The Metropolitan
Corporate Counsel®
National Edition
www.metrocorpcounsel.com
Volume 22, No. 12 December 2014

Increased Federal Scrutiny Warrants Another Look at I-9 Compliance

The Editor interviews **Alan J. Pollack***, Of Counsel at Norris McLaughlin & Marcus, P.A.*

Editor: Please tell us about your background.

Pollack: I have been practicing immigration law for nearly 20 years, including business immigration, family immigration, deportation issues, and worksite enforcement, including I-9 compliance. I've just concluded my term as chair of the New Jersey Chapter of the American Immigration Lawyers Association (AILA), the national association of immigration attorneys, which has about 12,000 members nationally and internationally. I'm also head of the Chapter's USCIS (Citizenship and Immigration Services) Committee of the local chapter, and a member of the National NBC (National Benefits Center USCIS) committee.

Editor: Let's talk about your work in I-9 compliance. What should companies be aware of in light of the recent increase in enforcement and audits?

Pollack: I-9 audit and compliance has become an increasingly hot topic for our Immigration and Employment compliance groups. I-9 compliance is being enforced by the Immigration and Customs Enforcement (ICE) subdivision known as Worksite Enforcement. As they've received ever-increasing funds over the past few years, they've been enacting their goal of auditing one in three companies with 500 or more employees, and have now moved on to audit over-200 employee organizations as well. For example, we were recently made aware that audit notice letters were sent to at least 79 different companies in the New Jersey area alone over the last few months. No longer are audits being complaint driven or driven solely by the nature of the business operation. Now we're seeing that random audits are much more prevalent, which means that companies have to pay much closer attention to their I-9s and make sure they are properly preparing and maintaining them for all of their employees, including their upper management, which some companies overlook.


Alan J. Pollack

Editor: Please talk a bit about I-9 compliance and steps a company can take to avoid inadvertent errors.

Pollack: The I-9 form is required for every employee of the company, including its officers, executives or partners. It is important to remember that the review and certification of an employee's documents must be done in person with the original documents. The I-9 must be filled out prior to the start of employment, and the employee must be given the option to choose the documents required to prove employment eligibility. The company cannot dictate which documents should be used. In addition, where employees have authorization for only a limited period of time, the company should be certain they have a calendaring system that allows them to be reminded to re-verify in a timely manner. It is also important to remember that in the case of former employees, companies are required to retain I-9 forms for a period of at least three years from the date of hire or for one year after the employee is no longer employed, whichever is longer. Once outside that period, it is a good idea to dispose of those I-9s as you are not required to keep them on file. I-9s kept on file after the mandatory retention period can still be found violative if they are not compliant.

I always recommend that a company undergo internal audits on a periodic basis to make sure that their paperwork is in order. It is important that the company have only a limited group of people who are trained specifically in preparing the I-9 and maintaining the files. This helps to prevent errors. If the internal staff is not well trained in I-9 compliance, then it is further recommended that the company hire an attorney to supervise an audit. When I prepare an audit for a company, in addition to looking for errors to correct, I also keep an eye out for particular trends or tendencies that may lead to repeat errors. Tendencies I often see include paperwork that is not properly signed, missing documentation, reliance on the wrong type of documentation – e.g. a passport or visa instead of an approval notice that lists the document's expiration – and not tracking expirations, or tracking expirations but not re-verifying the initial document. Once my review is complete, I not only correct the errors, but also prepare a report that companies can use to show good faith compliance efforts should they receive an audit. Finally, I will meet with the HR staff to train and educate them on what they are doing incorrectly so that they can be more efficient and accurate in the future.

Editor: What are some practical steps a company should take when preparing for an audit?

Pollack: Worksite Enforcement will typically send a letter notification of their plan to conduct an audit. When you receive that letter, you should contact your legal representative immediately. Usually you can contact ICE and ask them to schedule a mutually agreeable date to conduct the

Please email the interviewee at ajpollack@nmmlaw.com with questions about this interview.

audit, and the audit can also be conducted in a number of agreeable locations, including the attorney's office, if appropriate. There will often be sufficient time for the attorney to review the paperwork before it is reviewed by the government. During this period, it is important to assess what deficiencies there may be and how they might be mitigated prior to meeting with the agency.

Editor: Are there any recent cases of note?

