-DISCRIMINATION NOTICE:** All employees can choose which acceptable documentation to present for Form I-9. Employers cannot ask employees for documentation to verify information in **Section 1**, or specify which acceptable documentation employees must present for **Section 2** or Supplement B, Reverification and Rehire. Treating employees differently based on their citizenship, immigration status, or national origin may be illegal.

**Section 1. Employee Information and Attestation:** Employees must complete and sign Section 1 of Form I-9 no later than the **first day of employment**, but not before accepting a job offer.

Last Name (Family Name)		First Name (Given Name)		Middle Initial (if any)	Other Last Names Used (if any)		
Address (Street Number and Name)			Apt. Number (if any)	City or Town		State	ZIP Code
Date of Birth (mm/dd/yyyy)	U.S. Social Security Number		Employee's Email Address		Employee's Telephone Number		
<b>I am aware that federal law provides for imprisonment and/or fines for false statements, or the use of false documents, in connection with the completion of this form. I attest, under penalty of perjury, that this information, including my selection of the box attesting to my citizenship or immigration status, is true and correct.</b>				Check one of the following boxes to attest to your citizenship or immigration status (See page 2 and 3 of the instructions.):			
				<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 (Enter USCIS or A-Number.)			
				<input type="checkbox"/> 4. A noncitizen (other than <b>Item Numbers 2.</b> and <b>3.</b> above) authorized to work until (exp. date, if any)			
				If you check <b>Item Number 4.</b> , enter one of these:			
		USCIS A-Number	OR	Form I-94 Admission Number	OR	Foreign Passport Number and Country of Issuance	
Signature of Employee						Today's Date (mm/dd/yyyy)	

If a preparer and/or translator assisted you in completing Section 1, that person **MUST** complete the [Preparer and/or Translator Certification](#) on Page 3.

# Virtual Document Inspection

- DHS (finally) acknowledged new workplace realities post-COVID-19 pandemic.
- New “alternative procedure” aims to make compliance easier.
- Provides optional document inspection process for **qualifying employers** in lieu of in-person physical document examination.
- Rolled out August 1, but is **permanent** – not a pilot program.
- Must be a “**qualified employer.**”

# Qualified Employer

- To use the new “alternative procedure” of virtual verification, an employer must be participating and in good standing in E-Verify.
- “**Good standing**” means the employer ...
  - is **enrolled in E-Verify at all hiring sites** in the United States that will use the alternative procedure;
  - is compliant with all requirements of E-Verify program – MOU; and
  - continues to be participant in good standing at any time during which the employer uses the alternative procedure.



# Overview of New “Alternative Procedure”

- Optional – Qualified employer is not required to use this procedure.
- Best Practices: Employers should consistently use the alternative procedure.
  - Is this only for remote employees?
  - All employees at a hiring site or company-wide?
  - Traditional I-9 process for new hires that work on-site full-time or in a hybrid role, alternative procedure for fully remote employees at a hiring site.
- Don’t unlawfully discriminate.
  - No decision may be based on a protected characteristic.

# Overview of New “Alternative Procedure”

- Permits eligible employers to secure copies of the Form I-9 documents and review them remotely.
- Employer may engage an authorized representative to conduct inspection.
- Employer or representative conducts a video call with the employee to inspect the document(s).
- Employer specifically confirms on Form I-9 that it utilized the alternative procedure when reviewing the document(s).

# I-9 Alternative Procedure FAQ

*Q: What if an employee does not want to comply with the requirements of the alternative procedure – for example, provide copies of I-9 documentation? Instead, the employee requests that the traditional I-9 process be used. Can the employer require the employee to comply?*

DHS has clearly indicated that employees who are unable or unwilling to submit documentation for the alternative procedure must be permitted to submit documentation for physical examination.

