

Immigration Law: I-9 Compliance Guidelines

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In the past three years, the U.S. Immigration and Customs Enforcement agency ("ICE") has dramatically increased its enforcement efforts against employers, including using criminal laws to charge employers with felonies related to immigration compliance. Criminal arrests grew from 25 in 2002 to 1,103 in 2008. In July 2009, ICE launched a new audit initiative, issuing 652 I-9 audit notices to employers nation-wide - more notices in one month than in all of last year. Consequently, all employers, large or small, need to ensure that they have adequate compliance programs in place.

For every new employee, employers are required to fill out an I-9 Form, Employment Eligibility Verification, to document that the new employee is authorized to work in the United States. While the I-9 Form appears simple on its face, a proper compliance program requires knowledge of complex immigration and anti-discrimination laws, as well as state regulations. The consequences of insufficient I-9 compliance procedures include an expensive paperwork mess to correct, civil penalties, allegations of actual or constructive knowledge of unauthorized employment and criminal charges.

Completing the I-9 Form.

Employers must complete an I-9 Form for all employees hired after November 6, 1986. The regulations provide for fines of \$110 to \$1,100 per I-9 Form for mistakes or omissions on the forms.

Part 1 must be completed by the employee, no later than the actual start date of employment (there is no three day grace period).

Part 2 must be completed by the employer, including the examination of the required documents, within three (3) business days of the start date.

Employee identification and verification of employment eligibility.

Employers must verify both the *identity* of the employee and the employee's *work eligibility*. This is done by reviewing documents from the List of Acceptable Documents on the back of the I-9 Form. Employers cannot tell employees which documents to provide, but must instead give the employee the list and ask them to provide either *one from List A OR one from List B AND one from List C*. Employers cannot demand more or different documents than those listed (see "Document Abuse" below). Employees must provide original documents.

STATE REGULATIONS.

Under Colorado Revised Statute § 8-2-122 (2), employers must complete an Affirmation of Legal Work Status for all employees hired after January 1, 2007, within 20 days of hire. Employers must keep photocopies of all documents provided by the employee to establish identity and work authorization. The affirmations must be kept for the duration of the employment of the employee.

RECORD KEEPING AND RE-VERIFICATION

Retention. I-9 Forms must be kept at least one year after the termination of employment. If the employee was terminated or quit within three years of being hired, the I-9 Form must be kept for three years from the date of hire.

Re-Verification. On or before the expiration of any work authorization as identified in Section 1 of the I-9 Form, the employee must present a new work authorization document valid for future work. This should be a document from List A or List C; re-verification of the employee's identity (List B) is not required. Re-verification also must be completed if any employee changes his or her name, through marriage or otherwise. In those cases, identity documents with the new name are needed.

Discrimination Alert!

If an employer has concerns or suspicions about part of its workforce and wants certain employees to re-verify their work eligibility, to avoid discrimination claims the employer should re-verify all of its workforce at the same time.

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COMMON MISTAKES AND PROBLEMS

Errors in Completing the I-9 Form

Completing the I-9 Form may appear simple, but insufficient attention to detail can lead to numerous mistakes. Common errors include:

- ▶ No employee signature.
- ▶ No social security number or A-number listed in Section 1.
- ▶ The expiration date for work authorization, if any, is blank.
- ▶ Date of hire/employment missing (Section 1 and Section 2).
- ▶ Date of hire/employment in Section 1 is different than in Section 2.
- ▶ Employee doesn't fill out Section 1 on date of hire or first day of employment (there is no three day grace period for Section 1).
- ▶ Section 2 document list is incomplete - doesn't include issuing authority, document number, dates. Retaining photocopies is not enough, Section 2 must be filled in completely.
- ▶ Too many documents are listed and/or the wrong documents are listed.
- ▶ Employer signature is missing.
- ▶ Section 2 completed more than three days after date of hire/first day of employment.
- ▶ Discrepancies between Section 1 and 2 (names, spellings, dates).
- ▶ Re-verification is not completed on or before expiration of work authorization or upon employee change of name.
- ▶ Forms not retained for one year after termination of employment.
- ▶ State affirmation has different dates of hire than I-9 Form.
- ▶ State affirmation is incomplete.
- ▶ Photocopies of documents are not retained.

