



An ICE Cold Spring is Expected

Greenberg
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Worksite Investigations on the Rise

“Our goal is to foster a culture of compliance by deterring employers from hiring unauthorized workers, penalizing those who violate the law and encouraging employers to use compliance tools, such as E-Verify.”

- John Morton, Director of U.S. Immigration and Customs Enforcement

Legislative History

- Increase in Worksite Hearings
- Mandatory E-Verify in the states
- Mandatory E-Verify at the federal level
 - Business issues
 - Current climate
- Comprehensive Immigration Reform
- Enforcement Only

Who Must Complete an I-9?

- All employees hired after November 6, 1986
- Re-hired employees, if the original I-9 is beyond the retention date or otherwise unavailable

Simple, yet the devil IS in the details

- The I-9 process is designed to assure that we do not knowingly hire workers who are ineligible to work in the United States
- Clearly document that the employer does everything required in a responsible and conscientious manner to verify:
- That EVERY employee is who he/she says he/she is AND
- That EVERY employee is eligible to work in the United States

By When Must the I-9 Be Completed?

- Section 1 is to be completed by the employee at the time employment begins (Day 1)
- Section 2 must be completed by the employer within three business days of the date employment began
- Section 3 must be completed before a person's EAD expires or at the time an update becomes necessary. This is governed by the expiration date entered when the employee marks attestation box

Basic Rules

- Employee should always be given the choice of what documentation to present
- You cannot ask to see specific immigration documentation
- Do not overdocument
 - One List A document
 - Or one from List B and C
- Must be completed after employee is hired
- No prescreening

Reviewing the Documents

- If documents appear to be genuine, you must accept them, unless you have knowledge to the contrary
- However, if you have knowledge that they are not legitimate, you should not accept them
- Does the card look tampered with?
- Is something spelled wrong on the document like United States
- YOU ARE NOT A DOCUMENT POLICEMAN but must employ the reasonable person standard
 - What is that standard?

Best Practices/Training

- Why is this important?
- This doesn't affect my company...does it?
 - *"But our I-9s are in great shape..."*
 - *"But we don't hire foreign workers..."*
- What are some examples of best practices?
- Internal audit, review and audit again
- Train, train and more training
- Outside review is from knowledgeable sources are critical

Administrative Audits v. Worksite Enforcement Actions (aka Raids)

- What is the difference?
- What is the current policy guidance that ICE is following?
- Cooperation between multiple agencies
- EMPLOYERS ARE BEING TARGETED!

Employer Penalties: Civil and Criminal

- Fines
- Debarment
- Unexpected loss of workforce
- Loss of reputation
- Criminal charges

Employer Penalties: Civil and Criminal

Employer Penalties

- It is unlawful to knowingly hire or continue to employ an unauthorized alien.
- Constructive knowledge includes having information that would lead a person to reasonably conclude that person is not authorized to work in the United States.
- This may include, but is not limited to, situations where an employer:
 - Fails to complete or improperly completes the Form I-9
 - Employer Fails to sign the I-9 form
 - Employer does not assure that the employee properly completed Section 1 of the form, such as by failing to enter an expiration date for employment authorization when the employee indicates that he is an alien with employment authorization (attestation box 3)

...continued

- Fails to have the employee complete an I-9, and the employee turns out to be unauthorized to work
- Has information available to it that would indicate that the alien is not authorized to work
- Continues to employ the alien without reverifying his/her employment eligibility after the expiration date for employment eligibility listed by the alien in Section 1 of the I-9 form (attestation box 3)
- Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf
- DHS wanted to expand the definition of Constructive knowledge to include S.S. No Match letters

Employer Penalties: Civil and Criminal

Employer Penalties

Per Alien

\$110-1100

Substantive/Uncorrected Technical Violations

Technical and Substantive Violations

- Penalties are assessed for “paperwork violations” under the Immigration and Nationality Act
- May seem like minor errors, but the fines add up
- Examples:
 - Late completion of Section 1 or 2
 - Failure to prepare/present an I-9
 - Missing information (i.e. DOB, SSN, document expiration date)
 - Failure to sign or date

Technical and Substantive Violations

- Bono Amendment: protects well-meaning employers who commit *de minimis* paperwork violations
- Affirmative defense recognized to claims of "substantial compliance" with the paperwork verification requirements
 - Under this doctrine, an employer who demonstrates that it has complied substantially with these requirements will not be liable under Section 274A(e)(5), notwithstanding the fact that it has committed one or-more paperwork violations
- "good faith" of the employer and the "seriousness" of the violation committed

