



I-9 Compliance Challenges In The Hospitality Industry

Insights

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In the past several years, businesses in the hospitality industry have particularly borne the brunt of increased federal enforcement of the nation's immigration laws. Through high-profile tactics including raids of businesses large and small, the previous administration put employers on notice that hiring unauthorized workers could result in million dollar fines, jail time for company owners, and months of damaging press coverage.

Predictions that the incoming administration would ease enforcement actions against employers were recently dashed when Secretary of Homeland Security Janet Napolitano confirmed the agency's commitment to finding and prosecuting employers of unauthorized workers. In reaffirming its goal to "target the root cause of illegal immigration," the Department of Homeland Security announced it will focus its resources on the criminal prosecution of employers who hire unauthorized workers.

Fortunately for employers, the law recognizes that sometimes verifying an employee's work authorization may be complex and difficult. Even an employer who has no intent to hire an illegal worker can be duped by a fraudulent Social Security card or counterfeit driver's license.

The law may protect such employers so long as they attempted in good faith, and by following specific procedures, to hire only legally authorized workers. For businesses in the hospitality industry, a number of factors make screening workers more challenging than in other industries. What follows are some common challenges for businesses in the hospitality industry, and tips for how you can protect your company and ensure full compliance.

A Stitch In Time Saves I-9

The Form I-9 is one of the most effective tools for ensuring that a newly-hired employee is authorized to work in the United States. Federal law requires employers to complete a Form I-9 before any new employee can begin work, the sole purpose of which is to verify that the employee has authorization to work in the United States. The current version of Form I-9 became effective on April 3, 2009, and employers are required by law to use only the most recent version of the form.

While completing an I-9 form takes a little time, a few minutes spent properly completing the form can prevent a subsequent government audit or immigration raid, and may insulate you from

can prevent a subsequent government audit or immigration raid, and may insulate you from incurring civil fines or being criminally charged.

Employers who have heavy turnover, or who have multiple locations, should consider replacing paper I-9 forms with an electronic software program. Federal law allows the electronic completion of I-9 forms, giving employers access to computer-generated alerts about expiring employee documents as well as the ability to run comprehensive reports.

Moreover, an electronic I-9 program instantly double-checks that each form is entered completely and accurately. These programs can also be synchronized with the E-Verify federal database, if used or required.

Problems Common In The Hospitality Industry

Multiple Hiring Sites

Employers in the hospitality industry often have more than one location in which they do business. In many cases, individuals are hired at various locations and personnel paperwork is not processed centrally. This presents the challenge of ensuring that the hiring manager at each location is properly and consistently completing I-9 forms for each new employee, and is also maintaining them for a specified period as required by law. One hiring manager's mistaken understanding of how to properly complete the I-9 form may mean that all forms from that particular location contain the same technical errors. In the case of an audit, each paperwork violation on an I-9 form can generate a fine of \$110 to \$1,100.

Your best defense is to make available company-wide training-and-compliance manuals. A written policy dictating the timeline for when an I-9 form should be completed, together with simple but comprehensive instructions, can help ensure that your company's human resources personnel are completing I-9s in a consistent and accurate manner. Because proper training is never going to fully eliminate errors and omissions, employers should conduct a central audit of all I-9 forms at least annually.

Independent Contractors

The use of independent contractors is widespread in the hospitality industry. For example, an outside catering agency may provide staffing for a hotel ballroom, or a crew of painters may be brought in to refurbish a restaurant dining room. In the case of a true independent-contractor relationship, the business hiring the services of the independent contractor is not required to complete a Form I-9 for employees of the independent contractor. While this rule appears simple, it is in reality rather complex.

First, this rule only applies to true independent contractors. If an investigating federal agency, such as the Department of Labor, determines that the individual is actually an employee rather than an independent contractor, the employer will then be liable if the individual lacks valid work authorization.

Second, federal law prohibits the use of independent contractors when done to avoid inquiring into a worker's legal authorization to work. Using the labor of an independent contractor can lead to fines and even jail time if you had reasonable notice that the independent contractor lacked authorization to work in the U.S. This "common sense" test takes into account the totality of the circumstances: in other words would a "reasonable person" have suspected that the independent contractor did not have authorization to work? If you have doubts about the work authorization status of an independent contractor, consult with an immigration attorney to determine if additional investigation should be undertaken.

Short-Term Laborers and Re-Hired Former Employees

Because of the seasonal nature of many hospitality businesses, it's common for employees to work for a particular establishment for only part of the year, or for a one-time event such as a convention. This leads to a common scenario where an employee is hired, subsequently terminated, and re-hired during a later season or for a later event.

Employers in this situation often assume that since an I-9 form was completed on that employee's behalf originally, there is no need to re-verify that the employee has authorization to work. But this is not true. An I-9 form completed for a previously-terminated employee is only valid upon re-hire if the documents originally used for the I-9 form are still valid and have not expired. Also, the individual's original start date must not have been more than three years in the past.

Any employer re-hiring a former employee should carefully complete the reverification box in Section 3 of the I-9 form, and should ensure that the employee's employment authorization document continues to be current. Also, if the government has released a more current version of the Form I-9, be sure to use the most recent version for re-verification..

The Bottom Line

These are just some of the most common compliance challenges in the hospitality industry. While proper completion of the I-9 form might sound like just another human resources paperwork requirement, failure to comply can result in serious monetary fines and even criminal sanctions. For example, an unauthorized employee picked up by law enforcement, perhaps for something as minor as a routine traffic stop, can identify your business as his or her employer, instantly putting your establishment on the radar screen of federal immigration authorities.

Businesses in the hospitality industry should be aware that many of the hiring scenarios they commonly encounter may require additional research into the proper steps to ensure I-9 compliance. Our advice? Pro-actively institute company-wide training and compliance guidelines to ensure that non-compliance at one location doesn't attract government scrutiny for the entire company. Finally, the I-9 form appears deceptively simple but can be complex. Don't be afraid to seek assistance in properly completing and retaining I-9 forms.

