



Immigration Compliance Newsletter

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NEWS

Kindly indulge me for one minute while I explain my hiatus from the Immigration Compliance Newsletter last month. I am working on an immigration compliance [blog](#) through LexBlog and that has side-tracked me. Hopefully, starting next month my blog will be up and running and you will join me. Stay tuned.

I recently spoke at the Rhode Island SHRM Chapter [conference](#) in Providence about compliance issues. If you are a SHRM member you can see my presentation regarding how companies can work toward greater compliance with the immigration laws when it comes to your forms I-9, no-match letters, E-Verify and so on. I'm not going to lie to you, the photo of me could be better.

FEDERAL DEVELOPMENTS

The Importance of Completing Forms I-9 for Employees

That darn form I-9, it's the bane of my existence you may say. I'm here to confirm that it is. The importance of companies having forms I-9, as a baseline compliance requirement, cannot be said enough. It's a one-page form that can land a company in hot water if not completed and not completed properly.

Two recent cases from the Office of Chief Administrative Hearing Officer (OCAHO) involve companies ordered to pay penalties for missing forms I-9. On a scale of 1 to 10, 10 being the worse, not completing the form is a 10 as it's not merely a "technical or procedural violation", but a substantive violation in the eyes of the government (*i.e.*, the worse kind).

- [United States v. Ice Castles Daycare Too, Inc.](#) – daycare facility in Texas fined \$55,352 by ICE for failure to prepare or retain forms I-9 for 74 employees and ultimately ordered to pay \$18,500 by OCAHO. Consider that this is a small business whose reported business income was \$37,910 in 2009, was faced with declining enrollments and had in fact not hired any unauthorized aliens.
- [United States v. Pegasus Restaurant, Inc.](#) – restaurant in Colorado fined \$131,554 by ICE for failure to prepare or retain forms I-9 for 134 employees and ultimately ordered to pay \$49,427 by OCAHO. The judge did not find in this case that the owner of the restaurant acted in bad faith, just that he didn't complete any forms I-9. Of the total number of employees for whom a form had not been completed, it was determined that four were in fact unauthorized aliens.

The Immigration and Nationality Act imposes an affirmative duty upon employers to prepare and retain a form I-9 for employees hired after November 6, 1986 and to make those forms available for inspection on three days' notice. Penalties for failure to prepare or retain a form I-9 range from \$110 to \$1,100 per form. Certain factors are considered when assessing a penalty, such a size of the business, good faith of the employer, seriousness of the violation(s), whether there were unauthorized aliens and whether the employer has a history of prior immigration violations.

Bottom line is that if you are audited and you have no forms I-9 to present to ICE, your company will likely head down the same path as these companies. Now, before you rush out to complete forms I-9 for your employees, speak to an immigration practitioner about this undertaking. We are happy to discuss such with you.

Federal Register Notice on the Form I-9

The form I-9 is being revised...for the billionth time. That's a slight exaggeration, although now's a good time to make you aware that the form is updated with some frequency and it's incumbent upon you to make sure you are always using the most recent version of the form I-9 as there is a penalty for using an outdated version. I know...it seems like nothing is ever simple when one's trying to comply with the immigration laws.

U.S. Citizenship and Immigration Services (USCIS) announced in the Federal Register that they are seeking comments on a [revised form I-9](#) and comments can be submitted until May 29, 2012.

Proposed key revisions to the form I-9:

- Expanded instructions and a revised layout, taking the form from one to two pages – I guess the 69 pages in the Handbook for Employers aren't enough.
- New optional data fields to collect an employee's email address and telephone number – my understanding is that these fields are being added so that employees can be contacted directly about E-Verify Tentative Non-confirmation (TNC) notices since apparently some companies do not provide such notices to their employees. I hope everyone realizes that's a big no-no and that employees must be made aware of TNC notices.
- New data fields to collect foreign passport numbers and country of issuance.

E-Verify Employers and Federal Contractors List Available On-line

I recently attended an American Immigration Lawyers Association conference in Washington, DC and during the Verification Documentation panel discussion with officials from the Department of Homeland Security, they announced that a [list of employers](#) enrolled in E-Verify is publically available online. The lists, in excel format, will include enrolled employers with five or more employees and will be updated quarterly.

E-Verify Compliance Letters

The E-Verify Monitoring and Compliance unit has sent thousands of letters to employers over the past two fiscal years when non-compliance patterns are discovered by the unit. Non-compliant behavior could include registering for E-Verify but not using the system, pre-screening job applicants through the system or taking adverse action against an employee who is contesting a tentative non-confirmation generated by the system. Big brother is watching you.

If your company receives a phone call or a compliance letter from the Department of Homeland Security regarding compliance with the E-Verify program, it should be forwarded to the appropriate individual internally to be promptly addressed. In some instances the letter may be addressed to the company Program Administrator, and in all instances it must be reviewed and action taken where necessary. If you do not have a plan in place to address such a phone call or letter from the agency, now is a good time to consider such to address not only this situation but a visit by Department of Homeland Security agents. We are happy to discuss such a plan with you.

STATE DEVELOPMENTS

U.S. Congress Weighs in on the Arizona Immigration Law

Recently, House Democrats weighed in on the Arizona law (SB 1070) which is pending oral arguments before the U.S. Supreme Court this month on the constitutionality of the policing provisions of the law, including whether state and local law enforcement officials can check the immigration status of individuals they stop or arrest. Note that the Supreme Court is reviewing the policing measures of the Arizona law, having already decided that the E-Verify provisions are constitutional and not pre-empted by federal law. How they decide this case will have an impact on other states that have passed similarly harsh immigration laws, such as Alabama and Georgia.

The [amici curiae brief](#) was signed by dozens of lawmakers and the argument is essentially that the Supreme Court should leave to the U.S. Congress, not the states, the issue of how federal immigration law is enforced. Said another way, the Arizona law should be pre-empted as it directly conflicts with federal law. It's great that Congress is weighing in on the Arizona law, but maybe they should focus on rallying to address comprehensive immigration reform so that they don't have to then assert their authority on the issue before the Supreme Court when states act. Just a thought.

While still on this subject, Immigration Impact published a [blog](#) on March 29 highlighting opposition to Arizona SB 1070 and the impressive list of parties' ranges from law enforcement officers to former high ranking government officials to states, cities and counties.

For more information on how Arnall Golden Gregory LLP can assist companies with their employment eligibility verification practices and immigration compliance program, please contact:

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Not *if*, but *how*.®

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Arnall Golden Gregory, LLP has a full-service business immigration and compliance team ready to provide legal advice and counsel on issues addressed in this newsletter. For more information please contact Montserrat Miller at 202.677.4038.

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