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# Immigration Form I-9: A Form That Can Have Severe Consequences

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You are the general counsel of a company with locations all over the United States and thousands of workers. One day, agents from the U.S. Immigration and Customs Enforcement (ICE) agency, a division of the U.S. Department of Homeland Security (DHS), arrive at one of your largest warehouses and serve a forthwith subpoena and notice of inspection (NOI). They're seeking information about your company's hiring practices and Form I-9 for all employees in that warehouse for the past three years. You call your Director of Human Resources and you begin a discussion about what to do. This article addresses the history of Form I-9 and current initiatives underway by DHS.

## **What Is a Form I-9?**

In 1986, the Employment Eligibility Verification, Form I-9 was born with the passage of the Immigration Reform and Control Act (IRCA). IRCA requires employers to verify the identity and employment authorization of each person they hire, complete and retain a Form I-9 for each employee, and refrain from discriminating against individuals on the basis of national origin or citizenship, such as refusing to hire people from specific countries or questioning an applicant's immigration status before making an employment offer.

To ensure compliance, IRCA requires employers to ensure that each employee completes Section 1 of the Form, and presents documents to the employer from a List of Acceptable Documents which establish his or her identity and employment authorization. Employers cannot require employees to present particular documents, nor may employers question the validity of the documents unless they appear non-authentic on their face. Employers must ensure that all parts of the Form I-9 are completed correctly and in a timely manner. Section 1 of the Form must be completed by new employees on the first day of work for pay; and Section 2 must be completed by the employer or the employer's representative by the end of the third day after the first day of employment. After completing the Form, employers are required to retain the Form I-9 for all current employees — for terminated employees, employers must retain the employees' I-9s through the later of: 1) three years after an employee's hire date; or 2) one year after the employee's termination. Retention of these documents in an up-to-date and well-organized way is a key component of compliance and preparation for government review.

It all sounds so simple, but the completion of the Form I-9 creates opportunities for confusion and mistakes. DHS' Outreach Branch states that 76% of paper I-9s contain an error that could result in a fine from ICE.

## **Heightened Enforcement**

In a press release issued in December 2018, ICE stated: "Criminal investigations, business audits and arrests by ICE's Homeland Security Investigations (HSI) special agents and auditors surged in fiscal year 2018 compared to the previous year,

... Criminal indictments and convictions remained at a steady level compared to previous years, but those numbers are also expected to rise due to many ongoing investigations, which can take months to years to fully develop, according to HSI.”

Over the past two and a half years, ICE has conducted unexpected raids of hundreds of businesses throughout the country. In these raids, ICE agents serve subpoenas and NOIs on employers to audit their compliance with federal immigration law.

In fiscal year 2018, criminal investigations, business audits, and arrests by ICE surged from 300% to 750% compared to FY 2017. ICE’s Homeland Security Investigations (HSI) opened 6,848 worksite investigations compared to 1,691 in FY17; initiated 5,981 I-9 audits compared to 1,360; and made 779 criminal and 1,525 administrative worksite-related arrests compared to 139 and 172, respectively. Employers found in violation of Form I-9 rules have been subject to civil and criminal penalties.

Under federal immigration law, ICE agents may at any time require employers to produce their Form I-9s and audit them. Usually, an employer has three days to comply with notice of the audit request. Under certain circumstances, a brief extension of the time to comply may be negotiated, but one cannot anticipate that an extension will be granted

Employers found in violation of IRCA have been subject to civil and criminal penalties. Civil penalties for knowingly hiring and continuing to employ violations range from \$573 to \$20,130 per violation, with repeat offenders receiving penalties at the higher end. Penalties for substantive violations, which include failing to produce a Form I-9, range from \$230 to \$2,292 per violation.

Criminal penalties are assessed for employers who engage in a pattern of practice of hiring, recruiting, or for referring for a fee aliens unauthorized to work in the U.S.

## **What You Can Do**

Compliance with immigration law is complex and involves requirements imposed by several statutes and federal agencies. Even before you are visited by ICE, it’s critical to make sure you review your policies and practices to ensure you are compliant with immigration law. Take the time to review each internally and with counsel well-versed in immigration law, so that you can be confident that, should ICE appear at your workplace door, you will be able to satisfy agents’ demands promptly and accurately. After an ICE audit commences, an employer should not terminate any worker without consulting with an immigration attorney.

You should train all human resources personnel and make sure they understand the policies you have created in order to comply with immigration law. Who is in charge of your I-9 documentation? Does that person understand the risks to the organization if the documentation is not handled properly? Each employer should have a formal plan that describes the details of its verification and document-retention requirements. The plan should be available to and understood by any personnel involved in checking or retaining documentation. Do recruiting and hiring personnel understand your policies towards visa sponsorship and non-discrimination? You need to ensure that everyone involved in the process is well-trained, and that the training keeps up with changes in the law and practice.

Answering these questions now, before ICE is at your door, will ensure that any audits or investigations go smoothly. Should you get such a visit from ICE agents, make sure you:

- Study the documents that the ICE agents present and request that they identify themselves.
- Review the scope of the NOI and subpoena and ensure they are addressed to your company and are affixed with an official signature.

- Consult with an attorney before signing any waivers and request time to comply with the subpoena and audit completely and accurately.
- Seek immediate counsel and guidance from an experienced immigration attorney. There are a variety of steps you can take if your documentation is lacking and with guidance from experienced counsel, steps can be taken to mitigate the consequences such deficiencies could bring.
- If it turns out that you do not have adequate I-9 documentation, the financial consequences, along with the possible criminal consequences, can be devastating. Moreover, failing to comply timely and accurately with the subpoena and audit can add to those consequences.
- It is also wise to appoint someone at each workplace to work with your attorney and for dealing with ICE or other government officials, if they arrive or if they call to schedule a review of I-9 documentation. This person should understand the employer's rights and responsibilities and know who within the organization he or she should contact as soon as contact is made.
- It is important that before any documents are provided or statements made to the government that counsel be consulted to obtain advice from one well-versed in immigration law, and in I-9 compliance in particular. Additionally, consider advising your employees that it is their choice and they do not have a legal obligation to speak to the agents absent a subpoena, and may choose to consult with counsel before speaking to any government agents.

It is recommended that employers conduct periodic internal Form I-9 audits and make sure that they are using the most current one. The American Immigration Lawyers Association (AILA) on Employer's Rights and Responsibilities has a guide to employer rights and responsibilities in the event of an ICE worksite raid available at <http://bit.ly/2mPn6hZ>.

Finally, remember to always call your lawyer immediately if ICE agents visit your worksite.

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