Mandatory Compliance Issues Employers Are Ignoring

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Issues to Cover

1. FDNS Audits and How to Prepare
2. Mechanics for Helping Clients Track Expirations, Retention Schedules, Renewal Obligations, etc.
3. Public Access File Requirements and Pitfalls
4. Contractor vs. Employee and Compliance Issues to Consider for Contract Workers
5. PERM File Maintenance and Recruitment Reports

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H-1B Fraud Detection

- Created in 2004, to detect, deter and combat immigration benefit fraud
- $500 Fraud Fee supports 800 FDNS positions, including 68 new positions
- Shift from using contract inspectors to USCIS inspectors
- In FY 2011, 15,648 site visits were made to H-1B employers

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Frequent Compliance Issues

- Petitioner does not physically exist
- Petitioner misrepresented details of beneficiary's employment
- Beneficiary is not employed in the location or area certified
- Beneficiary is not performing duties specified on the petition
- Petitioner withdrew the petition
- Salary paid is inconsistent

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FDNS Site Visit

- Employers are chosen by random at zip code
- Arrive unannounced without warrant
- Speak with employer representative, immigrant employee, or immigrant employee's supervisor
- Confirm details of I-129 Petition, including job title, job duties, work location and salary(usually not the LCA)
- Tour and take pictures
- FDNS officer should only report back to USCIS

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Practice Pointers

- Obtain written confirmation the petitioner has reviewed the accuracy of the petition
- File an amended petition if material facts change or are false
- Clients should obtain name, title and contact information of the investigator
- Advise clients counsel may be present during interview

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Site Visit Problems

- Visiting the end-client without notice to the petitioning employer
- Repeatedly visiting the same employer
- Visiting workplaces that require a security clearance
- Asking for documents that exceed H-1B

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Results of Site Visits

- Of the 15,648 site visits in FY2011:
  - 7% of site visits resulted in USCIS Adjudications Notice of Intent to Revoke
  - 3% of site visits resulted in Revocations
  - Less than 1% of site visits are referred to ICE for criminal prosecution, where fraud is identified

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Tracking Expirations

- Who is responsible? (engagement letter)
- What should you track:
  - Employment authorization
  - Next action item
  - Priority date
  - Labor Cert validity date
  - 5th Year NIV date
  - Spouses expiration
  - Purging of document retention

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Public Access File

The employer must make the LCA and supporting documentation available to the public within one working day of the filing.

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Public Access File Includes:

- LCA and cover page
- Wage rate documentation
- Actual wage system
- Prevailing wage documentation
- Summary of benefits
- Posting notice

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Employer Must Maintain:

- Complete petition package
- Payroll and basic records
- Name, address, social security number, occupation of workers
- Benefit plans
- Record of dependency determination

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Actual Wage:

- Employer's own scale or system
- Must be documented
- May include variable rates

EMPLOYER MUST PAY THE HIGHER OF THE ACTUAL WAGE OR PREVAILING WAGE RATE

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Obligation to Pay

The H-1B worker first makes self available for work or otherwise comes under control of the employer

and

- If the H-1B worker does not reside in the U.S., not later than 30 days after that worker is admitted to the U.S.; OR
- If the H-1B worker already resides in the U.S., not later than 60 days after that worker becomes eligible to work

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Nonproductive Time

The employer *must pay* the required wage rate for all nonproductive time caused by:

- conditions related to employment
- lack of work
- lack of permit
- studying for licensing exam
- employer required training

Failure to pay will result in the employee's being "benched." Benched time must be compensated.

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Permissible Deductions

- Voluntarily authorized in writing by the employee, but not as a condition of employment
- Principally for the benefit of the employee
- Do not exceed the fair market value or actual cost of a provided benefit (lodging, transportation, goods, for example)
- Do not exceed the garnishment limits

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Investigations

- The existence of a valid LCA
- A complaint from an aggrieved party
  - a person or entity whose operations or interests are adversely affected by the employer's alleged non-compliance with the LCA
- An alleged violation of the H-1B program which occurred within 12 months of the complaint

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Violation Categories

- Wages
- Benefits
- Misrepresentation of a material fact
- Working conditions
- Strike/Lockout
- Notification
- Displacement – Direct and Secondary

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Violation Categories

- Recruitment
- Petition fees
- Early cessation penalty
- Discrimination for protected conduct
- Failure to make available public access documents
- Failure to maintain documentation
- Failure to cooperate in Wage Hour investigation
- Failure to comply with the regulations

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Levels of Violation

- Nonwillful Failure
- Substantial Failure
- Willful Failure
- Willful and Substantial Failure

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Contractor Compliance Issues

- Who is employer for H-1B purposes?
  - DOL
    - Regulations refer to common law definition of employment
    - However, entity that files H-1B "is deemed" to be the employer
    - Expect that generally petitioner will be liable for non-compliance

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Contractor Compliance Issues

- Who is employer for H-1B purposes?
  - USCIS
    - 2010 Neufeld Memo factors – H-1B employer must have right to control over employee
    - Failure to establish control leads to petition denial
    - FDNS inquiries into third-party contract situations
    - Review third-party placement contracts and develop documentation before filing petition

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Contractor Compliance Issues

- Who is employer for L-1B purposes?
  - In practice, USCIS permits looser relationships than H-1Bs
    - Employee of related company
    - Independent contractor
  - L-1B Reform Act
    - Prohibits "labor for hire" or L-1B worker where petitioner lacks of control and supervision
    - Review contracts for third-party placement and develop documentation before filing petition

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Contractor Compliance Issues

- General LCA posting options
  - Hard copy posting at place of employment
  - Electronic notice to employees
    - In the same "occupational classification"
    - At "each" place of employment
    - Method of communication:
      - Direct notification – e-mail
      - Other means "ordinarily" used to notify – intranet, home page, electronic bulletin board

