

## THREE KEYS TO COMPLIANCE: VERIFY, REVERIFY, RETAIN

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**A**lthough immigration officials sporadically have undertaken enforcement actions to increase compliance with the requirements of Form I-9 during the past decade — Form I-9 verifies employment eligibility — a combination of recent government announcements and renewed large-scale enforcement efforts highlight the importance of lawyers revisiting existing requirements now to minimize their clients' liability.

On Nov. 2, 2005, U.S. Department of Homeland Security (DHS) Secretary Michael Chertoff announced the new Secure Border Initiative, which aims to increase interior enforcement of immigration laws by, in part, targeting work sites.

On Nov. 17, 2005, federal agents raided a Wal-Mart construction site in Pennsylvania, arresting 125 workers, according to a Nov. 18, 2005, report on CNNmoney.com. This enforcement action — in the form of a raid — followed a 2003 federal investigation of Wal-Mart's subcontracting practices, which resulted in Wal-Mart paying an \$11 million settlement, according to a March 19, 2005, article on www.foxnews.com.

A spokeswoman for Wal-Mart said the company was satisfied with the civil settlement, and noted that DHS had not charged anyone at Wal-Mart with criminal wrongdoing, the article said. Michael J. Garcia, DHS assistant secretary for Immigration and Customs Enforcement (ICE), said, in the March 2005 Fox News article, "We plan to use this settlement as a model for future cases and efforts in

work-site enforcement."

On Nov. 28, 2005, President George W. Bush raised work-site enforcement as a cornerstone of his new immigration initiative, stating, "Better interior enforcement begins with better work-site enforcement," according to a Nov. 29, 2005, article in *The New York Times*. The president's proposed budget for fiscal year 2007 would increase funding for border and interior enforcement by 25 percent, to \$4.2 billion, according to the federal Office of Management and Budget (OMB).

These three events, less than a month apart, highlight the government's increased emphasis on policing employment-eligibility violations using an ever-expanding tool kit that includes stiff monetary penalties and criminal

sanctions. Recent enforcement actions, including the Wal-Mart incident, indicate that the federal government's policy is shifting away from imposing merely administrative penalties for paperwork violations toward expansion of existing legal precedent and more onerous prosecutions under the U.S. Immigration and Nationality Act's criminal provisions.

Wal-Mart's settlement with the government represents a trend toward enforcement measures that aim to hold companies civilly and criminally liable for the actions of their subcontractors.

In spite of this trend, however, the vast majority of employment-eligibility verification cases remain in the administrative court system. While the civil penalties for noncompliance certainly are preferable to criminal prosecution, litigation in administrative court can be burdensome for employers.

In the administrative setting, the playing rules tend to favor the government. For example, investigating ICE agents issue their own subpoenas for employers' records. Administrative judges determine the facts and the defendant's liability; juries are not an option.

A finding that an employer failed to properly verify an employee's employment eligibility may result in fines and penalties ranging from \$110 to \$1,100 for paperwork violations. If immigration officials find that an employer acted knowingly, the penalties can range from \$275 to \$11,000 per employee, according to Immigration and Nationality Act §274A(e)(4-5).

Obtaining formal judicial review of an administrative court's determination requires the defendant-employer to first appeal to the chief administrative hearing officer, and then, if necessary, to the federal circuit court, per §274A(e)(4-5).

### Renewed Enforcement

Whether in the civil or criminal context, the renewed enforcement of federal employment-eligibility verification laws requires that employers elevate federal Form I-9 requirements to a higher level of focus. Most employers harbor at least some level of Form I-9 liability, and attorneys must know how to best assist clients with compliance and protection in the event of a government audit. With that in mind, employers and their attorneys should be mindful of the following:

- *Know Form I-9 employment-eligibility verification requirements and penalties for noncompliance.* Three prongs exist in federal Form I-9 compliance: initial verification, reverification and document retention.

Employees must complete I-9 forms within three days of hiring.

The employer must examine and record documentation that proves the



employee's identity and employment eligibility. The legal threshold for examining these documents is that the documents must appear to be genuine and relate to the employee. This means that employers are not liable if employees present them with false documents, as long as the employers are—and remain—unaware of the fraud.

It is common for long-term employees to reveal to management that they previously presented false documents, a practice that can create new and contradictory liabilities for the employer. Such a disclosure requires immediate determination of the employee's current immigration status and action based on that status.

Federal law also requires reverification of employment eligibility for all hires with temporary work authorization. The reverification must occur on or before the date that work authorization is due to expire.

Finally, employers must retain Form I-9 documents for at least three years after the employee was hired, or for one year after the employee is terminated, whichever date is later.

- *Establish a nondiscriminatory system for reverification.* Employers must reverify employment eligibility on a set schedule, yet they must take care not to do so in a manner that the government could deem discriminatory under immigration status provisions. If an employer fails to reverify employment eligibility for individuals with temporary work authorization, the government considers the employer “on notice” that the employees may not be work authorized. This notice is likely to lead to increased penalties in the event of a government audit.

However, if immigration officials find that an employer has oververified—for example, asking for more documents than are legally required—the government may penalize the employer for document abuse or discrimination based on immigra-

tion status. Many employers have unwittingly over-documented their employees' work authorization out of an overzealous effort to comply with their understanding of the intent of the law. This overzealousness can lead to liabilities similar in magnitude to those associated with not documenting employment eligibility verification at all.

have shown up on site unannounced.

- *Conduct internal audits.* A well-directed internal audit, concluded prior to an actual DHS audit, can minimize the liabilities associated with an actual audit. Internal audits allow employers to discover correctible and recurring errors, and to provide training accordingly.

Attorneys should take concrete steps to minimize clients' exposure to immigra-

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- *Develop a system for routine document purging.* In the federal Form I-9 context, routine purging of old, outdated documents is key for employers seeking to minimize liability. But employers should make sure they no longer need the documents. Purging required documents can have consequences from the minimal (fines of up to several thousand dollars) to the catastrophic (jail time if the government determines that the employer has obstructed justice in shredding the documents).

- *Develop an audit response plan and train staff thoroughly.* Employers who have no pre-existing strategy for dealing with a government audit are most vulnerable to fines, sanctions and penalties for violations.

A sound audit response plan will include provisions for training personnel and for appointing a trusted employee to act as DHS liaison. Employees should know how to refuse effectively to waive their rights. They should also know to contact immigration counsel as soon as DHS makes known its intent to inspect employer records, especially if agents

tion-related sanctions. Knowing the Form I-9 requirements, instituting reverification and document purging routines, preparing for the possibility of raids, and conducting internal audits can help ensure that employers minimize federal Form I-9 liability.

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