

# Onboarding notes

## I-9 procedures are changing and non-compete agreements could be next

INTERVIEWED BY ADAM BURROUGHS

Many employers have questions about changes, both made and proposed, to certain onboarding issues — an update to the I-9 verification process as well as proposed federal changes to non-competition agreements.

*Smart Business* spoke with Alexandra G. Farone, Attorney at Law at Babst Calland, about what employers need to know about the I-9 changes and what's happening with non-compete agreements.

### WHAT'S HAPPENING WITH THE I-9 VERIFICATION PROCESS?

The I-9 employment eligibility verification process involves looking at documents to confirm the employee is who they say they are and that they are authorized to work in the U.S. The longstanding requirement that employers review those documents in person was relaxed during the COVID-19 pandemic, allowing it to be done remotely. As of August 1, 2023, the categorical relaxation of the in-person verification requirement ended. Employers now are required to resume in-person I-9 verification for all new employees, whether themselves or via an authorized agent, unless they are a registered user of the web-based platform E-Verify in good standing.

In addition, employers are also now required to re-verify in person anyone who had been verified remotely during the COVID-19 pandemic, and to do so by the end of August.

To address the challenge of re-verifying remote employees, employers who are not registered E-Verify users can designate an 'authorized agent' — who can be anyone, regardless of qualification — to act on behalf of the company to verify in person the employee's identification and work authorization documents. But no

### Alexandra G. Farone

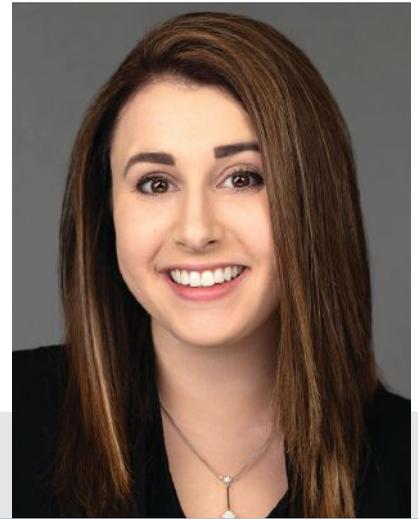
Attorney at Law  
Babst Calland

412.394.6521  
afarone@babstcalland.com



**WEBSITE:** For more information on how these changes could affect your business, connect with Alexandra or visit [www.babstcalland.com](http://www.babstcalland.com).

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matter who acts as the agent, the liability for inaccurate verification remains solely with the employer. So, if an agent verified someone who is not actually authorized to work in the U.S., the employer is going to be penalized.

Additionally, a new I-9 form just went live on August 1. There are several changes to the form, but most relevant is the ability for E-Verify employers to indicate remote examination of I-9 documents. The previous form can be used through October 31, 2023.

### WHAT'S HAPPENING WITH NON-COMPETE AGREEMENTS?

Earlier this year, the Federal Trade Commission issued a notice of proposed rulemaking on a potential national ban on non-competes, making the assertion that preliminary findings indicate that non-competes constitute an unfair method of competition, in violation of Section 5 of the Federal Trade Commission Act. Also, the General Counsel for the National Labor Relations Board issued guidance this year that indicates some existing non-compete provisions might violate the National Labor Relations Act. These announcements, along with emerging or imminent bans on non-competes in other jurisdictions have fueled rumors and misunderstandings among employers and employees alike that non-competes are already outlawed nationally.

This is not the case. No changes have been

made nationally as to the legality of non-competes. Right now, if an employer's city or state has not banned non-competes, the status quo is still in place, which is the case for Pennsylvania.

The ban that the FTC is contemplating is very broad. It would apply not only to employees, but also to independent contractors and unpaid volunteers. Existing non-competes would need to be rescinded, as they could legally no longer be in effect.

It looks as if the FTC is going to delay a vote on a final rule until next year. In the meantime, employers that use non-competes should begin thinking strategically about implementing non-disclosure agreements and similar protective measures in case the proposed ban does become law.

### WHO SHOULD EMPLOYERS TALK WITH IF THEY HAVE QUESTIONS?

Employers that are unsure about what's happening with these onboarding issues should call their employment attorney because the answers can be nuanced depending on factors such as the type of employer or whether a collective bargaining agreement is in place. It's best that employers talk with a legal expert to make sure that they're doing everything correctly at the outset of any onboarding issues, so that they can give the most accurate answers back to their employees and begin to plan for the future. ●