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Immigration Compliance Alert

July 2010

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Potential Changes in I-9 Protocols Affecting Every U.S. Employer

The Thursday Rule Pronouncement—Now Four Days, Rather Than Three, to Complete Section 2 of the I-9

During last month's E-Verify[1] redesign trainings, U.S. Citizenship and Immigration Services (USCIS) innocently "*reminded*" employers that companies have three days **after** the employee's date of hire to open a case in E-Verify. Interestingly, USCIS also proposed that this four day or "Thursday rule" apply to the timing for completing Section 2 of the I-9. There are several concerns with this new guidance and the way in which it has been disseminated.

First of all, the new guidance is inconsistent with previous trainings provided by both legacy INS and USCIS during E-Verify and I-9-related meetings and webinars. Moreover, it is also inconsistent with the general guidance provided in the *M-274 Handbook for Employers: Instructions for Completing Form I-9* (the 56-page instruction manual created by USCIS to guide employers through the verification process). Specifically, the M-274 states that employers must do the following:

> Ensure that the employee fully completes Section 1 of Form I-9 at the time of hire—when the employee begins work. Review the employee's document(s) and fully complete Section 2 of the Form I-9 **within** [emphasis added] 3 business days of the first day of work.[2]

There is no mention of the word "within" having any other meaning than 1. "used as a function word to indicate enclosure or containment; 2. being inside[3] The M-274 is consistent with the regulations, which also provide that Section 2 must be completed within 3 days of hire.[4] No mention anywhere about "within" not counting the day of hire.

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[1] E-Verify, previously referred to as Basic Pilot, is an internet-based system operated by the DHS in partnership with the Social Security Administration that electronically verifies the employment eligibility of each newly hired employee for participating employers. E-Verify, its implementation and its effect upon employers is not discussed here. For information about E-Verify, please see our June 2010 GT Alert.

[2] See M-274: Handbook for Employers: Instructions for Completing Form I-9 (Employment Eligibility Verification Form), U.S. Citizenship and Immigration Services, 5 (2009) *available at* http://www.uscis.gov/files/nativedocuments/m-274.pdf.

[3] See, Merriam-Webster's Collegiate Dictionary, Eleventh Edition copyright © 2008 by Merriam-Webster, Incorporated

[4] See 8 CFR §274a.2(b)(ii)(B); see also United States v. New China Buffet, 10 OCAHO 1132, 5 (2010) (recent decision of the Department of Justice's Office of the Chief Administrative Hearing Officer stating that an employer's failure to complete the form *within* three days of the hire is a substantive violation.

While we can't point to any written guidance issued by Immigration Customs and Enforcement (ICE), "within" has always meant the same for them as well. In fact, agents in the field for audit purposes have been trained to the day of hire as count Day 1, then Day 2 and then Day 3. They have never been instructed that the actual day of hire should *not* be included in counting to three.[5]

So, USCIS's pronouncement that employers have three days **after** the date of hire was news to us.

As such, over the past few weeks, USCIS has been encouraged to address this confusion, and went on to confirm that the determination of the hire date for E-Verify isn't always "clear and simple." It also noted as much on its website while further discussing the date of hire timeline for E-Verify.

The GT Response

The GT Business Immigration and Compliance Group was intrigued. Calling together our resources from the East and West coasts as well as our team in the Midwest, we began to consider the implications of what we considered to be a sweeping change of I-9 related protocols for employers. While third-party opinions differ—not only among immigration compliance practitioners, but also among electronic I-9 vendors in the marketplace—our team has always believed that there is a difference in the E-Verify hire date (the date that is placed in the employer certification as the "date employment began")—and the date on which the I-9 needs to be signed. This new definition was making the water even murkier.

After consulting the legislative history and reviewing the Illegal Immigration Reform and Immigrant Responsibility Act of 1996's references to the Basic Pilot program, we agreed that a basis for affording the additional day **for E-Verify** could be argued. However, the issue of the date of hire and timing **for I-9 purposes** was far more complicated.

