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CLIENT ALERT

I-9 COMPLIANCE FOR EMPLOYERS: Guidance from recent cases.

MAY 22, 2014

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To aid in the enforcement of the obligation on employers to hire only individuals authorized to work, the Immigration Reform and Control Act of 1986 (the "IRCA") requires employers to verify the employment eligibility of all new employees at the time they are hired. Every employee hired to perform labor or services in return for wages or other remuneration must complete an *Employment Eligibility Verification Form* (Form I-9). The most recent version of Form I-9 has an issuance date of March 8, 2013 and expires March 31, 2016.

While many employers may view completion of the I-9 as merely as paperwork hassle, incomplete form and mistakes made during the completion of the form may result in significant fines for employers. The below cases are some recent examples of cases involving mistakes and errors by employers with respect to completion of I-9's for their employees.

MEXICO FOODS, LLC D/B/A "EL RANCHO CORP." (April 24, 2014).

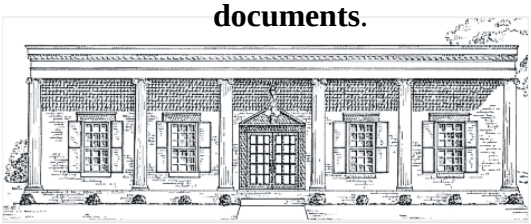
Mexico Foods, LLC ("Mexico Foods") operates the Supermercado El Rancho chain of supermarkets. An investigation by the U.S. Department of Justice, Civil Rights Division, Office of Special Counsel for Immigration-Related Unfair Employment Practices (the "OSC") revealed that Mexico Foods required its employees who were lawful permanent residents ("LPR's" or "green card holders") to reverify their employment eligibility by presenting new documents when their green cards expired, in violation of the law. Eventhough a green card may expire, an individual's lawful status as a U.S. permanent resident does not. Therefore, employees whose green cards have expired do not need to be re-verified through a new Form I-9. The investigation also revealed that Mexico Foods routinely requested a specific work authorization document from LPRs during the initial employment eligibility verification process even though, under the IRCA, employees are allowed to choose what documents to present. The OSC found that Mexico Food's discriminatory practices were based on an employees' citizenship status. Under a settlement agreement, Mexico Foods agreed to pay $43,000 in civil penalties, to set-up a back pay fund to compensate work-authorized individuals who suffered economic damages or lost work as a result of the alleged improper employment elibigility practices, required its verifying personnel to undergo training on their responsibilities to comply with the IRCA and to submit to monitoring for a period of 18 months.

LESSONS TO BE LEARNED:

Employers ARE REQUIRED to accept documentation that on its face appears to be genuine, relates to the emploee and satisfies the requirements of the IRCA.

Employers SHOULD NOT request more or different documents than are required by law.

Employers MUST permit employees to present any document/combination of acceptable documents.



M & D MASONRY, INC. (April 16, 2014).

This case has its origins in a newspaper article which appeared in the Atlanta Journal Constitution on April 30, 2010 under the headline, "Illegal hiring for airport construction?" The article quoted a hiring foreman for M&D Masonry, Inc. ("M&D") as saying that the company was employing workers on a job at the airport knowing they lacked valid employment authorization. The U.S. Immigration and Custtoms Enforcement's ("ICE"), Homeland Security Investigations Office then conducted a worksite enforcement investigation on May 7, 2010. ICE served M&D with a Notice of Inspection ("NOI") seeking I-9 forms for the company's current and terminated employees for the period May 7, 2007 until May 7, 2010, as well as for employment records, payroll data, wage and hour reports, and other information. M&D presented 342 I-9 forms, together with other documents. ICE subsequently issued M&D a Notice of Technical and Procedural Failures ("NTPF") on August 31, 2010, together with a Notice of Suspect Documents ("NSD"). M&D presented 56 corrected forms in response on September 14, 2010 and also advised ICE that 43 of the individuals on the NSD no longer worked for the company. M&D subsequently filed a timely request for a hearing on these charges.