EVEN IF A COMPANY HAS NOT HIRED UNAUTHORIZED WORKERS, MISTAKES ON I-9 FORMS CAN BE EXPENSIVE. THE GOVERNMENT CAN FINE AN EMPLOYER \$110 PER ERROR ON EACH I-9 FORM, CAPPED AT \$1,100 PER FORM.

Knowingly hiring or retaining an unauthorized worker carries a fine, *for each unauthorized alien*, of \$375 to \$3,200 for a first offense; \$3,200 to \$6,500 for a second offense; and \$4,300 to \$11,000 for a third offense. Employers can also face criminal charges.

Insufficient Workforce Monitoring

Compliance with the I-9 Form requirements is only the beginning. A number of factors can increase an employer's risk of hiring or retaining unauthorized workers, such as:

- ◆ Employees present new documentation that is inconsistent with previous documents, without sufficient follow-up and questioning by the employer.
- ◆ Insufficient follow-up on social security number "no match" letters.
- ◆ Ignoring rumors or complaints about unauthorized employees or contractors.
- ◆ No review of hiring decisions; no secondary oversight of compliance program.
- ◆ Ignoring communications from other agencies such as worker's compensation or other benefit agencies about problems with employee documents.
- ◆ Ignoring rumors or complaints about employees of subcontractors.

TRAPS FOR EMPLOYERS

Contractors As “Employees”

Generally employers are not required to complete I-9 Forms for independent contractors. However, for the purposes of immigration law a contractor may be deemed an “employee” of the company, even if he or she is not on the payroll. A number of factors are relevant to whether an individual is an independent contractor not subject to the employment eligibility verification process, including whether the individual: (i) supplies his or her own tools or materials for the job; (ii) offers services to the general public (not just one company); (iii) works for a number of different clients; (iv) has an opportunity for profit or loss as a result of services performed (not just wages); (v) invests in the facilities necessary for the work; (vi) directs the order or sequence in which the work is performed; (vii) determines the hours during which the work is done; and (viii) performs the work at locations other than the employer’s premises.



IT IS CLEAR THAT AN EMPLOYER CANNOT AVOID LIABILITY BY HIRING WORKERS THROUGH A SUBCONTRACTOR OR CONTRACTUAL RELATIONSHIP WITH ANOTHER COMPANY. WALMART PAID \$11 MILLION IN FINES BECAUSE ITS CLEANING SUBCONTRACTORS HIRED UNAUTHORIZED WORKERS.

Constructive Knowledge

An employer can be at risk for civil and criminal penalties if it is deemed to have “constructive” knowledge of hiring unauthorized workers. A company can be charged with constructive knowledge under a number of the following circumstances:

- ♦ Accepting documents that do not appear genuine on the face of the document.
- ♦ Accepting documents that do not appear to match the person presenting the document.
- ♦ Ignoring information about the possibility of unauthorized workers.
- ♦ Imputing the knowledge of lower level employees about unauthorized workers to upper level managers who “knew or should have known.”
- ♦ Actual or constructive knowledge that a subcontractor’s workforce is unauthorized.

PREVENTING DISCRIMINATION

The Immigration Reform and Control Act (“IRCA”) regulations apply to any employer of four or more people and prohibits discrimination based on citizenship or immigration status and national origin.

Citizenship/Authorized Workers. Employers cannot discriminate against anyone lawfully permitted to work based on that person’s immigration or citizenship status. For example, employers cannot hire only U.S. citizens or U.S. citizens and green card holders, and employers cannot refuse to hire asylees or refugees because their employment authorization documents contain expiration dates. However, an employer can refuse to hire someone who has been lawfully admitted to the

U.S. but would require a lengthy visa process to obtain work authorization (e.g. H-1B visas, EB visas).

