

Complying with Immigration Law **When Hiring Employees:** **A Few Tips to Save You Trouble Later.**

By Christopher A. Kerosky

Last July, the federal government issued over 500 notices to businesses, informing them that they would be audited by the Immigration and Customs Enforcement (ICE) for compliance with immigration law. In one month, ICE performed more audits than it did all last year. In November, the Department of Homeland Security announced that another 1000 companies would be sent audit notices by ICE that month.

The number of enforcement civil and criminal actions for failure to comply with the immigration requirements is at an all time high. Meanwhile, the DHS has pledged to increase the number of agents and resources devoted to enforcement actions against employers of the undocumented.

In this time of greater enforcement of immigration compliance laws, it is especially important that employers take prudent steps to make sure they are complying with the law's requirements.

In this article, I will attempt to set forth the requirements of the law applicable to the employment of immigrants, and provide some practical tips on how to reduce the risk to your company of civil or criminal penalties for non-compliance.

The I-9 Form.

The bedrock of the immigration compliance program is the I-9 form, the Department of Homeland Security pre-printed form that employers are supposed to fill out when they hire anyone. The purpose of the I-9 form is to ensure the identity and employment authorization of workers. The law requires all employers to fill out an I-9 form for all employees hired since November 6, 1986, regardless of their immigration status. The entire form is supposed to be filled out within three days of the employee starting work. The form is available at www.uscis.gov. Instructions for filling out the form are also available at this website.

The I-9 form has two parts. In the first section, the employee states that he or she is a citizen, lawful permanent resident, or alien authorized to work temporarily. In the second section, employers attest that they have examined original documents verifying the employee's identity and eligibility to work.

Here are some things to remember with respect to your company's I-9 practices:

- Fill out the I-9 completely and make sure it's signed. Sloppy paperwork is often a basis for increased scrutiny and penalties from the government;
- Set up a system for updating these records. For example, a tickler system should be set up to remind your staff when certain employment authorization documents expire so that they can verify if they have been renewed;

- You should personally view the original documents presented by the employee, but you need not make a copy;
- Keep the I-9 form on file for three years from the date of hire or one year after the last day of work, whichever is later.
- The I-9 can be stored in its original form, microfilm, microfiche, or electronically.
- Keep the I-9 forms separate from the employees' personnel files, in a separate file designated for this purpose.
- Have a written set of policies that your staff can follow in completing the I-9s.

Independent Contractors

Employers are not required to complete an I-9 for independent contractors, but the law states that the use of independent contractors cannot be used to evade the I-9 requirement. Recently, ICE has made an example of several employers who used independent contractors to perform tasks such as janitorial work or agricultural labor, when it was or should have been obvious that these contractors were not adhering to immigration laws.

The federal government takes the position that a business can still be liable for non-compliance with the law if they know or should have known that contractors are using unauthorized aliens to perform labor or services.

- Make your independent contractors set up an I-9 compliance system that meets the requirements of the law;
- Make it a condition of your contract with them that this system be maintained and that you have access to it to ensure compliance.

No Knowing Employment of Undocumented Workers.

The law prohibits any person or entity from knowingly hiring or continuing to employ an unauthorized worker. Knowledge may be either "actual or constructive." This means that the government can infer that an employer knew its employees were undocumented from any number of circumstances. Recently, the government has broadened the interpretation of constructive knowledge to include instances, for example, where an employer simply failed to re-verify an employee's expired right to work. Most prevalent is a finding of constructive knowledge when the employer ignores a "no match letter" from the Social Security Administration or other information that the employee is out of status.

The government can also claim that employers violate the law if they "recklessly" rely on employees to comply with the I-9 laws. Because whoever completes section 2 of the I-9 does so on behalf of the employer, the government takes the position that any knowledge acquired by the person completing the I-9 is imputed to the employer.

This makes it even more important that businesses have clear, well-defined, written procedures for compliance with the law. Here are some tips on those procedures:

- Ensure that the employee fully completes the I-9;

- Do not ignore “no match” letters from the Social Security Administration or similar notifications from other government agencies indicating that an employee of yours lacks the right to work;
- Whenever you are provided such information by the government, require the employee to provide documentation verifying that they are authorized to work;
- If you are not given such documentation to prove authorization to work, be prepared to terminate the employee;
- Apply these policies uniformly.
- Make sure that your employees responsible for I-9 compliance are well-trained and follow clear written guidelines.

Conclusion.

ICE issued new guidelines earlier this summer calling for more severe fines and criminal prosecution against employers found to violate these laws. The directives instruct ICE field offices and agents to focus on employers and supervisors. ICE has stepped up the use of audits to ensure compliance with I-9 rules and to punish intentional employment of undocumented immigrants. These new tactics are consistent with Obama’s campaign promise to attack illegal immigration by focusing on employers of undocumented workers.

These changes also make it even more important that businesses review their procedures and act to ensure that they comply with federal law.

Most importantly to demonstrating a company’s good faith compliance with the law is setting proper policies, creating a company compliance manual, and training employees who complete the I-9 forms.

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