

Employment Tax Briefing

Addressing the concerns of payroll tax departments

August 28, 2012

Form I - 9 compliance audits on the rise

In brief

Payroll and Human Resource Department Managers focus much of their energies on ensuring that employees are correctly compensated and that employers comply with required federal and state regulations. Managers have a new concern vying for their attention: criminal fines and penalties are being assessed against employers as the Department of Homeland Security focuses on employer compliance with the Form I-9 process.

Background

Immigration reform and control act

On November 6, 1986, Congress enacted the Immigration Reform and Control Act, which requires employers to verify the identity and employment eligibility of their employees. The Act also imposes criminal and civil sanctions for employment-related violations. Section 274A(b) of the Immigration and Nationality Act, codified in 8 U.S.C. § 1324a(b), requires employers to verify the identity and employment eligibility of all individuals hired in the United States after November 6, 1986.



The Employment Eligibility Verification Form I-9 (Form I-9) has been designated as the means of documenting this verification. Employers are required by law to maintain for inspection original Forms I-9 for all current employees.

Documentation under scrutiny

Historically, Immigrations Customs Enforcement ("ICE") conducted 'raids' on employers, rounding up employees that were hired and working in the United States illegally. The enforcement efforts have now shifted to employer documentation. The employer obligation for obtaining documentation and screening workers to ensure that they are eligible to perform services in the United States is now of primary concern, resulting in assessments of penalties and possible criminal sanctions against employers who knowingly have employment-related violations.

The documentation inspection process

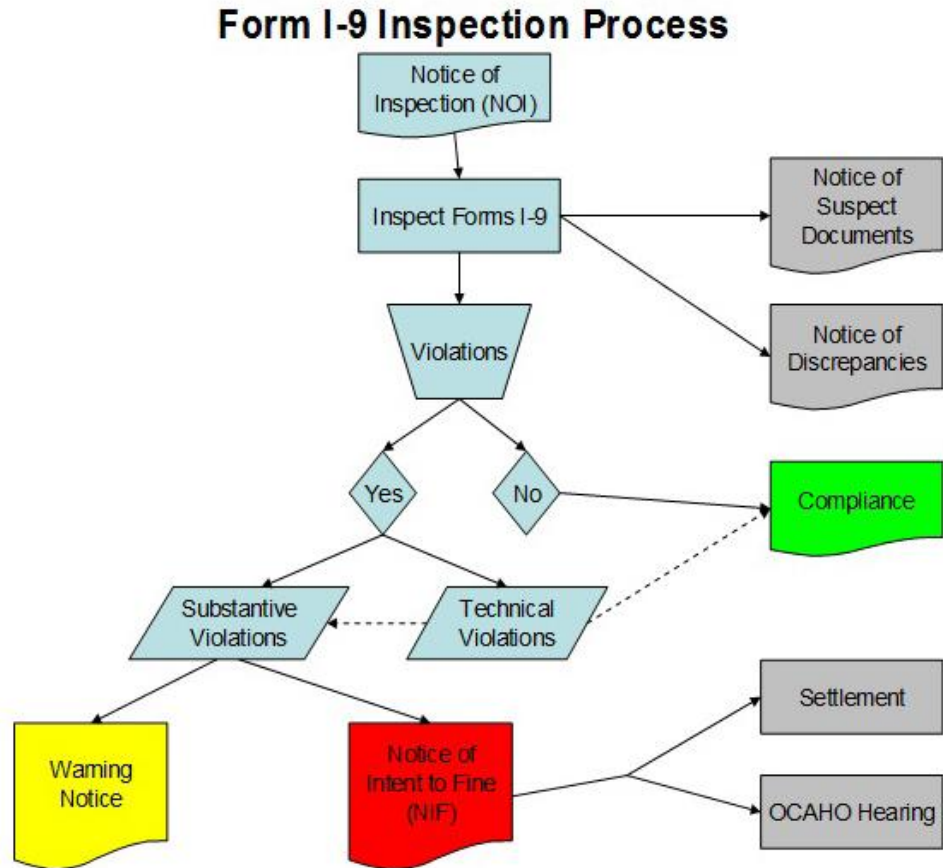
Beginning in 2009, ICE and Homeland Security Investigations ("HSI") initiated an employer-focused, administrative inspection effort designed to ensure compliance with the I-9 process. The inspection efforts, in the form of Form I-9 compliance audits, have annually increased. According to HSI's Fact Sheet entitled Form I-9 Inspection Overview, a Form I-9 compliance audit generally begins with the service of a Notice of Inspection on an employer, compelling the production of Forms I-9. In addition, employers may be requested to provide supporting documentation, which may include a copy of their payroll, list of current employees, articles of incorporation, and business licenses. HSI typically will grant an employer three business days to respond to the form production request.

