WLJ WOMEN LAWYERS JOURNAL

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NAWL NEWS

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Focus on immigration and the impact of changing policy

Immigration injustice is an urgent matter that needs our attention.

By Elizabeth A. Levy

Greetings for 2018!

This year's first issue of the WLJ includes a timely focus on US immigration laws and policies. This area of law is undergoing significant change in the current administration. Hundreds of thousands of immigrants and families are potentially affected by these changes. Many who had Temporary Protected Status (TPS) or who are here under the Deferred Action for Childhood Arrivals (DACA) policy are now threatened with deportation.

Some immigrants seek asylum in the US or come here alone as young children, sent by their families to escape deadly violence or persecution in their home countries. Others in desperation pay large sums of money to human traffickers who offer unreliable and dangerous transport under the most horrific conditions, with no guarantee of successful entry into the US. Many end up caught in transit and sent back to their countries. Those who do make it to the US are often severely traumatized by the experience.

Neither legal nor illegal immigrants now in the US can assume they will be able to stay here. They may be only one minor infraction away from arrest and deportation. This is an extremely challenging and stressful reality for them, their families and friends, as well as for our economy and those of the immigrants' home countries.

I first realized the impact of immigration policies as a teenager. Because I knew Spanish, I took a part-time job with individuals who did not speak much English. One day most of my coworkers did not show up, and I never saw them again. I later learned that immigrations and customs agents had visited the business and apprehended those who could not prove they were in the US legally. Their futures changed, literally, overnight.

As an exchange student in high school, I lived in Mexico with a local family and traveled with a dozen other exchange students, also female. As we explored the country, we unwittingly attracted a few young Mexican suitors. I later realized that these persistent young men were not merely romancing us -- some of them were hoping to gain access to the US by marrying a US citizen. In college I saw this again: some of my classmates here on student visas sought to marry a US citizen to gain citizenship status in the US. (I was moved to offer such a solution, but my mother intervened.)

Immigration injustices are but one of many urgent matters that need our attention. I am grateful to the legislators, lawyers and judges who are deeply committed to resolving such injustices. Those of you who practice law in this area deserve commendation for your efforts on behalf of these most vulnerable people.

In appreciation,

Elizabeth A. Levy is an intellectual property attorney and a pro bono hearing officer for attorney discipline matters with the Massachusetts Board of Bar Overseers. She is a NAWL board member and liaison to NAWL's Practice Area Affinity Groups.

Connections + Helping Others = Happiness → Success

How many times have we read or heard that success is not the key to happiness, but happiness is the key to success? If you are like me, when you hear these kinds of sayings worthy of an inspirational poster or social media post, you put it in the bucket of things you know you should get to at some point. You know, work out more, change your attitude, eat more kale and your life will improve dramatically. But I recently came across a Harvard Business Review article that got me thinking more about the sequence of happiness and success. The article, "Do Women's Networking Events Move the Needle on Equality?" by Shawn Archor discussed a study of working women across different functions and industries in the U.S. to answer the question posed in the title. And the short answer is: yes!

The study revealed that women who attended conferences showed positive intellectual outcomes and positive financial outcomes. The intellectual outcomes included: increased optimism, lower stress, and feelings of connection. I was particularly interested in the intellectual outcomes of conferences, something that I have experienced myself and is what drew me in and keeps me returning to NAWL events. The researchers polled the women who attended the conferences and a whopping 78% felt more optimistic about their future and 71% felt more connected to others. Additionally, women who attended a conference were more likely to get a higher pay raise and a promotion in the following year. The subjects were compared against a control group of women who had signed up for, but not yet attended a conference (taking into account that women who attend conferences might be a different demographic than those who do not).

How does attendance at conferences translate into positive financial outcomes? The link is in the intellectual outcomes. Social support has been found to be a great predictor of happiness during periods of high stress. Additionally, you can manage stress by rewiring your brain to be happier through small changes related to gratitude, engaging positively with your social support network, meditation, exercise or journaling about a meaningful experience. But the most effective of these may be engaging positively with your social support network. Interestingly, those that gave social support to others have been shown to be more engaged at work and have a higher likelihood of receiving a promotion.

I speak regularly with people about how NAWL is a place for women (and men) to find commonality. While our lives and backgrounds may be diverse, it is in the commonality – our desire to see women succeed – that provides a connection. Not a surprise to me that the study revealed that women's networking events have a positive impact. NAWL events and opportunities help us feel more connected. Feeling this kind of connection and social support has a positive impact on our outlook and happiness. Even more, helping someone else or engaging positively with our social support networks can increase our happiness and ultimately our success. So maybe it is much more than an inspirational poster: Happiness is the key to success.

How will you connect with others at NAWL to achieve your own success?

