BURR ALERT

I-9 and E-Verify Compliance Practices for Temporary Labor and Contractors

Four things to do now to minimize risk

Many of our clients rely on temporary labor solutions and outsourcing of certain functions to contractors to make their businesses work. While these workers are not your direct employees, their presence on your site doing your work triggers obligations for you as an owner under several regulatory regimes.

In the context of I-9 and E-Verify compliance, your obligations as an owner stem from a provision of the Immigration Reform and Control Act, which states:

For purposes of this section, a person or other entity who uses a contract, subcontract, or exchange, entered into, renegotiated, or extended after November 6, 1986, to obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to performing such labor, shall be considered to have hired the alien for employment in the United States in violation of paragraph (1)(A).

8 U.S.C. § 1324a(4). Immigration and Customs Enforcement (ICE) sometimes uses this provision during an I-9 compliance investigation to attempt to hold an owner liable for the immigration violations of its contractors. The rationale is this: if an owner turns a blind eye to its contractors' immigration compliance practices, the owner can be said to be using a contract to avoid directly verifying the work authorization of contractors' workers, and then benefiting from the workers' unauthorized labor. This is because ICE considers failure to follow I-9 rules and regulations to be constructive knowledge that an employer may be employing unauthorized workers – not bothering to verify is the same as verifying and ignoring the results. After connecting a few dots, ICE uses that same rule to hold an owner liable for contractor's violations – not bothering to make sure your contractor follows the law is the same as knowingly using the relationship with the contractor to avoid the law.

Confronted with this potential liability, the owner's natural temptation is to involve itself directly in its contractor's immigration compliance practices, or even to independently verify the work authorization of workers the contractor puts on site. However, acting on this temptation can backfire on the owner just as surely as failing to do anything at all. Here are the two primary reasons why:

1) Liability for Immigration-Related Unfair Employment Practices. As an employer, the owner is required to complete the I-9 process for each employee without discriminating against said employee. The Department of Justice (DOJ), which handles discrimination claims related to the I-9 process, has indicated that that the same is true for owners dealing with contract workers. When asked whether an owner could request documents from a contractor's worker proving that the worker is authorized to work, DOJ advised that this

practice is problematic for a number of reasons that could give the worker grounds to complain about discriminatory practices.

2) Practical limits to the amount of attention I-9 compliance gets. Many employers barely have enough time and resources to devote to monitoring their own I-9 compliance practices. Yet many owners are tempted to give themselves rights to review their contractors' immigration compliance practices through the language of the contract itself. A popular contract provision arose just after ICE began enforcing I-9 regulations against owners about ten years ago, which obligates the contractor to provide its I-9 Forms to the owner for review, and in some cases keep the I-9 Forms for contract workers assigned to the owner at the owner's site. ICE has been known to use that contract language against the owner if the owner never enforced it. In other words, an owner giving itself the right to monitor the contractor's compliance, but never exercising that right, is as bad as an owner who completely ignores the contractor's compliance.

Thus, the question becomes how one effectively serves these masters, at least in a way that minimizes risk on both fronts? Here are some ideas you can implement to minimize the chance that either your contractor will get you into trouble, or that you will get yourself into trouble monitoring your contractor.

#1 **Check the contract with the labor agency or contractor.** If your contract does not contain language that requires the other party to comply with all federal and state requirements to verify the work authorization of its workers before placing them on your site, your contract probably needs revision.

#2 **Consider requiring your labor agency or contractor to enroll in E-Verify**. Even though the companies you contract with may be required to enroll in and use E-Verify by state laws, it may be advisable to put this requirement in your contract with them as a condition of your continuing relationship.

#3 **Consider requiring your labor agency or contractor to have a third party audit its I-9 and E-Verify compliance.** Rather than putting the burden on yourself to make sure your contractors are doing everything they promise to do in your contract, you can build a requirement into the contract that they undergo a periodic I-9 compliance audit and produce a certificate from the auditor stating that they are compliant. You may even require that the auditor they choose be selected from a list of auditors known to you.

#4 **Train your HR personnel and related employees on how to handle information and/or suspicion that your labor agency or contractor may not be complying with I-9 and E-Verify regulations.** When encountering said suspicions, the best practice may not necessarily involve confronting the contractor's worker directly. Nor does it necessarily involve demanding proof from the contracting company that the worker is authorized to work. This is because discussions overheard in the locker room or questions that turn up when the worker is applying for her badge to access your site may not constitute "knowledge," that the worker is unauthorized to work under I-9 regulations. "Knowledge," as defined by regulation, is what obligates an owner to take further action, but acting without knowledge in a way that adversely affects a contract worker could lead to discrimination allegations.

The key to I-9 compliance in any scenario is to focus on the act of compliance itself – correctly and timely completing Form I-9 and E-Verify cases when required. Sometimes, compliance may not be enough, because sometimes the employer is confronted with information that calls the I-9 or E-Verify results into question. However, those situations must be examined carefully and acted upon with appropriate advice. By and large, the regulations are designed to discourage employers from second guessing the results of I-9 and E-Verify or substituting their own judgment for said results. The same can be said of owners monitoring contractor compliance – the primary focus is on the contractor's compliance practices rather than the contractor's workers. Taking appropriate action to compel contractors and labor agencies to comply with regulations according to the guidelines above is likely the best way to minimize your risk on all fronts.

If you have any questions or need further information, please contact:

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