



OSC ADVISES ON FORM I-9 COMPLETION AND DOCUMENT REVIEW

Electronic Form I-9 Pre-Population

Over the past several months the Department of Homeland Security (DHS) has provided guidance related to electronic Form I-9 creation and prepopulation of Section 1 of the electronic Form I-9. The United States Citizenship and Immigration Services (USCIS) and Immigration and Customs Enforcement (ICE) have recommended that employers not prepopulate an employee's information in Section 1 of an electronic Form I-9. Recently, the Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) made a similar recommendation.

The OSC advised that prepopulation of Section 1 of the Form I-9 based on previously provided information could increase the likelihood of including inaccurate or outdated information and could lead to improper refusal of documents presented for the Form I-9. The OSC reasoned that where the information was previously obtained from a job application or a job interview and where the employer did not provide the employee an opportunity to review the prepopulated information in Section 1 or build in a method for the employee to correct Section 1 of the Form I-9, then the prepopulated information in Section 1 could be inaccurate.

Employers using electronic Form I-9 software or considering the use of such software, especially where fields in Section 1 are prepopulated, are encouraged to contact their FosterQuan attorney to address possible issues related to completion of the Form I-9, including possible discriminatory practices.

General Contractor's Review of Original Documents Submitted to Subcontractor for Form I-9

The OSC also recently provided an advisory opinion for independent contractors. A general contractor had requested that a subcontractor's employees provide, before the subcontractor's employees could begin work on the project, the original documents that they had provided for their Forms I-9 to the general contractor. The OSC cautioned that asking for the original documentation related to the Form I-9 to be produced again could result in discriminatory Form I-9 violations.

Additionally, the OSC recommended against requesting the same original Form I-9 documentation to be produced again for logistical reasons. The documents provided with the initial Form I-9 could have since expired or been lost or stolen or the person's status could have changed since the initial Form I-9 was completed. Submission of the same documentation could therefore be infeasible or not provide an accurate reflection of the person's work authorization.

Due to possible privacy and discrimination issues, employers should be wary of providing Forms I-9 and any supporting documentation to third parties. If, however, the Department of Homeland Security is requesting an employer's original Forms I-9 and supporting documentation, we recommend the employer immediately contact its immigration counsel as time is of the essence due to the three day deadline to produce the original documents to DHS.

As always, FosterQuan will continue to monitor developments and will make future updates available via our Immigration Update[®] bulletins and on our website at www.fosterquan.com.