Take care,

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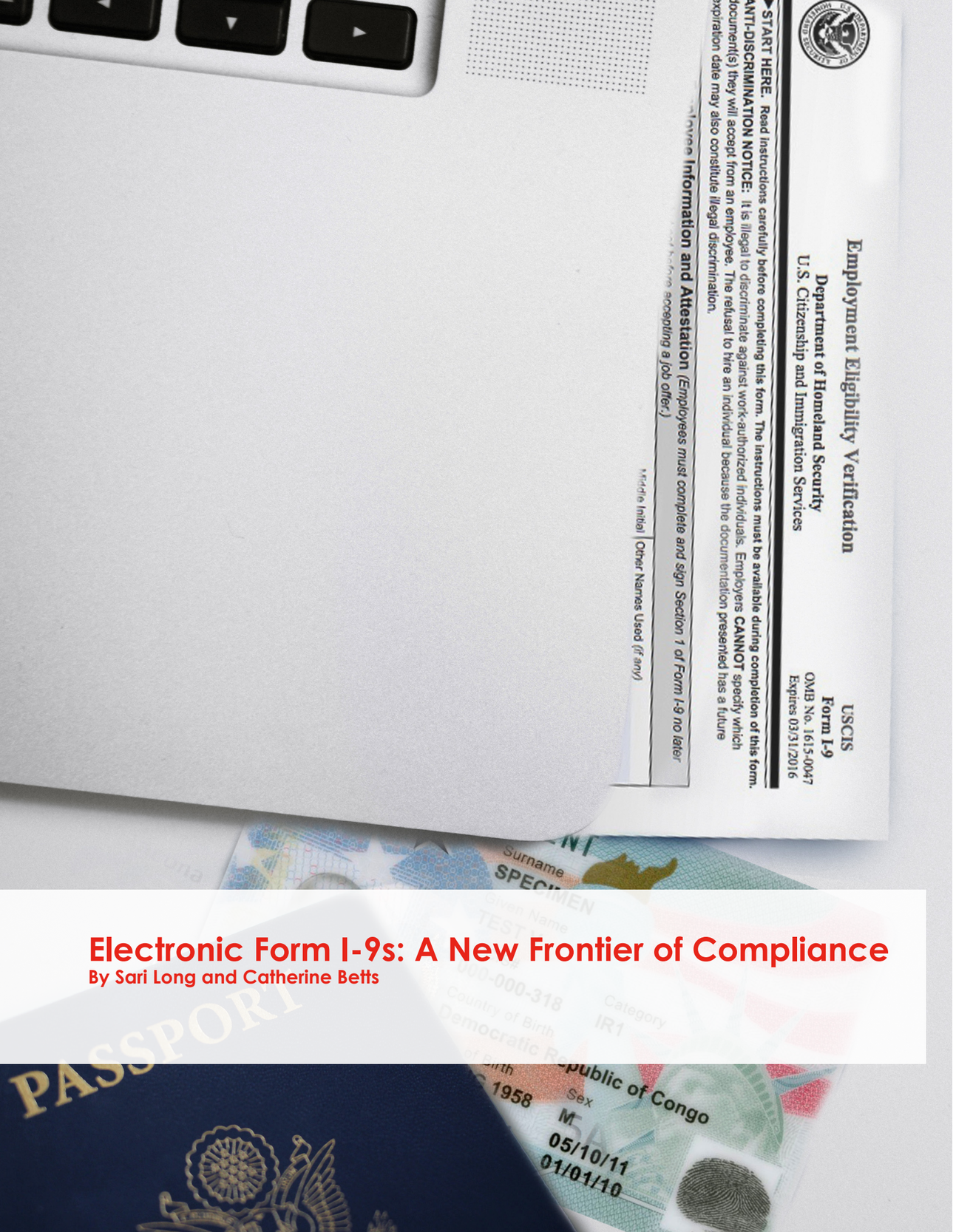

Electronic Form I-9s: A New Frontier of Compliance

By Sari Long and Catherine Betts

The Form I-9 has been a ubiquitous feature in employee onboarding since the Immigration Reform and Control Act (IRCA) was signed into law by President Ronald Reagan in 1986.[i] With IRCA's passage, U.S. employers became, for the first time, subject to sanctions for employing workers without valid work authorization.[ii] The Form I-9 captures basic identifying information about each worker and requires attestations regarding citizenship and work authorization from the employee as well as attestations from the employer regarding the documentation presented by the employee to confirm work authorization and identity.

In the past decade, the most sweeping change to the Form I-9 has come not from U.S. Citizenship and Immigration Services (USCIS), but from companies who have developed ways to create and store the Form I-9 electronically. In 2004, Congress enacted legislation to provide guidance to employers in completing, signing, and retaining electronic versions of the Form I-9.[iii] Up until that point, employers could retain I-9s only in the original paper format or on microfilm or microfiche.

For some employers, electronic I-9s have been a major advantage. They streamline employee onboarding and enable greater compliance with I-9 rules due to "smart" features of the systems that can "dummy-proof" some of the elements of the form itself, ensuring consistency and reducing human error in form completion. However, electronic I-9 systems are not always a panacea, and the proliferation of electronic I-9 products and systems resulted in widely varying levels of functionality, quality, and accuracy. DHS regulations do not specify in detail what kind of electronic system is compliant. As a result, employers should be wary of selecting an electronic I-9 system without due diligence and experienced immigration counsel. This article will describe some of the advantages and specific pitfalls of electronic I-9 systems.

Regulations Governing Electronic I-9s

The electronic I-9 regulations allow employers to electronically complete and/or retain the Form I-9.[iv] A compliant electronic I-9 system must be supported by a strong security system, which includes "reasonable controls" to ensure the system's "integrity, accuracy, and reliability", and must provide for backup and recovery of records to protect against information loss.[v] The system must also be capable of generating legible, hard-copy I-9s.[vi]

The electronic I-9 regulations also provide specific guidance for electronic signatures. Compliant electronic I-9 systems must include a method to acknowledge that the attestation has been read by the signatory, affix the electronic signature at the time of the transaction, and be attached to, or logically associated with, an electronically completed Form I–9.[vii] The system must also create and preserve a record verifying the identity of the person producing the signature, and upon request of the employee, the system must provide a printed confirmation of the transaction to the person providing the signature.[viii] The electronic signature requirements apply both to the employee signature and interpreter/preparer signature in Section 1, and to the employer's signatures in Sections 2 and 3. Merely typing a name in a signature box does not constitute a compliant electronic signature.[ix]

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i *See* Immigration Reform & Control Act of 1986, 8 U.S.C. § 1101 (2012).
ii Muzaffar Chishti et al., *At Its 25th Anniversary, IRCA's Legacy Lives On*, MIGRATION POL'Y INST. (Nov. 16, 2011), http://www.migrationpolicy.org/article/its-25th-anniversary-ircas-legacy-lives; *see also* [*De Canas v. Bica*], 424 U.S. 351, 360 (1976).
iii H.R. Rep. No. 108–731, at 1 (2004) (proposing amendments to "Section 274A of the Immigration and Nationality Act to improve the process for verifying an individual's eligibility for employment"); *see also* Consolidated.
iv 75 Fed. Reg. 42575 (July 22, 2010); see also 8 C.F.R. § 274a.2 (2017).
v 8 C.F.R. 274a.2(e)(i-v).
vi *Id.*
vii *Id.* at (h).
viii *Id.*
ix *See U.S. v. Agri-Systems D/B/A ASI Industrial, 12 OCAHO no. 1301* (Apr. 2017).

Advantages of an Electronic I-9 System

Employers seeking to reduce costs and improve efficiency are going paperless. Following this trend, and in light of growing audit activity and large fines levied by ICE for non-compliance, employers are turning to electronic I-9 systems. These systems bring many advantages, including cost savings, accuracy, and consistent retention of I-9 forms. Electronic I-9 systems also facilitate easier inspections and spot-check audits by employers.

Cost Savings

Employers may save costs by storing I-9 forms electronically instead of using conventional filing and storage for paper copies or transferring forms to microfilm or microfiche. Electronic systems rid employers of cumbersome paper I-9 forms that may be difficult to manage, secure, store and internally audit.

