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Immigration Compliance: A New Year's Resolution for the Workplace

"An ounce of prevention is worth a pound of cure"
Benjamin Franklin

Benjamin Franklin's advice is certainly not new to anyone in the health care industry. However, many organizations do not heed this advice when it comes to compliance with federal and state immigration provisions. The Obama administration has focused enforcement efforts on targeting employers who hire non-citizen workers. Since April 30, 2009 Immigration and Customs Enforcement (ICE) has initiated 1,897 cases, compared with 605 for all of Fiscal year 2008 and have fined employers nearly \$16,000,000 thus far. Additionally, both the Bush and Obama administrations have made it a stated goal to make examples of employers who knowingly hire or employ unlawful workers by charging management with criminal offenses ranging from engaging in misdemeanor charges involving a pattern and practice of employing unlawful workers to felony alien harboring and conspiracy indictments. In 2009, the major enforcement actions have coincided with holidays and long weekends, with more than 600 notices sent on July 1, and 1,000 notices sent just before Thanksgiving, creating late nights and long weekends for those without compliance systems in place.

In addition, new regulations now mandate that Federal contractors participate in the E-Verify program. States are also jumping into the fray, creating additional requirements for employers. In Colorado, employers must complete a separate affirmation for all employees hired after January 1, 2007, and anyone with a public contract must either participate in E-Verify or the Colorado Department of Labor and Employment's verification program. These new rules, combined with more stringent enforcement of existing laws, make it more important than ever for organizations to make sure that systems are in place, and staff is properly trained to comply with federal hiring rules related to immigration. This article discusses some basic steps that employers can take to minimize liability under existing immigration laws.

Employers are responsible to have a completed I-9 form for all employees hired after November 6, 1986. This rule, adopted under the 1986 Immigration Reform and Control Act, was meant to ensure that employers could verify both the identity and the employment eligibility of newly hired employees. Employers must have an I-9 on file for all current employees hired after November 6, 1986, and must retain I-9 forms for terminated employees for one year after the date of termination or three years from the date of hire, whichever is longer. Immigration and Customs Enforcement (ICE) may inspect I-9 forms for any employer and is only required to provide three days of notice before an inspection.

If, upon inspection, the employer is found to have knowingly hired or continued to employ unlawful workers, the employer and its management can be subject to civil fines and criminal prosecution. Civil fines can be levied on a per employee basis and be as high as \$3,200 **per worker** for a first offense. In addition, errors and omissions on the I-9 form can result in fines, regardless of the underlying immigration status of the employee. Thus, employers can hire legal workers, and still be subject to fines based upon



Caplan and Earnest LLC
1800 Broadway, Suite 200
Boulder, CO 80302
303-443-8010

**Legal Lines is a CAHSA
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Caplan and Earnest LLC**

CAHSA / Legal Lines
1888 Sherman St. #610,
Denver, CO 80203
303-837-8834



the state of the paperwork. Fines can be levied on a per employee basis, and be as high as \$1,000 **per worker** for a first offense.

The good news for employers is that Congress created a good faith exception for employers who take careful steps to comply with the law. Thus, even employers who unknowingly hire illegal workers will avoid fines by diligently completing paperwork and acting in good faith. While inclusion of an I-9 is standard fare in most new-hire paperwork, the apparent simplicity of this form is deceptive. The Department of Homeland Security's employer handbook that serves as a guide for assisting employers is 65 pages long, which should give employers an idea of the set of issues that can arise in the completion of an I-9.

Given both the potential liability for employers and the administration's increased use of I-9 inspections for employers, establishing solid systems for the completion, retention, and audit of I-9 forms is a must. Below are some practice tips for establishing an immigration compliance program.

- **Designate a person or small team who will be responsible for document review and I-9 completion.** Given the potential fines and the deceptive simplicity of the forms, it is important to have a single person or well-trained team that can correctly complete I-9 forms, and remain familiar with the legal issues surrounding document presentation. This should typically be a human resources or risk management professional.
- **Establish a storage and retention program for I-9 documents.** The personnel file is not the appropriate location for your I-9 documents. We recommend establishing specific binders for current employees, terminated employees, and any state-specific forms. Employers should also have a tickler system so that I-9 forms and any state-specific documents for terminated employees are promptly destroyed at the conclusion of the retention period. ICE can still fine an employer based on errors or omissions on forms associated with terminated employees, or forms that should have been destroyed but have been retained.
- **Schedule audits of your I-9s at regular intervals.** Best practices in this area involve both internal and external audits of the forms, and a system that will allow employers to quickly identify current employees and those hired and terminated since the last regular audit. An audit will allow an employer to identify and correct any errors on the forms and identify systemic issues, such as holes in training or particular staff members who are having issues with proper I-9 completion. Both Federal Prosecutors and ICE will typically give consideration to employers that have proper systems in place, and have taken steps to correct errors, which can serve to mitigate potential fines.
- **Offer regular training to all workers responsible for I-9 forms.** This can ensure that employers are using the proper form, update employers on worksite enforcement trends, and provide a reminder on the correct completion of I-9 and state-specific forms. This also gives everyone a chance to exchange ideas, tips, and to ask questions concerning unusual issues that arise in the completion of the paperwork.
- **Establish clear internal policies for compliance on employment of undocumented workers, communication concerning immigration status after hire, and reporting behavior concerning potential immigration violations.** The laws allow fines for both hiring and continued employment of undocumented workers. Therefore, clear, written policies concerning how a company hires, communications concerning immigration status, and how to handle employees who "come clean" about illegal status can help a company avoid fines, and employees and managers of a company avoid criminal prosecution.

Watch for transitions in employment. Health care organizations often hire individuals who

were formerly volunteers, or who originally worked for temporary agencies. Develop policies to ensure that when a person transitions from one type of relationship to your organization to another, an immigration (and background and licensure, if applicable) check occurs. This includes establishment of a tickler system for verification of expiring employment authorization documents.

In conclusion, employers who take small steps during the hiring and termination process can prevent significant problems for the company and management in the future. The ounce of prevention that comes with training and establishing procedures for I-9 compliance can pay off significantly if ICE targets your organization for an inspection. It is wise to review existing policies and to ensure that these policies are up to date and followed internally in this new enforcement climate.

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ICE Assistant Secretary John Morton Announces 1,000 New Workplace Audits To Hold Employers Accountable For Their Hiring Practices” November 19, 2009, accessed 11/20/09 at <http://www.ice.gov/pi/nr/0911/091119washingtondc2.htm>

C.R.S. §8-2-122

C.R.S. §8-17.5-101, 102.

8 U.S.C. §1324a(b)

8 U.S.C. §1324a(b)(3)(B)

8 C.F.R. §274a.2(b)(2)(ii)

8 C.F.R. §274a.10(b)(1)(ii); 73 Fed. Reg. 10130-37 (Feb. 26, 2008).

8 C.F.R. §274a.10(b)(2); 73 Fed. Reg. 10130-37 (Feb. 26, 2008).

8 U.S.C. §1324a(A)(3)

“Handbook For Employers, Instructions for Completing Form I-9” M-274 (Rev. 7/31/09) N. Accessed 11/20/09 at <http://www.uscis.gov/USCIS/Services%20&%20Benefits/Immigration%20Forms/m-274.pdf>.