# New I-9 Form and New Enforcement Focus on I-9 Violations and Discrepant Social Security Numbers

Linda D. McGill, Esq. | November 1, 2007

For the first time in 16 years, the federal government has made major changes to the mandatory I-9 immigration form. All new employees must fill out these forms. A copy of the new form will soon be available at the U.S. Department of Labor website, www.dol.gov. In addition, the government is taking a new and more aggressive enforcement approach toward I-9 compliance by employers as well as in situations where an employee has provided a discrepant social security number.

The Immigration Reform and Control Act of 1986 (IRCA) requires employers to verify the identity and work authorization of all individuals hired after Nov. 6, 1986. An I-9 form must be completed for all workers within three days of the commencement of employment.

Employers have typically complied with the I-9 process. In the first years after the process was adopted, the Immigration and Naturalization Service (INS) generally focused on educating employers about the verification process. Civil penalties and criminal prosecutions were rare. Employers have also been advised that they are not expected to be enforcement agents or detectives and are not required to look behind the information provided to them by an employee.

Now the INS has become more aggressive in conducting workplace audits and inspections of I-9 records and in imposing the penalties that exist in the law: from $100 to $1,000 for each incorrect or missing I-9. The penalties can add up quickly. For example, the INS recently accused Disneyland in California of having over a thousand paperwork violations and issued a notice to fine Disneyland $395,000. While a smaller company would not rack up that number of violations based only on paperwork, any penalty imposed by the INS affects not only the bottom line but the company's reputation and competitive position.

There is also a major shift in how employers must handle discrepant employee information with regard to Social Security Numbers (SSNs). When employers issue W-2 forms each January, copies are sent to the Social Security Administration. The SSA reviews the data and credits the amount of withholding taxes appearing on the W-2 to the employee, using the SSN. According to the SSA, the number of social security numbers reported on W-2s that are not recognized SSNs or are issued to persons other than the name shown on the W-2 has risen dramatically in recent years. The SSA attributes this to the increase in undocumented or unauthorized workers in the U.S. workforce.

When SSN's do not match the employee identified on the W-2, the social security withholdings are put in the SSA Earnings Suspense Account. The Suspense Account now contains over $500 billion, which cannot be used to fund social security benefits.

In an effort to reduce the monies in the SSA suspense account, the SSA issues no-match letters to employers. In the past, employers have been encouraged to correct transposed digits and to ask employees to contact the SSA to clear up any discrepancy. Typically, employers notified the affected employees of the problems with their SSN and let employees decide whether or not to contact the SSA. The no-match letters have not required the employer to report back to the SSA.

In June 2006, the Department of Homeland Security published proposed regulations designed to change the no-match letter into an enforcement mechanism. Under the proposal, SSA no-match letters would be accompanied by a warning that an employer who continues to employ an individual who lacks a valid SSN after 90 days of receipt of the no-match letter will be exposed to civil penalties of up to $2,000 per employee, as well as criminal prosecution with fines and the risk of six months' imprisonment.

An injunction against the proposed regulations has been obtained by the AFL-CIO and other advocates for unauthorized workers, who see the no-match enforcement action as a plan to weed out undocumented workers from U.S. workplaces. The injunction has the effect of suspending the regulations – but is only temporary.

Some form of stepped-up enforcement is inevitable and imminent. Enforcement will likely focus on larger employers and/or those that have warehouse or assembly line operations or those that employ lower-skilled or unskilled workers. However, the no-match warnings and exposure to penalties will apply to every workplace.

In light of the new position on enforcement, all employers should review the status of their I-9 records and program. "Best practices" include the following:

1. Audit I-9 forms and re-verify any that show deficiencies or expired work authorization.

2. Make sure that I-9 forms are kept separate from personnel records.

3. Destroy I-9 forms that are beyond the required retention period (three years after date of hire or one year after termination, whichever is longer).

4. If a request for entry or inspection of I-9's (or any employment-related records) is received from a government agency, contact counsel at once.

5. Be aware that Maine, New Hampshire, and federal law prohibit discrimination in any aspect of employment based on ethnic, racial, and national origin. Applicants or employees may not be adversely treated (for example, not hired, or once hired

asked for additional verification beyond I-9 requirements) based on stereotypical assumptions that because of their ethnic identity they are more likely to be unauthorized workers.

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