Accuracy and Consistency

Many employers find that electronic I-9 systems ensure that the Form I-9 is properly completed and retained, bringing consistency into the I-9 completion process and reducing human error. An electronic management system helps keep track of all the documents, deadlines, and work visa re-verification requirements. Electronic systems can spot discrepancies or missed fields on the form and can verify the employee's stated citizenship status with the documents presented in Section 2.

Auditing and Spot-Checks

Electronically retained Form I-9s are more "searchable," which is important for re-verification, quality assurance, and ease of inspection for auditing, storage and indexing compliance.

Certain electronic systems offer self-audit features that prevent costly mistakes. Electronic systems also provide management with a central view of the hiring and onboarding process. While the employee's original documents (such as passport, visa, driver's license, Social Security card, etc.) must still be presented in person, HR or other staff anywhere within a company can enter I-9 data directly into a secure system. This allows for more efficient employee on-boarding.

Some electronic I-9 systems have the capability to integrate with E-Verify, keeping all I-9 and E-Verify information for each employee in one electronic location. E-Verify is a free online tool developed and maintained by USCIS that employers may use in conjunction with the I-9 practices outlined above to verify work authorization. E-Verify does not replace the requirement to complete and retain a Form I-9 for all employees, but supplements it.

An electronic system creates workflow and storage benefits, and employers considering I-9 software should evaluate its ability to comply with ICE regulations and withstand an ICE audit. An electronic I-9 system does not replace the need for vigilance in training on the I-9 completion process. Furthermore, no system can supplant the need for anti-discrimination and document review training for HR professionals.

Electronic I-9 Challenges

It is clear from the discussion above that there are some key advantages to using an electronic I-9 system for some employers. If properly vetted and implemented, an electronic I-9 system can save time, improve compliance on form completion, and securely retain the form for future access. However, there are specific problems posed by electronic systems that are simply not applicable to paper-based I-9s.

The regulations governing electronic I-9s at 8 C.F.R. §274a.2 provide some general information on electronic I-9 system requirements, including electronic signatures, retention and security, audit trails and general format. Even if good electronic I-9 systems are "smart" enough to prevent human error in completing Sections 1 and 2, disadvantages specific to electronic systems may give some employers pause. Pros of moving from a paper-based to an electronic system must be weighed against the type and size of an employer's business, an employer's current I-9 practices, its ability to learn and implement a compliant system, access to immigration counsel to review the system before implementation and the reputation of the electronic I-9 provider.

The following outlines specific risks posed by electronic I-9 systems:

Discrimination

The Immigrant and Employee Rights (IER) section of the Department of Justice enforces the anti-discrimination provision of the INA.[x] IRCA created the Office of Special Counsel for Immigration Related Unfair Employment Practices, which became the IER in 2017, to oversee the provisions that made it unlawful for an employer to discriminate against a job applicant based on his or her national origin or citizenship status. IRCA prohibits, among other things, unfair documentary practices during employment eligibility verification, using Form I-9 and E-Verify.[xi]

If an electronic I-9 system limits the types of documents an employee may present in connection with Section 2 of the I-9 based on the immigration status the employee entered in Section 1, the employer could be found to have violated employee rights protected by the IER and IRCA.

This is just what occurred to Rose Acre Farms. IER filed suit against the egg producer "alleging that Rose Acre engaged in a pattern or practice of discrimination against work-authorized non-citizens in the employment eligibility verification process."[xii] The complaint indicated that the company purchased an electronic I-9 system that "may" have led human resources staff to request specific documents from non-U.S. workers, which is not permitted under I-9 rules.[xiii]

System Error

Perhaps the most relevant cautionary tale in electronic I-9 systems is that of Abercrombie & Fitch. In November 2008, ICE issued a Notice of Inspection for all of the company's Michigan retail stores. Abercrombie was using an electronic I-9 system that had been developed entirely in-house. The ICE audit uncovered problems with the electronic system and although there was no evidence that Abercrombie employed any workers without proper authorization, the company nevertheless paid a $1,047,110 fine to settle the case.[xiv] Although we do not have further details regarding the specific electronic system errors uncovered during the audit, it is clear that the system itself failed to meet ICE's scrutiny, apart from any HR employee error or fraud.

Gray Areas

The regulations governing electronic I-9s are not specific enough to give clear guidance as to what constitutes a compliant I-9 system. Until lawsuits or ICE investigations clarify the government's position on each of the following issues, employers must be cautious about the following possible risks with an electronic I-9 system:

- Pre-population

Employers tend to extol the pre-population benefit of electronic I-9 systems. The ability to integrate an I-9 with existing human resources systems and onboarding processes is attractive for saving time and ensuring consistent employee information. Although not referenced in official guidance or regulation, ICE has discussed the issue of pre-population of employee data on Section 1 of electronic Forms I-9 to legal immigration stakeholders, saying that "prepopulation of the Form I-9 has never been approved and is not acceptable … Prepopulating Form I-9 is considered a violation. HSI was not certain how it would charge prepopulation – as a substantive or technical violation – failure to prepare would be a possibility. Prepopulating Form I-9 and completing the preparer/translator section is 'absolutely not' acceptable to HSI."[xv]

IER has also issued guidance discouraging the use of pre-population of Section 1.[xvi] Despite these warnings, electronic I-9 vendors continue to offer pre-population of Forms I-9 as part of their system capabilities, although the related service contracts sometimes explicitly disclaim any liability on the part of the vendor if an employer chooses to implement the pre-population capability.

- Electronic signatures

Signing Form I-9 electronically (in Section 1 and Section 2) is a highly attractive component in many electronic I-9 systems. However, the regulations governing electronic signatures for electronic I-9s are murky at best. The system must "include a method to acknowledge that the attestation to be signed has been read by the signatory" and the system must "preserve a record verifying the identity of the

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x 8 U.S.C. § 1324b.

xi https://www.justice.gov/crt/immigrant-and-employee-rights-section.

xii https://www.justice.gov/opa/pr/justice-department-files-lawsuit-against-rose-acre-farms-indiana-alleging-discrimination.

xiii *Id.*

xiv *Supra* n. 47.

xv Minutes from the AILA Verification and Documentation Liaison Committee Meeting with ICE Homeland Security Investigations, April 11, 2013, published on AILA InfoNet at Doc. No. 13062401.

xvi Technical Assistance Letter from Seema Nanda, Deputy Special Counsel to Leslie Carr (Aug. 20, 2013), available at https://www.justice.gov/crt/technical-assistance-letters.

person producing the signature."[xvii] This, in addition to the requirement that no additional data elements or language are inserted,[xviii] makes the practical implementation of the signature rather shaky. As far as the authors are aware, no fines have been assessed against employers specifically due to noncompliant electronic signatures, but it appears to be an area ripe for enforcement should ICE so choose.

