

Immigration Enforcement in the New World Order: Where Are We Headed Next?

The recent presidential campaign, Executive Orders, headlines and marches have put immigration in the spotlight. The topic of immigration has not seen such a focus since several states enacted aggressive immigration laws. After the multitude of lawsuits challenging such laws law concluded, immigration passed from the headlines – until now.

Threats to national security and the deportation of criminal elements are the current national themes. Where will the focus turn next? We believe deterrence – drying up the market for “unlawful aliens” (a statutory term) by penalizing employers who hire them. Is this a real risk? The Immigration and Customs Enforcement department (“ICE”) recently fined an employer \$605,250 because the employer did not sign the verification contained in Section 2 of the I-9 form for approximately 800 past and current employees. There was no finding that any past or current employee was an unlawful alien. The employer simply did not sign the I-9 form where required. No new law, regulation or Executive Order was required to assess the over \$600,000 penalty. It was the simple enforcement of the existing laws.

The Department of Labor increased its investigations of employers for practices that violate the Fair Labor Standards Act. ICE may be the next agency to increase its enforcement efforts against businesses. Is your business ready when ICE comes knocking?

Federal law prohibits an employer from “knowingly” employing an individual not legally authorized to work in the United States. An employer that reasonably should have been aware that an employee is an unauthorized alien can be found to have “knowingly” employed the unauthorized alien. “Should have been aware” includes ignoring questionable I-9 documentation, not obtaining I-9 verification in the first place, or even ignoring workplace rumors about an employee’s unauthorized status. The penalties under federal law for knowingly employing an unauthorized alien are substantially higher than the penalties for technical violation (such as failing to sign where required). Penalties for first offenses range from \$539 to \$4,313 *per alien*. The penalties for subsequent offenses increase dramatically.¹

With the advent of the federal e-verify program, some employers have the misconception that employers only have to participate in the program to satisfy the obligation to confirm employment authorization.² *However, e-verify is not a substitute for I-9 compliance,*

¹ There are no monetary penalties under Alabama law for knowingly employing an unauthorized alien. Penalties involve suspension and permanent loss of state business licenses and permits.

² Under federal law, the use of the e-verify program is voluntary, but its use provides an employer a *presumption* that it has not knowingly employed an unauthorized alien. Under Alabama law, the e-verify program

and the failure to follow I-9 procedures can be extremely costly – over \$600,000 for one employer.

If your business has not been diligent in its I-9 verification procedures, hoping federal or state agents do not drop by for a visit is not a wise course of action. As seen above, noncompliance with I-9 obligations carries its own penalties. Sanctions for a first offense violation of I-9 requirements range from a minimum of \$216 to a maximum of \$2,156 *for each deficient form or lack of form*. Subsequent violations carry substantially higher minimum and maximum penalties.

If an employer has any reason to suspect its I-9 documentation is not compliant, it may wish to conduct a self audit.³ Correction of the I-9 deficiencies will not shield an employer from penalties. However, compliance efforts after an internal audit and correction may convince ICE to forgo or impose lesser penalties. In fact, guidance issued by ICE *encourages* employers to remedy any deficiencies discovered in an internal audit.

There is no cure-all. An employer cannot require its entire current workforce to undergo the I-9 process again. An internal audit involves the review all retained I-9 documents⁴ to determine if a deficiency exists. If an audit reveals deficiencies, corrections are recommended. Here are the protocols:

- Notify the affected employee privately that his or her I-9 paperwork needs to be corrected, specifically identifying the deficiency.
- Provide the employee a copy of his or her existing I-9 form and documentation.
- Missing I-9 form entirely: If an entire I-9 form is missing or was never completed, complete the current version of the I-9 form. The form should indicate the employee's initial date of employment in the certification portion of Section 2, but you should not backdate the I-9 form. Attach a signed and dated statement explaining the corrective action taken.

is mandatory and its use creates a conclusive presumption that an individual verified through the system is authorized to work in Alabama.

³ Government contractors should conduct a self-audit. Federal contracts typically require I-9 compliance as a term of the contract. Non-compliance could result in the cancellation of the contract and disbarment.

⁴ An employer must retain an employee's completed Form I-9 for as long as the individual works for the employer and either three years after the date of hire, or one year after the date employment is terminated, whichever is later. We suggest destroying your files of outdated I-9 files. Remember that I-9 files contain confidential identification and should be destroyed or shredded in a manner to preserve confidentiality, not just thrown in a trash can. For future retention efforts, to avoid having to track hire and termination dates and length of employment, it is simplest to maintain I-9 forms for three years following the termination of employment. I-9 forms can be retained either on paper, microform, or scanned and stored electronically.

- Incorrect or missing information on the existing I-9 form: Only the employee can correct errors in Section 1. The employer makes any necessary corrections to Section 2. If information is incorrect, draw a line through the incorrect information and either the employee (Section 1) or the employer (Section 2) should enter the correct information. Do not erase or “white-out” the incorrect information. If information is omitted on the original I-9 form, the information should be entered. Initial and date the corrected or added information.
- Missing or insufficient documentation: Ask the employee to present documentation that complies with current I-9 requirements. Staple the completed and signed Sections 2 and 3 of the current I-9 form to the previous I-9 form, together with a signed and dated explanation of the corrective action taken.
- Former employees: If the individual is no longer employed, attach a dated and signed statement to the original I-9 explaining that the individual is no longer employed and the correct or omitted information / documentation cannot be obtained.

E-verify is a voluntary program under federal immigration law and there is no penalty for not registering for e-verify. Without e-verify clearance of an individual, the employer simply does not enjoy the presumption that the employer has not knowingly employed an unauthorized alien. Alabama law requires participation in e-verify but does not carry a penalty for failing to register. An employer only loses the conclusive presumption of compliance with the Alabama immigration Act.

If an employer elects to register in e-verify, generally it may not e-verify existing employees. There is no way to gain the presumption for current employees. However, federal contracts typically contain an e-verify clause requiring participation in the program. ICE guidance indicates a federal contractor should immediately e-verify any current employees who were not verified at the commencement of employment. Again, the presumption of compliance is not gained but the breach of contract is cured. Once an employer enrolls in the e-verify program, it is required to timely e-verify all new employees. The failure to do so could result in an I-9 audit.

TAKE-AWAY: I-9 Enforcement is “just another brick in the wall.” If you haven’t audited your I-9 files recently, do so. If you find deficiencies in the I-9 files, correct them. If you have not enrolled in e-verify, do so. If you have any questions regarding I-9 obligations or the e-verify program, government websites are helpful, as is your employment counsel.

You can also reference: the Guidance for Completing I-9 Form: <http://bit.ly/2maBhfD>
The new I-9 Non-Fillable (Paper) Form: <http://bit.ly/2lw5DFE>

I-9 Central Home:	www.uscis.gov
E-verify Enrollment:	http://e-verify.uscis.gov/enroll
The E-Verify Process:	http://e-verify.uscis.gov/emp
E-Verify Quick Reference Guide:	www.dhs.gov/E-Verify

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