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Overzealous I-9 compliance can result in a discrimination lawsuit

- » The United States government has drastically increased Form I-9 audits.
- » Many Human Resources representatives are misinformed about Form I-9 specifics.
- » The United States government is also investigating Form I-9 discrimination.
- » Companies are forced to pay heavy Form I-9 discrimination fines.
- » Consistent Form I-9 policy is the best deterrence to fines.

As most of corporate America is already aware, Form I-9 compliance enforcement has increased at an exponential rate during the Obama administration. Since January 2010, more than 5,000 companies from many industries have been subject to Form I-9 audits by Immigration and Customs



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Enforcement (ICE).¹ Many of these investigations have resulted in fines issued by the U.S. government, and some ICE raids have led to criminal charges being brought against owners and managers. An unintended consequence of Form I-9 ICE raids has been the growing number of discrimination

suits brought as a result. These suits are rarely brought against employers who are maliciously preventing people from working, but many times are levied against persons who were misinformed about Form I-9 requirements and broke the law by being “over compliant.”

In order to limit a company’s Form I-9 liability, every Human Resources (HR) department representative should be trained in the rules and regulations governing the I-9 form. A thorough vetting of the M-274 (The Handbook for Employers: Instructions for Completing a Form I-9)² by each HR representative is essential

to avoiding fines and sanctions related to the form. A Form I-9 policy, based on the guidance found within the M-274, is vital because of the intricacies of the Immigration and Nationality Act (INA), which governs employment verification laws related to I-9 forms. The convoluted and detailed INA regulations for I-9 forms result in investigations of employers who had nothing but the best intentions. One of the most commonly overlooked regulations in the INA is the anti-discrimination provision, which prevents employers from asking potential employees for specific documents to verify employment eligibility. The INA anti-discrimination provision also prohibits employers from placing additional document burdens on work-authorized employees.

Unfortunately, many HR representatives still “over document” employees’ work authorization, exposing their company to discrimination lawsuits brought by the United States Department of Justice (DOJ) as well as other government entities, or even the wronged individuals themselves. In order to comply with employment eligibility verification regulations, an employer must examine either an original document from List A (U.S. passport, Employment Authorization document,

In the current enforcement environment, many employers have become concerned that their I-9 forms may contain errors and have overcompensated by developing unnecessary (and sometimes illegal) practices to improve their I-9 compliance.

Permanent Resident card, etc.) or a combination of a List B (driver's license, voter registration card, etc.) and a List C document government-issued birth certificate, Social Security card, etc.). The potential employee must be allowed to provide any combination of valid documents in order to satisfy Form I-9 requirements.

In the current enforcement environment, many employers have become concerned that their I-9 forms may contain errors and have overcompensated by developing unnecessary (and sometimes illegal) practices to improve their I-9 compliance. As a result, some companies have asked individuals to provide specific documents for employment eligibility verification, or if a candidate is not a citizen of the United States, they have asked for more documents than are necessary to complete a Form I-9.

Generations Healthcare, a healthcare provider based in California, was recently investigated and is now being prosecuted by the DOJ for mandating that all non-US citizens, who apply for employment with Generations' St. Francis Pavilion facility in Daly City, present extra work authorization documentation, a burden that was not placed on native-born US citizens.³

Other employers, such as Garland Sales Inc., a Georgia rug manufacturer, refused to accept sufficient employment verification documents from persons of foreign origin, and would request that naturalized

US citizens provide their permanent resident card, or "green card."⁴ If the employee refused Garland's request, their employment offer was rescinded. As a result, the Office of Special Counsel (OSC) for Immigration Related Unfair Employment Practices prosecuted the company and required them to pay \$10,000 in back pay and civil penalties.

To protect a company from an OSC employment discrimination investigation, and to also remain vigilant in employment verification practices, we recommend that a company's HR department has a detailed Form I-9 compliance policy with a corresponding checklist. Specifically, the policy should instruct your HR department to provide each potential employee with the government approved list of acceptable Form I-9 documents. This ensures that no miscommunication can occur and prevents your HR department from accidentally requesting specific documentation, which could be construed as discriminatory.

Above all, a company's Form I-9 policy should stress consistency. Most OSC investigations target companies that treat foreign nationals and naturalized U.S. citizens differently than native born U.S. citizens. By keeping employment eligibility verification processes consistent for each potential employee and keeping a well-trained HR staff, any company should be able to navigate the ever choppy enforcement waters surrounding the Form I-9. *

1. Jordan, Miriam: "Crackdown Resumes on Firms' Illegal Hires." *Wall Street Journal*, November 15, 2011
2. U.S. Citizen and Immigration Services: Handbook for Employers: Instructions for Completing Form I-9 Employment Eligibility Verification Form. M-274 (Rev. 06/01/11) N. Available at <http://www.uscis.gov/files/form/m-274.pdf>
3. United States Department of Justice: "Justice Department Files Lawsuit Against California Healthcare Provider Alleging Discrimination." News release, September 30, 2011. Available at <http://www.justice.gov/opa/pr/2011/September/11-crt-1301.html>
4. -United States Department of Justice. "Justice Department Settles Allegations of Citizenship Status Discrimination and Retaliation Against Georgia Rug Manufacturer." News release, December 30, 2011. Available at <http://www.justice.gov/opa/pr/2011/December/11-crt-1718.html>

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