# I-9 Alternative Procedure FAQ

*Q: Employers must retain copies of I-9 documents if they elect to use the alternative procedure for I-9 completion. For those I-9s completed using the traditional in-person document inspection, is an employer then required to keep copies of I-9 documents?*

No, that is not a requirement. It is important to note that the decision on this issue must be applied consistently. Additionally, E-Verify has document retention requirements that are separate from the I-9 process.

# RECENT I-9 ENFORCEMENT ACTIVITY

# DOJ Cracking Down on Employers

- DOJ has released information regarding multiple recent investigations of US employers related to alleged discrimination in the employment verification process.
- Most recently, DOJ announced settlement agreements with two different employers found to have engaged in **document abuse** → requiring certain workers to present specific documentation during the employment verification process.
- The separate employers received similar fines of \$140,000 and \$130,000, and also agreed to: undergo training on INA's anti-discrimination requirements; revised their related policies; and be subject to monitoring by the DOJ.

PRESS RELEASE

## Justice Department Secures Agreement with California-Based Manufacturer to Resolve Immigration-Related Discrimination Claims



[Español](#)

Thursday, September 28, 2023

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PRESS RELEASE

## Justice Department Secures Agreement with Janitorial Services Company to Resolve Immigration-Related Discrimination Claims



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# **IMMIGRATION CONSEQUENCES OF A GOVERNMENT SHUTDOWN**

# Which Government Agencies Handle Immigration?

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## U.S. Department of Homeland Security

U.S. Citizenship & Immigration Services  
Immigration & Customs Enforcement  
Customs & Border Protection



## U.S. Department of Labor



## U.S. Department of State



# Operational or Not?

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- **E-Verify** has been suspended during past government shutdowns.
  - DHS normally suspends related requirements
  - I-9 verification requirements are unaffected / employer's obligations will remain.
    - Employers must still complete Form I-9 no later than the third business day after an employee starts work for pay and comply with all other Form I-9 requirements.
- **USCIS** is a fee-generating agency, so is expected to continue operating in the event of a shutdown. May see processing delays due to decreased staff.
  - No impact unless the immigration petition relies on a determination from the DOL (LCA, PERM labor certification).
- **CBP** has been deemed essential in the past and is expected to continue processing arrivals to the US, as well as to continue adjudicating certain border petitions (Canadian TN and L).
  - No expected impact.

# Operational or Not?

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- **DOL** will not continue to operate → not fee-funded.
  - FLAG system will not operate; no ability to access or file, or receive:
    - Labor Condition Applications (H-1B prerequisite)
    - Prevailing Wage Determinations (PERM prerequisite)
    - PERM Applications for Labor Certification
- **CBP** has been deemed essential in the past and is expected to continue processing arrivals to the US, as well as to continue adjudicating certain border petitions (Canadian TN and L).
  - No expected impact.
- **ICE** is expected to continue to operate, as federal law enforcement is generally exempt from government shutdowns.
  - No expected impact

# Operational or Not?

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- **DOS** is partially fee-funded and has historically remained open – at least in part – during government shutdowns
  - US citizen services (passports) at consular posts abroad likely to be unaffected
  - Visa issuance likely to continue for some time, but may cease in the event of a prolonged shutdown
  - Non-emergency services may be suspended, and visa appointments could be canceled/rescheduled.

# Operational or Not?

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- **U.S. Department of Homeland Security**
  - I-9 obligations continue
  - E-Verify system outage
- **U.S. Citizenship and Immigration Services**
  - Fee-generating agency that does not rely primarily on government funding; continues to operate.
- **U.S. Department of Labor**
  - Will go dark (no LCAs/PWDs/PERMs)
- **U.S. Customs and Border Protection**
  - Essential personnel
- **U.S. Immigration and Customs Enforcement**
  - Law enforcement function
- **U.S. Department of State** (visa stickers and passports): will remain operational as long as there are sufficient fees to support operations.

