

Corporate Employers: Are You Prepared For I-9 (Employment Eligibility Verification) Audit?

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With its recent crackdown on employer compliance with employment verification laws, the U.S. Immigration and Customs Enforcement is taking bold new initiatives to audit employers' I-9 records. This article outlines the employment verification requirements, and what steps employers need to take to ensure compliance.

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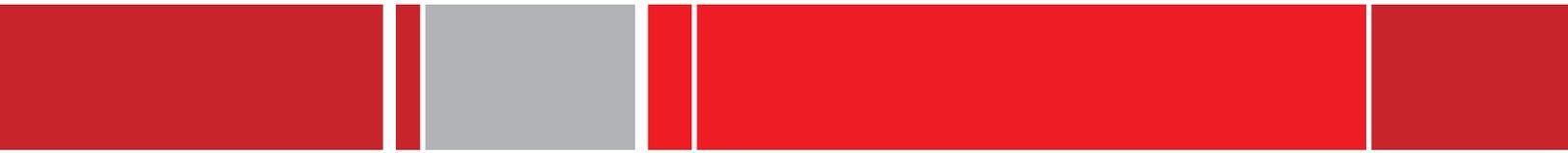
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■ PRACTICE POINT

Form I-9 was recently revised in December 2008. EFFECTIVE APRIL 3, 2009, EMPLOYERS MUST USE ONLY THE CURRENT VERSION OF FORM I-9 FOR ALL NEW HIRES, WHICH INCLUDES A REVISED LIST OF ACCEPTABLE DOCUMENTS.

Introduction

On July 1, 2009, U.S. Immigration and Customs Enforcement (ICE), the largest investigative arm of the Department of Homeland Security, announced that it issued a Notice of Inspection (NOI) to 652 businesses nationwide, as part of its larger initiative to increase its Form I-9 audits.

Form I-9 (“Employment Eligibility Verification Form”) is required to be completed by each new employee hired after November 6, 1986 to prove that he or she is authorized to work in the United States.

In a dramatic shift in strategy, ICE announced in April 2009 that it is focusing its resources on the auditing and investigation of employers suspected of knowingly employing illegal workers, rather than on the workers themselves. (Prior immigration enforcement attempts were often conducted by raiding factories and rounding up illegal immigrants not authorized to work in the United States.)

Compared to the 653 NOIs issued in just one day, ICE issued only 503 NOIs for all of fiscal year 2008. The surge in NOIs confirms the ICE’s commitment to reduce the demand for illegal workers, and to protect employment opportunities for those authorized to work.

American Apparel, a clothing manufacturer based in Los Angeles, was one of the 652 companies issued a NOI, for allegedly hiring approximately 1,800 illegal immigrants. American Apparel faces civil fines for any worker confirmed to be unauthorized.

Similarly, on July 7, 2009, Krispy Kreme was ordered to pay \$40,000 in fines following an I-9 inspection showing that the company had employed dozen of illegal aliens at one of its doughnut factories in Cincinnati.

The recent focus on I-9 audits demonstrates ICE’s increased commitment to hold employers accountable for their hiring practices and to ensure a lawful workforce.

To avoid the civil and criminal consequences for failure to adequately document the work authorization of their employees, it is imperative for companies to timely and properly complete their Form I-9s and to adopt strong immigration compliance procedures, including annual I-9 audits.

■ PRACTICE POINT

All documents must be unexpired. If a new hire presents a “green card” (Form I-551), the employer must re-verify the employee’s work eligibility before the document expires.

■ PRACTICE POINT

If an employee retires from your company after 20 years of service, you must properly store the original Form I-9 for 21 years.

Employment Eligibility Verification Procedures

Since the passing of the 1986 Immigration Reform and Control Act (“IRCA”), all employers must complete Form I-9 for all new employees, including U.S. citizens, to confirm their identity and work authorization eligibility.

Employers are required to screen ALL NEW EMPLOYEES at the time they are hired to ensure that they are authorized to work.

Generally speaking, the employment verification system consists of the following procedures:

- At the time of hire, employees must complete their part of Form I-9, which includes their name, address, date of birth and Social Security number. The employee must also attest under the penalty of perjury that he or she is a citizen or national of the United States, an alien lawfully admitted for permanent residence (a “green card” holder), or an alien authorized by INS to work in the United States; and that the documents presented as evidence of identity and employment eligibility are genuine.
- Within three business days of hiring, the employee must present to the employer either an original document that establishes both the employee’s identity and his or her eligibility to work (e.g., U.S. passport); or one original document for identity (e.g., driver’s license) and one for employment eligibility (e.g., a U.S. birth certificate). Form I-9 includes a list of acceptable documents.
- The employer must complete its part of the Form I-9, indicating what document(s) were presented. The employer must also attest under the penalty of perjury that he or she has examined the documents, and that they appear to be genuine, and that the individual hired appears to be eligible to work.
- The employer must retain the Form I-9 for every employee, regardless of nationality, for at least three years, or for one year after the employment ends, whichever is later.
- The Form I-9 must be available for inspection by an authorized officer of the Department of Homeland Security (DHS), Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), or Department of Labor (DOL) within three days’ notice.

■ PRACTICE POINT

It is illegal to knowingly contract with a company that hires unauthorized workers. For example, if you contract with a cleaning company to wash your floors, you do not need to complete Form I-9 for this company's cleaning crew. However, you must be sure that the cleaning company is in compliance with IRCA and any state employer sanctions laws.

Failure to properly retain and store the Form I-9 for each employee along with supporting documents in such a manner that it is readily produced within three business days of receiving an NOI may expose the employer to fines. Even clerical errors like failing to sign or date Form I-9 carries risk of penalty, so it is imperative that Form I-9 be completed accurately.

What Are The Penalties For Non-Compliance?

Employers who fail to comply with the above procedures are subject to civil fines of up to \$1,100 for each violation.

Employers are also subject to civil fines for knowingly hiring or keeping as an employee an unauthorized alien according to the following schedule:

- *1st Violation:* not less than \$275, nor more than \$2,200 for each unauthorized alien
- *2nd Violation:* not less than \$2,200, nor more than \$5,500 for each unauthorized alien
- *3rd Violation:* not less than \$3,300, nor more than \$11,000 for each unauthorized alien.

Further, employers engaged in a "pattern or practice" of illegal hiring face possible criminal penalties of up to \$3,000 for each unauthorized alien employed and/or imprisonment of up to six months.

Employment Eligibility Verification And Non-Discrimination

In verifying employment eligibility, it is illegal to discriminate against any individual (other than those not authorized to work in the United States) in hiring or discharging because of that individual's national origin or citizenship status, or because they are work-authorized.

Further, in completing Form I-9, an employer cannot specify which documents they will accept from an employee, provided that the documents are otherwise in a prescribed form as identified on the I-9 itself.

This presents a potential conundrum for the diligent employer who, for instance, refuses to accept a Social Security Card that does not appear legitimate, but later proves

genuine. Refusing to hire an employee under such circumstances can expose the unwitting employer to a charge of discrimination.

Employers should consult with a qualified attorney to ensure that their I-9 procedures are lawful.

Conclusion

Given ICE's renewed I-9 audit inspection efforts, it is increasingly important for employers to conduct regular I-9 audits so that they are properly prepared in the event of an I-9 audit.

Comprehensive immigration compliance procedures (including review deadlines and annual audits) should be adopted by all companies seeking to avoid running afoul of U.S. immigration laws.

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