

Survival Skills For Employers - I-9 Employment Verification Compliance Update

By Kathleen Campbell Walker¹

Office of Special Counsel Actions on the Rise

Employers continue to be elevated as a key tool in the ongoing efforts of the Obama administration to increase the enforcement of our dysfunctional immigration laws. Instead of headline catching raids by Immigration and Customs Enforcement (“ICE”) popular during the Bush Administration, the typical approach used now to try to decrease the hiring of undocumented workers is the use of administrative subpoenas and Notices of Inspection to review I-9 form compliance.

While the June 2010 ICE Strategic Plan reaffirmed the focus of the agency’s resources on the enforcement of I-9 compliance through more aggressive audits and the application of civil and criminal sanctions, the Office of Special Counsel (“OSC”) of the Department of Justice (“DOJ”) has also signaled an increase in its efforts to stop discriminatory practices by employers in the I-9 process. The OSC investigates and prosecutes allegations of national origin and citizenship status discrimination in hiring, firing, and recruitment or referral for a fee, as well as, unfair documentary practices during the employment eligibility verification process and retaliation under the anti-discrimination provisions of the Immigration and Nationality Act (“INA”). DOJ has released a video regarding worker rights and employer responsibilities under the anti-discrimination provisions of the INA, which is available at <http://www.justice.gov/crt/osc/>.

Employers must do what is required but not too much in their I-9 compliance procedures. Thus, on the one hand employers must timely determine the identity and work authorization of the new employee and at the same time the employer must not demand extra documentation of that status or risk charges of discrimination. It is the typical Catch-22 situation for many.

The July 15, 2010 article in the Wall Street Journal entitled, *Policing Illegal Hires Puts Some Employers in a Bind*, by Miriam Jordan outlines the increasing difficulty for employers caught up in the political fight over illegal immigration. By September of 2010, the DOJ will have increased the number of attorneys and investigators in the OSC by 25%.

The maximum criminal penalty for a pattern or practice violation of knowingly hiring undocumented workers is 6 months imprisonment for the entire pattern or practice violation and/or a \$3,000 fine per unauthorized worker. The penalties for I-9 paperwork errors, however, may result in civil fines ranging from \$110 to \$1,100 per employee with respect to whom the error was made. The fines for knowingly hiring or continuing to hire undocumented workers can be as high as \$16,000 per unauthorized worker for third or subsequent offenses occurring on or after March 27, 2008. Thus, while the I-9 may be a one page form, it is telling that the manual to complete it produced by Department of Homeland Security (“DHS”) is a mere 65 pages. <http://www.uscis.gov/files/form/m-274.pdf>

H-2B Focus – Wage and Hour Division (“WHD”) Audits

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On May 21, 2010 at a WHD stakeholder meeting held by the Department of Labor (“DOL”) in Washington, D.C., Ms. Diane Koplewski, Chief of the Immigration Branch, which is part of the Division of Enforcement Policy in the WHD, announced that there will be a pilot H-2B enforcement initiative scheduled to begin in October 2010. The H-2B category is used to allow temporary workers to fill only temporary non-agricultural positions required by a U.S. employer when no unemployed U.S. workers capable of performing the work can be found. These H-2B audits will focus on the hotel/motel industry based on perceived violations of H-2B regulatory requirements. These audits will include all employees of the facility and not just foreign workers. Subcontractors of the audited facility will also be audited (e.g. landscapers, janitorial contractors, and food service contractors).

Avoiding Knowing Hire Violations

Knowingly hiring an undocumented worker can expose management to criminal penalties. The Filip Guidelines of the DOJ provide guidance on how a company may decrease its exposure to criminal conduct allegations. Examples of corroborative evidence of actions which can lead to criminal investigation include:

- The employer failed to request the worker to present employment eligibility documents.
- The employer did not complete a Form I-9 for the worker until after a Notice of Inspection was served on the employer.
- The employer arranged for the workers to be taken to and from work.

What to be thinking about

- What exposure does our business have to I-9 compliance and discrimination actions/penalties?
- When was our last I-9 audit?
- Does it make sense to use the Social Security Number Verification System?
- What is E-Verify and should my company enroll?
- Why are these companies enrolling in IMAGE? Should we?
- What about using electronic I-9s?
- How do we have constructive knowledge exposure concerning an employee’s or an employee of a subcontractor’s inability to work legally in the U.S.?

Electronic I-9s

On July 22, 2010, ICE published a final rule to implement its new electronic I-9 rules effective August 23, 2010. Many large employers have implemented a variety of software programs in conjunction with other payroll programs to attempt to monitor their I-9 compliance obligations. Unfortunately, often employers are not aware of the extent to which any I-9 electronic program must be able to provide an electronic “paper” trail to enforcement authorities to meet regulatory requirements. The new final rule provides for the following substantive changes:

- Employers may use paper, electronic systems, or a combination of both.
- The audit trail required for electronic I-9 compliance requires that the audit be able to document when an I-9 is created, completed, updated, modified, altered, or corrected. This indexing system does not require that a separate electronically stored document

system be maintained for I-9s, if comparable results can be achieved without a separate description database.

