Insights, News & Events

IS YOUR BUSINESS PREPARED FOR AN I-9 AUDIT THIS HOLIDAY WEEKEND? A 5-STEP ACTION PLAN

Insights
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Last year, federal immigration authorities decided that summer holiday weekends were the perfect time to spring I-9 audits on unsuspecting employers – and signs point toward this trend repeating this coming July 4 and Labor Day. Given the ramped-up activity we saw during the Memorial Day weekend, we expect Immigration and Customs Enforcement (ICE) to once again scrutinize the immigration documentation of thousands of employers in the coming days. With the challenges from the COVID-19 pandemic and the workforce shortage crisis still looming, employers may not have I-9 compliance at the top of their priority list. However, many of the relaxed I-9 compliance rules that the Department of Homeland Security (DHS) temporarily put in place in response to the pandemic will end soon, compounding what's expected to be a busy summer. What do you need to know about I-9 compliance practices as we prepare for the summer holidays? This Insight summarizes your responsibilities and provides you with a five-step action plan.

Temporarily Relaxed Rules End

During the I-9 verification process, employees must provide documentation to their employers showing their identity and authorization to work. Employees can show one document from Form I-9's List A (such as a passport), which verifies both identify and work authorization – or they can show a document from List B (such as a driver's license), which establishes identity, *plus* a document from List C (such as a Social Security card), which establishes work authorization.

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On May 1, the DHS ended the COVID-19 temporary policy allowing employers to accept expired List B identity documents. In 2020, DHS adopted this temporary policy in response to the difficulties many individuals experienced with renewing documents during the COVID-19 pandemic. With the end of this temporary rule, employers now must accept only unexpired List B identity documents as part of their I-9 verification process as they did before the pandemic. More and more employers have recently reported receiving I-9 inspection notices from ICE indicating that ICE may have resumed its practice of issuing Notices of Inspection right before a holiday weekend. Therefore, it is as important as ever for you to ensure you are following all I-9 requirements and complying with all recordkeeping responsibilities.

What is an I-9 Inspection?

The Immigration Reform and Control Act requires all employers to verify the identity and employment eligibility of their employees hired on or after November 7, 1986, through the I-9 verification process. You should have a properly completed I-9 form on file for all current employees and maintain the properly completed I-9 form for former employees for either three years from the date of hire or one year from the end date of the employment relationship, whichever is the later date. You must maintain both current and past employees' I-9 form for inspection in case of an audit by the authorities.

In case of an audit, ICE will typically start the process by issuing a Notice of Inspection (NOI) to an employer. ICE does not have to have a subpoena or warrant to conduct an I-9 inspection. Upon receiving an NOI, you will only have three business days to produce the requested I-9 forms and supporting documents. ICE can also require a personal appearance to give testimony regarding the company's I-9 practices.

During an inspection, ICE can request I-9 forms for all current employees hired after November 6, 1986, and the I-9 forms for any prior employees within the retention period. ICE may also request an electronic employee list, quarterly wage and hour reports, payroll data, Social Security mismatch correspondence, E-Verify documentation, and business information such as employer ID numbers, address, and business licenses.

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For any technical, procedural, or substantive violations, the employer can receive a fine between $252 to $2,507 for each I-9 paperwork violation. ICE can also access a penalty from $627 to $5,016 for the first offense for any employer knowingly employing an undocumented worker. That penalty can drastically increase to $5,016 to $12,537 for the second offense and $7,523 to $25,076 for the third or subsequent offense. The final penalty amount is determined based on several factors, including business size, overall good faith compliance effort, seriousness of the violation, number of unauthorized workers, and history of prior offenses.

What Should Employers Do? 5-Step Action Plan

In order to protect your business and minimize any potential liabilities, you should consider the following five-step action plan:

- ensure your **I-9 compliance processes** are in place, up-to-date, and followed by the staff managing the I-9 process;
- train managers and staff on how to **timely and correctly complete an I-9**;
- also educate your managers on what actions they should take if they are made aware of an **employee who may not be authorized to work** in the United States;
- have an **outside immigration attorney** review your I-9s to assist in identifying any correctable errors so that you are ready to present your I-9 forms in case of an ICE audit; and
- establish a **rapid response team** that would be responsible for contacting your immigration and employment counsel in the event of a visit from ICE at your worksite.

Conclusion

Fisher Phillips will continue to monitor developments in this area, so make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information. If you have further questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our Immigration Practice Group.