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Employer Immigration Compliance in an Era of Heightened Enforcement and Increased Criminal Investigations

Strategies for Managing Risk, Ensuring I-9 Compliance,
Responding to ICE Notices of Inspection and Surviving Audits

WEDNESDAY, SEPTEMBER 16, 2015

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Mary E. Pivec, Partner, Ford & Harrison, Washington, D.C.

Jennifer G. Roeper, Partner, Shumaker Loop & Kendrick, Tampa, Fla.

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Employer I-9 Compliance: Responding to Heightened Enforcement and Criminal Investigations

Mary E. Pivec, Esq. – Ford Harrison LLP – Washington, DC

Jennifer G. Roeper, Esq. – Shumaker, Loop & Kendrick, LLP –
Tampa, FL

ENFORCEMENT TRENDS AND INITIATIVES

Enforcement Trends and Initiatives

- According to the White House, since January 2009, ICE has:
 - audited more than 8,900 employers suspected of hiring illegal labor;
 - debarred 8,590 companies and individuals; and
 - Imposed more than \$100.3 million in financial sanctions.
- This is more than the total amount of audits and debarments than during the entire Bush administration.

Enforcement Trends and Initiatives, cont.

FY 2013 Set Records for ICE Worksite Enforcement

- **3,127** Notices of Inspection Issued.
- **\$15.8** million in Fines.
- **452** Arrests:
 - **179** of which were:
 - Owners;
 - Managers;
 - Supervisors; or
 - Human Resource Employees.
- **277** Debarred Companies.



Enforcement Trends and Initiatives, cont.

The Obama Administration Worksite Immigration Reform Program

- Relies on multi-agency federal task force composed of representatives from DOL Wage and Hour Administration (“WHD”), DOL Occupational Safety and Health Administration (“OSHA”), National Labor Relations Board (“NLRB”), Equal Employment Opportunity Commission (“EEOC”), DOJ Office of Special Counsel for Immigration-Related Discrimination (“OSC”), DHS Fraud and National Security Directorate, DHS E-Verify, and DHS Immigration and Customs Enforcement (“ICE”).
- Goal is to facilitate the exchange of information and intelligence by and among the respective agencies to target employers who hire and violate the labor rights of undocumented workers for civil and criminal enforcement actions.

Enforcement Trends and Initiatives, cont.

- August 2015 – Texas– ICE raid at La Espiga de Oro results in detention of 10 illegal workers.
 - 7 of those detained have been granted employment authorization in exchange for serving as material witnesses against La Espiga de Oro.
- August 2015 – North Dakota – owner of onion processing plant is sentenced for harboring and transporting undocumented workers; ordered to forfeit \$100,000.
- July 2015 – Pennsylvania – eight restaurant owners and managers are charged with conspiring to harbor, transport and conceal undocumented workers, working for less than minimum wage.
- June 2015 – Kansas – owners of gas station and convenience store are charged with 45 counts of harboring undocumented workers, Social Security fraud, mail fraud, and making false claims to U.S. citizenship.

Enforcement Trends and Initiatives, cont.

- June 2015 – Washington – owner of fruit orchard agrees to pay \$2.25 million in civil penalties as part of settlement resolving IRCA violations involving nearly 1,000 undocumented workers.
- April 2015 – New York and Virginia – franchise owner of 7-Eleven stores is sentenced to 87 months on charges that he and others conspired to use stolen identities to hide systemic hiring of dozens of undocumented workers. Five co-defendants agree to pay \$2.6 million in back wages and state labor department penalties, forfeit 5 houses worth \$1.3 million, and give up franchise rights to 10 stores.

Enforcement Trends and Initiatives, cont.

- OSC: The other I-9 prosecutor.
- How do OSC independent investigations come about?
 - Referrals from OSC partners (USCIS, NLRB, EEOC, OFCCP) and state and local agencies.
 - Referrals from other stakeholders.
 - Hotline information.
 - Charge investigations.
 - Newspaper articles.
 - Congressional referrals.