National Origin. Small employers (4 to 14 employees) cannot discriminate based on national origin, which includes discrimination based on appearance, accent, language or name. Employers with 15 or more employees are already prohibited from national origin discrimination by Title VII of the Civil Rights Act.

Document Abuse. Employers cannot tell employees to produce a specific document, more documents or different documents than those listed on the back of the I-9 Form. Employers are also prohibited from rejecting valid documents that reasonably appear genuine on their face. Additionally,

employers cannot require some individuals to produce more or different documents than others.

For tax purposes, employers can ask new employees for their social security cards, but to avoid allegations of document abuse, the employer should do this separate and apart from the I-9 process.

In addition to navigating complex immigration laws, employers must also ensure that they do not engage in discrimination or document abuse.

Reducing Your Company's Risk Profile

Implement an I-9 Compliance Program

An effective compliance program can not only protect against hiring or retaining unauthorized workers, but can provide a defense against allegations of willfully violating the immigration laws. The key components of any effective compliance program are accuracy and consistency. Additionally, consistency over time and across the workforce is essential to protect against discrimination claims.

A good compliance program should include:

- ▶ Corporate Immigration Policy

Statements including positions on hiring only authorized workers, reporting concerns or suspicions to management, terminating unauthorized workers, tracking expiration dates for authorized workers, I-9 compliance policies and avoiding discrimination.

- ▶ Periodic training for employees regarding I-9 Forms, including timelines, recognizing authorized documents, detection of fraudulent documents, record-keeping and re-verification.
- ▶ Internal protocols for dealing with social security number "no-match" letters, discrepancies in the verification process and conflicting

identity/work status documents in a way that is consistent and non-discriminatory.

- ▶ Protocols for immigration compliance during lay-offs, reductions in pay, job transfers and other corporate restructuring efforts, particularly for temporary workers (e.g. H-1B workers).
- ▶ Annual internal audits of I-9 Forms and compliance procedures
- ▶ Periodic external audits of I-9 Forms and corporate policies and compliance procedures.

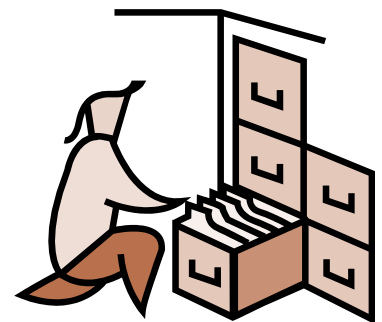
Participation in government programs does not provide a safe harbor from worksite enforcement and civil fines; it is only a safe harbor against criminal charges

A Note About Government Programs

A number of government programs exist that are aimed at reducing the incidence of inadvertent hiring of unauthorized workers. These include E-Verify and a pilot program, IMAGE. E-Verify requires the employer to verify new hires through the E-Verify system, which incorporates a number of databases. Employers cannot use it for existing employees and E-Verify cannot identify counterfeit, stolen or borrowed identity documents. IMAGE requires the employer to submit to a full government audit and self-report any errors or compliance violations to be "IMAGE-Certified." Participation in government programs does not eliminate the employer's obligation to accurately complete I-9 Forms for its employees, comply with non-discrimination laws and maintain a good compliance program.

Conclusion

Employers can face serious consequences from an insufficient or inconsistent I-9 compliance program. These guidelines provide an outline of some the key issues and concerns related to compliance with immigration laws in hiring employees, but cannot address the complexities of immigration law in just a few pages. In the era of increased worksite enforcement, every employer, large or small, should invest time to ensure that its I-9 Forms are accurate, up to date and that it has policies in place to prevent unlawful discrimination and the inadvertent hiring of unauthorized workers.



For specific problems, to develop company compliance policies or to schedule an I-9 audit, please contact:

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