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Audits Remain Favorite Tool Of Immigration Officials

Feds crack down on companies that hire undocumented workers

By JOAN ROWE

In the past two years, the Obama Administration has shifted immigration enforcement policy from stemming illegal immigration by targeting undocumented workers through workplace raids to targeting employers who employ undocumented workers through I-9 audits, fines and debarments. This strategy was announced in 2009 by Homeland Security Secretary Janet Napolitano, who said that the new worksite enforcement effort would emphasize criminal prosecution of employers that knowingly hire illegal workers.

Napolitano said the goal is to reduce the demand for illegal employment and protect employment opportunities for the nation's lawful workforce. This past October, the U.S. Immigration and Customs Enforcement (ICE) announced that since January 2009, it had audited more than 3,200 employers suspected of hiring illegal workers, debarred 225 companies and individuals, and imposed roughly $50 million in financial sanctions – more than the total amount of audits and debarments than during the entire previous administration.

Although designed to identify and prosecute employers who knowingly hire undocumented workers, I-9 audits also result in fines against employers who have unknowingly filled out I-9 forms incorrectly or who have failed to retain records. In an audit, ICE can request forms going back three years for current employees and up to one year from the date of termination for former employees.

Recently, the Obama Administration announced that it intended to increase the number of I-9 audits and establish an audit office called the Employment Compliance Inspection Center within the Department of Homeland Security (DHS) staffed with specialists to review I-9 files. Also, in a recent regulatory agenda for fiscal year 2011, the DHS announced that it will publish a final rule in early 2011 to amend the list of acceptable I-9 documents.

New Handbook

In January 2011, the U.S. Citizenship & Immigration Services published a revised M-274 Handbook for Employers, Instructions for Completing Form I-9. The latest version of the Handbook may be found at www.uscis.gov.

With the increased enforcement focus on I-9s and with the revisions to the handbook, including changes regarding documenting employment authorization, it is imperative that employers update their I-9 compliance plans. A written I-9 compliance plan should provide for an internal compliance system that includes: conducting I-9 self-audits at regular intervals, staff training, and an adequate tickler system to ensure that employees whose employment authorization will expire are re-verified. It is essential to fix promptly any errors discovered in the self-audit. Further, it is recommended to bring in counsel who can assist with the self-audit under the protection of privilege and assess the integrity of the employer's I-9 system.

Pursuant to U.S. immigration law, an employer must not knowingly hire undocumented workers or continue to employ them once an employer learns of unauthorized status. Employers must verify employment eligibility, through the I-9 form, of every employee, regardless of citizenship or immigration status. No I-9 form is required for an employee hired before Nov. 7, 1986. The I-9 is used to verify both the individual's identity and proper U.S. employment authorization.

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The list of approved documents that employees can present to verify their employment authorization is divided into three sections: List A documents to verify identity *and* employment authorization; List B documents to verify identity only; and List C documents to verify employment authorization only.

Except under certain limited circumstances, since 2009, expired documents are no longer acceptable for I-9 purposes. If a document doesn't contain an expiration date – such as a Social Security card – then it is considered unexpired.

The employee must complete Section 1 of the I-9 on the first day of employment. The employee must fill out his name, address, date of birth, Social Security number, citizenship status and sign and date the form.

The employer must complete Section 2 when presented with the employee's document(s) within three business days

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from the first day of work for pay. After examining the documents, the employer fills in the document's title, issuing authority and expiration date in List A or List B and C; and the employer certifies examination of document(s), indicates date employment began, and signs Section 2.

Section 3 of the I-9 form is for re-verification. If an employee starts employment with an employment authorization that will expire on a certain date, then before that expiration date, the employer needs to re-verify the employment authorization by way of the I-9 process.

Filing Extensions

Among other guidance, the revised handbook gives guidance on how to complete Section 2 for employers who have filed timely, but still pending, extensions of employment authorization for employees, as well as for employers who employ students with employment authorization in the F and J visa categories.

In addition, the revised handbook clarifies that an H-1B visa holder may complete the I-9 process to start to work for a new employer without producing a Form I-797 receipt notice from the immigration service regarding the filing of the change of employer H-1B visa petition. Under the American Competitiveness in the Twenty-first Century Act (AC-21), generally, an H-1B visa holder may change employers and start to work for the new employer upon the filing with USCIS of an I-129H change of employer petition. According to the revised handbook, "An H-1B employee's Form I-94/I-94A issued for employment with the previous employer, along with his or her foreign passport, would qualify as a List A document. You should write "AC-21" and record the date you submitted Form I-129 to the USCIS in the margin of Form I-9 next to Section 2."

Best practices for I-9 compliance:

- Give the employee a list of acceptable verification documents on the first day of employment.
- State that he/she can present one document from List A or one each from List B and C.
- Make sure that the employee fills out *completely* and signs Section 1 on the first day of employment.
- Make sure that the employee provides the Section 2 documents by the third day of employment.
- Review documents for genuineness.
- If it is company policy to make copies of the employee's documents and attach them to the I-9, then this must be done for all employees.

It is recommended to maintain I-9 records in a separate I-9 file, apart from other personnel records. Employers must maintain I-9 records for employees hired after Nov. 6, 1986 for a period of three years after the date of hire or for one year from the date that an individual's employment is terminated, whichever is later.

Employers found to have knowingly hired or continued to employ unauthorized workers could be fined up to $16,000, or in certain instances, be prosecuted criminally. Civil penalties for failure to complete an I-9 correctly could lead to fines of up to $1,100 for each such violation. Consider this: a single I-9 may contain several violations.

Employers must take proactive steps to ensure that hiring practices comply with immigration laws. In addition to immigration enforcement, employers audited and found to have I-9 violations could face additional, potential claims under RICO, discrimination complaints and shareholder suits. ■