Insights, News & Events

THE I-9: HOW MUCH TROUBLE CAN ONE PIECE OF PAPER CAUSE?

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No new hire has ever been accused of enjoying the time spent filling out the myriad forms they must execute at the outset of their employment. Likewise, it would be a curious manager who listed "helping new hires with orientation paperwork" as an enjoyable aspect of their job. This double malaise has led many employers to automate the process as much as possible: using electronic fill-in-the-blank forms to eliminate the potential for mistakes, and using a computer in place of the manager to ensure all the forms are completed and distributed to the necessary departments.

Of all the paperwork a new hire completes, perhaps the most important is the Form I-9. And unfortunately, the I-9 is a form that must be handled with precision and individual attention. Federal law obligates employers to fill out an I-9 for every employee, ensuring the new hires are lawfully entitled to hold a job in the U.S. While the form looks easy to use, lawyers auditing I-9 compliance routinely find errors.

Unlike many other forms on which an error is of little consequence and might easily be corrected, errors on the I-9 can result in heavy fines and penalties – even if the employer did not hire anyone not authorized to work in the country. Another unusual feature of the I-9 is the requirement that a company employee or authorized representative be present to certify the information provided. While the authorized representative does not have to be an employee of the company, this duty cannot be delegated to a computer.

RETAILERS ARE ESPECIALLY SUSCEPTIBLE TO I-9 PROBLEMS

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The nature of the retail business is such that employers often have multiple stores in various locations. Because of this geographic dispersion and in-person review requirement, the store manager (or the equivalent) is often charged with I-9 compliance. Herein lies the danger. While store managers can be trained on I-9 compliance, the subtle – and crucial – details of the training are unlikely to stick unless hiring is done on a very regular basis.

Even those who hire employees on a regular basis seldom consider the paperwork significant and are wont to speed through the process. Managers might accept paperwork that is obviously fraudulent, even to the untrained eye, in the rush to move the employee from the unproductive paperwork process to filling the store's needs. A recent case highlights the dangers of such carelessness.

SUBSTANTIVE VIOLATION LEADS TO SUBSTANTIAL FINE

In *Buffalo Transportation Co. v. United States*, an employer that provides transportation services for individuals traveling to medical appointments did not fill out Form I-9s at the time of hire for any of its 54 employees. While the employer did make copies of the identifying documents required to complete the forms, it did not complete the I-9s in a timely manner. According to federal law, Section 1 of the I-9 must be completed no later than the first day of employment, and section 2 must be completed within three days of the first date of employment.

After receiving a notice of an I-9 audit by Immigration and Customs Enforcement (ICE), the company filled out I-9s for all of its employees. ICE concluded the employer had failed to fulfill its I-9 obligations and issued a $109,000 fine. The company appealed the fine to an Administrative Law Judge (ALJ), who upheld the violations but reduced the fine to $75,000. The ALJ based his decision on the size of the company and a lack of showing of bad faith.

Unsatisfied, and apparently bolstered by the ALJ's finding a lack of bad faith, the company sought review in the 2nd Circuit Court of Appeals. There it argued that its failure to complete the I-9s in a timely fashion was only a technical violation, not a substantive one. The difference between the two is significant; a fine based on a technical violation is subject to a good faith defense, while a fine based on a substantive violation is not. (Incidentally, ICE has since

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amended its regulations to remove the distinction between technical and substantive violations, thereby eliminating the good faith defense).

The company argued it had substantively complied with the I-9 requirements by keeping on file a copy of each employee's identifying documents required to complete the I-9. The 2nd Circuit rejected this argument and ruled the untimely completion of the I-9s was substantive. The court relied upon a 1997 guidance memorandum issued by the former Immigration and Naturalization Service (INS), which defined a "substantive error" as one that undermines the statutory requirements of employment verification. It thereby found a failure to complete an I-9 form within the allotted three business days of hire is substantive because it is not merely small and easily corrected. An example of a procedural error, the court said, would be listing an incorrect birth date or other typographical inaccuracy.

THERE'S MORE BAD NEWS

Buffalo Transportation is hardly alone in facing significant fines for I-9 failures. Hartmann Studios was recently hit with a fine in excess of $600,000, primarily for failing to sign I-9 forms at the time they were completed. To compound the danger of falling into the same trap as these unfortunate employers, the range of fines for a first violation of I-9 non-compliance was raised in August 2016 from between $110 and $1,100, to anywhere between $216 and $2,156.

What can make these fines especially onerous is that multiple violations can be found on each form. ICE interprets its regulations to allow a fine for each error on an I-9 and also fine a company based upon the percentage of I-9s that have substantive or uncorrected technical errors. Thus, a single incorrect I-9 can result in multiple fines. In addition, if the fail rate of a company exceeds 50% of their I-9s, ICE can assess penalties of $2,156 on each form, even if the same mistake appears on each one.

And we expect the federal government to soon turn the spotlight on employers to search for these errors. While the number of I-9 audits has steadily decreased in recent years, most experts expect an increase soon in light of the new administration's focus on enforcement of immigration laws. Indeed, President Trump has promised to increase the

budget and hire more ICE investigators, and we expect them to remain busy for the foreseeable future.

IS THERE ANY GOOD NEWS?

If there's any good news, it begins with the fact that the U.S. Citizenship and Immigration Services released a new Form I-9 (dated November 14, 2016). Using the new form became mandatory as of January 21, 2017. While this new form should help employers eliminate errors in completing the forms, it creates fewer excuses for employers who fail to execute it properly.

The new form provides clearer instructions for employees and employers on the correct way to complete it. For those employers completing the form electronically, the new I-9 provides "smart fields" which will limit errors by those entering the data into the form. This new form, which replaced the version in existence since 2013, will be valid until August 31, 2019. After January 21, 2017, all previous versions of the Form I-9 are invalid for new hires, re-hires, and re-verification purposes.

Positive changes include prompts on the electronic version to ensure information is entered correctly, the ability to enter multiple preparers and translators including a supplemental page for the preparers and translators, dedicated areas for including additional information rather than adding it to the margins of the form, and improved instructions that include specific instructions for each field – which will be particularly helpful for those using the electronic form.

The new form does require some information not previously requested. If the employee is an alien authorized to work in the country, they must include the Alien Registration Number/USCIS Number, the Form I-94 Admission Number, or the Foreign Passport Number and the Country of Issuance. Further, employers must now insert the employee's citizenship/immigration status on page 2. The Social Security number field is voluntary unless the employer is enrolled in E-Verify.

WHAT TO DO NOW?

In light of the new form, and in an effort to avoid costly mistakes, we recommend you take several immediate actions. First, decide whether it is better to complete the

new Form I-9 manually or electronically. Electronic execution will prevent some elementary errors but will require training for the user.

Second, train those responsible for execution of the new Form I-9 to ensure compliance with the proposed changes, as they may impact your current processes and procedures. These changes include the use of preparers and translators, as well as the data input for certain foreign national employees.

Finally, consider a compliance review of your immigration processes and procedures. Employer compliance will continue to be a major focus of ICE during the Trump administration. Both the addition of smart fields and the continued movement towards electronic data collection indicate a clear movement to greater enforcement actions by ICE. Not only can this lead to increased fines and penalties for I-9 violations, it can also trigger related employer compliance investigations through the Office of Special Counsel, Department of Labor, and Internal Revenue Service. For these reasons, the time to ensure compliance is now.

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