Technical and Substantive Violations

Substantial compliance met if:

1. Form I-9 to determine an employee's identity and employment eligibility has been used
2. the employer's signature under penalty of perjury appears in Section 2 of the form
3. the employee's signature appears in Section 1
4. in Section 1, an indication appears that attests under penalty of perjury that the employee is either (a) a citizen or national of the United States; or (b) a lawful permanent resident; or (c) an alien authorized to work until a specified date
5. there is some type of information concerning, or a reference to, a document either spelled out or attached either in Section 2, List A, or Section 2, Lists B and C

Employer Penalties: Civil and Criminal

Employer Penalties

Offense	Penalty per alien
1 st	\$375-3200
2 nd	\$3200-6500
3 rd	\$4300-16,000

Employment of Unauthorized Workers

Employing Unauthorized Workers and I-9 Violations (§274A of INA)

- These penalties are for the knowing employment, recruitment or referral for hire of unauthorized workers
- Hiring, recruiting or referring unauthorized worker, first offense (per worker) - minimum of \$375 to maximum of \$3,200
- Hiring, recruiting or referring unauthorized worker, second offense (per worker) - minimum of \$3,200 to maximum of \$6,500
- Hiring, recruiting or referring unauthorized worker, third offense (per worker) - minimum of \$4,300 to maximum of \$16,000

Employer Penalties: Civil and Criminal

Offense	Penalty per alien
1 st	\$275-2200
2 nd	\$2200-5500

Document Fraud

Immigration-Related Document Fraud

- These penalties apply to various prohibited activities, all relating to document fraud and listed in six subparagraphs at 8 U.S.C. §1324(c)(a).
 - Includes accepting a fraudulent document
- Document fraud, first offense - minimum of \$275 to maximum of \$2,200.
- Document fraud, subsequent offenses - minimum of \$2,200 to maximum of \$5,500.

Factors affecting penalty assessments

Employer Penalties

1. Size of employer
2. Good faith effort to comply
3. Seriousness of violation
 - Intentional falsification
 - Deliberate refusal to prepare I-9
 - Negligent failure to prepare I-9
4. Employee is ultimately authorized to work
5. Employer history of violations
6. Other factors:
 - Timely completion or inaccurate completion
 - Altered or backdated I-9
 - Employer's overall practice
 - Reasonable care and diligence

Worksite Enforcement on the Rise

- 500 audits in 2008
- More than 3,600 audits from January 2009 to March 2011
- \$56 million in fines
- 1,000 Notices of Inspection in February 2011 alone
- Use of new ICE Employment Compliance Inspection Center to permit larger ICE audits
- Cooperation and MOUs between multiple agencies
- Increasing E-Verify investigations
 - Possible monitoring and compliance site visits

What to Do if You Receive an ICE Notice of Inspection

- Notify management and executive teams immediately
- Retain experienced immigration counsel
- Gather I-9s and supporting documentation
- Don't be afraid of the cost - non-compliance can be even more expensive
- Remember the importance of proactive compliance planning

Compliance Planning

- Why is compliance important?
- Who should have a compliance program?
- What are the core elements of an effective compliance program?
- Why is it important that my compliance operations be centralized?

Compliance Planning Do's and Don'ts

1. DO timely complete Form I-9s for all employees
2. DON'T knowingly hire unauthorized workers
3. DO examine all documents for authenticity
4. DO conduct periodic training for all staff
5. DON'T re-verify work eligibility of lawful permanent residents or U.S. citizens
6. DO memorialize a written compliance policy
7. DO conduct internal audits with competent counsel
8. DON'T wait until ICE comes knocking at the door

Corporate Responsibility

Corporate Responsibility

- What are my compliance responsibilities as a public company?
 - Sarbanes Oxley
- What types of actions should be taken in the event of a merger or acquisition?
 - Due diligence
 - Future liability
 - Clean up post closing?

E-Verify Background

- E-Verify (formerly known as the Basic Pilot Program)
- Mandated by Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)
- Partnership between the Department of Homeland Security (DHS) and Social Security Administration (SSA)
- Provides a means for participating employers to verify the employment eligibility status of newly-hired employees
- Federal Contractor requirements effective for contracts awarded on or after September 8, 2009

E-Verify Basics

- The best thing that is currently available
- Statistics still show substantial non-confirm rate for initial review
- Government databases are not updated quickly
- USCIS/ICE-MOA
- Federal Contractors have been mandated to use E-Verify as the government claims it will lead by example and contracts awarded on or after September 8, 2009 are mandated to use the system and flow down the requirement
- State Laws
 - No requirement in Illinois
 - Employers must complete additional attestation

Pros and Cons of E-Verify

PROS: How does E-Verify help your business?