- Audit trails

Electronic I-9 regulations require that employers produce audit trails for each electronic I-9. Although ICE has issued explicit guidelines with respect to what audit trails must include,[xix] no fines or other enforcement actions have explicitly referenced inadequate audit trails. If an electronic I-9 system cannot easily produce an ICE-compliant audit trail for every I-9, employers should switch vendors immediately.

- Online security, data integrity, outages, and service provider issues

Part of due diligence in selecting an electronic I-9 vendor must include inquiry into the company's data security measures, its data storage and backup methods, and quality assurance procedures. To date, ICE has not issued a publicly-noted fine for an employer's failure to maintain system security or data integrity, but again, it is an area that is only likely to grow in importance as more and more employers adopt electronic I-9 systems. Relatedly, if an employer chooses to engage a commercial electronic I-9 service provider (as opposed to building an electronic I-9 system in-house), it is unclear how a system failure on the provider's side (i.e., a hack, server breakdown or other issue entirely outside the employer's control) could be assessed and remedies enforced by ICE. Ultimately, employers are responsible for the compliance of their Forms I-9, regardless of whether those forms are completed on paper or created via an electronic I-9 system. The employer, not the third-party service provider, is responsible for ensuring that the electronic I-9 system is compliant with the applicable regulations. Furthermore, no electronic system can overcome poor training of HR administrators and managers responsible for managing and completing I-9s. No system is smart enough to resolve sloppy document review practices, discriminatory behavior (such as requesting certain documents only from certain employees), or timeliness of I-9 creation.

Conclusion

A well-developed electronic I-9 system can certainly improve some employers' compliance with I-9 requirements. Such a system will ensure that all necessary fields are completed properly and that the "logic" between what an employee enters in Section 1 and the documents presented for Section 2 makes sense. For employers that utilize E-Verify, having a system that handles both the I-9 itself and connects to E-Verify can save time and effort, and reduce human error.

However, the appearance of ease-of-use and other time-saving features should not lull an employer into a sense of well-being that the system is compliant. With the increased level of scrutiny on I-9s in the current administration, employers must be rigorous in vetting electronic I-9 products and vendors, asking questions about audit trails, filing backups and system security, vetting its ability to produce a compliant form upon request and in a timely fashion in the event of an audit, and assessing whether it covers all bases with respect to the electronic I-9 regulations. Due diligence in selecting an electronic I-9 product will save countless hours and untold dollars down the road in the event of an I-9 audit.

xvii 8 C.F.R. §274a.2(h).

xviii "Alternatively, Form I-9 can be electronically generated or retained, provided that the resulting form is legible; there is no change to the name, content, or sequence of the data elements and instructions; no additional data elements or language are inserted; and the standards specified under 8 CFR 274a.2(e), (f), (g), (h), and (i), as applicable, are met."

xix Memorandum from James Dinkins, Executive Associate Director, "Guidance on the Collection and Audit Trail Requirements For Electronically Generated Forms I-9" (Aug. 22, 2012), accessed https://www.ice.gov/doclib/foia/dro_policy_memos/collect-audit-forms-i9.pdf. Issued as a result of a Freedom of Information Act Request, released on October 2, 2012.

DANCING IN THE DARK:

Recent Developments in H-1B Visa Processing

by Autumn Misiolek Tertin

As April approached, many employers and their counsel are rushed to assemble thousands of H-1B visa petitions to be filed in this year's fiscal quota. However, with significant changes occurring over the past six to nine months impacting the filing process, individual H-1B filers should be making adjustments if they hope to have their petitions approved this year. Broad-ranging policy shifts from the U.S. Citizenship and Immigration Services ("USCIS") are strongly impacting U.S. employers of foreign nationals. The good news is that with careful planning and strong supporting evidence, H-1B petitioners can be successful in securing top foreign talent to add to their workforce.

The H-1B visa is issued to professionals to work in the U.S. in a specialty occupation (i.e. requiring at least a Bachelor's degree or its equivalent)[i] for up to three years, with a three-year extension available.[ii] Availability of the H-1B visa is limited by an annual allotment of visas for each fiscal year ("the H-1B cap").[iii] Under current law, there are 65,000 H-1B visas available each fiscal year, with an additional 20,000 available for recipients of U.S. graduate degrees.[iv] The H-1B cap opens every year on April 1st for employment beginning on October 1st of the corresponding year.[v] Due to the popularity of the H-1B visa, the H-1B cap is almost always reached on the first eligible filing date, resulting in a five-day lottery period for petition filings. During this lottery, USCIS conducts a computer-generated selection from all H-1B petitions filed. Lucky winners of the H-1B lottery will have their petitions reviewed and processed by USCIS.

Historically, most H-1B petitions selected in the lottery have been approved by USCIS.[vi] However, with the issuance of the March 31, 2017 USCIS Policy Memorandum, "Rescission of the December 22, 2000 'Guidance memo on H1B computer related positions,'"[vii] and the April 18, 2017 Executive Order, "Buy American and Hire American,"[viii] the paradigm began to shift. The USCIS Policy Memorandum changed the longstanding policy that computer programmer positions are presumed to qualify as an H-1B specialty occupation. Instead enacting the exact opposite, the USCIS Policy Memorandum provides that computer programmer positions would generally not qualify as a specialty occupation position. In addition, the Executive Order calls on U.S. government officials to rigorously enforce and administer immigration laws to protect U.S. workers, which has resulted in intense scrutiny on foreign worker visa petitions by USCIS.[ix]

In June 2017, H-1B petitioners began receiving thousands of Requests for Evidence ("RFE's") pertaining to whether their respective positions qualified as specialty occupations and/or whether the petition was properly filed with a supporting Labor Condition Application ("LCA").[x] The so-called "Level 1 Wage Issue," never before seen in the H-1B context, threw

i *See* 8 CFR § 214.2(h)(1)(ii)(B).
ii *See* 8 USC § 1184(g)(4).
iii *See* 8 USC § 1184(g)(1)(A)(vii).
iv *See* 8 USC § 1184(g)(5)(C).
v *See* 8 CFR § 214.2(h)(8)(ii)(B).
vi *See* USCIS H-1B Dataset: "H-1B Trends: 2007 to 2017" (Oct. 12, 2017).
vii USCIS Policy Memorandum, "Rescission of the December 22, 2000 'Guidance memo on H1B computer related positions,'" PM-602-0142 (Mar. 31, 2017).
viii Exec. Order No. 13788, 82 Fed. Reg. 18837 (Apr. 21, 2017).
ix *See* USCIS Article, "Buy American, Hire American: Putting American Workers First" (Oct. 24, 2017), https://www.uscis.gov/laws/buy-american-hire-american-putting-american-workers-first.
x *See* AILA Practice Pointer, "Responding to H-1B Requests for Evidence (RFEs) Raising Level 1 or Level 2 Wage Issues," AILA Doc. No. 17090132 (Sep. 20, 2017).

another wrench in the H-1B process, creating delays and causing denials for many petitioners. Basically, USCIS argued that because a position was entry-level, thereby offering the lowest wage amongst four levels of Department of Labor ("DOL") wage classifications for a certain position (i.e. a Level 1 wage)[xi], the position could not qualify as an H-1B specialty occupation. This reasoning was attributed to the aforementioned USCIS Policy Memorandum and Executive Order.