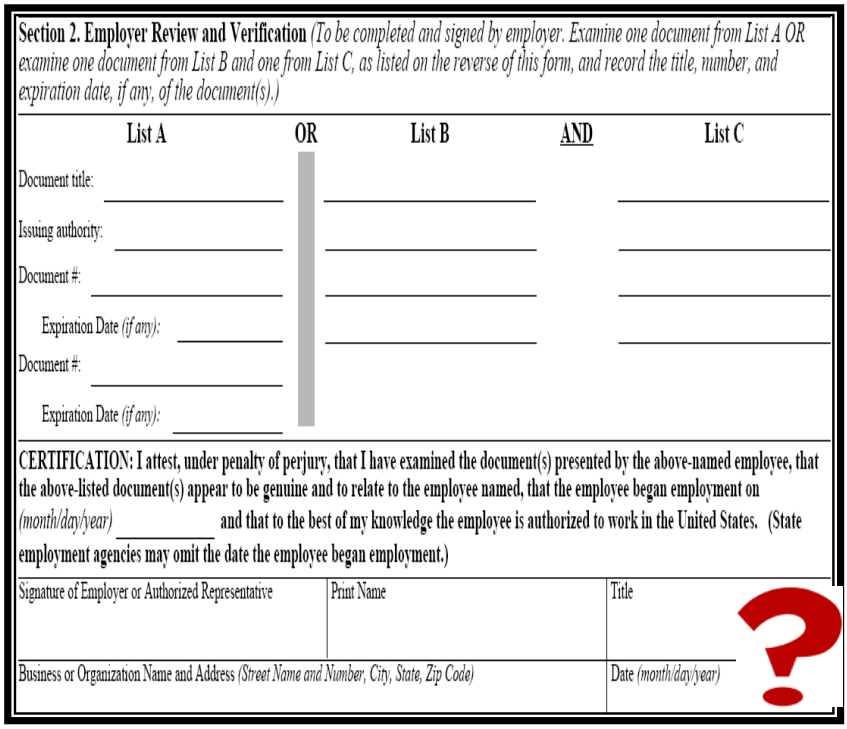
Whether the USCIS intended to afford an additional day both for the completion of E-Verify and for the completion of Section 2 of the I-9 required immediate clarification. After reaching out to USCIS for guidance, E-Verify representatives confirmed that indeed they had intended to confirm a four-day window (Monday hire date/Thursday deadline) for the completion of both E-Verify **and** Section 2 of the I-9. Following GT's discussion with the government, on June 30th, USCIS issued a public clarification on its E-Verify website confirming that: **"If the employee starts work for pay on Monday, the third business day after the employee started work for pay is Thursday (assuming all days were business days for the employer). The first day the employee starts work for pay is not included in the three business day calculation**."

However, it was not enough to stop with USCIS. The fact that the Department of Homeland Security was very close to issuing final electronic I-9 regulations, coupled with the fact that Immigration and Customs Enforcement (ICE) is generally responsible for conducting I-9 audits in relation to enforcement, led us to consider that ICE

[5] However in the Field Agents Manual, there is guidance to not count the day a Notice of Inspection is served, when providing 3 days notice to produce Forms I-9s.

should have been consulted with regarding such a "clarification." In performing further due diligence that led us to reach out to various ICE offices, it quickly became apparent to us that neither the implications of such guidance, nor its sweeping impact from an employer HR perspective, had been thoroughly considered by USCIS. Moreover, it was unclear whether the proper divisions within ICE had been consulted to ensure consistency in interpretation, and more importantly, national enforcement. All of our efforts were then focused on obtaining concrete guidance from ICE on whether it planned to agree with USCIS' interpretation of the regulation.

The three-day issue was not entirely new to ICE, as their attorneys continue to grapple with the definition of "three days" in the context of the new electronic I-9 regulation currently being vetted at OMB. However, their focus on the three days was generally thought to be an issue of determining the category of days that would apply in satisfying the requirement (i.e, three employer work days, three federal government work days, or three employee work days). Within our group, we discussed this challenge for employers and hoped the upcoming electronic I-9 regulation would provide clarity on whether the government (and that means USCIS and ICE) allows for three **federal working** days or three **employer business** days. However, the issue of **when** the three days started was a new concern.



Section 2. Employer Review and Verification *(To be completed and signed by employer. Examine one document from List A OR examine one document from List B and one from List C, as listed on the reverse of this form, and record the title, number, and expiration date, if any, of the document(s).)*

List A	OR	List B	AND	List C
Document title:				
Issuing authority:				
Document #:				
Expiration Date *(if any)*:				
Document #:				
Expiration Date *(if any)*:				

CERTIFICATION: I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on *(month/day/year)* _____ and that to the best of my knowledge the employee is authorized to work in the United States. (State employment agencies may omit the date the employee began employment.)

