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Keeping ICE Out of the Workplace: An Update in I-9 Compliance

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By now, most healthcare employers have heard of E-Verify. But many remain uncertain as to whether E-Verify applies to them. And for good reason – the final rule requiring certain federal contractors and subcontractors to use E-Verify has been embroiled in litigation and its implementation delayed no less than four times. Add state legislation mandating the use of E-Verify to the mix, and you have a nationwide patchwork quilt of E-Verify requirements – enough to make any employer dizzy. Yet, now more than ever, it is critical for employers to understand and comply with the I-9 requirements that apply to them.

On April 30, 2009, the Department of Homeland Security (DHS) announced a shift in its enforcement

focus from work site raids in which undocumented workers are the target to employers of undocumented workers. Immigration and Customs Enforcement (ICE) agents were given specific instructions to “obtain indictments, criminal arrest or search warrants, or a commitment from a U.S. Attorney’s Office to prosecute the targeted employer, *before* arresting employees for civil immigration violations at a work site.” This shift in enforcement policy was illustrated on July 1, 2009, when ICE issued 652 Notices of Inspection to employers, an increase from the 503 notices issued in all of 2008.

Given this shift in enforcement policy and the changes in state and federal legislation, how does an employer avoid a visit from ICE?

Ensure Proper I-9 Verification

Employment is one of the strongest magnets drawing unauthorized individuals to the United States. In 1986, Congress attempted to weaken the magnetic pull of employment by passing legislation requiring all employers to verify the identity and employment authorization of each newly hired employee.

Employers comply with this requirement through the use of the Form I-9, which they must ensure is timely and properly completed. Within three business days of the date employment begins, an employer must review documents selected by an employee from the current List of Acceptable Documents, and complete the form by verifying that the documents presented appear genuine on their face and relate to the employee presenting them.

Understand E-Verify’s Mandatory Application

In 1996, an electronic component was added to the I-9 verification process. E-Verify is a free, internet-based system used to electronically confirm employment authorization. According to DHS, an independent research firm found that 96.9% of all queries run through E-Verify result in employment verification within 24 hours. The remaining 3% of queries result

in electronic responses that either require employers to take additional steps to verify work authorization or to terminate an employee based on the system's inability to verify work authorization.


Although initially only available to employers in five states on a voluntary basis, E-Verify is now available to employers nationwide. And it is no longer strictly voluntary; many states, although

not Washington, have enacted legislation mandating the use of E-Verify. To complicate matters, cities and counties in numerous states have passed ordinances mandating the use of E-Verify for certain employers. For example, the City of Lakewood recently enacted an E-Verify ordinance which mandates use by the city as well as city contractors and subcontractors, subject to a limited exception.

On September 8, 2009, a new group of employers will be added to the list of those required to use E-Verify as a result of a recent federal court decision upholding a regulation requiring covered federal contractors and subcontractors to use E-Verify. In light of this decision, all employers should review whether they are federal contractors or subcontractors subject to the E-Verify requirement.



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Although many healthcare entities receive reimbursement for services to Medicare or Medicaid beneficiaries, reimbursement alone does not require healthcare employers to use E-Verify.

But change may be coming. This year, a coalition of activist groups in Washington State lobbied, albeit unsuccessfully, to get a form of E-Verify legislation on the ballot. At the federal level, two competing bills requiring all employers to use E-Verify or a similar electronic database have been reintroduced in Congress. Bottom line – some form of mandatory electronic verification for all employers is likely on its way.

Tips for Employers

Until then, healthcare entities can reduce the likelihood of an ICE visit by following the below steps:

- Properly and timely complete the current version of the Form I-9 for all new hires;
- Ensure documents appear genuine, pertain to the employee providing them, and are on the current List of Acceptable Documents;
- Re-verify applicable documents prior to expiration;
- Store Form I-9s for three years or one year after employment ends, whichever is later;
- Consider adopting an I-9 com-

pliance policy and designating an “expert” to complete all Form I-9s;

- If errors are discovered, consider conducting an internal I-9 audit;
- Follow procedures uniformly and document steps taken; and
- Stay apprised of the applicable requirements, including E-Verify, and consult counsel with questions.

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