HSI special agents or auditors then conduct an inspection of the Forms I-9 for compliance. When technical or procedural violations are found, pursuant to Immigration and Nationality Act §274A(b)(6)(B) (8 U.S.C. § 1324a(b)(6)(B)), employers are given 10 business days to make corrections.

The Fact Sheet then describes how "employers may receive a monetary fine for all substantive and uncorrected technical violations. Employers determined to have knowingly hired or continued to employ unauthorized workers under the Act § 274A(a)(1)(a) or (a)(2) (8 U.S.C. § 1324a(a)(1)(a) or (a)(2)) will be required to cease the unlawful activity, may be fined, and in certain situations may be criminally prosecuted. Additionally, employers found to have knowingly hired or continued to employ unauthorized workers may be referred for debarment by ICE, meaning that the employer will be prevented from participating in future federal contracts and from receiving other federal government benefits."

Penalties in this area are stiff and have increased during the Obama administration. Monetary penalties for knowingly hiring and continuing to employ workers without sufficient or with incorrect documentation range from \$375 to \$16,000 per violation. Penalties for substantive violations, which include 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, the seriousness of the violation, whether the violation involved unauthorized workers, and history of previous violations.

ICE and HSI have provided the following illustration of the inspection process, current as of November 19, 2009.



Form I-9 compliance audits on the rise

Since January 2009, ICE has audited more than 8,079 employers suspected of knowingly hiring workers unauthorized to work in the United States, debarred 726 companies and individuals, and imposed more than \$87.9 million in financial sanctions.

In FY 2010, ICE conducted about 57% more audits than in FY 2009 and all indications are that these audits will continue to increase. In February 2011 alone, ICE issued notices of inspection to 1,000 employers.

According to Janet Napolitano, U.S. Department of Homeland Security Secretary, before a Judiciary hearing conducted in July of 2012: "We also have eliminated high-profile raids that did little to enhance public safety, and instead we are promoting compliance with worksite-related laws through criminal prosecutions of egregious

employer violators, Form I-9 inspections, civil fines, and debarment, as well as education and compliance tools."

Examples of penalties and fines following I-9 audits include:

- A Washington-based food supplier was sentenced to probation and assessed \$1 million in criminal fines for hiring illegal aliens. HSI conducted a review of the company's I-9 employment eligibility verification forms in early 2011. The audit found significant discrepancies. Of the more than 300 forms reviewed, more than 200 were suspect.
- Following an investigation and audit of Form I-9 documents, 14 New England employers have been fined in 2010 for various violations that enabled companies to hire illegal aliens.
- HSI announced a \$1,047,110 fine settlement reached with a clothing retailer for violations of the Immigration and Nationality Act related to an employer's obligation to verify the employment eligibility of its workers. The settlement is the result of a November 2008 Form I-9 inspection. The audit uncovered numerous technology-related deficiencies in the retailer's electronic I-9 verification system. The company was fully cooperative during the investigation and no instances of the knowing hire of unauthorized aliens were discovered. Despite this, the company was still fined over \$1m for the violations found.

Let's talk

Form I-9 compliance audits have increased in number since 2009 and with the focus of the current administration on employer compliance, that number is expected to continue to increase. Businesses should ensure that their on-boarding process includes compliance with Form I-9 documentation requirements. The ICE Mutual Agreement between Government and Employers ("IMAGE") program and the US Citizen and Immigration Service's EVERIFY program are tools that can be utilized by businesses in order to show that they have exercised due diligence in their hiring and screening process. If these tools are used, generally a 'good cause' argument can be made to mitigate any fines or penalties that may be assessed. If you are contacted regarding a Form I-9 investigation or you have questions regarding the IMAGE or EVERIFY programs and how they can assist you in your compliance efforts, please contact

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