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ALERT

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Tougher Enforcement of I-9 Regulations Announced

E-Verify System Became Effective September 8, 2009

By Deborah E. Klahr

Whenever an employer hires a new employee, the employer is required to have the new hire complete and sign Form I-9 issued by the Department of Homeland Security ("DHS"). This form verifies the employee's eligibility to work in the U.S. and must be completed regardless of whether the employee is a U.S. citizen, permanent resident or holder of a valid work visa. In addition to completing and signing the Form I-9 when the employment commences, employees are also required to produce corroborating documentation that establishes their eligibility to work in the U.S.

The list of acceptable documentation to prove eligibility to work in the U.S. is contained in a checklist at the end of Form I-9. All new employees must either produce one document that establishes both identity and employment authorization (List A) or a document that establishes identity (List B) and a document that establishes employment authorization (List C). For example, U.S. passports, permanent residence cards and employment authorization cards with photographs (EADs) establish both identity and employment authorization. Alternatively, driver's licenses with the driver's photograph can be used to establish identity, and Social Security Account Number cards that do not state that the card does not authorize employment in the U.S. can be used to establish employment authorization. Additional types of documentation that satisfy the requirements for establishing employment eligibility can be found in the checklist located at the end of Form I-9.

Employers are not permitted to specify which document or combination of documents employees must produce and should simply provide employees with the list of acceptable documents. Moreover, employers should be very careful not to request any documentation outside of the parameters set forth in Form I-9. Even the slightest error on the part of the employer can expose the employer to charges of unlawful discrimination based on citizenship status or national origin. Proper care should be taken by employers to make certain that they do not leave themselves open to claims of (*cont'd* ➔)

unlawful discrimination.

The Form I-9 must be maintained by employers for a period of at least three years or for one year after the employment is terminated, whichever is later. It is advisable to maintain the Form I-9 separately from the employee's HR or payroll file. It is also recommended that the Form I-9 be maintained in a location that is easily accessible, should the employer be required to produce the Form I-9 for government inspection.

For years, the U.S. government has been lax in the enforcement of regulations that cover the preparation and retention of I-9 forms for new employees. No more. DHS recently announced that it will be vigorously enforcing these regulations and will be holding employers accountable, both with civil penalties and possibly even criminal penalties, should employers fail to comply with the Form I-9 regulations.

Recently, DHS sent notices to more than six hundred employers asking them to produce all of their Forms I-9 for inspection. The failure of an employer to produce these documents will result in civil penalties and fines. More important, if DHS has determined that an employer has either knowingly hired an employee who is not authorized to work in the U.S. or has failed to comply with the employee eligibility verification requirements, DHS will issue a Notice of Intent to Fine, advising the employer of its plan to impose penalties upon the employer. Proper care should be taken by all employers to comply with these regulations.

Moreover, for those employers who wish to enter into federal contracts with the

U.S. government, an additional verification system must be followed beyond that of complying with the regulations related to the completion and retention of Forms I-9 for all their employees. Effective September 8, 2009, all federal contractors and subcontractors are now required to use the new E-Verify online system to verify their employees' eligibility to work in the United States if their contract includes the Federal Acquisition Regulation (FAR) E-Verify clause.

The E-Verify system, operated by the DHS in conjunction with the Social Security Administration, is a free web-based online system that compares information provided on the Form I-9 with federal government databases to verify an employee's eligibility to work in the U.S. The goal of this new system is to prevent unauthorized workers from obtaining employment in the U.S. and also to prevent employers from employing those who are not authorized to work in the U.S. Companies awarded a contract that contains an E-Verify clause will be required to enroll in the E-Verify system within thirty (30) days of the contract award date and will have to confirm that all new hires are eligible for employment in the U.S., regardless of whether these new hires will be employed under the federal contract.



The information provided here is necessarily general and is not intended as legal advice or a substitute for legal advice. If you have any questions regarding this Alert, please contact Deborah E. Klahr at dklahr@lindabury.com.

Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision.

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