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The Truth About I-9 Compliance

by Michael J. Wildes, Esq.

Over the past few years, worksite investigations have been increasing in frequency across all industries in the United States. In 2008 alone, U.S. Immigration and Customs Enforcement (ICE) made over 1,100 criminal arrests tied directly to the enforcement of such investigations. These arrests included business owners, managers, and supervisors who were convicted of criminal offenses associated with the knowing hire of undocumented workers, Social Security fraud, money laundering, and identity theft.

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In addition, ICE took over 5,100 undocumented workers into custody based on immigration violations revealed during worksite investigations. And, since April of last year, ICE has implemented a new, comprehensive strategy to reduce the demand for illegal employment and to protect employment opportunities for the nation's lawful workforce. Under this strategy, ICE is focusing its resources on the auditing and investigation of employers suspected of cultivating illegal workplaces by knowingly employing undocumented workers. As part of this initiative, 1,897 businesses around the country have received Notices of Intent to have their I-9s audited to determine compliance.

In the event of an audit, employers have 3 days to present their I-9s for inspection. The I-9s are examined for missing and/or incorrect information and evaluated to determine if the employer is knowingly allowing unauthorized individuals to work at his/her company. Penalties, which range anywhere from \$110 for each I-9 paperwork violation to up to \$16,000 per undocumented worker employed, are then assessed accordingly.

Therefore, it has become increasingly important to be aware of the potential consequences of an ICE worksite inspection, and to be prepared in the event of an audit.

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What is Form I-9 and how is it completed?

The Immigration Reform and Control Act of 1986 (IRCA) mandates that as of November 6, 1986, all U.S. employers are required to have a Form I-9, Employment Eligibility Verification, on file for each newly hired employee, citizen and non-citizen alike. This form, which verifies the identity and employment eligibility of the newly hired individual, must be completed by the employer or its representative within 3 business days of the employee's first day of work. Employers should develop a consistent policy regarding when they provide the employee with the form as well as the manner in which the form is completed.

Once the employee has the form, he/she is responsible for entering his/her personal information such as name, address, date of birth, and social security number, when applicable, in Section 1. The employee must attest, under penalty of perjury, to the basis on which he/she is employable (i.e., as a citizen of the United States, a noncitizen national, a lawful permanent resident, or an alien authorized to work). If the employee needs assistance completing the form, the individual providing that help must complete the preparer/translator section.

Thereafter, the employer must review, in its unexpired original state (with the exception of a certified birth certificate), a document or set of documents according to the List of Acceptable Documents attached to the form, record information specific to the document (s) in Section 2, and attest to the authenticity of the documents and the date the employment began.

When employment is not time limited, as is the case for U.S. citizens, noncitizen nationals, lawful permanent residents, asylees [someone who has political asylum in the US] and refugees, there is typically nothing more to do once the form has been completed and filed away. However, when the employment is time limited, as in the case of aliens authorized to work for a specific period of time, the date of expiration must be noted and the I-9 revisited prior to that time so that it can be updated and the individual's status reverified in Section 3. Failure to do so can be financially costly to the employer who is audited by ICE and found to have unauthorized individuals on payroll.

On its face the I-9 form seems deceptively simple to fill out correctly and without understanding its importance in proper context, many busy employees, HR reps, and employers give it only a cursory glance before filing it away. As perhaps proof of this one-page form's relative difficulty, U.S. Citizenship and Immigration Services (USCIS) has published a nearly 60-page booklet called the M-274: Handbook for Employers. The booklet is available online through the USCIS website and is highly recommended reading for all employers and their representatives administering the forms.

The key to I-9 completion is a clear understanding of the nuances of the form as well as setting a consistent and clear company compliance policy. Doing so will enable the businesses to continuously operate within the confines of this law.

Make sure you have the information you need to know about these current HR challenges and how to most effectively manage them in your workplace.

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