



Immigration Compliance Newsletter

Published by Montserrat Miller, Immigration, Privacy & Government Affairs Practice Teams | Washington, DC

July 2012

FORM I-9 AND E-VERIFY COMPLIANCE TIPS AND MISTAKES

It sure does seem like we are seeing more Employment Eligibility Verification form (“form I-9”) audits and greater use of E-Verify at the state level these days. If that is your hunch, then I’m here to confirm that hunch as both are on the rise and the trend will likely continue for several reasons. First, the Department of Homeland Security (DHS) has repeatedly stated that worksite enforcement is a priority. One way in which DHS, and more specifically Immigration and Customs Enforcement (ICE), are pursuing this priority is through individual audits of companies’ forms I-9 as well as the issuance of waves of Notices of Inspection (NOI), which triggers a government inspection. Regarding the states, there are several factors driving their push for mandatory E-Verify. One is frustration with the U.S. Congress’ inability to address comprehensive immigration reform. Another is a measure of xenophobia. And a third is the U.S. Supreme Court’s decision in *Whiting v. Chamber of Commerce*, which essentially stated that Arizona’s E-Verify law was not pre-empted by federal law. Mix these components together and you have an increase in state activity mandating the use of the electronic employment eligibility verification program called E-Verify.

That being said, how can you help your company stay ahead of the curve and work toward greater compliance with the immigration laws? The following tips and mistakes should help although they do not, a complete compliance program, make.

Compliance Tips for Employers:

- **Be aware of state E-Verify measures and whether they apply to your company.** Presently the following states mandate E-Verify for private employers, or have similar measures in effect which require an employer to take additional steps beyond completing the form I-9 for new hires: Alabama, Arizona, Georgia, Colorado, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee and Utah. As a general rule, failure to abide by state E-Verify measures is tied to businesses licensure and/or permits and their issuance or renewal.
- **Have a form I-9 for all employees hired after November 1986.** If you do not have forms I-9 for all current employees, before you charge into correcting this situation, retain experienced immigration counsel.
- **Conduct a self-audit of your forms I-9 annually, preferably by outside immigration counsel.** Self-audits are helpful on many levels, including showing good faith and understanding what the field is doing and how they are completing the forms as well as using E-Verify where required. It is also considered a “best practice” by ICE pursuant to their IMAGE program. One caveat: I would caution anyone against conducting an internal self-audit without the assistance of outside immigration counsel guiding you through the process. You can, in fact, worsen your situation if for instance (even if well-intentioned) you backdate information on the forms, make corrections without proper annotations, or destroy prior forms I-9 after completing a new form.

- **Maintain a “tickler system” to notify you of expiring work authorization documents.** This is low-hanging fruit if audited by ICE agents to have in your employ someone whose work authorization expired. Once you are aware of the fact that an employee’s work authorization has expired, you have knowledge that you are employing someone who may not be authorized to work in the United States. You need to take immediate action to address this issue and given the complexities of such a situation I would advise speaking with immigration counsel before acting.

Top Mistakes Employers Make:

- **Not having a corporate immigration compliance strategy or plan in place.** What do I mean by this? If ICE agents were to appear at one of your sites, do you have a plan in place to make sure either the receptionist or front line supervisor/manager contacts the appropriate person internally (*i.e.*, legal counsel, head of Human Resources and/or owner) and that the NOI is properly routed. A NOI requires you provide ICE with your forms I-9 and supporting documents within three business days of receipt. In a perfect world, companies should have in place a written form I-9 and E-Verify policy explaining this process. A NOI can quickly lead to ICE asking for additional documentation, not all of which is necessary or relevant. This could include corporate and financial documents, Social Security Administration No-Match Letters, employee rosters and payroll reports.
- **Not completing a form I-9 for new hires.** Two cases highlighted in my April 2012 [Immigration Compliance Newsletter](#) feature small businesses which did not complete forms I-9 and were subsequently fined for their failure to do so. *Completion of the form I-9 is mandatory and all employers must have a form I-9 for all employees hired after November 6, 1986.* One of the first things that ICE will do when auditing a company is crosscheck a list of current employees to confirm there is a corresponding form I-9. This of course assumes that you are properly completing, storing and retaining the forms. While on the subject of retention of forms I-9, note that you can destroy forms I-9 for terminated employees within a specified time frame as spelled out by DHS; however, you must have a form I-9 for each current employee. I have seen employers apply DHS’ time frames and purge forms I-9 for current employees, which is not acceptable.
- **Failure to fully complete the form I-9.** Sounds simple enough but I do see that employers simply do not complete the entire form I-9. One way this is done is by having the employee complete Section 1 and then stapling a copy of the photocopied documents as a proxy for completion of Section 2 by the employer. Not acceptable.
- **Using an outdated version of the form I-9.** The most recent version of the form I-9 is found on the U.S. Citizenship and Immigration Services (USCIS) [website](#). The most current version has the date 08/07/09 in the bottom right hand corner and it is the one you should be using. Sometimes it seems more efficient to print and save the form I-9 so you can use it whenever a new hire is made. Stockpiling the form can lead to improperly using an outdated form I-9, which can lead to complications if you are audited by ICE. Also, the rumors that a new two-page form I-9 may be on the horizon are true. If you would like to see what the new form may look like, you can search the Federal Register at <http://www.regulations.gov/>.
- **Over-documentation in Section 2.** The form I-9 requires an employer to verify an employee’s identity and work authorization by allowing that individual to present either an acceptable List A document or List B and List C documents. You do not need List A, B and C documents. You do not get more stars if you complete every section in Section 2 of the form I-9. It is not unusual to see employers—particularly when faced with noncitizen employees or those with Hispanic surnames—to require that they provide a List A permanent resident card and then a List C Social Security card, for instance. This is not acceptable. Doing so can lead to claims of discrimination on the basis of national origin and/or citizenship because you are treating these new hires differently than U.S.-born employees. Another way this can occur is if a new hire states that they are a lawful permanent resident in Section 1 and

then provide a driver's license and social security card. This is acceptable and employers cannot request different documents in this situation, such as requiring the individual to provide you with their permanent resident card.

In addition to these tips and common mistakes, please subscribe to my Immigration Compliance Insights blog which you can find by clicking [here](#) or through visiting my LinkedIn [public profile](#).

For more information on how Arnall Golden Gregory LLP can assist companies with their employment eligibility verification practices and immigration compliance program, please contact:

Ms. Montserrat Miller, Partner
montserrat.miller@agg.com
202.677.4038



Not *if*, but *how*.®

The *Immigration Compliance Newsletter* provides a general summary of recent legal and legislative developments and is for informational purposes only. It is not intended to be, and should not be relied upon as, legal advice.

Arnall Golden Gregory, LLP has a full-service business immigration and compliance team ready to provide legal advice and counsel on issues addressed in this newsletter. For more information please contact Montserrat Miller at 202.677.4038.

©2011 All Rights Reserved.