# USCIS FEE INCREASES ON DECK FOR 2024

# USCIS Fee Proposal Deferred

- Proposal to increase fees first published in January 2023 and final rule publication recently postponed until “early” 2024.
- **Final fee schedule unknown**, but 2023 proposed rule instructive.
  - 40% weighted average increase above current fee schedule.
  - Employment-based petitions to see sharpest increases.
  - More than 6000 individuals and entities commented on the proposed rule.
    - Criticized the negative impact on U.S. businesses.
    - Chilling effect on foreign investment.
- USCIS last adjusted its fee schedule in 2016.
  - Weighted average fee increase of 21%.
  - Under the Trump administration in 2020, the agency issued a fee rule containing significant changes to the USCIS fee structure, which was enjoined by federal court and never implemented.

# QUESTIONS?

# Increasing Scrutiny for DEI Programs: The Impact of Supreme Court's Recent Admissions Decision on Private Employers' DEI Initiatives

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ACC Chicago - October 2023



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# The Litigation – SFFA v. Harvard and UNC

Students for Fair Admissions sued Harvard and the University of North Carolina alleging admissions policies violated the 14th Amendment's Equal Protection Clause and Title VI of the Civil Rights Act of 1964 by using race and color as one of many factors in the admission process.

# The Ruling – SFFA v. Harvard and UNC

- Harvard’s and UNC’s admissions policies violate the 14th amendment’s Equal Protection clause.
- The schools’ stated interests in fostering a diverse student body “are not sufficiently coherent” to justify consideration of race.
- The schools’ policies “unavoidably employ race in a negative manner,” rely on “racial stereotyping,” and lack a meaningful end point.
- But “nothing prohibits universities from considering an applicant’s discussion of how race affected the applicant’s life, so long as that discussion is concretely tied to a quality of character or unique ability that the particular applicant can contribute to the university.”



# The Aftermath – Conflicting Attorney General Letters

- **13 Attorneys General write letter threatening “Fortune 100 CEOs”**

- “[We] remind you of your obligations ... under federal and state law to refrain from discriminating on the basis of race, whether under the label of ‘diversity, equity, and inclusion’ or otherwise.”
- “Treating people differently because of [skin] color ... even for benign purposes, is unlawful and wrong.”
- “Companies that engage in racial discrimination should and will face serious legal consequences.”

- **21 Attorneys General write letter supporting DEI efforts**

- “[We] vigorously oppose any attempts to intimidate or harass businesses who . . . advance [DEI].”
- These AGs believe corporate DEI programs “are lawful and serve important public and business purposes,” and
- *SFFA* decision does not prohibit or impose new limits on DEI initiatives



# The Aftermath – Conflicting EEOC Positions

## EEOC Chair Charlotte Burrows (in a statement on SFFA decision)



- The “decision turns away from decades of precedent ... Diversity helps companies attract top talent, sparks innovation, improves employee satisfaction, and enables companies to better serve their customers.”
- “It is still lawful for employers to implement diversity, equity, inclusion, and accessibility programs that look to ensure workers of all backgrounds are afforded equal opportunity in the workplace.”



## EEOC Commissioner Andrea Lucas (in an opinion piece)

- SFFA decision = “Supreme Court’s rejection of diversity, nebulous ‘equity’ interests, or societal discrimination as justifying actions motivated – even in part – by race, sex, or other protected characteristics.”
- Conservative groups (and potentially the EEOC) plan to challenge measures she asserted may already violate existing non-discrimination laws.

## The Aftermath – Pressures from Employees, Customers, and Private Groups

- Lawsuits filed on behalf of white workers rely on Section 1981 to challenge corporate DEI programming.
  - “American Alliance for Equal Rights” is a non-profit founded by conservative activist Edward Blum, who brought *SFFA* suits and has filed several Section 1981 cases.
- Lawsuits target diversity fellowships at Perkins Coie LLP and Morrison & Foerster LLP
  - Citing Sec. 1981, the suits target diversity fellowships allegedly not open to white men.
  - The firms tweaked their fellowship programs and say they will continue to promote DEI.
  - “American Alliance for Equal Rights” has dismissed suit against Morrison & Foerster.

