

# Applying Good Faith Defenses Against I-9 Violations



U.S. Citizenship  
and Immigration  
Services

Employers often assert good faith compliance to mitigate charges and fines for alleged employment verification violations and/or charges of having knowingly hired an unauthorized worker. However, in many instances this defense fails because the employer has not taken the proactive steps required for the defense to succeed. What are effective ways to make the best use of the good faith defense? Read on to learn more.

## When can employers benefit from the “good faith” defense against employment verification sanctions?

- 1) When asserting an affirmative defense against an alleged violation of the verification requirements in the hiring, recruiting, or referral for employment of an alien in the U.S.;
- 2) When limiting liability for fines resulting from the failure to comply with the employment verification requirement notwithstanding a technical or procedural failure to meet the requirements if there was a good faith attempt to comply; and
- 3) When assessing the appropriateness of civil monetary penalties imposed on employers.

## Good faith defense applied to Form I-9 technical or procedural violations

This defense affords employers 10 days after notice to correct certain technical or procedural errors committed when preparing Form I-9 and avoid liability. This defense does not apply to substantive violations such as failure to complete an I-9 timely.

This issue was recently illustrated in a case where an employer that had been in business for almost 35 years operating a metal-finishing factory was charged with hiring undocumented workers and failing to timely prepare or present Form I-9. (See *U.S. v. Anodizing Ind.*, 2013).

The employer asserted good faith compliance with the requirements of the immigration laws arguing that it should not be penalized because its employee’s omissions of dates in the I-9 were minor technical or procedural violations.

The court disagreed and reasoned that this was not a case of an employee accidentally leaving blank dates off on the I-9, but it was a case of substantive violations for untimely preparation of I-9s. Many I-9s were completed 13 days after the Notice of Inspection was served and one day before the forms were delivered to ICE. The employer’s delays in preparing Form I-9 ranged from weeks to 22 years. The court noted:

*“Waiting to prepare an I-9 for up to twenty-two years after an employee is hired is not a technical violation. Nor does it demonstrate that Anodizing ‘made every effort to remain knowledgeable of the law,’ as it contends, or reflect a good faith attempt to comply with the recordkeeping requirements.”*

**\*\*Voted Lawyer of the  
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# Applying Good Faith Defenses Against I-9 Violations Cont'd

## Good faith defense applied to the assessment of an employer's penalty

In assessing the employer's penalty, the government and the court must consider five factors one of them being the good faith of the employer. An analysis of an employer's good faith begins with determining whether the employer reasonably attempted to comply with its obligations prior to the issuance of the Notice of Inspection (NOI).

In another recent case, Immigration and Customs Enforcement (ICE)'s complaint alleged that the employer failed to prepare Forms I-9 timely or prior to the service of the NOI. (See *U.S. v. Modern Disposal Inc.*, 2013).

ICE arrived at a base fine for the violations and then aggravated the fines on the basis of the company's lack of good faith in the employment verification process. ICE showed that 55 of the Forms I-9 were not prepared within three days of the employees' hire dates and even after the NOI was issued, these I-9s contained substantive errors.

The court disagreed with ICE and reasoned that the tardy completion of an employer's Form I-9s, without more, is not evidence of bad faith. A finding of bad faith must be supported by "*evidence pointing to culpable behavior beyond the fact that a high number of the Forms I-9 are missing or contain deficiencies . . . .*"

The court looked favorably upon the fact that the employer admitted that the Forms I-9 were filled out *after* the NOI was served; and that since the employer had been able to hire a human resources director to oversee preparation of hiring documents, the company had complied in good faith with the verification requirements.

On the contrary, in other cases, the courts have found *evidence of culpable behavior* when the employer or employee backdates or otherwise concealed information or misled the government as to when the Form I-9s were actually completed. *Lack of good faith* has also been found when the employer delegated the I-9 functions to employees who were not trained or qualified to perform these tasks and when the employer took no action to educate its staff about its I-9 responsibilities.

## What can we learn from these cases?

- Failure to prepare Form I-9 within three business days of an employee's hire date is always considered a serious violation because an employee could be unauthorized for employment during the entire time his or her eligibility is unverified. This is a substantive violation that will lead to the most severe fines.
- The longer an employer delays in preparing an employee's Form I-9, the more serious the violation and the harder it will be for the employer to assert the good faith defense.
- The good faith defense is supported by evidence of proactive education, training, audits and compliance with the employment verification requirements.
- A poor rate of Form I-9 compliance is insufficient, without more, to show a lack of good faith for aggravation of penalties absent some culpable conduct going beyond mere failure to comply.
- Backdating Form I-9 or otherwise concealing information or misleading a government investigation has been considered evidence of lack of good faith.

The best defense against I-9 charges and fines is to be proactive and diligently ensure that Forms I-9 are completed timely and correctly for all required employees *before* the government or OCAHO's involvement.