

Duff on Hospitality Law

Don't Let a Form I-9 Audit Cause Heartburn for Your Restaurant or Hotel

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Some employers don't take the Form I-9 seriously, but they should. The government has significantly increased its audits of all kinds of employers – not just the bad guys - and are assessing hefty fines for mere technical violations. This is particularly true in the hospitality industry, which can be a target for audits and which, because of employee turnover, has seen disproportionately high fines.

Every employer knows that the government's one-page form, the "[Form I-9, Employment Eligibility Verification](#)," must be completed for every new employee. And most make sure that they get theirs completed in a timely manner. But failure to be vigilant regarding the timelines or whether the forms are completed fully or correctly can cost even the best employer thousands of dollars in fines.

Most employers consider themselves good guys. They don't purposely seek out or hire employees who are not authorized to be employed in the U.S. But those employers are mistaken if they think that [Immigration and Customs Enforcement \(ICE\)](#), the enforcement arm of the Department of Homeland Security, only audits unscrupulous employers. ICE does focus on certain industries in which there is a history of unauthorized employment, but the reality is that ICE has become very good at conducting audits, and has a team of forensic auditors on staff that it wants to keep busy. ICE does that by initiating seemingly random individual audits or nationwide actions in which up to 1,000 audits are served in a single day, providing as little as three days' notice before documents have to be surrendered. The writing is on the wall – employers should plan for and expect a government audit of its Form I-9 documentation.

No employer can expect to be fully compliant with Form I-9 requirements. Over 25 years of enforcement has shown that even the best employers make innocent mistakes that can result in crushing fines or worse. And fines against well-known, employers sends a message that's hard to avoid.

A single Dayton area restaurant was fined more than \$20,000 for failing to comply with Form I-9 verification requirements.

In Michigan, Abercrombie and Fitch paid more than \$1 million in fines for paperwork errors, with no allegation of unauthorized employment.

A Washington-based supplier of fresh organic herbs to nearly 2,700 grocers survived an audit, but then was sentenced to \$1 million in criminal fines and probation for re-hiring key workers that it had dismissed after the government notified it of "suspect documents."

Mass dismissals occurred at Chipotle Mexican Grill restaurants in the Midwest after an ICE action.

A national fast-food chain was named as the subject of a raid even though it was on an independently-owned franchisee's location.

ICE audits conducted of Portland-area hospitality industry virtually crippled business during the winter holiday season.

Here are some examples of situations in which fines can be assessed that you might not be aware of.

- Using the incorrect version of the Form I-9
- Note that the current version of the Form I-9 is set to expire on August 31, 2012, although as of this posting, you can still use this version until a new version is issued
- No date indicated for the attestation by either the employee, the employer or both
- No date showing when employment began

Fortunately, employers have ten days to correct certain procedural and technical errors and therefore avoid fines. Unfortunately, not everything can be corrected in that time, such as missing documentation for a former employee. Those items that aren't corrected get tallied in the final determination of the fine assessed by ICE.

There is also a long list of items for which a fine is required, regardless of an employer's good intentions, with no requirement that ICE allow time for correction. These include:

- Not having a Form I-9 for an employee (or former employee) at the time of the audit
- ICE cross-checks payroll records and tax filings, among other documents, to verify who should have a Form I-9
- Lack of an employee's signature in Section 1
- No check mark by the employee in one of the four boxes in Section 1

How much are the fines? The range for a first-time “paperwork” fine is \$110 - \$1,100 per Form I-9. The government determines where to fine an employer within that range based primarily on the percentage of Forms that have errors. For instance, an error rate of 20% results in a fine of \$440 per Form I-9 with an error and, at 30%, a fine of \$605 per Form I-9 with an error. A complex analysis of factors, including the size of the business, its good faith in attempting compliance, and whether unauthorized employment actually occurred can increase or decrease fines by as much as 25%. You can imagine how quickly a large number of seemingly innocuous errors can add up to crushing fines.

Recordkeeping requirements of the Form I-9 can result in disproportionately high fines in the hospitality industry as compared to other employers of the same size. Primarily, this is because of the industry’s proportionally higher employee turnover and the fact that an employer must retain all Forms I-9 for employees for at least three years past the date of hire or one year past the date of termination, whichever is greater. As a result, between two employers with the same average number of employees, the high turnover employer will have a greater number of Forms I-9 retained for audit which may have errors that could result in a fine. Between two similar-sized employers, the high turnover employer is more likely to have a greater fine.

Businesses with multiple locations are also at greater risk of Form I-9 problems. Many restaurants have focused Form I-9 compliance at central locations to increase consistent standards and reduce the chance of innocent noncompliance or, worse yet, intentional failure or fraud at locations not regularly under the eye of management.

Unfortunately, the source of one employer’s pride in the fact that employees refer family and friends for employment can also be the source of increased risk of skilled document fraud or insider document falsification. ICE audit results clearly indicate that family and friends in charge of Form I-9 completion can increase the likelihood of knowingly hiring unauthorized workers.

And, of course, one of the biggest problems with Form I-9 compliance is that it is paperwork that must be completed within a very limited timeframe. Many employers who have the luxury of making a job offer in advance of a starting date use that time to prepare the Form I-9 between the offer and the starting date, or to notify the employee of the requirement that documentation must be completed within the strict timeframe or face discharge.

To sum up, take Form I-9 compliance seriously. Plan to survive a Form I-9 by instituting a Form I-9 compliance plan that is pro-active, not reactive. Establish a policy, train a specific person or group of people to take responsibility for Form I-9 preparation and compliance. Consistently monitor, audit and enforce Form I-9 compliance, and investigate allegations of unauthorized employment. React quickly if served with a government audit – proper action taken between the date of being served with the audit and turning over the records can result in a savings of thousands of dollars in fines, and this means getting counsel involved immediately. It is a mistake to wait until the end of an audit process to involve counsel. Early action can often significantly reduce the overall penalty – which is good for your bottom line.

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Tags: employment eligibility verification, Form I-9, ICE, Immigration and Customs Enforcement