In order to be successful in their petitions, H-1B petitioners had to prove to USCIS that their respective positions are complex enough to qualify as a specialty occupation, but not so complex that they are removed from being entry-level (i.e. Level 1). Easier said than done, and many petitions have been denied. However, with enough supporting documentation and a carefully-crafted job description, savvy H-1B petitioners and their counsel have been able to get their petitions approved by USCIS.

For this H-1B season, the RFE trend is expected to continue, along with the Level 1 Wage Issue, so petitioners must be diligent in the preparation of their petitions. Some quick tips are as follows:

- Only select a Level 1 wage if the position is truly entry-level;
- Consider whether a Level 2 wage might be more appropriate if the duties, scope, or requirements of the position make it seem more advanced;
- Assign percentages of time to job description duties;
- Clearly state the exact minimum position requirements in the petition;
- Provide evidence to show why a Bachelor's degree is required for the position;
- Also provide evidence to show that a Bachelor's degree is normally required for the position, both inside and outside the company;
- Explain how the employee is supervised;
- If the position is Level 1, explain how work performed independently (i.e. without supervision) in the position is limited; and
- Describe what differentiates the entry-level position from the company's more advanced, experienced, and managerial positions within the same occupational category.

It is important to note that the RFE's plaguing H-1B petitions have not stopped with cap-subject petitions. On October 23, 2017, USCIS issued another Policy Memorandum, "Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitioners for Extension of Nonimmigrant Status,"[xii] which changed a longstanding policy regarding USCIS deferring to prior approvals in petitions involving the same parties and underlying facts. Basically, when an H-1B petitioner previously filed to extend an employee's prior-approved cap-subject petition for an additional three years, so long as there were no material changes to the original petition, the extension would be approved. However, with the new Policy Memorandum, USCIS reversed this, and is now directing its adjudicating officers to thoroughly review each petition without any deference to the prior filing. This means that H-1B petitioners could face the same hurdles when extending a petition as they did with the initial filing, making supporting evidence that much more important.

Similarly, when there has been a material change to the original petition (e.g. the employee is given a different position) and the H-1B petitioner needs to file an amended petition, the same increased scrutiny can be expected. This includes scenarios where the employee's work location has changed, pursuant to the April 2015 precedent decision, *Matter of Simeio Solutions, LLC*.[xiii] The exception to this is when the work location changes to within a normal commuting distance from the location listed in the existing H-1B petition. In that scenario, the H-1B petitioner does not have to file an amended petition and is safe from the increased scrutiny.

"In light of the current uncertain state of employment-based immigration, counsel should carefully measure advice to employers, weighing what is known against what is unknown."

Other H-1B case types currently experiencing RFE's are cap-exempt petitions. Institutions of higher education or affiliated or related nonprofit entities can file cap-exempt petitions (i.e. petitions not subject to the annual H-1B quota) at any time.[xiv] Cap-exempt petitions can also be filed by healthcare organizations on behalf of foreign physicians who participate in the Conrad 30 Waiver Program ("Conrad 30").[xv] Cap-exempt H-1B petitions filed by institutions of higher education or affiliated or related nonprofit entities have been under additional scrutiny since the Department of Homeland Security ("DHS") published the final rule, "Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers," in the Federal Register on November 18, 2016.[xvi] As part of this rule, which became effective on January 17, 2017, DHS clarified that when an H-1B petitioner is claiming cap exemption based upon an affiliation with an institution of higher education, the petitioner must prove that a fundamental activity of its organization is to directly contribute to the research or education mission of the institution. In addition, petitioners can no longer rely on the fact that they were granted cap-exempt status previously, due to the lack of deference given to prior petitions by USCIS. This adds another obstacle for H-1B petitioners hoping to avoid the H-1B cap and secure work authorization for their foreign employees.

Cap-exempt H-1B petitions filed by healthcare organizations as part of Conrad 30[xvii] have not yet been receiving increased RFE's, but petitioners can certainly expect increased scrutiny given all the recent immigration changes. As background, Conrad 30 allows foreign physicians who originally came to the U.S. on a J-1 visa (reserved for foreign exchange participants) to apply for a waiver of the two-year home residency requirement[xviii] upon completion of their medical education or training program. [xix] As part of the waiver program, the foreign physician must agree to begin employment within 90 days at a healthcare facility designated by the U.S. Department of Health and Human Services ("HHS") as a Health Professional Shortage Area ("HPSA"), Medically Underserved Area ("MUA"), or Medically Underserved Population ("MUP"). The HHS-designated healthcare facility would serve as H-1B petitioner for the foreign physician, and if the petition was approved, the physician would be employed for a minimum of three years. There are many steps involved in ultimately filing a cap-exempt H-1B petition through Conrad 30, and petitioners must be organized and diligent in their approach. Incomplete petitions or those lacking sufficient supporting evidence are sure to receive an RFE from USCIS in this time of increased scrutiny.

In light of the current uncertain state of employment-based immigration, counsel should carefully measure advice to employers, weighing what is known against what is unknown. Counsel are encouraged to speak with their immigration clients to plan and strategize on upcoming petitions. Although there have been significant changes impacting the filing process, the obstacles are not insurmountable, and H-1B petitioners can still successfully employ talented foreign workers on H-1B visas. With recent policy shifts in mind, adjustments should be made sooner rather than later to ensure that petitions filed with USCIS are well-supported to meet the increased levels of scrutiny. This will give petitioners and their counsel the best chance of approval, and avoid them being left "dancing in the dark."

