

Document Diligence: An Employer's Guide to I-9 and H-1B Compliance

Written by Kevin J. Fitzgerald

July 10, 2018

As we reported last month, Acting Executive Associate Director for Homeland Security Investigations (“HSI”) Derek N. Benner stated in a May 14, 2018 press release that “Employers need to understand that the integrity of their employment records is just as important to the federal government as the integrity of their tax files and banking records. All industries, regardless of size, location and type are expected to comply with the law.” Hence, all U.S. employers are subject to an HSI audit of workers' employment eligibility. Now more than ever, it is imperative to ensure I-9 compliance at your organization.

Similarly, the current administration has instructed the Secretary of Labor to investigate injuries to U.S. workers caused by the employment of foreign nationals admitted under nonimmigrants visas. As the Department of Labor (“DOL”) ramps up its wage and hour audits, it is critical that employers sponsoring H-1B workers for employment have their Public Access Files (“PAF”) in order and have an understanding of who may inspect those files.

The Cost of Non-Compliance

Employers need to be prepared to respond to the increased focus on worksite audits, investigations and the enforcement measures that may follow. Failure to follow the law can result in criminal and civil penalties. In January 2017, the U.S. Immigration and Customs Enforcement agency (“ICE”) penalties for I-9 investigations substantially increased for I-9 violations occurring after November 2, 2015. Even simple mistakes, like paperwork violations, can cost companies between \$216 and \$2,126 per each employee's Form I-9. Monetary penalties for knowingly hire and continuing to employ violations range from \$375 to \$16,000 per violation, with repeat offenders receiving penalties, at the higher end. The most recent increased penalties are available here. Employers should prepare for increased audits by conducting internal I-9 self-audits to ensure compliance and making sure employees responsible for I-9 and E-Verify compliance are well-trained and knowledgeable about the company's protocol in the event of an audit.

The I-9 Audit/Investigation

Under federal law, employers are required to verify the identity and employment eligibility of all individuals they hire, and to document that information using the Employment Eligibility Verification Form I-9. ICE uses the I-9 inspection program to promote compliance with the law, part of a comprehensive strategy to address and deter illegal employment. Most I-9 audits progress in the following way:

- ICE/HSI serves an employer with a Notice of Inspection, alerting them of a pending audit of their hiring records to determine whether they are in compliance with the law.
- Employers are required to produce their company's Form I-9s and supporting documents, including payroll records, list of employees, articles of incorporation, etc. Current law provides employers with at least three business days to produce the requested documents.
- The HSI audit team will review each form for technical or procedural violations, and provide the employer with 10 business days to make corrections.

If employers are not in compliance with the law, an I-9 inspection of their business will likely result in civil fines and could lay the groundwork for criminal prosecution if they are knowingly violating the law. All workers encountered during these investigations who are unauthorized to remain in the U.S. are subject to administrative arrest and removal from the country. Here is an outline of the process.

DOL's Wage and Hour Investigation

Under the H-1B program, DOL's Wage and Hour division is responsible for ensuring that H-1B workers are receiving the wages promised on the Labor Condition Application (LCA), working in the occupation specified, and at the location(s) stated. In order to demonstrate compliance with the LCA, employers are required to maintain a Public Access File with specified documents to support the employer's attestation listed on the LCA. DOL can only initiate H-1B-related investigations as a result of one of four factors:

1. DOL receives a complaint from an aggrieved person or organization
2. DOL receives specific credible information from a reliable source that the employer has failed to meet certain LCA conditions, has engaged in a pattern or practice of failures to meet such conditions, or has committed a substantial failure to meet such conditions that affects multiple employees
3. Secretary of Labor has found, on a case-by-case basis, that an employer, within the last five years, has committed a willful failure to meet a condition specified in the LCA or willfully misrepresented a material fact in the LCA
4. If the Secretary of Labor has reasonable cause to believe that the employer is not in compliance, the Secretary may certify that an investigation be conducted.

When violations are found, DOL may assess civil money penalties and other remedies, including back wages depending on the type and severity of the violation.

What Can You Do Now to Prepare?

Because employers now have a heightened risk of being audited or investigated by ICE/HSI/DOL, it is increasingly important to make sure your organization's immigration related documents (e.g. I-9 forms, PAF files) are completed correctly. Employer should make sure to identify an individual or team within the organization that is responsible for immigration compliance. The team should review the company's current protocols and procedures as well as processes for record keeping for the compliance period. The compliance program should also have an outline of a plan to follow in the event of an audit or investigation.

We also recommend that employers conduct periodic internal audits to ensure that each employee has a Form I-9, each H-1B employee has a corresponding PAF file, and that it was prepared correctly with sufficient documentation.

Finally, employers should consider providing refresher training to Human Resource professionals and other managers responsible for compliance to ensure best practices are being utilized at your organization. We can certainly assist with this.

With a steady uptick in I-9 Audits and H-1B wage and hour compliance investigations, it underscores how important it is for employers to meet all their compliance obligations as well as develop and maintain the appropriate policies and mechanisms to ensure consistency and reduce the probability of non-compliance.

We offer a variety of programs to help you stay compliant.

RELATED PRACTICES

■ [Immigration](#)

■ [Labor & Employment](#)

This communication is intended for general information purposes and as a service to clients and friends of Foley Hoag LLP. This communication should not be construed as legal advice or a legal opinion on any specific facts or circumstances, and does not create an attorney-client relationship.

United States Treasury Regulations require us to disclose the following: Any tax advice included in this document was not intended or written to be used, and it cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code.

Attorney advertising. Prior results do not guarantee a similar outcome. © 2017 Foley Hoag LLP. All rights reserved.