*Barclay Damon Live*: *Labor & Employment Podcast*

Hosted by Ari Kwiatkowski, Barclay Damon

Episode 62: “Immigration Alert! USCIS Publishes Revised I-9 Form,” With Jennifer Behm

Ari: Hi, everyone. This is a *Barclay Damon Live* broadcast where we discuss all things L&E, labor and employment. I'm Ari Kwiatkowski. Let's dig in.

Ari: Hi, everyone. Welcome to episode 62, “Immigration Alert! USCIS Publishes Revised I-9 Form.” I am thrilled to welcome back to the podcast today, Jennifer Behm from Berardi Immigration Law. Jennifer is a partner there, and she provides the whole gamut of immigration services for her clients, which are both in US and Canada. And so like I mentioned, she's from Berardi Immigration, which is probably my favorite firm, other than, of course, Barclay Damon. So, Jennifer, welcome to the podcast. Thanks so much for joining me.

Jennifer: Aw, thanks, Ari. Oh, it's fun to be here with you.

Ari: I appreciate it. And you know, our listeners, as Jennifer and I talked about this offline, but our listeners know that I always ask our guests to share a fun fact about their personal and professional lives. And I remember what you shared last time because I thought it was like, very sweet, and it was about your family. But my understanding is your planned fun fact for today is kind of related.

Jennifer: Yeah. So last time, my fun fact is that I'm a very proud working mom. My new fun fact is that we just added a dog to our chaos. We just adopted a sweet boxer mix. She's about a year and a half, so a really, really great dog. She's crate trained. We also got some formal training for her. And it's funny because I'm not…. The reason we haven't had a dog earlier was solely because of me. My husband, my kids, they were begging for a dog, and it was kind of serendipitous how it happened. One of my colleagues here at the firm, they foster dogs, and he is always like, oh, my girlfriend got another dog, we’re fostering this dog. And then one day he comes in and he's like, oh my gosh, we're fostering the best dog right now.

Ari: Aw.

Jennifer: No, my family and I, we just had a conversation, and I was sitting on my couch a couple of days before my husband was out of town and I'm like drinking my coffee uninterrupted, and I'm like, finally, things are feeling a little bit easier. So then fast forward…

Ari: Let’s get a dog!

Jennifer: Let’s get a dog! So it's been a couple of months. It's been really fun. She's a great dog, and she's brought a lot of joy to our family so….

Ari: Last time Rosanna Berardi, who also is with Berardi Immigration, was on, and it might have been last year, she talked about how she had I think at the time it may have made them the first time she came out, she had just gotten a dog. So you guys are just growing. Everyone's growing their families…

Jennifer: A topic of conversation. Like, who would have thought Jennifer, Rosanna finally cracked…it’s another logistic to plan for in life. But it's been really fulfilling and really worth it. And for me, I was at the Barclay Damon retreat a couple of weeks ago and I can't remember which attorney I was speaking to, but somebody was like, oh, you have a boxer. Is she really handsy? And I'm like. And he goes, Yeah, they paw a lot. That's why they call them boxers. And she's so handsome. She paws for belly rubs and love and snuggles.

Ari: Oh, yeah, I had no idea. That's why they're called boxers.

Jennifer: Same! And I didn't either.

Ari: Well, I love that fun fact, Jennifer. I feel like when people talk about their dogs, it's similar to when our guests talk about their travels. We could just spin off and do a whole separate episode. But for the sake of our listeners, Jennifer, let's dig in. I'm hoping we can start by you just briefly explaining the key changes in the revised I-9 form, which actually was just published a couple of days ago and why employers should care.

Jennifer: Yes. So a few weeks ago, DHS released two big announcements relating to I-9. So the first is that they are issuing a new form and we'll chat about that in a moment. But there's a new form effective August 1. And the second big news break is that they have finally allowed for an alternative procedure to the in-person physical inspection of the documents. There's a catch, though. It's only available to employers enrolled in E-Verify. But it's big news because for a long time when employers are inspecting and fulfilling their I-9 duties, documents always have to be inspected in person. And in this post-COVID world that we're in—and even during COVID—it became a real pain in the neck for employers because of how remote the workforce has changed over the last few years. Right.

Ari: So kind of that. And that seems antiquated, too. So kind of modernizing the process a little bit. So, Jennifer, you mentioned the new I-9 or Form I-9. Can you tell us what the purpose of the new form is?

Jennifer: Yeah. So the I-9 is used by employers to verify the employment eligibility of any new hire, US citizens and foreign nationals alike. So an employer's looking at documents to confirm that they are eligible to work in the United States. In the past, prior to this August 1 form, it was a little bit cumbersome and bulky to get through. So there have been some modifications that have streamlined it for employers or their agents to fulfill I-9 and fill that form out.