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xi See Employment and Training Administration "Prevailing Wage Determination Policy Guidance" Nonagricultural Immigration Programs (revised November 2009) (describing how H-1B petitions rely on four wage levels to determine the minimum (i.e. prevailing) wage to be offered to a foreign worker, with Level 1 being the lowest).

xii USCIS Policy Memorandum, "Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status," PM-602-0151 (Oct. 23, 2017).

xiii *Matter of Simeio Solutions, LLC,* 26 I&N Dec. 542 (AAO 2015).

xiv See INA § 214(g)(5)(A).

xv See INA § 214(l).

xvi 81 Fed. Reg. 82398 (Nov. 18, 2016).

xvii See INA § 214(l)

xviii See INA § 212(e) (describing how J-1 physicians are subject to returning to their home country for two years following their U.S. medical education or training, but the U.S. Department of State can waive the requirement).

xix See USCIS Article, "Conrad 30 Waiver Program" (May 5, 2014), https://www.uscis.gov/working-united-states/students-and-exchange-visitors/conrad-30-waiver-program.

High-Impact Hashtags

By Jenny Waters

We are in a transformative moment in history precipitated by two powerful hashtags – #MeToo and #TimesUp. Why are the #MeToo and #TimesUp movements important? For two very different, but important reasons.

The #MeToo movement provided a very visual representation of the breadth of the sexual harassment and assault epidemic in a way that piecemeal individual stories had not. It prompted conversations between parents and grown children, spouses, friends, and co-workers about issues that had never been discussed before. It humanized an issue that always seemed to be someone else's issue. It also shut down victim-blaming by removing the perpetrator from the narrative. The reflexive need to defend someone specific and the fear of reprisal was removed from the calculus because details were not required to join the chorus of #MeToo. The hashtag was developed a decade earlier by Tarana Burke as a way to show solidarity between rape survivors, but it needed the power of Ronan Farrow's Harvey Weinstein exposé in *The New Yorker* to go viral. And its power was in its viral nature.

Taking advantage of the momentum created by #MeToo, the #TimesUp movement shifted the conversation from problem recognition to action. A group of powerful women, including lawyers, capitalized on the power of #MeToo to create #TimesUp to say: we have heard the stories and we have seen the breadth of the impact and we cannot continue on this path. A handful of women with power and stature were able to topple giants of industry, often without resorting to the justice system. There are still many women who remain unheard by virtue of their lack of such a visible platform and their inability to access a justice system built to protect them. The Times Up Legal Defense Fund recognizes that the privilege granted to those who are seeing the impact of their stories does not belong to all women who have stories to tell. The very existence of the Times Up fund will give them a voice by disabusing employers of the notion that they hold all the power and their employees have none.

To date, the fund has reached $21.3 million and the National Women's Law Center has recruited hundreds of lawyers to handle the cases that are streaming in. Over 1,800 claimants have been connected to legal assistance in the months of the fund's existence. The group of legal experts not only offer employment law expertise, including in cases of harassment, discrimination, and pay equity, but also defamation expertise as women are sued for slurring the name of their alleged harassers or the women are slurred by those they have accused.

The practical impact of these two important moments is being felt in HR departments, on boards, and in the C-suite of businesses large and small. That sexual harassment policy that has long existed as a tool to defend sexual harassment suits is being dusted off and repurposed for its originally intended purpose – protecting employees from sexual harassment by dictating a culture of respect, serving as a guideline for investigations, and providing clarity around discipline. Those charged with enforcing the policies' provisions now have the ear of leadership as they investigate claims and recommend disciplinary action. Businesses must justify their decisions to their customers, who have shown a willingness to change their spending habits based on business's reaction (or lack of reaction) to harassment complaints. The economic pressure to resolve complaints in a way that protects key rainmakers and business generators is now outweighed by the economic pressure to engage in a bona fide harassment investigation and implement meaningful remedial measures.

Is #TimeUp for the Legal Profession?

One question that is raised repeatedly is: when will #MeToo and #TimesUp hit the legal profession? We have seen titans of Hollywood, Silicon Valley, politics, the media, and the venture capital community very publicly fired after investigations into sexual harassment complaints, but we have yet to see that happen to equity partners or general counsel.

The only salacious #MeToo moment so far for the legal profession began in the same way as the Harvey Weinstein scandal, with a crowd of women telling eerily similar stories. A group of Judge Alex Kozinski's 9th Circuit law clerks told *The Washington Post* that he shared sexual images and banter with them in chambers. By virtue of their position and for lack of a clear reporting mechanism, the clerks had no power to object or remove themselves from the situation without career reprisal. In his statement after the allegations were published and Judge Kozinski announced his retirement, he expressed regret if he caused any offense, a tacit statement that he did not feel that he had done anything wrong. This is a reflection of a society that at worst supported the kind of culture that thrived in his chambers and at best turned a blind eye. While Judge Kozinski's retirement mooted the investigations into his behavior, the Washington Post article prompted swift action from Justice Roberts, who immediately formed a committee to evaluate and revise the sexual harassment guidelines that apply to the federal judiciary.

Outside of the Kozinski story, we have only seen the first ripples of #MeToo and #TimesUp in BigLaw with the dismissal of three partners as a result of sexual harassment investigations in February of 2018. Two partners operated out of UK offices and in both cases neither the firm nor the person who reported the harassment disclosed the name of the partner.

In one case, the allegation was made and investigated a few years ago, the firm offered the accuser a settlement, she left, and the accused remained at the firm. Presumably in light of the glare of the #MeToo movement the firm brought in an outside investigator and ultimately decided that it could have handled the situation better and the accused has now left the firm. It does nothing to remediate the impact he had on the associate's career, but it delivers a message to the firm's employees that it will no longer tolerate a culture that turns the other way in the face of sexual harassment.

In the other case, a partner was accused of sexual harassment at a smaller firm prior to merging into a BigLaw firm. When the BigLaw firm learned of the complaint it undertook its own investigation and terminated the partner. In both of these cases, law firms revisited the results of sexual harassment investigations that preceded the #MeToo and #TimesUp movements. Both firms decided that, when viewed through society's new lens of acceptability, they should part ways with the accused. This will shape the way that those firms investigate claims of sexual harassment from this point forward.

A third case demonstrates a major concern for employers and employees alike. A partner was accused of sexual harassment at one BigLaw firm, which undertook an investigation and decided to terminate the partner. Not long after, another BigLaw firm, apparently in the dark as to why the partner left his prior firm, made a splashy announcement of his arrival. When a woman from his original firm spoke out about why he left, he was dismissed by his new firm. Before #MeToo and #TimesUp, this man's former colleague likely would not have felt empowered to speak up for fear of not being heard or for fear of retaliation.

