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Ideas & Trends

IMMIGRATION

What you need to know about the Form I-9

Over the past few years, worksite investigations have been heating up in the United States across all industries, says Michael Wildes, Managing Partner of the leading immigration law firm, Wildes & Weinberg, P.C. 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.

In addition, ICE took over 5,100 undocumented workers into custody based on immigration violations revealed during worksite investigations. So if you think that your organization is safe from this massive effort, it is safe to think again.

Begin with an understanding of what is required

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 employment eligibility of the newly hired individual, was recently updated effective August 7, 2009 and must be completed by the employer or its representative within three business days of the employee's first day of work. Failure to do so can result in significant civil and criminal penalties. In fact, effective March 27, 2008, the Department of Homeland Security ("DHS") increased penalties assessed against businesses that knowingly hire undocumented workers by 25 percent.

Penalties for failed audits. In an effort to reduce the illegal employment of undocumented workers, ICE conducts audits of businesses suspected of engaging in illegal hiring practices, especially those in fields known to employ undocumented workers. In the event of an audit, employers have three days to present all of their I-9s for inspection. They are then examined for missing and/or incorrect information and penalties are assessed accordingly.

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SMOKING CESSATION

Case Study: How Navistar improved productivity by implementing and supporting no-smoking initiatives

Now only did we just enter into a new year, we also entered into a new decade and people are celebrating with bigger than ever resolutions. Some are vowing to finally lose those last 20 pounds while others are certain that this will be the year they smoke their last cigarette. There's no better time to quit smoking than now when tobacco-related illness is the leading preventable cause of death in the United States, accounting for approximately 20 percent of all deaths annually. In addition, smoking-related medical expenses cost employers an extra \$2,132 per smoking employee per year.

In response to growing evidence that tobacco cessation programs improve employee health and yield cost savings to employers, many companies have begun implementing workplace smoking cessation programs. The National Business Coalition on Health (NBCH) has developed a case study profiling Navistar, an employer that has successfully implemented such programs.

Background

Navistar, an Illinois-based truck and engine company, is an industry leader in delivering

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FORM I-9

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These penalties range anywhere from \$110 for each paperwork violation found on an I-9 up to \$16,000 per undocumented worker found to be employed. 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. U.S. businesses should adopt compliance policies that will enable their businesses operate within the confines of this law.

Since April of last year, ICE has implemented a new, comprehensive strategy to reduce the demand for illegal employment and 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 be audited to determine their compliance.

I-9 is deceptively difficult

The I-9 form is deceptively difficult 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. While failing to collect I-9 forms for each employee hired after 1986 is a serious offense, the mere possession of I-9 forms is not sufficient to substantiate a good faith effort to verify employment eligibility. Substantive errors on the forms are reason enough to be levied with serious fines and/or criminal penalties. As perhaps proof of this one-page form's relative difficulty, U.S. Citizenship and Immigration Services (USCIS) has published a nearly sixty page booklet called the *M-274: Handbook for Employers*. The booklet is available online through the USCIS website and, according to Wildes, is highly recommended reading for all employers and their representatives administering the forms.

The difference between identity and eligibility documents. The M-274 explains that the documents provided for the completion of the I-9 must serve

the dual purpose of verifying identity and employment eligibility. Some documents satisfy both requirements at the same time; U.S. passports, Permanent Resident Cards ("green cards"), and some Employment Authorization Cards are counted among these. Other documents satisfy only one of the two requirements; for example, driver's licenses establish identity, but not employment eligibility. Likewise, certified birth certificates indicating U.S. birth establish American citizenship and therefore employment eligibility but because they do not bear a photo of the holder, they cannot establish identity.

Sometimes evaluating proffered documents requires a better-than-average understanding of immigration status. Social Security cards are commonly provided as proof of employment eligibility but HR representatives must recognize that not all Social Security cards qualify to this end. Some aliens receive Social Security cards that indicate "Not Valid for Employment" which, clearly, are not an acceptable form of work authorization. Still others may indicate "Valid for Work Only With DHS Authorization." These cards are issued to aliens who have been granted the temporary right to work in the U.S. but whose authorization may be restricted to specific pre-authorized employers. Careful review is required of all documents provided, especially in these cases.

Whereas establishing the employment eligibility of an American citizen bearing a U.S. Passport is a relatively straightforward process, navigating the mass of interrelated forms required of aliens with legitimate work authorization can be significantly more difficult. For example, aliens bearing a J-1 visa must provide an unexpired foreign passport, an I-94 form, and a DS-2019 form. Should any of these elements be missing, employment eligibility was not sufficiently verified. Certain receipts are considered acceptable under given circumstances and not under others. In short, the I-9 form, the importance of which is growing at a very fast rate, is not an easy form to navigate.