# Legal Landscape for Private Employers

- Employment context is different from education context.
- Employers cannot make employment decisions based on race or other protected class membership.
- Primary civil rights law = Title VII
  - Prohibits discrimination based on race, color, sex, national origin and religion.
- Race and gender-based preferences unlawful ... except in very narrow circumstances specifically designed to correct “manifest imbalance” in the workplace.

# Impact on Private Employers & DEI Initiatives

- Currently *no direct impact* on Private Employers.
- 14th Amendment does not apply to private companies – Title VII, not Title VI, governs employment decisions.
- No direct impact on federal contractors and subcontractors – Exec. Order 11246, Section 503, VEVRAA still control.
- Employers (still) may NOT:
  - Use quotas or set-asides.
  - Motivate decision-makers to act “because of” race.
  - Rely on “stereotypes.”



# Future Supreme Court Challenges

- Two pending Supreme Court cases that may expand challenges to workplace DEI initiatives:
- *Muldrow v. St. Louis*
  - Seeks to extend discrimination claims to employment practices that do not materially and significantly disadvantage an employee.
  - In this case, an inconsequential transfer or reassignment).
- *Davis v. Legal Services Alabama, Inc.*
  - Seeks to extend claims of discrimination to all employer actions.
  - In this case, suspension of white employee with pay pending investigation into race-based harassment claims against him.
- Potential impact of *Muldrow* and *Davis*: The more the Supreme Court rules smaller segments of employment programs amount to an “adverse action” or cause sufficient injury to pursue a claim → more programs may be vulnerable to legal challenges.





# What's Next?

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## External Challenges to DEI initiatives

- Edward Blum/SFFA emailed 150 schools in July demanding compliance with *SFFA* decision.
- SCOTUS's conservative majority may reach the same conclusions regarding private employers' efforts to increase diversity.
- More anti-DEI legislation?
- More "reverse discrimination" lawsuits and other litigation?
  - Former employees.
  - Shareholder derivative suits.
  - Private interest groups like SFFA and American Alliance for Equal Rights.



# What's Next?

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## Internal Challenges to DEI initiatives

- Employee pushback
- Executive caution/disinterest
- Shareholder pressure
- Uncertainty
- Inadequate support for DEI
- DEI Fatigue – DEI Professional burnout



# Practical Steps – It's A Good Time to Revisit ...

- Diversity goals in recruiting and promotion
- Collection and use of data
- Training
- Scholarship and Mentorship programs
- Board diversity initiatives
- Supplier diversity programs
- Employee resource groups
- Language in public statements (web sites, annual reports)
  - ESG, DEI goals and programs



# Takeaways

## Potential consequences of being too aggressive on DEI ...

- Litigation challenging DEI programs and practices.
  - Cost, distraction, and publicity.
- Increased likelihood that litigation is *successful*.
  - Financial exposure and potential reputational damage.
- Getting pulled into social media disputes.



# Takeaways

## Potential consequences of not being aggressive enough ...

- Backsliding on goals of diversity, inclusion and belonging.
  - Loss of benefits of diversity.
- Disengagement of diverse employees.
- Weakened position in the competitive hiring market.
  - ... especially with Millennial and Gen Z workers.
- Getting pulled into social media disputes.



# Takeaways

- If our DEI, EEO, and affirmative action programs *were* legal and compliant prior to *SFFA* decision, they still are!
- Employers (still) may NOT:
  - Use quotas or set-asides
  - Motivate decision-makers to act “because of” race or other protected classes
  - Rely on “stereotypes”
- Employers (still) MAY:
  - Support the concept of diversity in employment
  - Have Diversity | Equity | Inclusion | Belonging | Accessibility policies