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## I-9 Compliance - An Increasingly Important, But Often Overlooked, Necessity for Your Business

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Is your company following the rules when it comes to confirming the eligibility of your employees to legally work in the United States? It is important for you to be able to answer that question “yes.” According to a recent article in *The San Diego Union-Tribune*, United States Immigration and Customs Enforcement (or “ICE”) has significantly increased the number of audits in San Diego and across the state over the past year. The U.S. Citizenship and Immigration Services (or “CIS,” and formerly known as the “Immigration and Naturalization Service”) reported a total of 66 audits in San Diego county in fiscal year 2010, up from only 1 in 2008, and 44 in 2009. Considering California’s diverse population and work force, it is likely the federal government will continue to increase its focus on the region’s employers.

The Immigration Reform and Control Act of 1986 (or “IRCA”) requires employers to verify both the identity and eligibility of all employees hired after November 6, 1986. In doing so, employers must ensure that they and their employees have properly completed the Employment Eligibility Verification form, better known as the “I-9.” While the form takes only minutes to complete, there are pitfalls which can lead to costly civil penalties (which have reached six and seven figures for some employers) and criminal prosecution. For example, ICE recently disclosed that retailer Abercrombie & Fitch was fined over \$1 million for deficiencies in its verification system. Details: <http://www.ice.gov/news/releases/1009/100928detroit.htm>. Notably, the investigation found no instances of Abercrombie knowingly hiring unauthorized aliens. The problem was simply a matter of faulty record-keeping.

Fortunately, by taking the issue seriously and following a few guidelines, employers can comply with federal law and avoid both the potential time and costs associated with unintended legal violations.

### Penalties.

IRCA prohibits employers from (1) knowingly hiring an alien who is not authorized to work, (2) hiring any individual without verifying his or her identity and work authorization, or (3) continuing to employ an individual if the employer knows or should know the person is not authorized to work legally in the United States.

Penalties for knowingly employing somebody not authorized to work in the United States range from \$375 to \$3,200 for a first time offense. While the fines for a second and third violation jump to a minimum of \$3,200 and \$4,300 respectively, you should expect criminal sanctions, including jail time, after the first violation. The penalty for I-9 paperwork violations alone range from \$110 to \$1,100 for **each** individual, though in practice, anything other than a very technical violation will likely result in fines toward the higher end of that range. In addition to the \$1 million plus fine assessed to Abercrombie & Fitch, Catholic HealthCare West, the eighth largest hospital provider in the nation, recently paid \$275,000 to settle claims of employment discrimination by the U.S. Department of Justice. More details:

<http://www.justice.gov/opa/pr/2010/October/10-crt-1166.html>. That company was improperly requiring non-U.S. citizen and naturalized U.S. citizens to present more than the minimum work authorization documents required by federal law, while at the same time permitting native-born citizens to provide whichever documents they chose. (More information regarding what employers can and cannot require as far as documentation is set forth below.)

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### **Summary of Form / Deadlines.**

The I-9 is relatively simple and comes with comprehensive instructions on how to prepare it. The form contains three sections: (1) the employee's background information and verification thereof under penalty of perjury (which the employee can fill out), (2) the employer review of identification and authorization documents and verification thereof, and (3) re-verification for those employees whose work authorization has expired.

Section 1 must be completed by the employee at the time his or her employment commences. Section 2 must be completed by the employer by the end of the third business day of employment. (However, do not risk a late form. Complete Section 2 at the same time as Section 1). Section 3 must be completed on or before the date the employee's work authorization expires (if it does in fact expire).

With regard to Section 2 (employer review of identify and verification documents), page 5 of the form provides examples of acceptable documents (i.e., List A documents, such as a U.S. Passport, that verify both identity and eligibility to work in the United States; or documents from both List B and C, which verify identity and authority to work, respectively). The documents must be **current** (i.e., no expired driver's licenses), and the employer must examine the **original** documents. The employer then verifies under penalty of perjury that it viewed the documents, the documents relate to the individual being hired, they appear to be genuine, and that to the best of the employer's knowledge the employee is authorized to work in the United States.