Ari: Got it. So did you want to talk a little bit or tell our listeners a little bit, Jennifer, about those modifications in the new form?

Jennifer: Yes. So previously the major changes and those who are familiar with I-9s, this will make a lot of sense too, but they reduce section one and two to a single-sided sheet, which is big. The preparer and translator certification. If an employer was going to use that, that was kind of smack dab in the middle of the form, that's been moved to its own supplement page. So it's not as confusing to get through. A big change that immigration attorneys in particular like to see is that the term “alien authorized to work.” We use the term alien in our Immigration and Nationality Act and that term and a little bit of a bone of contention for understandable reasons. They rephrased that to “noncitizen authorized to work.” The form and its accessibility is now way more compatible for tablet and mobile device access. That's big. Finally, the government's kind of upping their game with respect to technology advances.

Ari: Right.

Jennifer: And the page three, the list of accessible documents that an employer can refer to when completing an I-9 form. That's been expanded a bit to include some additional documents or special situations, primarily with respect to employing foreign nationals who are authorized to work. So from an immigration perspective, we have all of these special rules and regulations and all sorts of different documents that can prove someone's work eligibility and that list of acceptable documents now gives a little bit more clarification and context for special situations when it comes to employing foreign nationals.

Ari: Well, that sounds helpful. At least most of the changes and more of a streamlining of the process. And then, are there some updates to the instructions, too? Because I feel like those were historically kind of like….

Jennifer: Super long! We have to go.

Ari: Through the instructions.

Jennifer: ..they are simpler and again, easier to understand and follow. The instructions for a two-page form used to be FIFTEEN pages long. Now they're down to eight, which is still comical, but yeah.

Ari: Like half the size. So I guess that's cool, right?

Jennifer: And then USCIS also included instructions to the new alternative procedure for the inspection, which I had mentioned a little bit earlier.

Ari: Yeah, So I want to talk about that, Jennifer. I think it's probably a good transition, but so which employers are qualified to use the alternative inspection procedure? Are there limitations on that?

Jennifer: Yeah, it's a really welcome change. And when this news line first hit, I think employers, when they saw it, they're like, yes! We can use remote inspection to complete our I-9 obligations. But then when you start reading the details of it, it's only employers who are active participants in E-Verify.

Ari: Right.

Jennifer: So differentiate what E-Verify versus an I-9 is. E-Verify is an online system that's operated by DHS in partnership with the Social Security Administration. So employers can use that program. They can register themselves in their worksite locations and use that program to… it's an extra step of verification to confirm eligibility of their employees to work in the United States. So they will get an I-9, enter the data into the E-Verify system, and then E-Verify will come back. And it's an extra, “hey, yeah, this person's good to go.” And they check it against social security records, right? So currently E-Verify is voluntary for employers. I think some states do require it. I'm not sure off the top of my head which states require it of their employers. But I do know that some public employers and employers who have government contractors, they need to use E-Verify to fulfill federal contracts.

Ari: Right.

Jennifer: It is an optional system for the most part. So, going back to this remote inspection and these new benefits for I-9 purposes, it's only going to really benefit those employers who are enrolled in E-Verify.

Ari: Got it.

Jennifer: Yeah.

Ari: So, Jennifer, it was my understanding that employers who use E-Verify during COVID or the pandemic were afforded some flexibility. Can you talk a little bit about that and how that kind of interplays with this new form?

Jennifer: Yes. So when COVID was active and happening, DHS said to employers, okay, we're going to pause the in-person I-9 inspection requirement of all employers, E-Verify or not.

Ari: Right.

Jennifer: And so for a few years, employers were really enjoying the flexibility in fulfilling their I-9 requirements. And they could, you know, they're hiring people all over the country or individuals are working from home and not reporting into offices. So I-9 were done virtually and without that in-person inspection. So as COVID’s winding down, DHS said, okay, by August 30, all employers have to go back and redo those I-9s and look at the documents and physically inspect them. And this has been a humongous headache for employers, especially larger organizations, because I have some clients who have thousands and thousands of employees across their different facilities.

Ari: Right.

Jennifer: They got like a two-month notice to try and coordinate their resources to fulfill this inspection requirement.

Ari: Right.

Jennifer: On top of that, sometimes you have employers who utilize third party software systems to maintain I-9 documents that historically you don't have to easily access again. Right. Unless you're getting audited or …you don't need to add notes to those. So the new remote inspection benefits really only help employers who were participants in E-Verify and those who created cases and examined documents virtually during COVID. They can use the new alternative remote procedure to update their I-9s. But employers who aren't E-Verify employers, they still need to fulfill that in-person inspection requirement.

