



I-9 Compliance: What You Need to Know

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Immigration & Customs Enforcement (ICE) recently announced an initiative to step up audits of employment records. Are you at risk if ICE comes knocking at your door? There are a number of things employers can do to minimize the risk of immigration violations, including developing and maintaining appropriate compliance programs.

Complete and Maintain Form I-9's

U.S. employers must complete and retain a Form I-9, Employment Eligibility Verification, for each individual hired for employment in the United States. The Immigration Reform and Control Act of 1986 imposes stiff penalties for employers who fail to comply with the law's requirements, including proper completion and maintenance of I-9's.

The I-9 consists of several parts: Section One should be completed by the employee before he or she begins working; Section Two requires employers to confirm identity and employment eligibility within three days of the date of hire. The attachment to the I-9 describes the documents that an employee may present to verify identity and work authorization. Section Three relates to re-verification. Employers must re-verify employment authorization before an employee's work authorization expires. Employers also should re-verify when a former employee is re-hired, either by completing a new I-9 or, under certain circumstances, updating the original by completing Section Three.

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Employers may use the I-9 form with a revision dates of August 7, 2009, or February 2, 2009. The revisions dates are located at the bottom right corner of the form. Employers should photocopy all documents presented by the employee and keep the I-9 with the copies of the documents in an I-9 file maintained separate from the employee's personnel file. Form I-9's should be maintained for three years after the date the employee's employment begins or one year after the employment is terminated, whichever is later. In light of increasing ICE audits, employers should consider conducting an internal audit of their I-9 records and ensure they have an effective and consistent immigration policy in place.

Adopt an Immigration Policy

In addition to proper maintenance of I-9's, employers should consider adopting a corporate immigration policy. Like any sound policy, it should plainly state that all employees are expected to comply with all relevant immigration laws. The policy also should identify a compliance officer who is responsible for ensuring the company and its employees understand the laws and the policy. It should establish a training program and require regular monitoring and auditing to measure compliance. Most importantly, the policy should specify ramifications for violations.

Have you heard of E-Verify?

Employers should consider enrolling in the government's E-Verify program. E-Verify is an internet-based system operated by U.S. Citizenship and Immigration Services (USCIS) in partnership with the Social Security Administration. It currently is free to employers and is available in all 50 states. It provides an automated link to federal databases to help employers determine employment eligibility of new hires and the validity of their Social Security Numbers.

E-Verify provides a simple way for employers to electronically verify the employment eligibility of their newly hired employees. According to USCIS, E-Verify virtually eliminates Social Security mismatch letters, improves the accuracy of wage and tax reporting, and helps employers maintain a legal workforce. Employers who use E-Verify have a rebuttable presumption that they have not knowingly hired an unauthorized alien. However, an employer cannot knowingly employ an unauthorized worker, even if that individual's information has successfully passed through the E-Verify program.

Although E-Verify is currently a voluntary program, legislation has been introduced in both the House and the Senate that would expand the E-Verify system and require its use by all employers. In the meantime, federal contracts awarded and solicitations issued after September 8, 2009, will include a clause committing government contractors to use E-Verify. Companies awarded a contract with the federal government will be required to enroll in E-Verify within 30 days of the contract award date.

Although the government is singing the praises of E-Verify, the program is not without fault. It has a relatively high error rate and it will not pick up on false identifications. For example, it will verify whether a Social Security Number is valid and whether the Social Security Number has been issued to the person whose name has been provided. If an employee provides a Social Security Number and matching identifying information, E-Verify cannot identify whether the information has been stolen. Thus, E-Verify does not provide a risk-free means of verifying workers.

Trends in Enforcement

This summer, ICE announced a new initiative to hold employers accountable for their hiring practices as they relate to immigration. As the first step in the initiative, ICE issued Notices of Inspection to 652 businesses nationwide – approximately 150 more than it issued during the entire fiscal year 2008. Any business can be the subject of an I-9 audit. Most audits involving non-egregious violations are likely to result in employer fines of approximately \$100 to \$1000 for every improperly completed I-9.

Not only is ICE stepping up enforcement, but employers who employ unauthorized workers are being targeted by their competitors. Companies are filing lawsuits under the Racketeer Influenced and Corrupt Organizations Act (RICO) against their competitors, alleging that they are losing business as a result of the employer's pattern of hiring illegal aliens. RICO provides for stiff criminal and civil penalties and the federal courts have endorsed this new avenue of immigration enforcement.

ICE's increased focus on employer accountability, coupled with recent increased RICO litigation as a form of "self help," exemplifies the urgency for I-9 compliance. Because the emphasis is no longer on education and compliance, but instead rests squarely on enforcement and punishment, it is crucial for employers to assess their I-9 records and practices. Employers are encouraged to seek assistance from experienced immigration counsel when assessing and auditing internal practices.



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