Enforcement Trends and Initiatives, cont.

- What types of remedies does OSC seek?
 - Hire or re-hire.
 - Back pay.
 - Injunctive relief.
 - Training.
 - Monitoring.
 - Civil money penalties.

Enforcement Trends and Initiatives, cont.

E-Verify Monitoring Operation.

- Electronic surveillance of participating employer E-verify usage and compliance with MOU.
- Analytic software detects:
 - Abnormal spikes in case entry.
 - Failure to print out Further Action Notices.
 - Failure to report employee No-Contest Elections prior to termination.
 - Failure to close out cases post-TNC notification.

FORM I-9 MECHANICS

Form I-9 Mechanics

Who needs an I-9? All employees hired after November 6, 1986.

- Includes all payroll employees (including high-level managers, owners, etc. whether or not they are U.S. citizens).
- Does not include volunteers.
- Does not include independent contractors (...but be sure to include language in your contract to cover I-9 liability).

Form I-9 Mechanics, cont.

Perform I-9 Check-Up.

- Where do you store your I-9s? Separate out from personnel files...avoid a fishing expedition.
- Are all of your I-9s kept on-site or at a home office location?
- Do you have an I-9 captain?
- When was the last time your HR team had I-9 training?
- Are you using the most current version of the form?
- Do you verify all I-9s in person? Faxed/scanned copies of documents are not acceptable.
- Is every box complete?
- Is every I-9 signed and dated correctly by both employee and employer.

Form I-9 Mechanics, cont.

Be sure every I-9 is completed timely (biggest area for fines).

- The I-9 should be completed only after the employee has accepted the job offer.
- Section 1 should be completed by the employee on or before day 1 of employment (work for pay).
- Section 2 should be completed by the employer no later than day 3 of employment.
- If documents are not verified by day 3 – terminate until acceptable documents produced.

Form I-9 Mechanics, cont.

- Be sure documents are listed in proper columns (List A, B, C).
- Make sure all documents are unexpired at time of hire.
- NEVER ask for specific documents! Present the list and allow employee to choose.
- Asking for specific documents or taking too many documents = document abuse (Fine!).

Form I-9 Mechanics, cont.

New Confessed Identity Scenarios (“NCIS”) Protocol.

- What should I do if employee “Juan” comes in one day and says that his name is actually “Carlos” and he provides a new social security card and driver’s license indicating that he is “Carlos”?
 - **Step 1:** Evaluate company policies. Typically a “one-strike policy” is not advisable. An approach that empowers management to evaluate each scenario is recommended. *Note: In California, an employer cannot terminate an employee for attempting to update his or her I-9 with authentic documentation.*
 - **Step 2:** Prepare and complete a new Form I-9 in the same manner as any new hire. Make sure to use the employee’s original date of hire noted on the previous I-9. Retain previously completed I-9 and keep with newly completed I-9.
 - **Step 3:** Document the reason for the newly confessed identity scenario (i.e. obtained employment authorization through DACA).

RISK MITIGATION AND DUE DILIGENCE

Risk Mitigation and Due Diligence

Employment Verification Best Practices.

- Use E-verify for all hiring – BUT REMEMBER: NO DEFENSE TO SUBSTANTIVE I-9 PAPERWORK VIOLATIONS.
- Establish a written hiring and I-9 policy.
- Establish an *internal training program* on how to complete I-9s and how to identify fraudulent use of documents in the I-9 process.
- Permit the I-9 process to be conducted only by individuals who have received this training – and include a secondary review as part of each employee's verification, to minimize the potential for a single individual to subvert the process.

Risk Mitigation and Due Diligence, cont.

Employment Verification Best Practices.

