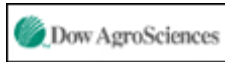




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## February Extra: The Whys and Hows of the Internal I-9 Audit

By Ken C. Gauvey  
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The I-9 form appears simple. It's a one-page form, half of which the employee fills out. Yet errors in completing the I-9 form can result in significant civil and criminal penalties being brought both against the company and human resources managers individually. These penalties may be reduced or avoided with a proper internal audit of both the I-9 procedures and I-9 forms maintained by the employer. It should be noted before going through the penalties that aside from knowing violations, whether constructive or actual, penalties may not be assessed without giving employers an opportunity to correct the problem.

Penalties for violating proper I-9 procedures range from criminal penalties for engaging in a pattern or practice of violation to civil penalties. The criminal penalties include fines of no more than \$3,000 for each unauthorized alien and imprisonment for not more than six months. From a company perspective, these criminal penalties may be applied to anyone who participated in the pattern or practice of violation from CEOs to human resources managers. I-9 enforcement is now focused on criminal prosecution, according to an April 2006 memo issued by Immigration & Customs Enforcement (ICE). ICE is moving to bring criminal charges of I-9 violations as well as money laundering and harboring illegal aliens whenever possible. The penalties associated with these charges are potentially 20 and 10 years in prison. As a result of this new stance by ICE, arrests for criminal violations brought by ICE have increased from 24 in 1999 to 716 arrests in 2006 and 3,667 administrative charges.

There are two types of civil penalties: knowing violations and failure-to-comply violations. Civil penalties for knowing violations can range from \$250 for the first violation up to \$11,000 per violation for repeated violations. For example, if a company currently has three undocumented workers on payroll, the fee would not be \$250 times three violations but rather it would likely amount to \$11,000 times three violations. Penalties for failure to comply with the employment verification requirements, whether the error was intentional or not, can range from \$100 to \$1,100 per violation. The penalties are assessed taking into consideration several factors including the size of the business, the good faith of the employer, the seriousness of the violation, whether the violation concerned an undocumented worker and the history of violations of the employer.

In assessing penalties, the Code of Federal Regulations recognizes that constructive knowledge may be imputed on the company and its managers by "notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition." One of these "certain facts" is the failure to properly fill out the I-9 form. This is why demonstrating a good faith effort to comply with I-9 procedures is

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necessary to avoid the fines and penalties associated with knowing violations.

By demonstrating a good faith effort in complying with I-9 procedures, employers can avoid the penalties associated with knowing violations. Such violations may be reduced to failure-to-comply violations, resulting in \$100 to \$1,100 fines or even no fines at all if corrections are made after notification of the existence of the errors. Therefore, to avoid exposure to the higher fines it is important that companies do an annual internal audit of their I-9 procedures and their I-9s on file.

**HOW TO CONDUCT AN INTERNAL AUDIT.** After filling out the initial I-9, the next step to ensuring compliance with the I-9 regulations is to conduct an in-house audit. Employers need to be careful when conducting an internal audit as mishandling an audit creates a potential for discrimination charges. Title VII makes it illegal for an employer to discriminate on the basis of race or national origin. So, for example, if an employer only focuses on those employees who appear to be foreign nationals in an I-9 internal audit, the employer is subject to discrimination charges. To avoid such charges and to ensure a successful audit, an internal audit should follow certain guidelines.

First, ensure that an internal audit is not based on race or national origin. This may be accomplished by auditing all I-9 forms or by auditing a truly random sample of I-9 forms. A company may not selectively choose which I-9 forms to audit. To do otherwise is to invite a discrimination action.

Second, an employer should consider an I-9 self-audit on an annual basis, which may eliminate complaints that an employer is only conducting targeted audits. The audit should mirror as much as possible an actual government compliance audit. This step not only verifies the I-9s on file, but it also helps the human resources department to be better trained to act under an actual government compliance audit.

Finally, an employer must keep copies of all the I-9 verification documents or none of them. An employer cannot keep verification documents for some employees and not others. While performing the audit, if you discover that some I-9s have copies of the verification documents and others do not, then you should obtain those that are missing or get rid of those in your possession. So far, Colorado is the only state that requires employers to maintain copies of all verification documents with the I-9 forms.

To conduct an internal audit, obtain a complete list of employees, current employees as well as those who have been terminated within the past three years. Next, obtain the I-9 form for each and compare it to employee list to ensure the company is holding all the I-9s. Keep the I-9 forms in a separate file from the employee personnel files. This is done for a number of reasons, chief among these is the fact that if an agent receives the employee personnel file along with the I-9, they will read the entire personnel file and have the authority to pass on the information they gain to other areas of the government. The Department of Labor and the Department of Homeland Security are working together and communicating with each other.

Keep I-9s for terminated employees for three years from the date of hire or one year after termination, whichever is longer. I-9s falling outside of these time frames should be destroyed and the date the I-9 was destroyed should be written on the employee's file in case there are ever questions as to whether an I-9 was ever completed. It's a good idea to keep two binders, one for current employees and the other for terminated employees. Make it your policy to transfer I-9s from the current-employee binder to the terminated-employee binder whenever employees are terminated.

When performing an internal audit, take great care in changing the information on an I-9 form. The person making those changes should initial and date the new information with a note such as "corrected during self-audit." Information should not be deleted but rather crossed out with a single line and the correct information written above it with initials and date added. This demonstrates that the forms have not been "doctored" but rather a self-audit resulted in the discovery of errors which were then immediately corrected to show compliance with federal regulation.

Consult immigration practitioners if there you have any questions that might need



clarification. I-9 compliance is a significant issue these days with a number of high-profile raids conducted by Immigration and Customs Enforcement (ICE). Take the necessary steps to ensure you are not susceptible to the steep civil and criminal penalties associated with poor management of I-9 forms.

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