Pollack: There have been many more visible cases and I-9 audits in the recent past and present. It is clear that I-9 enforcement is on the rise from the increase in cases and appeals in the Office of the Chief Administrative Hearing Officer (OCAHO), which is the agency that hears appeals of I-9 audit cases. In 2012, OCAHO only issued 11 published decisions, but in 2013, OCAHO published 38 decisions, 8 of which concerned discrimination and document abuses where employers demanded more proof of employment eligibility than is mandated by law or singled out particular ethnicities for greater scrutiny. The 30 remaining cases concerned Form I-9 violations that had technical errors, companies that had constructive or actual knowledge of unauthorized employment, and instances where there were substantive inconsistencies in data recorded on Form I-9 and the actual identification documents presented by employees. In each of these 30 cases, employers not only contested the ICE allegations, but also sought reduction in the ICE-assessed fines. In 28 such cases, OCAHO reduced the penalties actually sought by ICE for a myriad of reasons, including the precarious financial condition of the employing companies in question, the relative size of the employer – with smaller employers gaining greater relief from ICE-imposed fines (normally a 5 percent mitigating factor on the ICE-imposed fine), and OCAHO findings that ICE's financial penalties were unduly punitive. It is important to note, however, that reductions in such fines are not automatic. Furthermore, it is not a defense to say that you were unaware of the I-9 rules and requirements, and failure to correct obvious errors on the forms once brought to the company's attention can further diminish your ability to negotiate a reduction in penalties. Major corporations well known to the public have already faced severe fines and sanctions related to I-9 compliance.

Editor: Please expand upon the fines that might result from a violation.

Pollack: In addition to I-9 violations, companies should also be aware that there are separate potential violations for knowingly hiring and employing unauthorized workers. It is important for corporations to recognize the stiff penalties that are in place for multiple violations as well.

Monetary penalties for knowingly hiring or continuing to employ unauthorized workers range from $375 to $16,000 per violation, with repeat offenders receiving penalties at the higher end. Penalties for substantive violations of I-9s, which includes failing to produce a Form I-9, range from $110 to $1,100 per violation. In determining penalty amounts, ICE considers five factors: the size of the business, good faith effort to comply, seriousness of violation, whether the violation involved unauthorized workers, and the company's history of previous violations. A company can demonstrate "good faith" efforts by conducting internal audits, especially with an immigration attorney, and documenting those efforts. Even if there are still some "technical" or minor violations, typically ICE will simply instruct you to correct them so long as you are demonstrating good faith. This is one of the reasons it is so important to stay on top of this issue and to conduct audits internally before ICE comes knocking on your door.

If there is an audit and violations are found, there is a process. In instances where a notice of intent to fine (NIF) is served, ICE will deliver charging documents specifying the violations committed by the employer. The employer then has the opportunity to either negotiate a settlement with ICE or request a hearing before the Office of the Chief Administrative Hearing Officer within 30 days of receipt of the NIF. If the employer takes no action after receiving a NIF, ICE will issue a final order. If a hearing is requested, OCAHO assigns the case to an administrative law judge and sends all parties a copy of a notice of hearing and the government's complaint, thus setting the adjudicative process in motion. In either situation, it is strongly recommended that the company seek experienced counsel who handle such matters, whether for negotiation or to determine whether a request for a hearing is appropriate.

Editor: What are the key differences between using E-Verify and filing an I-9? Is there any likelihood that E-Verify might one day become the preferred employment eligibility verification method?

Pollack: E-Verify does not replace the legal requirement to complete and retain Form I-9. E-Verify verifies the employment authorization of new hires based on the information they provide on Form I-9. You still must retain and store Form I-9 in either paper, electronic, or microfilm/microfiche format for as long as the employee works for you, and then for the required retention period. If a business is engaged in federal government contracts, E-Verify is required for all new hires. In addition, individual states may also require use of E-Verify under certain circumstances or when a company is engaged in state contracts. The last Senate comprehensive reform bill proposal included a provision to eventually make the use of E-Verify mandatory. However, there have been a lot of negative comments by corporations regarding use of E-Verify, and while it is unclear whether E-Verify will become mandatory or not, at the moment, it is not. There is also no plan at this time for E-Verify to replace I-9 compliance.

Editor: Discuss the importance of counsel working with immigration or I-9 specialists when conducting compliance reviews.

Pollack: Having an experienced attorney who deals with these agencies regularly is often very helpful in negotiating the final outcome in audit cases. I have been working in immigration practice for twenty years and I'm also deeply involved with AILA, and both experiences have given me the opportunity to meet with a number of officials in both the United States Citizenship and Immigration Services (USCIS) and ICE, and some of these officials are now with the ICE Office of Worksite Enforcement. In almost all of the cases I've been involved in, whatever the initial findings of the audit, the fines and penalties have been negotiated and reduced. I would like to think that my experience and knowledge of the system and individuals within the system provides my clients with an advantage in the process.