



# Immigration Compliance Dangers In The Shared Economy

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There is no greater area of business innovation than in the shared economy. Companies like Uber, AirBnB and Postmates are among the leaders in technical innovation and business strategy. At the heart of the shared economy is the creative way these entrepreneurs look at traditional business models. Uber is a car-driving company with no cars, AirBnB is a lodging company with no real estate and Postmates is a food delivery service that has no restaurants. Although the shared economy works in different industries, they share a common thread of using freelancers instead of employees.

Like many issues in the shared economy, immigration compliance is an unexpected but growing concern. The Form I-9 is the primary enforcement tool of U.S. Immigration and Customs Enforcement. Since 1986, the Form I-9 requires employers to inspect every employee's evidence of ability to work in the United States. ICE has the authority to inspect employer records to determine whether the employer is in compliance. When employers do not fulfill their immigration compliance obligations, ICE can fine an employer several thousands of dollars for each instance of violation.

When enacting immigration compliance laws, the president and Congress did not contemplate the shared economy. In fact, there is a specific Form I-9 exemption for freelancers or contractors. While many shared economy companies have strong background check systems to address questions of status, the penalties for failure to ensure freelancers are authorized to work is almost nonexistent for companies in the shared economy. So long as the freelancers are not true employees and the company has no reason to know that those performing work for them lack valid work authorization in the United States, immigration compliance rules and penalties do not apply to the company.

This gap of liability creates an opportunity for many undocumented workers to earn extra income through freelancing. This is especially true for smaller companies that attempt to distance themselves from traditional employer-employee relationships in part to access more cost-effective work arrangements. The freelancer can pick up a gig simply by claiming they are authorized to work in the U.S. This is a growing problem for employers in relation to the Trump administration's focus on immigration enforcement.

The Trump administration has promised to increase ICE by 15,000 officers. Many of these officers will be assigned to ensure employer compliance with immigration law. With approximately 11 000 000 people in the United States without documentation the likelihood that an employer has

11,000,000 people in the United States without documentation, the likelihood that an employer has undocumented workers in their workplace is very high. If a shared economy employer determined that its freelancers would be treated like employees, the process of conducting I-9s for each of those employees could result in a massive reduction of workforce. Many of these new “employees” would simply find other opportunities where immigration status is not checked.

In addition, ICE recently doubled the financial penalties for employers who fail to comply with immigration compliance requirements. For substantive or uncorrected technical errors on the Form I-9, an employer can expect to see fines of \$216 to \$2,156 per form. Therefore, an employer with 100 employees who does not keep I-9s for its employees would be looking at a fine of \$215,600. A summary of ICE’s fines and I-9 investigation can be found [here](#).

Although ICE might demand to see Form I-9s as part of an immigration inspection, employers should remember that they have rights too. To initiate an investigation, ICE must supply a subpoena in the form of a notice of inspection. At minimum, the employer will have three business days to provide ICE with Form I-9s and related documentation. Employers should be aware of how they can protect their worksite and their employees without being combative with ICE.

The best protection from ICE is preparation. ICE cannot fine a company for immigration violations if they have a strong culture of immigration compliance and properly execute and retain the Form I-9 for each employee. Accidentally completing an I-9 for a freelancer is actually evidence that indicates that person is an employee. Therefore, employers are responsible for more than simply ensuring that they have inspected the forms but also that the documentation appears genuine and related to the person providing it to them. Employers must also be sure to identify who should even complete the Form I-9 to begin with.

Protection from ICE starts with developing clear immigration compliance policies and conducting an internal I-9 audit. I-9 audits can be done quickly and at reasonable costs compared to the potential liability that I-9 violations can cause. Employers should designate a trained person to conduct the audit. For example, this might be someone internal or contracting with a human resources consultant or attorney. At minimum, a good audit will include at least all current employees. Strong compliance systems and protocols will be essential for a company that might be quickly required to create I-9s for members of its workforce.

The categorization of a workforce as freelancers saves shared economy companies on wage and hour requirements, workplace safety, paid leave and health care. For those companies required to recognize their workforce as employees, the immigration compliance requirements can be a heavy burden. If entrepreneurial companies are looking to move into the shared economy workforce model, they must carefully document who is an independent contractor, a joint employee or a true employee. If the company fails to clearly document that those who perform its work are not employees, the failure to maintain I-9s could be extremely costly.

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While many companies are very sophisticated regarding the basic requirements of maintaining a proper independent contractor relationship with its workforce, there are many companies that do not understand the basic common law elements that establish whether there is an employer/employee relationship. Generally, these include control of activity, expenses, tools, written agreements and continuation of the relationship. Completing an I-9 for a freelancer would actually be evidence of creating an employer/employee relationship.

As freelancers continue to demand benefits similar to those of employees, there will be increased scrutiny on immigration compliance. Further, as the Trump administration takes a harder stance on immigrants without legal status in the United States, many may turn to companies in the shared economy as a means to avoid detection. As investigations increase and fines continue to be assessed, immigration compliance will create additional incentives for companies to carefully define their relationships with their workers.

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