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Contractor Compliance Issues

- Issues for contractors at third party sites
  - Hard copy posting – end user often refuses
  - Electronic notice
    - Who is in same "occupational classification"?
    - Method of communication:
      - Direct notification to end user's workers
      - Other means to notify
        - » Intranet, home page, electronic bulletin board
        - » Issues re access to computers and to specific websites
  - Practical solutions and documentation

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Regulatory Provisions on Overall PERM Document Retention

- General PERM retention requirement:
  - Retain copy of PERM and all supporting documents for 5 years after filing
- Audit:
  - Retain supporting documentation for audit
  - Must not commit "substantial failure" in responding to PERM audit
- Request to reconsider:
  - Use documentation from audit record *or*
  - Provide new documentation only if employer "did not have an opportunity to present" it previously and it existed at time of PERM filing and was properly retained

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PERM Retention File Checklist All PERM Filings

- Copy of PERM filing
- Prevailing wage determination
- Notice of the job opportunity to employees or bargaining representative
- Documentation of employer's recruitment efforts
- Employer's recruitment report
- Resumes received in response to recruitment

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PERM Retention File Checklist Specific Situations

- Evidence of business necessity
- Documentation for a live-in worker
- Documentation of notification and consideration after lay-off
- Documentation where alien has ownership interest or related situation

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Compliance Requirements Job Order

- Regulations
  - Start and end dates entered on PERM "shall serve as documentation of this step"
- Case law
  - BALCA denied case where employer did not provide proof of job order posting - *Bettina Equities* (Mar. 4, 2011)
  - In two other cases, BALCA held that regulations do not require proof of posting - *Mandy Donuts* (Jan. 7, 2011) and *A Cut Above* (Mar. 8, 2012)

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Compliance Requirements Job Order

- Practice pointers
  - Despite *A Cut Above*, it is still best practice to retain copy of job order postings
  - Print first and last day of job order posting
  - Review job order periodically to ensure that it has not changed or closed

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Compliance Requirements Sunday Print Ads

- Regulations
  - Copies of "newspaper pages" where ads appeared or
  - Proof of publication from newspaper
- Case law
  - *Natural Nature* and *Tri Valley* holdings consistent with regulations
  - Documentation must be either newspaper pages or proof of publication

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Compliance Requirements Sunday Print Ads

- Practice pointers
  - Develop a reliable system to obtain tear sheet or legible copy of newspaper
  - Be sure to have name of publication, text of ad and date clearly on same page
  - If original or copy of newspaper page is not available, obtain affidavit from newspaper confirming text and date of publication

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Compliance Requirements Prof. Journal or Organization

- Regulations
  - Copy of journal page where ad appeared
- Practice pointers
  - Develop a reliable system to obtain tear sheet or legible copy of journal page with name of publication, text of ad and date
  - If original or copy is not available, obtain affidavit from journal confirming text and date of publication

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Compliance Requirements Local and Ethnic Newspaper

- Regulations
  - Copy of newspaper page where ad appeared
- Practice pointers
  - Develop a reliable system to obtain tear sheet or legible copy of newspaper page with name of publication, text of ad and date
  - If original or copy is not available, obtain affidavit from paper confirming text and date of publication

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Compliance Requirements Job Search/Employer Website

- Regulations
  - Dated copies of web pages where ad appeared
- Case law
  - If no dated print out of ad on employer web site, include affidavit from official responsible for posting on employer website with audit response – *PSI Family Services* (Apr. 16, 2010)

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Compliance Requirements Job Search/Employer Website

- Case law (cont.)
  - If print out is dated after close of recruitment, employer letter is insufficient to establish that official had personally posted the ad on the employer website – *EZChip* (Jan. 12, 2011)
  - Statements in recruitment report are insufficient to document recruitment on on-line website – *TransAtlantic* (Jun. 29, 2010)

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Compliance Requirements Job Search/Employer Website

- Practice pointers
  - Print first and last day of website posting (including web address, date and text of ad)
  - If employer web site is hosted by third party, verify that necessary information is included
  - Address deficiencies in employer website documentation with affidavit from responsible official who actually posted the ad on the employer website

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Compliance Requirements Employer Referral Program

- Regulations
  - Dated copies of employer notices or memos advertising program and incentives
- FAQs
  - Employer must document employees were aware of vacancy such as posting on intranet
  - Notice of Filing not sufficient for this purpose

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Compliance Requirements Employer Referral Program

- Case law
  - Affidavit from company official with dates of posting stating that position was eligible for incentives was sufficient – *Clearstream Banking* (Mar. 2010)
  - Generic program with incentives in on-going intranet posting may be sufficient – *Id*.
  - Flyer with program incentives posted during recruitment was sufficient – *Sanmina-Sci* (Jan. 19, 2011)

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Compliance Requirements Employer Referral Program

- Case law (cont.)
  - Description of referral program, documentation of notice of program to employees, and receipt of resumes through program was sufficient – *AQR* (Jan. 26, 2011)

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Compliance Requirements Employer Referral Program

- Case law (cont.)
  - Copy of internal job posting without dated copies of referral program and incentives was not sufficient – *Deloitte* (Mar. 2, 2011)
  - Single undated page about policy from employee manual with no documentation of notification of employees or effective dates was not sufficient – *Marlabs* (Mar. 16, 2012)

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Compliance Requirements Employer Referral Program

- Practice pointers
  - Obtain copy of referral policy listing incentives
  - If policy is not dated, obtain affidavit from official in HR stating that it was in effect during recruitment
  - Provide documentation that employees were on notice (do not rely on Notice of Filing)

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Questions & Answers

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