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Electronic Storage Of Form I-9: Boon Or Bust?

New technological capabilities and regulatory scheme create data dilemma

By **ANDREW L. WIZNER**

As the national debate on immigration brings work site enforcement into sharp focus, the Department of Homeland Security published an Employment Eligibility Verification Program regulation permitting electronic creation and storage of Forms I-9. Is the new rule a useful tool for companies to ensure compliance, or a trap rendering employers more susceptible to government enforcement?

The Immigration Reform Control Act of 1986 requires employers to verify that workers are authorized to work in the United States by completing and retaining Form I-9. This system imposes on employers the duty to examine specified documents so as not to violate the prohibition on unlawful hiring or knowingly employing an unauthorized alien.

The employer must determine that the documents presented by the employee reasonably appear on their face to be genuine. In that case, the employer will have demonstrated good faith compliance with the employment eligibility verification requirements.

The law permits, but does not require, copying and retention of documents presented by individuals to establish employment authorization. Employers must retain the I-9 form for three years

after the date of hire or one year after the date of the employee's termination, whichever is later. Failure to complete properly and retain the Form I-9 subjects the employer to civil penalties and—in cases of knowing violations—criminal prosecution.

The U.S. Immigration and Customs Enforcement (ICE) assumed overall responsibility for enforcement of the program in 2003 when the legacy Immigration and Naturalization Service transitioned from the U.S. Department of Justice and split into three directorates within the U.S. Department of Homeland Security (DHS).

In light of DHS estimates that 10.5 million unauthorized immigrants reside in the United States as of January 2005, ICE is stepping up enforcement through collection of civil penalties and criminal prosecutions.

The agency may seek fines ranging from \$250 to \$5000 per employee for substantive violations.

In addition, ICE Assistant Secretary Julie Myers declared that "ICE is taking an increasingly tough stance against... corporate violators that knowingly employ illegal aliens. Bringing criminal charges... is a tactic we are adopting nationwide."

In July and August, the agency announced its latest criminal charges against officers of five companies alleging various violations, including transporta-

tion of illegal aliens for profit, misuse of Social Security numbers, and acceptance of false documents as evidence that employees were allowed to stay or work in the United States.

Electronic Retention Requirements

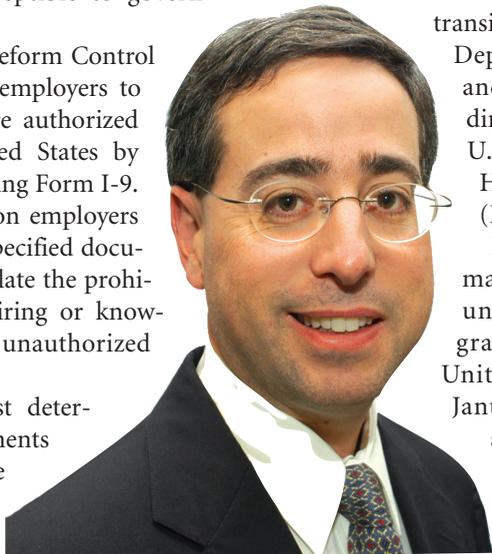
The new rule permits employers to complete, sign, and retain Form I-9 electronically. Use of electronic systems for this purpose is optional, not required for new verifications only. The rule does not require the use of any particular software product; and, instead sets forth system performance requirements derived from previously published Internal Revenue Service rulings.

The standards for electronic retention of I-9s require reasonable controls to ensure system integrity and accuracy, an inspection and quality assurance program to check for system failures, an indexing system to search by any I-9 data field, and the ability to reproduce legible and readable documents. The employer must make available upon request a description of the computer program, including its indexing system. The electronic storage program must also be capable of producing an audit trail in order to record who has accessed the computer system and the actions performed in it during a given period of time. The rule also requires establishment of a security system to control access.

Friend Or Foe?

Is the new rule generally advantageous to employers in ensuring compliance, or does it render the employer more susceptible to swift and costly enforcement?

The I-9 software on the market promises



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to prevent negligent or purposeful data omission, avert entry of data into wrong fields, eliminate the possibility of accepting the wrong combination of documents, guard against unsigned or undated forms, and even ensure that forms are completed in a timely manner.

The programs may also prompt employers to re-verify I-9s in the case of expiring work authorization. The employer could benefit through reduction in labor costs and storage space for paper-based systems, although these costs would have to be balanced against the initial capital of moving to an electronic system. Overall, the electronic option seems to be a viable method of I-9 compliance.

From the enforcement perspective, however, the electronic I-9 compliance alternative requires further consideration. Employers would be able to furnish the Form I-9 in a matter of minutes from an on-site location, rather than a lengthy period required to access paper documents that might be stored off-site. In the case of the largest employers, such data accessibil-

ity, especially with an indexing system, seems to invite government review. In fact, DHS or any other agency with jurisdiction could request production of the I-9s remotely.

"Constructive Knowledge"

Employers considering implementation of an electronic I-9 creation and storage system should be mindful of a proposed rule regarding Social Security No-Match letters. The Social Security Administration routinely issues No-Match letters when names and Social Security numbers on Wage and Tax Statements (Forms W-2) do not agree with the agency's information. The letters are advisory in nature and typically notify the employer not to take adverse actions against employees.

ICE nonetheless issued a proposed rule that would establish a new definition of "constructive knowledge" creating a presumption of knowingly employing an unauthorized alien when the employer fails to take appropriate action following receipt of a No-Match letter from the Social

Security Administration. While ICE reviews comments on its proposal, it continues to publicize its work site enforcement campaign against company officers.

This development has prompted many employers to implement the proposed rule's procedures in advance of final rule-making. Such actions could subject employers to potential allegations by their employees of discrimination based on national origin or other bases.

Insofar as the electronic creation and retention of Form I-9 includes social security numbers derived from documents reasonably appearing genuine on their face, employers who implement electronic I-9 software may be creating an easily accessible record of potentially constructive knowledge in the hiring and continuing employment of unauthorized aliens.

Overall, however, the safeguards inherent in I-9 software create another basis for employers to demonstrate good faith compliance with the employment verification requirements, thereby protecting against fines and criminal enforcement. ■

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