# Keep an 'Eye' on Form I-9

***By Giselle Carson, Esq., Marks Gray, P.A.***

Immigration reform is at the top of the 2013 agenda for President Obama and the Congress. Any reform will likely include continuing worksite enforcement and fines for employers that fail to properly verify their workforce and an expansion of (even mandatory) E-Verify. Additionally, USCIS released a revised and expanded Form I-9 on March 8th which must be in use by May 8th.

As corporate counsel, you are likely to be engaged in responding to an I-9 Notice of Inspection, determining whether to settle or litigate a Notice of Intent to Fine; and acting on a Notice of Suspect documents.

Recently, there have been some favorable decisions from the Office of the Chief Administrative Hearing Officer (OCAHO), a component of the Executive Office for Immigration Review (EOIR), on employer sanctions. The summary of the cases below will help you to (a) evaluate your company's current status and (b) plan for training and attorney-directed compliance audits to avoid liability and protect your budgets.


**What are the employer's employment verification obligations?**

Employers are required to verify the employment eligibility of their workers using the Form I-9. Employers must prepare and retain these forms and make them available for inspection on three days' notice.

Form I-9 must be completed for each new employee within three business days of the hire, and each failure to properly prepare,

*continued on page 10*

*continued from page 9*
retain, or produce the form upon request constitutes a separate violation. 8 C.F.R. § 274a.10(b)(2).

The I-9 has two main parts: Section 1 is completed and signed by the employee attesting as to his/her status; and Section 2 is completed and signed by the employer and contains specific information about the documents examined to establish the employee's identity and eligibility for employment. Employers can, but are not required, to copy the documents they examine.

### How penalties are determined for I-9 paperwork violations?

Monetary penalties are assessed for I-9 substantive and uncorrected technical violations. The minimum penalty for each violation is $110, and the maximum is $1,100. Additionally, ICE has a *Guide to Administrative Form I-9 Inspections* (the Guide) which contains a matrix whereby a baseline penalty is calculated and can be aggravated or mitigated by other factors.

What constitutes a substantive versus a technical violation is ambiguous, complicated, fact-specific and an evolving statutory concept. The most used guide to determine the nature of a violation is contained in the *INS Virtue Memorandum*. For example, according to the *Virtue Memo* substantive violations include: failure to complete Form I-9, no employee or employer signature on the specific Form I-9 , employee attestation not completed within three days of hire, and listing of improper documents to establish identity or employment eligibility

Whether a violation is technical or substantive is also based on the seriousness of the error and whether or not it could have led to the hiring of an unauthorized alien. Technical or procedural errors are certain minor, unintentional violations such as failure of the employee to include his or her address and/or date of birth. In the case of a technical violation, the employer must be given notice and ten business days to correct the error before it can be fined.

### Can ICE's I-9 paperwork penalties be negotiated or litigated?

**Yes.** Although ICE has broad authority and discretion in deciding how to assess and negotiate penalties; its internal guidelines have no binding effect in OCAHO. *See U.S. v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6 (2011). If ICE's proposed penalties are unreasonable or disproportionate considering the facts, and ICE will not negotiate a reasonable reduction in the penalties, the employer should consider requesting a hearing with OCAHO.

In assessing the appropriate penalty, the ALJ is required to consider de novo the following factors: 1) the size of the employer's business, 2) the good faith of the employer, 3) the seriousness of the violation(s), 4) whether or not the individuals involved were unauthorized workers, and 5) the employer's history of previous violations. 8 U.S.C. § 1324a(e)(5).

The government bears the burden of proof on the penalty and liability.

In *U.S. v. Pegasus Restaurant, Inc.*, 10 OCAHO no. 1143 (2012), the government sought penalties of $981.75 for each of the 134 uncompleted I-9s (130 of these I-9s belong to U.S. workers). The government argued that an aggravation of the base penalty was warranted because an employer's failure to complete I-9s is among the most serious of violations.