Signature of Employer or Authorized Representative	Print Name	Title
Business or Organization Name and Address *(Street Name and Number, City, State, Zip Code)*		Date *(month/day/year)*

As GT posted on several blogs, critical confirmation from ICE was obtained: GT was the first to confirm the government's welcomed position. Indeed, the agency would respect the "Thursday Rule."

What Does This Development Mean?

At this point in time, while ICE does not intend to issue separate guidance on the what we consider to be the revised interpretation of the three-day rule, it is assumed that the agency forwarded the USCIS posting to the 1,700 or so Special Agents in the field and to their Forensic Auditors. On the record, ICE could not recall any worksite investigations that involved companies that have received administrative fines *solely* on the basis of being one day outside of the previous interpretation of *within three days of hire*. Neither could we. We would be interested to learn if this is not the case.

The bottom line is this: The government is trying to improve transparency and we applaud DHS's ongoing efforts to continue dialogue with stakeholders, but it is not enough. Companies cannot afford this type of surprise interpretation of long-standing regulatory authority. Instead, employers require guidance, consistency and

clarity from the federal government. Employers are already struggling with immigration compliance-related issues and anything to further confuse companies will not be well received. Most importantly changes such the one discussed herein require notification to all employers, not just those on E-Verify. The M-274 should immediately be updated and the USCIS website should include an attachment to the I-9 which clarifies the "Thursday day rule." (And while USCIS is making updates, we would very much appreciate an updated list of acceptable List A, List B and List C documents to include the additional ones noted in the M-274 but found nowhere in the Form I-9 instructions.

The question on everyone's mind surrounds whether we should be changing policies right away to provide an additional day for Section 2 (and E-Verify) completion. Not necessarily. This clarification does not automatically require an immediate change in the field. Applying a consistent policy to all employees will keep you out of trouble on the discrimination front. What this does do, however, is provide employers an opportunity to review all polices and decide exactly what needs to be updated and what makes sense for you. Perhaps requiring the entire I-9 to completed prior to starting work for pay should be mandated across the board, perhaps a training is necessary as none of your current I-9s have Section 1 completed timely, on Day 1.

Looking Ahead

As you navigate the world of employment verification and immigration compliance, here are some important questions that you should be asking yourself and your teams of professionals (e.g., Payroll, Recruitment, Human Resources, and Counsel):

- Do we have a consistent, non-discriminatory employment verification compliance policy?
- Do our hiring authorities receive monthly, quarterly and/or annual training on the policy?
- Do those responsible for recruiting our talent understand which questions may be asked of a prospective employee and which questions are off-limits?
- Did we seek legal advice prior to changing any I-9 related policies?
- Should we consider providing an additional day for our new employees to present Section 2 documents or should we keep our current policy of three days?
- Should we be doing more to identify the true identity of our new hires?
- If we are on an electronic I-9 application, does our system correctly replicate the guidance issued by the USCIS? And does this system provide for different I-9 work-for-pay dates vs. E-Verify hire dates?
- Should we consider an electronic I-9 application? What are the risks and benefits associated with such an undertaking?

The GT Business Immigration and Compliance team is available to discuss with you what impact the answers to these questions may have on your organization's outstanding exposure and future compliance. Our team can also provide you with all the other questions not asked above, but critical for consideration prior to being selected for a government instigation. In this ever-increasing nationally and regionally diverse enforcement environment, look for GT to ask the right questions, insist on the right answers and provide workable solutions to your most difficult employment verification and immigration compliance challenges.

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Greenberg Traurig's Business Immigration and Compliance Group has extensive experience in advising multinational corporations on how to minimize exposure and liability regarding a variety of employment-related issues, particularly I-9 employment eligibility verification matters and E-Verify related issues. In addition to assisting in I-9 and H-1B (Labor Condition Application) audits, GT develops immigration-related compliance strategies, company protocols and performs internal I-9 compliance inspections. GT has also defended businesses involved in large-scale government worksite enforcement actions, high stakes administrative I-9 Audits and Department of Labor Wage and Hour investigations. Our seasoned attorneys provide counsel on a variety of compliance-related issues, including IRCA anti-discrimination laws-Office of Special Counsel Investigations, and employers' responsibilities when faced with traditional no-match situations, as well as more serious workplace identity theft or other alleged misrepresentations made by employees. Our national footprint, combined with a broad based platform, provide seamless integration with our partners practicing in government contract, deemed export, labor & employment, tax, white collar defense, litigation as well as other areas of the law.

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