

Insights, News & Events

WEB EXCLUSIVE: WHEN I-9S LEAD TO OH-NOS: FAILING TO COMPLETE FORMS WITHIN 3 BUSINESS DAYS CAN LEAD TO HEFTY FINES

Publication
Feb 1, 2017

A recent federal court of appeals decision provides an important reminder for you to complete I-9 forms promptly and properly retain related records in the event of a government inspection. Failure to follow the lessons taught by this case could lead you to suffer a fate similar to the unfortunate employer involved. The good news is that there is a simple four-step plan to keep you in compliance and out of the courtroom.

COMPANY HAD 54 PROBLEMS...

Buffalo Transportation, Inc., is a small private company located in Upstate New York that provides transportation assistance to individuals traveling for medical appointments. After an I-9 audit, the United States Immigration and Customs Enforcement (ICE) found that none of the company's I-9 forms were completed within three business days after the start date of employment as required by the Immigration and Nationality Act. Instead, all 54 of the company's I-9s were completed and signed *after* management received ICE's audit notification.

The company argued that it had substantively complied with the I-9 requirements by retaining all the identifying documents on file, allowing it to prove that all

Service Focus

Counseling and Advice

Immigration

employees were legally permitted to work in the country. ICE disagreed, pointing to federal regulations that expressly indicate the mere copying and retaining of identifying documents does not relieve an employer from its I-9 obligations. ICE issued Buffalo Transportation a civil penalty of over \$109,000. Upon review, an Administrative Law Judge reduced the amount to \$75,000 after considering the size of the employer and the absence of bad faith.

...That Multiplied To 75,000 Problems

The company appealed the decision to the 2nd Circuit Court of Appeals, arguing that its failure to complete the I-9 forms within the legally required time should be considered a procedural or technical error rather than a substantive error. Such a distinction is important because it would have preserved the ability to make a "good faith" defense argument and limit damages. However, the court rejected the employer's arguments and upheld the \$75,000 civil penalty assessment in a December 22, 2016 ruling.

The 2nd Circuit judges relied upon a 1997 guidance memorandum issued by the former Immigration and Naturalization Service (INS) that defined a substantive error as any error that "undermines the statutory requirements of employment verification." The court applied the INS guidance and found that an employer's failure to complete an I-9 form within the allotted three business days of hire is substantive because it was not merely a small error that could easily be corrected. An example of a procedural error, the court concluded, would be something along the lines of listing an incorrect birth date or some other similar typographical inaccuracy.

A 4-Step Plan To Avoid I-9 Headaches This decision demonstrates how an employer's failure to both understand the I-9 process and maintain a strong immigration compliance program can lead to significant penalties. You should prepare for a possible audit and enforcement action by following these four best practices:

1. Conduct an internal I-9 audit

Perform yearly I-9 audits to ensure you have a properly completed I-9 form for every current employee hired after November 6, 1986. If the audit uncovers any errors, follow the recommended process to correct the errors and make note of these changes. If you are unsure how to correct an error or properly document changes, or if you have any questions concerning I-9 audits, you should reach out to your legal representative for assistance.

2. Properly train those completing I-9 forms

Any company representative responsible for I-9 completion and verification must receive proper training about the I-9 documentation process to avoid common compliance violations. Many employers assign the I-9 functions to personnel not properly trained in I-9 documentation procedures and lacking in appropriate oversight, which is a mistake. You should ensure this responsibility is handled by those in the human resources department, and you should provide them regular and comprehensive I-9 training to help avoid major financial penalties.

3. Verify I-9's for all remote employees

You might retain authorized non-employees – such as notaries – to complete I-9s on your behalf for those employees working in a remote location. However, these third parties may not be familiar with I-9 documentation and updated compliance requirements. Regardless of their status, their mistakes could end up leading to exposure for your company. If you use third parties to review a remote employee's documents and complete Section 2 of the I-9, you should have a human resources team member review the completed I-9 paperwork as soon as possible and take immediate steps to bring the form into compliance.

4. Consider signing up for E-Verify

E-Verify is an online government system allowing you to instantly validate a new hire's employment eligibility to work in the United States. You simply input relevant information from the completed I-9 form and the system compares it against the records of the Social Security Administration and the U.S. Department of Homeland Security. While the use of E-Verify is currently voluntary for most employers, some states have mandated its use for employers doing business in their state. The Trump administration may soon require it for all employers across the country. Using E-Verify may eliminate some common I-9 mistakes, but you should weigh all the pros and cons and consult with immigration counsel before you sign up.

Conclusion

Given the incoming administration's emphasis on addressing undocumented immigration, it is likely that enforcement efforts will increase in the next few years. Your diligence in ensuring timely and accurate completion of the employment verification process might spare you costly fines and defense costs, so there is no better time to get your I-9 process on the right track.

For more information, contact the author at RNeale@fisherphillips.com or 206.682.2308.