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Proper I-9 Preparation and Maintenance is More Critical Than Ever in Light of Increased Enforcement Actions by ICE

By Deborah E. Klahr, Esq.

The Form I-9 issued by the Department of Homeland Security (DHS) verifies an individual's eligibility to work in the United States and must be filled out by the employee no later than the time of hire and reviewed and certified by the employer within three (3) business days of the date of hire. All employers have been required to complete the Form I-9 for every new employee hired after November 6, 1986, for compliance with the Immigration Reform and Control Act (IRCA) of 1986.

The Form I-9 must be completed by all new employees, regardless of their immigration or citizenship status. As part of the process, employees must produce documentation that establishes their eligibility to work in the U.S., such as a U.S. passport, permanent residence card or employment authorization document. The employer may not request any specific document to establish work authorization as employees are permitted to choose from a list of acceptable documents to verify their work eligibility. These documents must be unexpired, however, and must reasonably appear to be genuine.

Until only recently, employers were mostly lax in completing the Form I-9 and were particularly inattentive to making certain that the form was properly filled out, verified and certified on a timely basis. In the last two years, however, Immigration & Customs Enforcement (ICE), a division of DHS, has significantly increased its investigations of employers and is now actively pursuing strict enforcement of Form I-9 requirements by employers. ICE is now going after employers and is issuing Notices of Inspection (I-9 audit notices) in unprecedented numbers to enforce full I-9 compliance by employers. ICE is targeting employers of all sizes and across all industries. Employers who continue to prepare and maintain their I-9s with a "head-in-the-sand" mentality are at risk for costly fines and/or criminal action.

During an ICE I-9 audit, an ICE forensic auditor typically visits the employer and serves the employer with a Notice of Inspection, requiring the employer to produce all of its I-9s for inspection within three business days. In addition to production of all I-9s, the employer is often required to produce payroll records, tax records and corporate documentation. The ICE auditor then reviews each I-9 to determine if there are any errors in any of the fields on the I-9s or if there are any discrepancies between the I-9s produced and payroll records. Mistakes on the I-9 can expose the (*cont'd* ➔)

employer to the imposition of fines for failing to properly prepare and complete the I-9 in compliance with immigration regulations.

ICE will also closely check the work eligibility status of every employee. If ICE determines that there are employees who are unauthorized to work in the U.S., ICE will require the employer to terminate those employees unless those employees can produce additional evidence of work authorization. Moreover, if ICE believes that the employer *knowingly* hired or continued to employ anyone who is not authorized to work in the U.S., ICE will likely impose additional fines and may also bring criminal charges against the employer.

Given the current heightened scrutiny of I-9s by ICE, it is more important than ever that employers proactively make certain that their I-9s have been properly prepared and maintained so that they are best insulated from liability. Employers should implement proper processes and procedures for I-9 completion. They should make certain that the staff responsible for the I-9 preparation has been fully trained in the immigration requirements so that they know how to properly complete the Form I-9. Employers should perform an audit of all of their I-9s to make certain that the I-9s were filled out correctly, verified and signed and certified in a timely fashion. U.S. employers should give serious consideration to having outside counsel conduct the audit and assist in proper training of relevant personnel.

In addition to proper completion of I-9s, employers must also make certain that they are maintaining the I-9s as required by law. It is advisable to maintain I-9s in a separate file from the employees' personnel files for easy access in the event of a Notice of Inspection. It is also prudent business practice to make and retain a copy of the work eligibility documentation submitted by the employee as proof of work authorization so that this documentation can be provided to ICE in the event of an investigation. Employers should also create a tickler system

for any employee that requires any follow-up reverification of work eligibility, such as when an employee has a work visa or work authorization card with an expiration date.

If an employer receives any information that raises a question as to a particular employee's eligibility to work in the U.S., such as a Social Security number "no-match" letter from the Social Security Administration or an error report from the employer's payroll preparer, the burden is then on the employer to inquire further into the matter. No adverse employment action against the employee may be taken simply on the basis of this information but the employer must investigate and resolve any discrepancies. An employer cannot simply ignore this information because it may result in ICE imposing fines or criminal sanctions, concluding that the employer had constructive knowledge that the employee was not work authorized.

One important note: While employers are required to ensure that they are properly preparing and maintaining their I-9s for all employees, they must be extremely careful to make certain that nothing said or done during the I-9 process violates the immigration discrimination provisions of IRCA or Title VII of the Civil Rights Act. Employers must treat all employees in a consistent manner, regardless of their citizenship or immigration status or national origin. Requesting specific documents or more documents than the minimum required can expose an employer to unlawful discrimination charges. Great care must be taken to carefully balance the requirement to comply with I-9 regulations while not overstepping immigration anti-discrimination laws.

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The information provided here is necessarily general and is not intended as legal advice or a substitute for legal advice. If you have any questions regarding this Alert, please contact Deborah E. Klahr at dklahr@lindabury.com.

Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision.

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