Importantly, IRCA prohibits any employer from requiring the employee to provide any specific documents or combination of documents from the approved list. For example, the employer cannot insist on a passport if the employee is offering a driver's license and a social security card. Nor can the employer require the employee to provide more than the minimum number of documents allowed. Further, employers cannot refuse documents tendered by an employee that reasonably appear genuine on their face.

### **Best Practices.**

While by no means complete, the suggestions below regarding compliance and maintenance of I-9 documentation should simplify the process, but more importantly, reduce the time and effort associated with a government audit, while helping to prevent unnecessary and costly fines.

#### **1. Perform routine self audits.** *Your company should do so at least once a year, preferably more often if possible.*

CIS or any other agency authorized to audit your company's I-9 forms (such as the Department of Labor) must give you a minimum three days of notice before auditing your records (assuming you ask for such notice). Three days is not a lot of time to gather the necessary information, especially if you employ a significant number of people. You should therefore keep your forms in a separate file from the employee files, as finding and gathering I-9s from every individual employee's personnel file alone could take more than the three days the government provides.

Further, if there are problems with any of your company's forms, routine audits will give you time to fix them without the pressure of pending government enforcement. Notably, there is very little on an I-9 you can't fix during a self audit. If you find forms in which the address or date of birth was left off, simply fix it and note "self audit" somewhere next to the change. Cross off or write over errors. (Do not use white out, which signals to an auditor that somebody was trying to hide or cover up something.) Further, if you are missing forms for employees, fill out new ones, as a late form is much better than no form at all. In other words, make sure all of your company's forms are complete and accurate.

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### **2. Keep a separate file for former employees.**

As part of your self audit, discard those forms that you no longer need to keep. Under IRCA, employers must keep I-9s for (a) three years from the date of hire, and (b) one year from the date the employment terminates. You must meet **both** tests before you can discard the form. (Under these rules you must therefore have a Form for every current employee, regardless of how long he or she has been employed.) Once you can discard the form, however, you should do so. There is no point getting fined over faulty I-9s you had no obligation to keep.

### **3. Do not make photocopies of identification and verification documents.**

While you are allowed to keep copies, the better practice is to only examine them and then return them to the employee. The government auditor is trained to spot fake documents, and if you have copies he or she may hold you to a higher standard than is necessary, increasing your chances of getting into trouble. You do not need to be able to determine when a document is fake, as you are only certifying that they “appear to be genuine” to you. Don’t give the government a reason to fine your company. (Note, however, if you do make photocopies you must keep them with the I-9 form and turn them over as part of any audit.)

### **4. Keep a tickler file for those employees whose work authorization will expire.**

If you can do so, you should remind the employee at least 120 days prior to the date his or her employment verification expires. If the employee is unable to produce new documents before the prior document expires, put him or her on unpaid leave or terminate him or her. (Note, there is no need to, and you may not, re-verify Permanent Resident Cards or U.S. Passports).

### **What to do if ICE or DOL Audits Your Company?**

If you request three days notice, you are entitled to it. In practice, it is not uncommon for government officers to simply show up at your office and ask if they can look at your documents. If you “consent” you are given no notice whatsoever. The better practice, however, would be to politely insist on the three day notice (which the government will likely already have prepared for you).

Further, get the names (or preferably the business cards) of the agents conducting the audit, and always copy everything you give to them. Absent copies of what you turned over, it will be very difficult to rebut or contest any fines levied.

Finally, keep a detailed memorandum of the events including the date and time of the request, the audit itself, what was said or demanded and any other events related to the audit. To the extent there are questions about what happened, a detailed memorandum will help you recall what happened if it becomes important later and will add credibility to your version of what transpired.

### **Conclusion**

The information provided above is designed only to be a summary of the I-9 form, the process for completing it, and some issues surrounding the government’s attempts to enforce its immigration laws.

If you have questions, need help with a self audit, or have been contacted by the government regarding your I-9 practices, please contact Todd Kinnear for further guidance.