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**Top 10 employer mistakes on
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Employer immigration compliance: The top 10 employer mistakes on the Form I-9 and easy solutions

By Maria Kallmeyer and Grant Govern, Business Immigration Team, Quarles & Brady LLP

In November of 2009, U.S. Immigration and Customs Enforcement (ICE), a division of the U.S. Department of Homeland Security (DHS) announced that it was issuing 1,000 Notices of Inspections (NOIs) to employers across the country, alerting business owners that ICE will audit their Form I-9 hiring records within three days to assess compliance with federal employment eligibility verification laws. This follows on the heels of ICE issuing 654 such notices in July of 2009 and stepped up pressure on employers across the board in relation to immigration and employment eligibility. This article explains the employer's obligations and then discusses ten mistakes that immigration lawyers commonly find when auditing clients' Form I-9 records.

The Immigration Reform and Control Act of 1986 (IRCA) imposes regulations on employers to verify the identity and employment eligibility for all employees (U.S. citizens and non-citizens) hired after November 6, 1986 on the Employment Eligibility Verification Form (Form I-9). For purposes of IRCA compliance, hiring refers to actually commencing employment for

"wages or other remuneration." An employee is defined as "an individual who provides services or labor for an employer for wages or other remuneration," excluding independent contractors or casual hires. The completed and verified Form I-9 must be stored on-site or electronically for review by ICE if requested.

On the other hand, IRCA stipulates the following obligations for employers in the United States to protect employees during this process:

- (1) Employers may not discriminate in recruitment, hiring or discharge on the basis of national origin or citizenship status. For example, employers may not treat employees or new hires differently based on their status as either a U.S. citizen, Lawful Permanent Resident or refugee/asylee.
- (2) Employers may not request more or different employment authorization documents than those required under IRCA, or refuse to honor tendered documents that on their face "reasonably appear to be genuine and to relate to the individual."
- (3) Employers may not retaliate against workers who bring discrimination complaints.

IRCA provides both criminal and civil penalties for violations of hiring, employment verification and non-discrimination provisions. Of the 654 NOIs ICE issued in July of 2009 to businesses nationwide, 61 employers have received fines totaling \$2.3 million; 326 employers were found to be in compliance with employment laws or were served with a warning notice in expectation of future compliance; and the remaining 267 audited employers are still waiting ICE's final assessment.

The 1,000 businesses served with audit notices in November of 2009 were purportedly selected for inspection as a result of investigative leads and intelligence and because of the business' connection to public safety and national security. For example, privately owned critical infrastructure businesses were one of the targeted groups of businesses, but IT, manufacturing, and hospitality industry employers also received these NOIs. ICE has declined to release the names and locations of the businesses at this time due to the sensitive nature of these audits. The audits may result in civil penalties and lay the groundwork for criminal prosecution.

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tion of employers who knowingly violate the law. They are particularly alarming because notices contain requests for employers to provide a broad range of documents, including but not limited to:

- Copies of any information related to the Form I-9 compliance procedures;
- A roster of independent contractors, including dates of hire and termination;
- Lists of all individuals who are employed on a sporadic, irregular or intermittent basis;
- Copies of requests for corrections from the Social Security Administration (No Match Letters);
- Copies of nonimmigrant and immigrant petitions filed with the U.S. Citizenship and Immigration Services (CIS); and
- Copies of corporate documentation including annual reports and federal tax reporting numbers.

Because employers are forced to be in two roles that are seemingly at odds with each other — verifying the employment of every employee while at the same time avoiding discriminatory practices — it is important to understand the duties very precisely. The following list of ten common mistakes that employers make in relation to IRCA compliance and their solutions was compiled to help employers review their procedures.

Mistake 1: Not requiring employers to complete Form I-9: IRCA regulations require employers to have each new employee complete all sections of the Form I-9 within his/her first three days of employment. Employers who do not complete the Form I-9 open themselves up to adverse claims ranging from paperwork violations to a knowingly hiring illegal aliens violation. The recommended solution to this mistake is to develop and maintain a workable I-9 compliance system.

Mistake 2: Not completing Section 1 of the Form I-9 on the first day: Although employees have three days to provide the required eligibility documents, they must complete the entire Section 1 of the Form I-9 on or before the first day of employment. Employers who do not require new employees to complete Section 1 of the Form I-9 by the first

day of work are subject to paperwork violations. The recommended solution for this common mistake is to make completion of Section 1 of the Form I-9 every new employee's first action, and to create a system of accountability to ensure that this is a consistent practice.

Mistake 3: Accepting receipts or copies instead of real, original documents: IRCA regulations require employers to review original documents as part of the I-9 process. Receipts are only acceptable as the replacement of a document granting work authorization if the original was lost, stolen, or damaged. For example, an employer may not accept a receipt for an employment authorization card application that is still pending. If a receipt is presented as a replacement document, the employee has 90 days to provide the original document. The notation must be made on the Form I-9 within those 90 days to indicate that the original was verified. Accepting a receipt in this limited circumstance can create a substantial amount of follow up. Therefore, the authors recommend requiring original documents unless there has been a replacement request.

Mistake 4: Employer tells the employee specifically which documents to show: Although it is sometimes tempting, an employer may not suggest which document(s) to bring or limit the list that is available on the Form I-9. Doing so, may result in a claim of Unfair Immigration Employment Practices, and fines for each employee hired during the period of time in question. This mistake has an easy solution — do not ask for a specific document, just provide the list on the back of the Form I-9.