- Employers are only required to provide or transmit confirmation of an I-9, if the employee requests a copy. This confirmation may be in the form of a printed copy of the electronic record or other transaction record format.
- When employees request such I-9 transaction confirmation, the employer shall provide it in a reasonable period of time.

It is important to remember that an electronic I-9 system may not be subject to any agreement that would limit or restrict access to and use of the system by an agency of the United States. Just as the use of an electronic I-9 system can improve an agency's enforcement effectiveness, so can the use of the E-Verify or IMAGE programs.

E-Verify and IMAGE

Both E-Verify and IMAGE are cooperative programs offered by the government to employers to improve their compliance with employment verification requirements contained in the I-9 form and related regulations. Neither program offers, however, any concrete assurances by the government that an employer will gain any reduced penalty or investigation leniency by voluntarily enrolling in either program. Both programs allow enhanced access by the government to data provided by the employer. The data gained from employers is also used by the government for investigation purposes.

Many states, such as Arizona among others, have mandated the use of E-Verify. To participate, the employer must register on-line and agree to the terms of the E-Verify Memorandum of Understanding ("MOU"). The MOU provides that the DHS reserves the right to conduct I-9 compliance inspections during the course of E-Verify use and to conduct any other enforcement activity authorized by law. In addition, the employer agrees to allow DHS and the Social Security Administration ("SSA"), as well as their agents to make periodic visits to the employer for the purpose of reviewing E-Verify related records [*i.e.*, I-9s, SSA transaction records (no-match letters) and DHS verification records], which were created during the employer's participation in the E-Verify program. Further, the MOU provides that for the purpose of evaluating E-Verify, the employer agrees to allow DHS and SSA to interview it regarding its experience with E-Verify and to interview employees hired during E-Verify use concerning their experience, and to make employment and E-Verify records available to DHS and SSA. These provisions could allow DHS and SSA to circumvent any current I-9 regulatory requirements for subpoenas, search warrants, or even a three-day notice requirement to review records, and substantially expands the types of documentation to be reviewed by the government.

The IMAGE (ICE Mutual Agreement Between Government and Employers) program was commenced in 2007 with the goal of assisting employers in providing a more secure and stable workforce and to enhance fraudulent document awareness. The basic requirements for IMAGE are as follows: complete self-assessment questionnaire; enroll in E-Verify; enroll in Social Security Number Verification System ("SSNVS"); adhere to IMAGE best employment practices; undergo an I-9 audit conducted by ICE; and review and sign an initial IMAGE partnership agreement with ICE.

Best Practices

To gain an idea of what the government would like to see from employers, the stated ICE list of best employment practices for employers is as follows:

- (✓) Use [E-Verify, the DHS employment eligibility verification program](#), to verify the employment eligibility of all new hires.
- (✓) Use the SSNVS and make a good faith effort to correct and verify the names and Social Security numbers of the current workforce.
- (✓) Establish a written hiring and employment eligibility verification policy.
- (✓) Establish an internal compliance and training program related to the hiring and employment verification process, including completion of [Form I-9](#), how to detect fraudulent use of documents in the verification process, and how to use [E-Verify](#) and [SSNVS](#).
- (✓) Require the [Form I-9](#) and [E-Verify](#) process to be conducted only by individuals who have received appropriate training and include a secondary review as part of each employee's verification to minimize the potential for a single individual to subvert the process.
- (✓) Arrange for annual [Form I-9](#) audits by an external auditing firm or a trained employee not otherwise involved in the [Form I-9](#) process.
- (✓) Establish a procedure to report to ICE credible information of suspected criminal misconduct in the employment eligibility verification process.
- (✓) Establish a program to assess subcontractors' compliance with employment eligibility verification requirements. Encourage contractors to incorporate IMAGE Best Practices and when practicable incorporate the verification requirements in subcontractor agreements.
- (✓) Establish a protocol for responding to letters received from federal and state government agencies indicating that there is a discrepancy between the agency's information and the information provided by the employer or employee (for example, ["no match" letters](#) received from the SSA).
- (✓) Establish a tip line mechanism (inbox, e-mail, etc.) for employees to report activity relating to the employment of unauthorized workers, and a protocol for responding to employee tips.
- (✓) Establish and maintain appropriate policies, practices and safeguards against use of the verification process for unlawful discrimination, and to ensure that U.S. citizens and authorized workers do not face discrimination with respect to hiring, firing, or recruitment or referral for a fee because of citizenship status or national origin.
- (✓) Maintain copies of any documents accepted as proof of identity and/or employment authorization for all new hires.