- Relatively easy system to use for new hires
- Free system to ensure businesses are not hiring undocumented workers
- Provides affirmative defense that the employer did not “knowingly” hire an undocumented worker
- Good PR - Clear message to the public: Company is socially responsible
- Photo Screening Tool- Assist in detecting document fraud
- Will improve as other biometrics are added

Pros and Cons of E-Verify

CONS: What are the risks to enrollment?

- Not a "safe harbor" from worksite enforcement
- Agree to permit DHS and SSA to visit work sites to review E-Verify records and other employment records related to E-Verify
- Opportunity & Resource Costs
 - TIME : entering data, dealing with TNCs, finding replacement workers, E-Verify training
 - Cost estimates: \$9k per year for any company over 500 employees, or less than 1 percent of expected revenue for small entities -much higher
- Employers are bound by the terms of the MOU
- Discrimination suits based on improper application of E-Verify and MOU standards

Employer Responsibilities

- Unless you are a Federal Contractor, E-Verify must ONLY be used to verify NEW hires, and must be initiated after the employee accepts the position (hire date) and within 3 days of the employee's actual start date
- E-Verify procedures must be applied to ALL new hires, regardless of nationality or citizenship status
- Must have a training and audit protocol in place to review E-Verify and the I-9 process together
- Must display the E-Verify Poster in an area visible to prospective and existing employees to show that it is an E-Verify Participant (English and Spanish Versions)
- Must display the Anti-Discrimination Poster issued by the Office of Special Counsel for Immigration - Related Unfair Employment Practices, Department of Justice (DOJ) in an area visible to prospective employees (English and Spanish Versions)

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Employee Rights

- The employee has the right to contest or not to contest a Tentative Nonconfirmation (TNC) from SSA or DHS
 - Employee must continue working until the company receives a final non confirmation
- Employees who believe that they have been subjected to discrimination based upon their national origin or citizenship or immigration status with respect to hiring, firing, recruitment or referral for a fee, through an employer's use of E-Verify, or when completing the Form I-9 may have a cause of action against the employer
 - Your company must have E-Verify audit and compliance procedures in place

Federal Contractor Requirements

- Federal Acquisition Regulation (FAR) amended by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council to reflect the FAR final rule published on November 14, 2008
- Applies to federal contracts awarded on or after September 8, 2009 where clause is inserted
 - requires Federal Contractors (and subcontractors) to use E-Verify to verify their new employees' and those assigned to the contracts eligibility to work legally in the United States

Identity Theft Issues

- E-Verify does not offer adequate protection
- Develop a policy for handling any identity theft claims which arise
- Consider use of third-party measures to reduce the risk of identity theft
- ICE audits use background checks/commercial data to detect identity theft

What is the Office of Special Counsel, DOJ?

- Does your company have anti-discrimination policies in place?
- I-9 process-overdocumentation
- Can you have citizen only hiring polices?
- Very interested in E-Verify
- Scrutiny of temporary worker programs

Proper I-9 Usage: Avoiding Discrimination Claims

When do we deal with Office of Special Counsel?

- “Citizen only” hiring practices
- Immigration law (IRCA) prohibits discrimination in hiring and discharging based on national origin or citizenship status
- Do Not use the I-9 process to pre-screen for hiring
 - However with consistency you may I-9 prior to payroll date
- If documents meet I-9 requirements, we do not request additional or different documents unless the original documents do not appear facially valid
 - If documents do not meet I-9 requirements, request alternatives-and provide the list of eligible documents again

ICE IMAGE Program

- Voluntary partnership with ICE to encourage compliance
- Employer participation requirements:
 - Self-assessment questionnaire
 - ICE I-9 Audit
 - E-Verify
 - SSNVS
 - IMAGE Best Hiring Practices
 - Enter IMAGE partnership agreement

IMAGE

ICE IMAGE Best Practices

- Use E-Verify
- Use SSNVS for wage reporting purposes
- Written hiring and employment eligibility verification policy
- Internal compliance and training program
- Form I-9 and E-Verify training
- Annual I-9 audits
- ICE reporting procedures
- Contractor and/or subcontractor compliance
- “No Match” protocol
- Tip line
- Non-discrimination policies
- Maintain document copies

IMAGE

The cost of doing business...

...is now too high to ignore the consequences

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