Auditing Your I-9’S



Employers are required to complete Form I-9s to verify the identity and work authorization of new employees in order for them to legally work in the United States. The Form I-9 must be completed within three days of the employee’s first day on the job and recertified using Section 3 of the Form if employment authorization expires during employment (with recertification occurring no later than the expiration date to ensure continuity of employment authorization at all times). Employees that were hired prior to November 6, 1986 are not required to complete a Form I-9. To the extent you discover that some or all current employees who were hired after November 6, 1986 do not have Form I-9s on file, or if there are other discrepancies with I-9 compliance, an internal audit is a good way for the employer to correct the Forms in advance of an external claim or audit (which can result in the imposition of fines and penalties, etc.).

AUDITING YOUR CURRENT EMPLOYEES:

Step One: Create a master list of all current employees that include their name and date of hire.

Step Two: Verify you have an I-9 Form on file for all current employees (unless they were hired prior to November 6, 1986). If you do not have an I-9 Form on file for a current employee please refer to the I-9 Employer Handbook (available at https://www.uscis.gov/sites/default/files/files/form/m274.pdf) for the employer’s available courses of action.

Step Three: If you made copies of any documentation that were used to verify employment on the I9, check to make sure you made copies of all documentation for all employees. You are not required to make copies of the documentation but if you do for some you must do for all. Consistency reduces claims of employment discrimination.

REMEDYING MISSING OR INCOMPLETE FORMS:

Step One: If I-9 Forms are missing for one or more employees, you must have these employees complete an I-9 Form using the most current version (available at https://www.uscis.gov/i-9) and accepting only those documents acceptable on the List of Acceptable Documents (located on the last page of the Form) as soon as possible. You should identify the original hire date on the Form but sign with the current date, and attach a note explaining the discrepancy (e.g.,

discovered missing I-9 and sought to correct, etc.).

Step Two: If I-9 Forms are deficient for one or more employees, the best practice is to correct the original Form(s) if the original documents establishing identify and employment eligibility were acceptable, or for the employer to require the impacted employee(s) to complete a new Form I-9 – again using the most current version – and, if necessary, produce documentation that is currently acceptable to verify identity and employment eligibility (if either or both were deficient on the first Form).

STORING AND RETAINING FORM I-9S:

Storing Forms: I-9 Forms (and any copied documentation, if the employer makes copies) must be stored separately and securely from the personnel files. The employer has the option to either have a separate Form I-9 file, one for each employee, or all Form I-9s can be stored collectively in a binder or folder organized by alphabet or date of hire. Separate files for the I-9 Forms is not only for confidentiality reasons, and for ease of production if audited, but also so that managers and supervisors who may need to review a personnel file for performance management, promotion, discipline, and other similar reasons would not have access to the confidential information about an employee's protected class status (such as national origin for example) that may be contained on the I-9 Form or attached documentation and that could adversely (and unlawfully) influence their employment decisions. An employer has less exposure to a claim that an employment decision was made for a discriminatory reason or in retaliation for a claim if the employer can show that the decision-maker did not have knowledge of or access to this information. This may be more difficult to prove if the I-9 Form is stored in an employee's personnel file.

Electronic Format: I-9 Forms may be maintained in paper or electronic format. An employer may scan original and general personnel file documents, including I-9s, into a computer system, and shred or otherwise dispose of the hard copies, and just retain the documents electronically. (If the hard copies are disposed of, as noted they must be destroyed completely and fully to retain the privacy and confidentiality of the information – throwing documents into a trash can where they can be readily retrieved and reviewed is insufficient.) Paperless personnel files, including I-9 Forms, must be kept in the same manner as would paper ones, and this is true of scanned records as well as those generated electronically originally. This means that if I-9s are scanned, they must be electronically stored separately from the personnel file documents and there needs to be sufficient safeguards as to such files. They cannot be available to anyone surfing the company intranet (or otherwise). They must also be able to be reproduced (i.e. printed) whenever necessary. The U.S. Citizenship and Immigration Services provides guidance to employers relative to retention and storage of Forms I-9 in an electronic format, which you are encouraged to review at https://www.uscis.gov/i-9-central/103-electronic-retention-form-i-9.

Retaining Forms: The requisite retention period for the Form I-9 is one year from the date of discharge or three years from the date of hire, whichever is the longer period.