Mistake 5: Keeping copies of verification documents for some, but not all employees: Only keeping copies of verification documents (i.e., passports, driver's licenses, social security cards) for foreign-born employees or another select group of employees can result in an employee claiming Title VII nationality discrimination or a complaint with the Office of Special Counsel. The easy solution for this common mistake is to either keep copies of verification documents for all employees or for no employees. Employers have the option of keeping copies for all employees or none. There are practi-

cal and legal costs and benefits to both options. Employers should discuss these with competent employment/immigration counsel.

Mistake 6: Throwing away “old” Forms I-9 or making new ones at the wrong time: IRCA regulations require employers to keep Forms I-9 on file for all current employees. For terminated employees, employers may destroy their Forms I-9 one year after termination or three years after hire, whichever is longer. This mistake can result in significant per employee fines. However, the solution is simple — never destroy Forms I-9 for current employees and keep terminated employees' Forms I-9 for one year after their last day of employment or three years after hire, whichever is longer.

Mistake 7: Employer does not reverify expiring immigration documents: IRCA requires employers to reverify each employee's Form I-9 if he or she checks the fourth box in Section 1 (or third box in older versions of the form), indicating that he or she is an alien that is authorized to work until a given date. The employee's Form I-9 must be reverified by the expiration date listed. Failure to reverify an employee's Form I-9 can result in a fine of up to \$1,100 per employee if the employee is unauthorized to work in the United States. The solution to this common mistake is to set up a reminder or tickler system to remind the employer to reverify when necessary.

Mistake 8: Employer reverifies the Form I-9 when it is not necessary: Employers should not reverify when an employee's List B document expires (driver's license or lawful permanent resident card (green card)). This can result in small fines or accusations of document abuse. The solution to this mistake is to not reverify any employees who check the first three boxes in Section 1 of Form I-9.

Mistake 9: Employer demands Social Security Card: Section 1 of the Form I-9 only asks for the Social Security Number, not the actual card, and that box is only required for employers who are registered for the Federal Electronic Verification system (E-Verify). Employees can voluntarily use the card as a Section 2 document, but only if it does not have any restricting language on it, such as “Not valid for work without

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DHS authorization.” Requiring a social security card when it is not actually required can result in a fine or document abuse claim, or even an employment discrimination claim.

Mistake 10: Not managing the details: There are a few other mistakes that are typically found during employer audits that can result in paperwork violations: (1) Section 1 of the Form I-9 was not signed by the employee; (2) Section 2 of the I-9 form was not signed by the employer; (3) the employee does not mark a box in Section 1; (4) the Section 2 documents provided do not support the status indicated in Section 1; and/or (5) the documents provided are listed in the wrong columns in Section 2 of the I-9 form. These mistakes can be easily avoided by properly training the

employer’s representative who is responsible for the I-9 records and by closely following the instructions on the form itself.

The Form I-9 is available on the CIS website at www.uscis.gov under the “Immigration Forms” tab. Additional resources for employers can be found in CIS’ *I-9 Employer Handbook M-274* and ICE’s *Guide to Travel and Identity Documents*.

If you have specific questions about your business, the Business Immigration Team at Quarles & Brady helps employers develop I-9 compliance programs, including I-9 audits, E-Verify compliance, and business immigration visas and green cards (on a flat-fee or hourly basis). Contact Maria Kallmeyer at 312-715-5009, maria.kallmeyer@quarles.com or Grant Sovern at 608-283-2668, grant.sovern@quarles.com if you have questions. ■

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COBRA

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eligible individuals since October 31, 2009); or

- for periods of coverage beginning prior to December 19, 2009, was not eligible for subsidized COBRA coverage because the nine-month subsidy period lapsed, but who would have been eligible for subsidized COBRA coverage had the fifteen-month subsidy period applied at that time. A period of coverage is

the month-long or shorter period with respect to which premiums are charged for health coverage. (See box below.)

Employers have until February 17, 2010 to provide this notice to individuals. Although it is not entirely clear, it appears that the Department of Labor has 30 days within which to release draft notices complying with the law change.

Assistance eligible individuals who discontinued COBRA coverage after the nine-month subsidy ended must remit retroactive premium payments (based upon the applicable 35 per-

cent subsidy) by the later of February 17, 2010 or 30 days following the date the individual receives notice of the extended benefit. Individuals who continued to pay for COBRA coverage after the nine-month subsidy ended will be credited for such payments by setting off the amount of the COBRA premium that exceeds the 35 percent subsidy against future COBRA premium liability or refunding the excess to the individual.

If you have any questions about the COBRA subsidy extension or its application to the administration of your group health plan, please contact author Daniel A. Kaufman. (See information at the bottom of page 13). ■

For example, Acme Co. administers its COBRA continuation coverage on a monthly basis. Ed is terminated as part of a general reduction in force on February 20, 2009. Ed becomes eligible for COBRA coverage in the Acme Co. group health plan effective March 1, 2009. Assuming Ed was eligible for the subsidy (i.e., Ed did not have other coverage available), Ed would have received the subsidy for a period of nine months — or through November 30, 2009. Under ARRA, Ed would have been eligible to continue COBRA coverage, but would no longer have received the subsidy. Assume Ed discontinued coverage beginning December 1, 2009 because he could no longer afford the coverage.

Under the DDAA, Ed is now entitled to retroactively elect to begin COBRA coverage again. The period of subsidized coverage would begin on December 1, 2009 and may extend up to May 31, 2010. Acme Co. must give Ed notice of his new rights under DDAA. Beginning June 1, 2010 and ending August 31, 2010, Ed would be eligible for unsubsidized coverage (assuming that no intervening event occurs that would lengthen Ed’s COBRA entitlement).

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