ICE responded by filing a complaint with the Office of the Chief Administrative Hearing Officer ("OCAHO") alleging that M&D Masonry, Inc. ("M&D") engaged in 364 violations of 8 U.S.C. § 1324a(a)(1)(B). The case was assigned to an Administrative Law Judge ("ALJ"). The complaint was divided into two counts: Count I alleged that M&D failed to ensure that 277 named employees properly completed Section 1 of the I-9 and/or failed to ensure that the company properly completed Section 2 of the form. Count II alleged that M&D failed to prepare and/or present Forms I-9 for eighty-seven employees. ICE later filed a motion to amend its complaint to withdraw twenty-five of the violations alleged in Count I, leaving 339 alleged violations. ICE sought penalties in the amount of $981.75 for each violation, for a total requested penalty of $332,813.25.

ICE concluded that penalties totaling $332,813.25 should be imposed for the 339 violations shown. ICE started with a baseline penalty of $935 for each violation in accordance with internal agency guidelines based on the employer's 84% error rate (referred to as its "Enforcement Matrix"). It then aggravated the penalties by 5% for the seriousness of the violations not only because of their inherent seriousness, but also because more than a hundred I-9 forms were supposedly verified by a signature stamp on the same day, February 20, 2008, regardless of the wildly varying dates reflected in Section 1 of the forms. The government also aggravated the penalties by another 5% based on the size of the employer, pointing out that M&D had been in the business for more than 20 years, had more than 400 employees over a three year period, a payroll of 4.3 million dollars, and a number of significant contracts. ICE treated the involvement of unauthorized workers and the lack of history of previous violations as neutral. Finally, the government says it mitigated the penalties by 5% based on the good faith criterion, and the net result is a reasonable and proportionate penalty that should not be disturbed. The final assessment was made at the rate of $981.75 for each violation. The ALJ subsequently lowered the penalties to $650 each for Count I violations and $750 each for Count II violations (failure to prepare I-9 forms) for an overall penalty of $228,300.

In her discussion of the statutory element of good faith, the ALJ cited *Broussard-Wadkins* as authority for the proposition that "the presigning of hundreds of I-9 forms in batches has been found to constitute 'false attestation' within the meaning of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1546(b)." *See M & D Masonry, Inc.*, 10 OCAHO no. 1211, at 12. M&D noted that ICE continues to use its "Enforcement Matrix" in calculating the civil penalties it assesses for violations of 8 U.S.C. § 1324a, despite the number of times that OCAHO has found ICE's penalties to be "excessive" in particular cases.

M&D did not dispute that it pre-signed over 100 I-9 forms that it delivered to ICE pursuant to the Notice of Inspection; nor did M&D dispute that pre-signing I-9 forms is wrong. However, M&D questioned whether this conduct should be "equated with alleged racketeering under RICO." M&D asserted that the "inflammatory and unfounded suggestion that it committed a criminal RICO violation jeopardizes its ongoing existence and future," and requested that the Chief Administrative Hearing Officer ("CAHO") vacate the final decision and order "as a rejection of OCAHO's inclusion of such an allegation." M&D also argued that inclusion of a reference to RICO in a published OCAHO decision threatens the continued viability of M&D's business because of the "shadow" it casts over M&D. M&D filed a timely request for administrative review of its case and was granted review de novo by CAHO Robin M. Stutman. After reviewing the issues raised on appeal, CAHO Stutman declined to modify, vacate or remand the ALJ's decision.

LESSONS TO BE LEARNED:

An employer SHOULD periodically conduct a self audit of its I-9 records for compliane with the IRCA.

An employer SHOULD NOT presign I-9's under any circumstance.

KETCHIKAN DRYWALL SERVICES, INC. ("KDS") (August 6, 2013).

KDS is a small Washington employer with just 4 full-time and approximately 20 part-time employees. When a project required more workers, KDS would bring on temporary employees as needed. Temporary workers were required to go to the company's offices to provide information for their I-9s before beginning work on a project.

