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New I-9 Enforcement Initiative by ICE Coming to a Business Near You

By Deborah E. Klahr, Esq.

Employers have long required employees to complete a Form I-9 issued by the Department of Homeland Security (DHS) to confirm employees' eligibility to work in the U.S. Form I-9's must be completed regardless of whether an employee is a U.S. citizen, permanent resident or holder of a valid work visa. Employees must also produce corroborating documentation establishing eligibility to work in the U.S., such as a U.S. passport, permanent residence card or employment authorization document. In the past, many employers paid little attention to these verification requirements because the agencies responsible for enforcement, the DHS and the Department of Labor, did not pursue proper Form I-9 compliance, verification or maintenance.

In recent months, however, the Obama Administration announced a major initiative by the Immigration & Customs Enforcement (ICE), an arm of DHS, to pursue strict enforcement of Form I-9 requirements by employers. As a result of this new and tougher stance on I-9 compliance, ICE has issued an unprecedented number of Notices of Inspection and Audit Notices to suspect employers - in one week in November alone, more than 1000 employers were served with notices. ICE appears to be targeting large employers in industries with generally high levels of illegal workers, but it is only a matter of time before the focus turns to average small-to-medium-sized businesses. Employers who fail to appreciate the consequences of this current enforcement initiative face serious financial and criminal penalties.

Employers subject to an ICE inspection must produce all Form I-9s for inspection, typically within three business days. Employers can also expect that a production of payroll reports will be required. If ICE determines that the I-9s are defective or do not match with payroll reports, a Notice of Intent to Fine will be issued and ICE will delve further into the status of all employees. Moreover, if ICE determines that the employer *knowingly* hired employees who are not eligible to work in the U.S., ICE may levy additional fines and also seek criminal charges against the employer.

As a result of the new strict enforcement mandates, numerous employers have paid out staggering fines in recent months, and some are facing criminal charges for I-9 deficiencies.

So what should employers do to protect against this heightened governmental scrutiny? First, employers should immediately undertake an internal audit to confirm that a fully and properly completed Form I-9 exists for every employee on the company's payroll reports; that there are no technical paperwork violations (typographical errors, misplaced answers, etc.), and finally, that there is no evidence of having hired an employee who is not authorized to work in the U.S. Employers should give serious consideration to having outside counsel or (*cont'd* ➔)

consultants well-versed in Form I-9 regulations and compliance conduct the audit.

Employers should also maintain I-9s in a separate file from the employees' personnel files for easy access in the event a Notice of Inspection or Audit Notice is received. While not required by I-9 regulations, it is also prudent to retain a copy of any documentation submitted by employees as proof of eligibility to work in the U.S. If an employee has produced verifying documentation that requires follow-up documentation, such as a work visa or work authorization card that is due to expire, the employer should make certain to request updated eligibility documentation from the employee.

Unfortunately, the I-9 verification process puts employers on the horns of a dilemma. Under current Immigration laws, employers must ensure compliance with the I-9 verification process to evade civil and criminal penalties. At the same time, employers must ensure that in doing so, they do not engage in immigration discrimination in violation of Title VII of the Civil Rights Act and other anti-discrimination laws. To accommodate these seemingly divergent statutory objectives, immigration regulations prohibit employers from specifying the documents or combination of documents the employee must produce to verify work eligibility. Rather, employers must simply provide employees with the list of acceptable documents listed in the I-9 instructions, leaving employees free to select those documents they wish to produce to establish eligibility. Moreover, employers must be extremely careful not to request any documentation outside of the parameters set forth in Form I-9. Even the slightest error exposes

employers to charges of unlawful discrimination on the bases of citizenship or national origin status. Thus, even if an employer suspects that an employee may have submitted forged or stolen documentation, so long as the documents appear to be legitimate on their face, the employer cannot probe further and accept the submitted documentation.

Moreover, if an employer receives any information that calls into question an employee's authorization to work in the U.S., such as a letter from the Social Security Administration advising of a "no-match" between the employee's name and the social security number supplied by that employee, the employer should investigate the matter further. Ignoring this information may cause ICE to conclude that the employer had constructive knowledge of the employee's ineligibility to work, thereby exposing the employer to fines and/or criminal sanctions.

Clearly, for employers it is no longer just a case of "Buyer Beware" but also "Hire Beware." Negligent or willful ignorance of I-9 enforcement initiatives, as well as its interplay with anti-discrimination requirements, will increasingly lead to liabilities that well exceed employers' costs of compliance with these legal requirements.



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 Klahr at dklahr@lindabury.com or Sergio Simoes at ssimoes@lindabury.com of the Immigration Group.

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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