In all three cases, the partner departures only made news after the investigations ran their course. This distinguishes the #MeToo moments for law firms from those in politics, business, and media where the fact of allegations inspired strong public reactions. The assumption in those cases was that the public was entitled to the facts uncovered by the investigation and that the investigation had to come to conclusion within a matter of days.

How have these BigLaw investigations stayed out of the news until they were resolved? It may be because as a profession we believe in due process

"Employees are entitled to operate within a workplace without being sexualized or without being subject to a barrage of sexual comments. It should be the standard of operation for a professional environment, whether that environment is traditional or modern, to treat coworkers with respect."

and discourage publications of accusations before an investigation runs its course. It may be that accusers still fear the personal or professional stigma of making a public report of sexual harassment or assault. It may be that we are seeing #MeToo percolate into the legal profession, but in a much more understated way.

Time will tell whether the legal profession can apply the lessons of the #MeToo moment without need for splashy headlines. If firms and legal departments fail to reform their processes for investigating sexual harassment claims and enforcing impactful consequences, the balance that is allowing them to operate under the radar will shift and they will face the same public scrutiny that has toppled the other leaders of industry.

Practical impacts of #MeToo

A unanimous bipartisan group of state attorneys general wrote to Congress encouraging them to enact proposed legislation that would revised the Federal Arbitration Act by banning mandatory arbitration of sexual harassment claims. Some of the claims that have come to light as a result of the #MeToo movement uncovered a web of enablers who may or may not have known that they were playing a role in a larger pattern of behavior. Harvey Weinstein's many alleged transgressions may have been averted if earlier settlements had not remained confidential.

To be clear, if mandatory arbitration is barred for sexual harassment claims, arbitration would still be available to victims of sexual harassment if that is how they feel comfortable pursuing their claims. There is still a very real fear of retribution from future employers and some victims may want the privacy of pursing their claims through arbitration. But for those who are not afraid of reprisal and are motivated by the need to protect future potential victims, escaping from the bounds of mandatory arbitration will allow them to make a real impact.

In the case of Roger Ailes and Fox News, if Gretchen Carlson had not found a way around the mandatory arbitration provision of her contract, the world may not have known of a pattern of harassment and assault at the company. Ms. Carlson would have received a settlement or award and Mr. Ailes would have remained at the head of Fox News. As it was, the public backlash to the public proceedings push for stronger measures. Now, Ms. Carlson is one of the leading proponents of the move to ban mandatory arbitration clauses as they apply to sexual harassment claims. The New York Senate passed the first ban against mandatory arbitration in early March. The Congressional bill is still pending.

Another area of immediate impact is on the HR departments across the legal profession. Before the #MeToo movement, if employers were sued for failing to prevent or address harassment in their halls, they needed sexual harassment policies as evidence of their effort to protect against a hostile environment. The mere existence of a policy was exhibit A of their effort to create an appropriate work culture. After #MeToo, they are almost certainly all taking a red pen to their old sexual harassment policies and perhaps even their dating policies. Policies that lack real enforcement mechanisms will be replaced. Investigations will catch the attention of firm and company leadership rather than being hidden in an HR department that lacks authority to enforce policies remedies. HR departments will be empowered to investigate even the biggest firm rainmakers rather than make apologies for the bad behavior and move on.

One issue that must be addressed and that has not made any real headlines is a mechanism to alert future employers to serial harassers. Employers have long feared defamation suits arising from tepid references. As a result, harassers are free to hop from one legal job with one set of victims to another legal job with another set of victims. One element of the problem can be addressed by pooling sexual harassment and assault claims in one place and requiring reports of any claims to the top leadership of the firm or company. That avoids the silo effect, which often allows them to of leadership to visualize trends and live in a world of plausible deniability. The other element of the problem can be addressed with clarity around the responsibility of prior employers to honestly respond to requests for information on the reason for termination. It is a complicated issue but preventing future instances of harassment and assault justifies the work required to find a workable solution.

The Economic Impact of Bad Behavior

One thing that is becoming clear in the #TimesUp movement is that legal accountability is diverging from social accountability. Certainly, some of the allegations that have led to the public ouster of CEOs, Board Chairs, and media personalities have risen to the level of legal culpability, but some of the alleged behavior, which may not raise to the level of creating a hostile work environment, is being seen in a new light.

The standards for acceptable professional behavior should have been clear long ago, but the polarization brought on by the #MeToo and #TimesUp movements has clarified right and wrong. Employees are entitled to operate within a workplace without being sexualized or without being subject to a barrage of sexual comments. It should be the standard of operation for a professional environment, whether that environment is traditional or modern, to treat coworkers with respect. Employers can create workplaces that support and encourage innovation, fun, and creativity without allowing it to devolve to a sexually charged environment. Employers should have the vision to see how certain lighthearted, but misguided behavior can lead to dangerous behavior.

As a result of the #TimesUp movement, customers are changing their purchasing decisions based on how well companies respond to sexual harassment allegations. Customers are holding companies to a higher standard than "just don't allow your leaders to break the law". Customers want to support companies that have shown real leadership in creating cultures of respect within their workforces. When allegations came to light that Steve Wynn had a history of harassing women the stock of Wynn Resorts dropped precipitously, pushing Wynn to step down from his eponymous company.

A similar reaction from customers who participated in the #DeleteUber campaign resulted in the ouster of founder Travis Kalanick. That hashtag movement was motivated by customers' belief that the former CEO created a "bro" culture that allowed sexual harassment to fester. Despite initially handling the matter as would have been acceptable even just one year ago – issuing a corporate apology and promising to do better – Uber ultimately bowed to the economic pressure and parted ways with its founder. This was one of the incidents that buoyed other victims and helped precipitate the #MeToo and #TimesUp movement.

One concern, especially for lawyers who believe in due process, is the swiftness of justice that is required by the purchasing public. When an allegation comes to light in the media or on social media, customers are very quick to organize a boycott or sell shares before an investigation can run its course. That creates an invitation to fraud and has the potential to impose irreversible damage on the innocent. We must, as a country, find the balance.

We are already starting to see more men who are afraid to work one on one with women or travel with women colleagues. The fear of fraudulent claims of sexual harassment or mixed messages keeps men from having closed door conversations with women at work. Those exclusions will erect just as strong a barrier to women's professional success as sexual harassment or assault. Men need clarity on what is and is not acceptable workplace behavior after many years in which unacceptable behavior was ignored. With new ground rules established, men and women should be able to work together to achieve the results promised by all of the studies that show the economic benefits of working with a diverse team. Without this clarity, women will be systematically excluded from the mentorship and sponsorship relationships that lead to advancement and parity.