- Establish a *protocol* for responding to no-match letters received from government agency.
- Use an *I-9 Audit Checklist* for every new hire.
- Ensure that contractors and/or subcontractors establish procedures to comply with I-9 requirements. Encourage contractors and/or subcontractors in these Best Practices and, when practicable, incorporate the use of E-Verify into subcontractor agreements. Consider requiring contractors and subcontractors to provide annual I-9 compliance workforce certifications conducted by a qualified, independent attorney or auditing firm.
- Establish an automated tickler system with reminders of upcoming expiration dates. Remind your employees of upcoming expirations set for 6 months, and 3 months out.
- Use Section 3 to re-verify documents – be sure to do this timely!
- Do NOT re-verify permanent residents, refugees or asylees.

Risk Mitigation and Due Diligence, cont.

Document Retention.

- How long must you keep an I-9 for a terminated employee?
 - Follow the 3 year/1 year rule: 3 years after I-9 was created or 1 year from date of termination, whichever is later.
 - Efficient rule of thumb: purge 3 years after termination date.
 - Best to keep two I-9 binders: one for active employees (organize alphabetically); and one for terminated employees (organize by date of termination and purge monthly).

RESPONDING TO NOTICES OF INSPECTION AND AUDITS

Responding to Notices of Inspection and Audits

Standard NOI Requests

- **All Original I-9 Forms** (includes copies of employee identification documents if copied and retained by the employer, even if not specified).
- **Listing** of all current employees for whom I-9s should be on file with hire date.
- **Listing of all** employees terminated within 12 months prior to the date of the NOI and terminated employees hired less than 3 years prior to the date of the NOI.
- **Company Payroll Records** for last pay period prior to NOI.
- **Copies of Employer's Quarterly Tax Returns** (Form 941) for the four quarters prior to the NOI.
- **Employer Identification Number** (EIN) and documentation.
- **Copies of Business Licenses.**
- **Articles of Incorporation.**
- Current **Independent Contractor** roster listing dates of hire and termination.
- Current **Listing** of all paid, on-call individuals employed on a sporadic, irregular or intermittent basis.
- Documentation of participation (past or present) in **E-Verify** or the **Social Security Number Verification Service.**
- **All Social Security No-Match Letters .**

Responding to Notices of Inspection and Audits, cont.

- Never waive the 3-day Notice to Produce I-9 Forms.
- ICE is not your friend, no matter how friendly.
- Immediately contact counsel.
- Extensions – Truth or Fiction?
- Carefully read the Notice of Inspection (“NOI”) and any accompanying subpoena.
- Document everything that is turned over to ICE.

PENALTIES AND SANCTIONS

Penalties and Sanctions

- Fines for failing to complete the I-9 properly (on-time, and without technical deficiency) can range from \$110 to \$1,110 per form (total often runs deep into the six-figure range).
- Looking at your I-9s before ICE gets involved can save substantial dollars (“good faith efforts to comply” reduce penalties significantly).
- In July 2015, Hartmann studios ordered to pay more than \$600,000 in fines for more than 800 I-9 paperwork violations.
- Proposed changes to E-verify would require use of the system for re-verification, not just new hires.

TOP 10 I-9 TIPS

1. Do make sure I-9s are completed on time.
2. Do make sure I-9s are not backdated.
3. Don't request specific documentation as proof of identity and/or work authorization.
4. Don't accept a Social Security card that indicates it is *Valid Only with DHS Authorization*.
5. Don't request new documentation when an employee's *green card* expires.
6. Do make sure to complete Section 2 of the Form.
7. Don't require employees to list Social Security numbers if your company does not use E-verify.
8. Do re-verify documents in a timely manner.
9. Do make sure that the employee and the employer representative sign and date the Form.
10. Do make sure, if you copy documents, that you do so on a consistent basis.



Thank You!

Questions?

Mary E. Pivec

mpivec@fordharrison.com

202.719.2061

Jennifer G. Roeper

jroeper@slk-law.com

813-227-2259