The ALJ determined that Pegasus was a small business with declining financial resources, and a poor rate of I-9 compliance was insufficient to show bad faith absent some culpable conduct going beyond the mere failure to comply. The judge reduced the fines for 130 violations from $981.75 to $350 each; but, it declined to reduce the penalties for the four unauthorized workers. *Pegasus* is a good case to remember when defending a bad faith claim and litigating penalties which appear disproportionate to a businesses' resources.

### What factors determine whether an employer is liable for the "knowing hire" or continuing to employ an unauthorized worker?

In addition to I-9 paperwork violations, an employer could be liable for the knowing hire of unauthorized workers. Under the regulations, "knowing" includes both actual and constructive knowledge. Actual knowledge is established through evidence that the employer, or its agent, *knew* that the worker was not authorized to work.

To establish constructive knowledge, the evidence must show that the employer *should have known* that the worker was not authorized. Constructive knowledge may be inferred from facts such as an employer receiving specific information from a government agency or another reliable source that raises suspicion about the authorization of an employee, and the employer continues to employ the individual and fails to take any action.

In *U.S. v. New El Rey Sausage Co.*, 1 OCAHO no. 66, 389, 408-11 (1989), *aff'd*, 925 F.2d 1153 (9th Cir. 1991) and *U.S. v. Mester Mfg. Co.*, 1 OCAHO no. 18, 53, 76-77 (1988), *aff'd,* 879 F.2d 561 (9th Cir. 1989), constructive knowledge was found when the employers continued to employ suspect employees without taking any action after receiving government notification about the questionable status of the employees.

Constructive knowledge may include situations where an employer fails to complete or improperly completes an I-9; has information that would indicate that the worker is unauthorized; and/or acts with reckless disregard for the legal consequences of permitting someone to introduce unauthorized workers into its work force.

Constructive knowledge has been described as "willful blindness", "conscious disregard, "or "deliberate ignorance". In *U.S. v. Carter*, 7 OCAHO no. 931, 121, 144-46 (1997), constructive knowledge was found when the employer delegated the I-9 responsibilities to a foreman who did not understand English and received

*continued on page 11*

*continued from page 10*

no training on the employment verification process.

Employers found to have knowingly employed an unauthorized worker may be fined, could be subject to cease and desist orders, can be criminally prosecuted, and may be subject to debarment from federal contracts.

**If an employer fails to complete section 2 of Form I-9 but retains copies of the documents provided by the employee is the employer relieved from liability for a substantive paperwork violation?**
**No**. I encounter this violation often when auditing I-9s. The regulations provide that *the copying or keeping an electronic image of the document presented by an employee does not relieve the employer from the requirement to fully complete section 2 of the Form I-9*. 8 C.F.R. 274a.2(b)(3) (emphasis added).

*U.S. v. Ketchikan Drywall Servs., Inc (KDS).*, 10 OCAHO no. 1139 (2011), is a very instructive and lengthy (46 pages) decision relating to I-9 violations and defenses. KDS was assessed *$173,250 in I-9 fines for paperwork violations despite having no unauthorized workers.*

KDS was charged with substantive violations for its failure to complete section 2 of the I-9s. KDS kept copies of the documents provided by the employees and argued that "the statute authorizes an employer to make copies of the documents presented 'for the purpose of complying with the requirements of this subsection," and asserted that copying the documents relieved it from liability with respect to omissions in Section 1 and Section 2 of the I-9 form.

The court disagreed and held that the copying of documents did not satisfy the employer's I-9 responsibilities. In June 2012, KDS filed an appeal to the 9th Circuit and argued that the ALJ erred in finding that the copying of documents was insufficient to comply with I-9 requirements, among others. We will follow this development and provide updates.

## In Conclusion

I-9 audits and fines are going to continue throughout 2013 and beyond. In 2007, ICE conducted 250 I-9 audits. In recent years, the number has increased to 3,000 per year.

More than $87 million in fines have been issued to employers for employment verification violations. Any company, regardless of geographic location, size, and composition of workforce or industry can be audited at any point in time.

Taking proactive steps by providing attorney-led training and auditing can not only save an employer significant amount of money and time but it can also help to avoid bad publicity and additional compliance responsibilities? Auditing, correcting and evaluating a potential penalty is complicated … Start now to protect your business!

### Form I-9 Inspection Process