

Avoiding Immigration-Related Litigation in the Current Labor Market

By Amy L. Peck &

December 30, 2021

Meet the Authors



Amy L. Peck

Principal

402-391-1991

Amy.Peck@jacksonlewis.com

Related Services

Construction

Immigration

According to the U.S. Bureau of Labor Statistics, the number of unfilled job openings increased by over three million in the last year. The construction industry has been particularly hard hit by labor shortages, causing many employers to turn to alternative hiring sources, including recruitment and hiring of foreign nationals. This can be a consistent and reliable source of labor in an otherwise difficult market.

However, employers must be mindful of the significant immigration-related compliance obligations involved in hiring and onboarding, as well as in management of programs recruiting foreign nationals for specific positions. In particular, construction industry employers should ensure all recruitment and hiring programs are legally compliant. Additionally, they must be cautious of citizenship discrimination and overdocumentation violations.

Failure to comply can result in costly audits by the Department of Justice, or complaints of citizenship discrimination. The Department of Justice has been particularly active in investigating immigration-related issues over the last year, including securing significant settlements against several employers who engaged in unintentional, technical violations of federal immigration regulations.

Best practices employers can take to avoid immigration-related litigation in the current labor market include:

1. Working with legal counsel to implement any new programs involving recruitment of foreign nationals (*e.g.*, H-2B or J-1 Visa programs), even if working with an experienced recruiting company. Although these programs can be beneficial for employers, the related regulations are complex. It is crucial to design legally compliant programs from the outset.
2. Training all employees who are involved in the hiring process on I-9 compliance, including what information should be provided to new hires when they are completing Form I-9.
3. Not requesting specific documents from new hires to prove their authorization to work in the United States. The I-9 law requires employers to give employees a choice of which documentation they offer to prove identity and work authorization, and to give employees the published [List of Acceptable Documents](#), which can be found online or on page 3 of the [Form I-9](#) on the government website.
4. Making sure all employees involved in the I-9 process understand that they should not reverify employees' work authorization unless required to do so by law. For example, U.S. Citizens and Legal Permanent Residents have the permanent right to work in the U.S. This right does not expire, unlike the work expiration date of Employment Authorization Cards that grant temporary work authorization which expires and needs to be reverified.
5. Performing annual Form I-9 training and anti-discrimination training that includes

information on citizenship discrimination. In a government audit, the training documents are evidence to show that the employer had acted in good faith.

6. Engaging in periodic internal I-9 audits, with oversight from legal counsel, to ensure general compliance company-wide. This is particularly important for companies with several employees involved in completion of Form I-9.

There are significant penalties associated with immigration-related discrimination and failure to comply with federal immigration laws. In addition, employers can be held liable for back wages and other losses incurred by individuals affected in these areas. The time and expense involved in the proactive steps above is relatively minimal in comparison to the potential liability.

Please contact a Jackson Lewis attorney with any questions.

©2021 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on employment and labor law since 1958, Jackson Lewis P.C.'s 1,000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged and stable, and share our clients' goals to emphasize belonging and respect for the contributions of every employee. For more information, visit <https://www.jacksonlewis.com>.