



## Human Resources Law Alert

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### **I-9 Compliance: Walking the Tight Rope**

In recent years, an increasing number of small business owners have been fined and arrested on criminal charges for employing undocumented workers. As such, all employers, big and small alike, would be alarmed to learn that despite their diligent efforts, they have failed to fully comply with the law. These U.S. immigration laws are administered by the Department of Labor (DOL) and the Department of Homeland Security (DHS) and govern the requirements of employing all workers, including Americans. This lack of compliance can result in significant penalties, fines, loss of business, criminal charges and even imprisonment for business owners and high level managers for failing to comply. The Federal law requires that every U.S. employer complete a Form I-9, Employment Eligibility Verification Form, for all employees hired to work in the United States, regardless of the employee's citizenship. The purpose of Form I-9 is to help employers verify their employees' identity and their authorization to work in the United States. This requirement took effect on November 7, 1986.

While there are several U.S. government agencies authorized to audit an employer's I-9s, Immigration and Customs Enforcement (ICE) is the main agency charged with auditing

the I-9s of employers to enforce employment eligibility laws. During an I-9 audit, a team of highly skilled forensic auditors will inspect the Form I-9 documentation to identify areas of concern that may lead to potential criminal prosecution of the employer and to search for technical or substantive employer paperwork violations. If violations are found, the employer will be penalized. In determining the amount of any penalty assessed as a result of non-compliance, ICE uses a five prong test to mitigate the fines: (1) the size of the business of the employer being charged; (2) the good faith efforts of the employer to comply; (3) the seriousness of the violations; (4) whether the violation involved employing unauthorized workers; and (5) the history of the business' previous violations.

It is not difficult or time-consuming to complete Form I-9. The key to compliance is properly filling out and maintaining the Form. The I-9 is divided into three specific sections and can be completed any time after an offer of employment is made and accepted. Regardless, the I-9 must be completed within 3 days of the employee's start date. It is the employee's responsibility to correctly and legibly fill out the information in Section One of the Form I-9. By doing so, the employee provides, among other items, his/her name, address, date of birth, and if not a U.S. citizen, attests to his/her employment eligibility authorization.

In the next step, within three days of hire, the new employee must provide the employer with an original document or set of documents evidencing identity and work eligibility. The documents which are acceptable are laid out on a three-column list supplement to Form I-9. List A documents provide proof of identity and employment authorization, most popularly provided under this column is a U.S. passport. If a List A document is not

provided, then, a combination of List B (identity only) and List C (employment eligibility only) documents such as a drivers license (B document) and social security card (C document) can be used to establish the requisite proof for these columns. An employer may never suggest which documents an employee should provide to complete Form I-9 as such suggestions can trigger a discrimination lawsuit.

The employer is required to thoroughly review the document(s) provided by the employee to make sure that they do not appear to be fraudulent. (The employer is held to a “reasonable man standard” when examining the documents.) Once the documents have been accepted by the employer as relating to the individual, the employer then records the employee’s identity and employment eligibility information on specific lines in Section Two of Form I-9. In addition, the employer must complete additional fields in this Section and provide the date of hire, the complete name and address of the employer, as well as the name and title of the HR person tasked with Form I-9 completion. By completing this section, the employer attests that it has verified the identity and employment eligibility of the newly hired individual. Section Three only needs to be completed when the employee presented a time-limited work authorization document or when rehiring an individual whose prior I-9 was completed within the past three years and where there was no change in that employee’s work authorization status.

It is a regulatory obligation for employers to retain the employee's Form I-9 throughout the lifetime of the employment. Once an employee has been terminated, regardless of the reason, the employer must retain the form for three years from the date of hire or one year after the employee's last day of work, whichever is later. We have found it a good

business practice to keep the I-9s of current employees in alphabetical order in one binder and those of terminated employees alphabetically in another.

Despite Form I-9's simplicity, paperwork errors are regularly made, causing liability for many small business owners. The errors may be divided into two categories: technical (minor) and substantive (major). In the event of an audit, the employer will be given a ten-day grace period to correct technical errors only. For this reason alone, it is a good idea for employers to be proactive and schedule a yearly in-house audit or retain a law firm with expertise in this area to evaluate the condition of the Forms. For some employers, technical errors do not create significant liability and can be justified as just another cost of doing business, while for others, substantive violations most certainly are of tremendous concern. The penalties associated with pure paperwork violations can range from \$110 to \$1,110 *per violation*, while hiring or continuing to employ a person who is unauthorized to work in the U.S. can range from \$375 to \$3,200 for each undocumented worker.

Fines often amount to many thousands of dollars. It is easy to understand how quickly fines can add up when an employer unintentionally keeps poor I-9 records and how accuracy, therefore, is extremely important in order to remain compliant with the Form I-9 requirement. Based on the above, it is recommended that all business owners pay close attention to the proper execution of I-9s to ensure that the employer is legally protected and in compliance with the ever-changing U.S. immigration laws. Failure to comply with the I-9 rules can result in significant penalties, loss of business, criminal charges, and even imprisonment. Our firm has a dedicated Form I-9 team that has reviewed the I-9s of mom and pop businesses as well as Fortune 500 companies. We have yet to see a fully

compliant client.

It is best to be proactive; not reactive.

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#### About the Editors

For over 30 years, [Sean Kelly](#) has focused his practice on counseling employers and defending employment cases, and has successfully tried many employment cases to verdict. He is certified by the Supreme Court of New Jersey as a Civil Trial Attorney, has been repeatedly included in New Jersey Monthly Magazine's list of New Jersey "Super Lawyers," holds the highest rating awarded by the Martindale-Hubbell Lawyers Directory, has been named a Master of two separate American Inns of Court, and is included on the New Jersey Superior Court roster of court-approved mediators.

[DanaLynn Colao](#) focuses her practice on business litigation with an emphasis on employment issues. She counsels and provides training for clients on a wide array of issues that arise in the workplace including medical leaves of absence, wage and hour claims, employment agreements and non-compete agreements. Strategic thinking and affirmative measures enable DanaLynn to significantly reduce potential liability for her clients. DanaLynn was selected to the *New Jersey Law Journal's* list of leading lawyers in the "Forty Under 40" selection and she has been listed since 2009 in the NJ Super Lawyers "Rising Star" category.

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