

IMMIGRATION: Working in America

Employment Eligibility Verification: Are You I-9 Compliant?

by Becki Young

Immigration laws require all US employers to complete Form I-9, the Employment Eligibility Verification form (www.uscis.gov/files/form/i-9.pdf) on behalf of all employees, in order to verify their identity and their authorization to work in the US.

On November 22, 2010 the American Immigration Lawyers Association (AILA) met with US Immigration and Customs Enforcement (ICE) to discuss I-9 compliance issues as well as procedures for I-9 corrections.

At the outset, AILA discussed the doctrine of "substantial compliance," which has been recognized by the

government as a defense to paperwork violations. In essence this doctrine says that an employer should be found in substantial compliance with the I-9 rules if s/he can prove that (1) s/he used an I-9 form, (2) s/he signed the form, (3) the employee signed the form, (4) s/he indicated in Section I of the form that the employee was authorized to work in the US, and (5) s/he referenced or attached the documents that s/he reviewed to confirm employment authorization. AILA encouraged ICE to rely on this legal doctrine when conducting worksite audits.

Additionally, AILA expressed concern over the lack of guidance for employers who seek to correct errors that they have discovered in their I-9

files. AILA pointed out that many employers perform self-audits in an attempt to comply with the I-9 rules, and they may discover I-9 completion errors in the course of these self-audits. In some cases, employers can come into compliance by correcting the errors; other I-9 deficiencies are timeliness violations and therefore are impossible to cure. Some violations are impossible or very difficult to cure due to the circumstances, for example because the party who failed to properly complete the I-9 is no longer employed by the company.

In response, ICE indicated that its most important concern is whether or not the employer's actions are reasonable. They further stated:

- To assess whether an employer acted reasonably, any corrections need to make clear both what happened and when. The contemporaneous notes and information on the I-9 need to show that the employer has acted reasonably. If an employer makes a correction during an internal audit, then that should be indicated on the corrected I-9.
- If an ICE auditor provides instructions for corrections, the employer should ask for that instruction in writing and then note on the corrected I-9 that the actions were taken pursuant to ICE auditor instructions.
- If there are technical violations, the employer must be given an opportunity to correct. However, [ICE views] the good faith of an employer differently when corrections are made after ICE has issued an NOI (Notice of Inspection) – ICE is tougher on those. [ICE] would look favorably upon pre-NOI corrections in some situations where the same correction might lead to a fine if the correction is made post-NOI. The only violations that the employer will be offered an opportunity to correct

by ICE post-NOI are technical ones. Moreover, [ICE feels] that a substantive violation concerning timeliness cannot be corrected, no matter when the correction occurs.

Normally, ICE requires corrections to Section I (the employee section of the form) to be completed by the employee; however in response to the question of whether an employer could make Section I corrections on behalf of an employee working in a remote location, ICE stated that "if an employee provided authorization for the correction, and such authorization could be documented and attached to the I-9, then, yes, this could be okay when ICE evaluated the totality of the circumstances."

Finally, in response to complaints that some ICE auditors are overzealous and too concerned with minute details, the agency explained that many of their auditors are number crunchers with either a CPA or accounting training and thus are very exacting.

As a matter of practice, all employers should conduct I-9 self audits on a regular basis. If you require any assistance regarding I-9 audits or other worksite compliance issues, you may contact our office at the number below.



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