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# Between a rock and a hard place

*An update on I-9 compliance*

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It has been more than five years since the Department of Homeland Security (DHS) implemented a worksite enforcement strategy targeting the employment of unauthorized workers by employers through I-9 audits. Under the Immigration and Reform Control Act (IRCA), an employer must confirm the employment eligibility of all employees hired after Nov. 6, 1986, by completing the I-9 Employment Eligibility Verification form. Failure to complete this form or to complete it correctly can result in civil and/or criminal fines against an employer.

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While the employment eligibility verification requirement has existed since 1986, I-9 enforcement was lackadaisical during the decade before July 2009, when DHS issued its first set of Notices of Inspections (NOI) to employers. The enforcement strategy has been devastating for employers: I-9 audits of employers quadrupled from 240 in 2007 to more than 3,000 in 2012. In addition, during that time enforcement fines against employers for I-9 violations totaled more than $13 million in addition to an undetermined cost of legal bills. With hopes of Congressional immigration reform quickly fading, enforcement of immigration laws through I-9 audits of employers does not appear likely to subside. Here's what employers should do to comply with employment eligibility verification laws without running afoul of anti-discrimination laws.

## Establish a written I-9 policy

The first evidence of an employer's good faith in complying with its I-9 employment eligibility requirements is a written policy that outlines the company's I-9 policy and procedures. The purpose of a written policy is to show the public and, most important, DHS, that the company understands its I-9 obligations and has implemented good faith procedures to ensure compliance. A common pitfall in I-9 compliance occurs when there is not ownership of the I-9 process. There should be a designated company representative who owns the I-9 process for the company. This information should be part of the I-9 procedures along with a step-by-step guide as to how the company completes its I-9s.

## Conduct regularly scheduled in-house I-9 audits

Employer-initiated I-9 audits help ensure that these forms are stored, prepared, and completed accurately and that errors can be corrected in a timely fashion. At a minimum, companies should have a third

party review their I-9s at least once to ensure that the forms are being completed correctly and to obtain appropriate I-9 training where needed. While the third party auditor does not have to be legal counsel, it is recommended in order to protect the I-9 results and findings under attorney-client or attorney work product privileges. Periodic I-9 audits also can serve as training opportunities for company personnel. Most importantly, in-house audits provide an opportunity for employers to correct I-9 errors discovered during the internal audit. Unless an error is one of timeliness, U.S. Immigration and Customs Enforcement (ICE) should fine only those errors that exist after an NOI is issued.

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### Implement a reminder system for I-9 reverification of employee's employment eligibility before it expires

ICE considers it an egregious violation for an employer to fail to re-verify the employment eligibility of an employee whose employment authorization has expired. Employers should establish a reminder system to obtain documentation of continued employment eligibility of an employee before his or her work authorization expires. One exception is an employee that presents an I-551 lawful permanent resident card, as the I-551 does not need to be reverified even though it has an expiration date.

### Conduct I-9 training

Employers must provide I-9 training to all company representatives engaged in recruitment, orientation, and hiring processes for the company. This includes employees who are in charge of the I-9 process or are acting as the company's representative in completing the I-9. ICE considers efforts by employers to provide I-9 training to its representatives as evidence of good faith by the employer to comply with IRCA.

### Photocopy supporting documents presented as part of the I-9 process

Opinions differ as to whether employers should make photocopies of the supporting documentation presented during the I-9 process. These differences arise since IRCA and related regulations do not require employers to maintain photocopies presented for the I-9 process. (However, employers who are registered users of E-Verify are legally required to make photocopies of certain I-9 documentation as part of the E-Verify process.)

The case against making copies of I-9 supporting documents focuses on the concern that the photocopies can be used as evidence against employers if it is later determined that the I-9 documents are fraudulent. However, employers are not forensic experts and are not required to attest to the authenticity of I-9 documents. The employer is only required to attest that it has examined the documents presented by the employee and that the documents "appear to be genuine and relate to" the employee who presents the documents for I-9 verification.

Proponents of making photocopies base their argument on the fact that employers can use the photocopies to make corrections to I-9 errors during an internal audit. In addition, employers can avoid substantial paperwork fines in an ICE I-9 audit by having such photocopies on hand. During an I-9 audit, ICE must provide employers a 10-day period to correct I-9 technical or procedural paperwork violations to avoid potential fines. Employers who submit photocopies of supporting documents with the I-9s as part of their response to a NOI have a "second chance" to correct their I-9s by using the photocopies in order to avoid potential fines for certain violations. Based on past I-9 audits and I-9 negotiations with ICE, it would be prudent for employers to make photocopies of supporting documents presented for the I-9. This should help minimize any potential fines.

Any business that has not been complying adequately with I-9 verification procedures should take ***immediate*** steps to ensure full compliance. It is never too late to comply, right up to the time an employer receives an NOI.

### Excess vigilance

The rise in I-9 audits and fines has caused some employers to be overly vigilant in the employment verification process. This can cause problems, as shown by the rise in anti-discrimination claims before the Office of Special Counsel (OSC) against employers for document abuse. OSC investigates allegations of discrimination against employers when they treat workers differently in the hiring and firing process due to the worker's citizenship status, immigration status, or national origin. The prohibition against discrimination on these grounds also extends to the I-9 and employment verification process. OSC has warned the following acts can result in fines for discriminating during the hiring process:

- Refusing to hire workers who sound or appear foreign
- Preferring to hire U.S. citizens (unless it is legally required that the position only be filled by an U.S. citizen)
- Hiring nonimmigrant visa holders but rejecting qualified U.S citizens and lawful permanent residents who apply for the same job

In addition, employers can face allegations of discrimination during the I-9 process for certain actions including but not limited to the following: demanding that employees provide specific documents to complete the I-9; asking employees for more documentation than is required to complete the I-9; rejecting valid employment authorization documents from noncitizens; and demanding that lawful permanent residents present a new "green card" when their current green card expires.

As employers implement I-9 programs to protect themselves in I-9 audits, they must ensure their policies are applied consistently across the company and that no set of individuals is treated differently from the rest of the workforce. Overzealous I-9 policies that involve document abuse or result in discriminatory behavior also have resulted in substantial fines against employers. Employers must balance their obligations to not engage in discriminatory activities with their obligations to verify the identification and employment eligibility of new hires.

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