Ari: And they need to do it by the end of the month.

Jennifer: August 30.

Ari: Wow.

Jennifer: Yeah. Yeah.

Ari: That seems like a big headache, honestly. And do you think that there's an opportunity for an extension of that for those employers who were not…

Jennifer: I don't see it coming. I think that this is the government's… I think this is the most that we're going to get at this point in time.

Ari: Take what you can get.

Jennifer: Yeah, take what you can get. I'm hoping in the future, the government will continue to roll out remote benefits. My guess is that they're going to tie that E-Verify enrollment.

Ari: Right. Makes sense. So, Jennifer, can you talk a little bit about just the specific steps involved in this alternative procedure?

Jennifer: Definitely. So employers will use a video call for their remote inspection, and it requires their employee to share their identity and employment documents. So maybe a birth certificate and their driver's license or their passport. The I-9 still has to be completed within three days of their first… their start date.

Ari: Yep.

Jennifer: What will happen is the employer probably an HR representative or somebody who's helping with the onboarding process. They'll do a live video, a Zoom, a Microsoft Teams. The individual will present their documentation and they'll complete the I-9 together and the employee will have to send a copy of their documents to the employer. But everything can be done virtually. And that in-person inspection requirement won't apply, which is I mean, it is hugely helpful for larger employers, especially those who have a an extensive remote workforce.

Ari: Right. Right. Well, kind of reminds me of how virtual notarizations were allowed.

Jennifer: Yeah, exactly. Yeah. Yep.

Ari: So, Jennifer, I think we would be remiss not to talk about potential penalties for employers who may not be maintaining the I-9 form properly. Can you just give us a bit of a rundown on that and what employers need to do?

Jennifer: Yeah. So employers who don't complete or properly retain their I-9s… and if DHS walks in and audits them and the government finds that they haven't been properly fulfilling their obligations, they can face serious civil monetary penalties. And in some cases, if it's super egregious, they may be liable for criminal penalties as well. So DHS, DOJ, DOL, they can all step in and take a closer look, have an audit. So it's really important to keep these documents at top of mind when hiring new employees, US citizens and foreign nationals alike.

Ari: Right. And, Jennifer, can you just remind our listeners the employer's obligation for how long they need to maintain the forms?

Jennifer: Yeah. So employers have to keep and I-9 for as long as the individual works for the employer and for the required retention period after that employee ends. And so it's either three years after the date of hire or one year after their employment ended, whichever is later. And I-9 records can be kept digitally or electronically or they can be kept on paper. We generally recommend that I-9 compliance is not kept in a personnel file. You want a file for I-9s for your employees. So, it's really important for employers to have a strong process in place.

Ari: Yes. Agreed. For the maintenance of all things and all documents are required to be maintained by law, right?

Jennifer: That's right.

Ari: So, Jennifer, I think we're at nearing the end of our time together. You know, is there any are there any last words of wisdom or any final point you want to hit that employers should be aware of before we break for the day?

Jennifer: Yeah, so there's always a transition period when something new is rolled out. Right. So employers don't fret if you're listening today and you're like, Oh my gosh, it's past August 1. I need to be using the new form, we haven't been. You can continue to use the old I-9 version up to October 31 of this year. But after that, if you're audited and you haven't updated your records to the new forms, you want to make sure that you're using the new version. So that's available for download beginning August 1. And then for employers who want to utilize this remote inspection procedure, make sure you're enrolled in E-Verify. And again, coach your managers who are reviewing the I-9 documents to make sure that you have a strong procedure to properly complete that form and inspect the documents over video. It's also important to make sure that we're not engaging in any discrimination practices so employers don't want to have, “oh yeah, for you will do the remote inspection, but for you, we're going to require you to come in person.”

Ari: Right.

Jennifer: Consistent policy in place… and be on the lookout. We expect USCIS to provide additional guidance on this and hopefully we'll see the program continue to expand so that more employers can be… can take advantage of this flexibility.

Ari: Great. Well, thanks so much for doing this, Jennifer. I think this was a great synopsis of the new changes. And I think that, you know, this is actually a big deal for employers, especially the alternative procedure, if they can use it, I think it will definitely help streamline the process, especially for remote workers.

Jennifer: So for sure. Without a doubt.

Ari: All right. Well, thank you so much, Jennifer, and….

Jennifer: Thank you! Have a good weekend.

Ari: You, too. Thank you.

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