Over the years, responsibility for completing the I-9 forms was passed among nearly a dozen employees who had no particular training for the task. ICE had also warned KDS of deficiencies following a 2000 I-9 audit. In 2006, KDS hired a new comptroller who had I-9 training and tried to improve compliance with the required documentation. However, in 2008 ICE conducted another audit of KDS. During this audit, ICE uncovered numerous problems, including the failure by KDS to provide any I-9 forms for 43 employees. KDS had also neglected to complete the attestation section of the I-9 forms (Section 1) for another 65 employees and to note the supporting documents (Section 2) for 110 more. Finally, there were 53 employees on whose I-9 forms Sections 1 and 2 were both lacking. When ICE proposed a civil penalty of $286,624, KDS requested a hearing before an ALJ. KDS argued before the ALJ that it had substantially complied with I-9 requirements by retaining copies of the supporting documents for many employees, even if the related I-9 form wasn't completely filled out and signed. KDS' position was that ICE could determine a workers' legal status by examining the underlying documents. The ALJ was not persuaded by such argument. The ALJ did determine, however, that ICE's evidence fell short on some violations and reduced the fine to $173,250. KDS appealed the ALJ's ruling to the Ninth Circuit.

On appeal before the Ninth Circuit, KDS again took the position that it had substantially complied with the intent of the I-9 requirements and that its deficiencies were technical rather than substantive (e.g. in many cases, KDS had photocopied worker identity and legal status documents and stored them along with partially completed I-9 forms). KDS argued that any penalty should be reduced because of its good faith efforts to comply with the requirements of the IRCA.

The Ninth Circuit in deciding the case looked to the specific language of the Immigration and Nationality Act which provided that employers must retain completed I-9 forms and present them for inspection by ICE on three days' notice. The court noted its general deference to the agency tasked with enforcing particular requirements (e.g. ICE). The court reviewed ICE's decision under the narrow "arbitrary or capricious" standard as set forth in the Administrative Procedures Act ("Act"). KDS in its defense claimed that its record keeping established the legal status of its workers and that ICE was arbitrary in insisting on "technical" compliance with the details called for on I-9 forms. KDS argued that it fully complied with its statutory obligations by copying and retaining its employees' verification documents together with partially completed I-9 Forms because the documents showed the employees' eligibility for work and the forms had been signed. KDS also further argued that any other deficiencies should be excused as merely "technical or procedural" failures made in spite of its "good faith attempt to comply." Finally, KDS argued that the Act unambiguously allows an employer simply to copy and retain its employees' verification documents in order to comply with the verification and documentation requirements imposed by the IRCA.

The Ninth Circuit in ruling against KDS's position to read § 1324a(b)(4) of the IRCA as providing an alternative to filling out the forms completely, found that the statute does not allow for such an interpretation and that "[i]n other words, copying and retaining documents is neither necessary nor sufficient for compliance, and § 1324a(b)(4) simply makes clear that it is permitted. The court further went on to state that " 'Fully' means 'fully,' and not, as KDS argues, 'partially.'".

LESSONS TO BE LEARNED:

Employer's "good-faith efforts" to comply ARE NOT enough.

Employers MUST fully and completely fill out I-9 forms.

John R. LaBar is available to consult with employers regarding a review of their employment law and HR needs.

John R. LaBar is a named member of Henry, McCord, Bean, Miller, Gabriel & LaBar, P.L.L.C. His practice includes assisting business and corporate clients in business/corporate, real property, tax, intellectual property, creditor bankruptcy (including collection of accounts), corporate litigation and employment law. Mr. LaBar is the Town Attorney for the Town of Morrison, Tennessee. He has served as an Adjunct Professor of Law at the University of Tennessee College of Law teaching Contract Drafting, is a frequent author in legal newsletters, and is often a speaker and acts as faculty for legal education seminars on employment law topics.