Avoid discrimination

Side-by-side with the I-9 and employment eligibility verification comes the issue of employment discrimination. Though verifying

the documents of aliens with work authorization is sometimes a more onerous process, it is absolutely essential that employers not grant preferential hiring treatment, as an overarching policy, to citizens over any other group. Wildes points out that regarding this matter, the M-274 states: "[You should not] limit jobs to U.S. citizens unless U.S. citizenship is required for the specific position by law; regulation; executive order; or federal, state, or local government contract. On an individual basis, you may legally prefer a U.S. citizen or national over an equally qualified alien to fill a specific position, but you may not adopt a blanket policy of always preferring citizens over noncitizens."

The rights of U.S. citizens, permanent residents, temporary residents, asylees and refugees are universally protected under U.S. law. Engaging in unfair immigration-related employment practices may result in significant civil money penalties and possibly compensatory damages. Other forms of prohibited hiring practices include national origin discrimination, unfair documentary practices (document abuse), and retaliation. It is expressly forbidden to request that an employee provide specific documents or more documents than is necessary to establish identity and employment eligibility.

Further, it is discriminatory practice to set different standards of employment

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Taking inventory of your workforce composition saves money

We've seen plenty of suggestions on what to do with an organization's full time or contingent employees, but not many on how to best evaluate the entire composition of the workforce. This type of evaluation is the first step towards improved talent inventory control and is vital in this tough economy.

Here are some tips, provided by an HR expert, for improving your control over talent inventory, the benefit of which is a potentially large cost savings:

1. **Segmentation.** Provide adequate information to employees who are not members of your full-time staff. This includes detailing specific skill set requirements and standard use of every area of operations. It's not enough to simply categorize these workers as full time or temporary employees. Rather, create categories such as professional contingent, administrative contingent, independent contractor, technical consultants, business consultants and deliverable associated (the talent necessary to complete projects or statements of work).
2. **Governing policies.** Define the criteria for acquiring non-employees. The policies and procedures put in place should not prohibit the business' need to place talent quickly. Instead, they should manage all sources of talent, and connect them to very specific measurable performance expectations.
3. **Conversion of deliverables to skill requirements.** Evaluate all projects and statements of work to determine if they are being abused as an end to run around headcount. This is a frequent tactic used to connect the needed skill set against the deliverables that are understood as necessary for the current fiscal year (or any other short term objective). Typically, it's possible to convert a small percentage of skills currently being used to complete projects or statements of work into standard skill requirements. By doing this, there is an opportunity to decrease the pay rate for this labor, and thereby the overall cost of having it as part of the workforce.
4. **Audit independent contractors.** Identify company-wide use of employees classified as independent contractors. It's not unusual to discover that approximately 25 percent of independent contractor use violates state compliance regulations. And, in an economy where state revenues are shrinking, greater scrutiny by the states should be expected. Prepare your company by performing your own independent contractor audit.

5. **Analysis of buying autonomy.** Segmentation of the workforce enables a more discrete analysis of how much buying autonomy exists across varying lines of business and tactical areas of operation. Look to uncover unnecessary premiums being paid for talent, and uncover potentially inefficient or non-existent cost performance processes.
6. **Examine the supply chain.** Review and analyze every supplier and determine how they are performing. Identify the cost impact their services, if unmanaged, have on overall labor expenses. Completing these examinations frequently will uncover an inability to identify every participating vendor in the supply chain.
7. **Uncover and identify rogue spending.** While this may appear to overlap with the examination of the supply chain and the analysis of buying autonomy, the objective here is to gain an intimate understanding of expenses currently "off the radar," and subsequently, not measured for performance. □

Source: Taken with permission from a July 8, 2009 blog posting entitled, "Best Practices For Evaluating Workforce Composition," written by Joel Capperella; www.theseamless-workforce.com.


FORM I-9

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eligibility based upon place of birth, ancestry, native language, accent, or perceived "foreignness." You also may not refuse to accept a document because of that document's future expiration date, or request new documents during reverification if the employee presented one during initial verification. The burden of understanding the intricacies of the employment eligibility verification process is on the employer, and you may not plead ignorance or decry the process as being too complicated.

Careful training is essential. The best way to stave off an ICE audit is to manage one's I-9 Forms conscientiously, especially through careful training of HR representatives. Thoughtful reading of the M-274 handbook is essential, as is keeping it close by for frequent reference. Employing a third-party auditor is never a bad idea, and is almost essential if it comes to light that your own I-9s require remedial work. As the old saying goes, an ounce of prevention is worth a pound of cure, and so too with I-9 Forms. Demonstrating a good faith effort to rectify and maintain I-9 Forms may save thousands of dollars in time, money and heartache. □

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 For additional information regarding the Form I-9, check out the HR Practices Guide Explanations ¶353. In addition, a list of guidelines for conducting your own I-9 audit, a step that could go a long way in ensuring your compliance, can be found at ¶357, also in the HR Practices Guide Explanations.