The #MeToo and #TimesUp movements changed everything about the way that we think about working with others. It changed what we all should expect in terms of respect for co-workers as well as the repercussions for failing to meet the legal or social standard for acceptable behavior. We should celebrate the fact that victims' voices and stories are being heard in a new and important way and that our voices are impacting policy. We should celebrate that #TimesUp is giving a voice to the voiceless.

The best possible outcome of #MeToo and #TimesUp is parity in the workplace. It begins and ends with respect. To get there, we as a society must leverage these powerful hashtag movements for change through impactful legislation and policies that protect the rights of all employees to succeed on their merits.

Jenny Waters is Executive Director of the National Association of Women Lawyers where she directs the organization's operations and implementation of the strategic plan. Prior to her work at NAWL, Ms. Waters was a litigator at a Chambers-ranked boutique law firm in Chicago handling complex commercial litigation. Ms. Waters graduated from Princeton University in 1998 and earned her J.D. from Northwestern University School of Law in 2002.

Shifting Paradigms in the Legal Profession: Altering Perception for a Better Reality

At the 2018 Mid-Year Meeting South Beach, members had the opportunity to shape the future of NAWL and the legal profession. They recognized and honored leading lawyers and business leaders who have made a significant impact on improving and diversifying the legal profession. And, as always, there was plenty of time for networking built in throughout the event.

Photos: Marty Morris/ MPM Photography LLC

Networking Roster

The NAWL Networking Roster is a service for NAWL members to provide career and business networking opportunities within NAWL. Inclusion in the roster is an option available to all members, and is neither a solicitation for clients nor a representation of specialized practice or skills. Areas of practice concentration are shown for networking purposes only.

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ACC	Accounting
ADO	Adoption
ADR	Alt. Dispute Resolution
ADV	Advertising
ANT	Antitrust
APP	Appeals
ARB	Arbitration
AVI	Aviation
BDR	Broker Dealer
BIO	Biotechnology
BKR	Bankruptcy
BNK	Banking
BSL	Commercial/ Bus. Lit.
CAS	Class Action Suits
CCL	Compliance Counseling
CIV	Civil Rights
CLT	Consultant
CMP	Compliance
CNS	Construction
COM	Complex Civil Litigation
CON	Consumer
COR	Corporate
CPL	Corporate Compliance
CRM	Criminal
CUS	Customs
DEF	Defense
DIV	Diversity & Inclusion
DOM	Domestic Violence
EDR	Electronic Discovery Readiness Response
EDI	E-Discovery
EDU	Education
EEO	Employment & Labor
ELD	Elder Law
ELE	Election Law
ENG	Energy
ENT	Entertainment
EPA	Environmental
ERISA	ERISA
EST	Estate Planning
ETH	Ethics & Prof. Resp.
EXC	Executive Compensation
FAM	Family
FIN	Finance
FRN	Franchising
GAM	Gaming
GEN	Gender & Sex
GOV	Government Contracts
GRD	Guardianship
HCA	Health Care
HOT	Hotel & Resort
ILP	Intellectual Property
IMM	Immigration
INS	Insurance
INT	International
INV	Investment Services
IST	Information Tech/Systems
JUV	Juvenile Law
LIT	Litigation
LND	Land Use
LOB	Lobby/Government Affairs
MAR	Maritime Law
MEA	Media
MED	Medical Malpractice
M&A	Mergers & Acquisitions
MUN	Municipal
NET	Internet
NPF	Nonprofit
OSH	Occupational Safety & Health
PIL	Personal Injury
PRB	Probate & Administration
PRL	Product Liability
RES	Real Estate
RSM	Risk Management
SEC	Securities
SHI	Sexual Harassment
SPT	Sports Law
SSN	Social Security
STC	Security Clearances
TAX	Tax
TEL	Telecommunications
TOL	Tort Litigation
TOX	Toxic Tort
TRD	Trade
TRN	Transportation
T&E	Wills, Trusts & Estates
WCC	White Collar Crime
WOM	Women's Rights
WOR	Worker's Compensation

NAWL welcomes new members

Membership in the National Association of Women Lawyers has many advantages, among them, opportunities for continuing legal education, a subscription to the Women Lawyers Journal, leadership development and professional networking with other members. Please welcome these new members who joined to take advantage of these and the many other member benefits.

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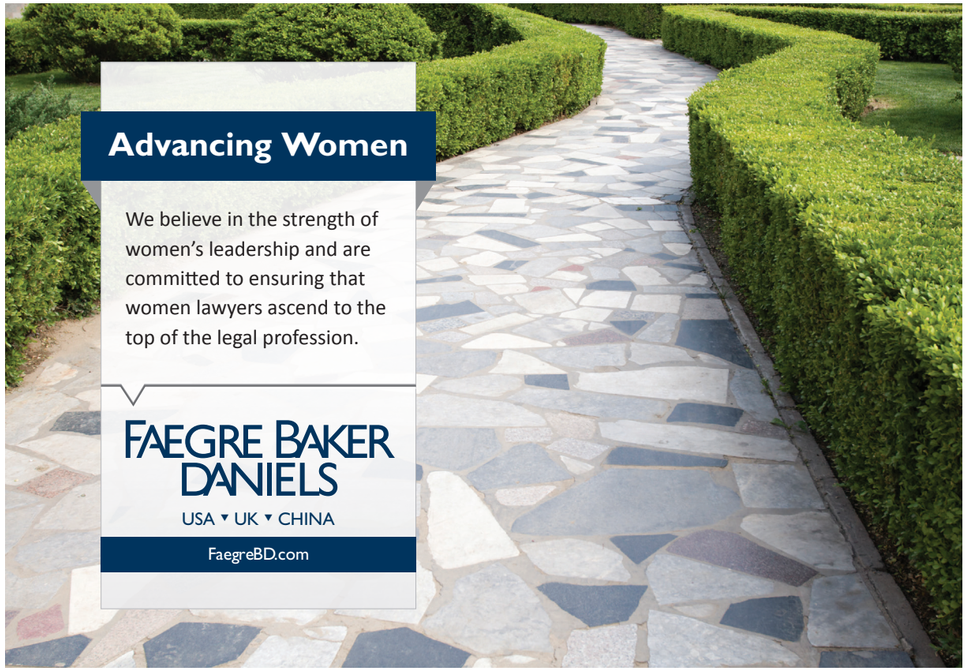
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