

## The New Era of Immigration Enforcement

*By, Melissa Angeline, Cohen Seglias Pallas Greenhall & Furman, PC*

### **Will you be ready if the government puts your employee work authorization records under the microscope?**

In 2009, the U.S. Immigration and Customs Enforcement (ICE) announced that it was targeting its workplace enforcement efforts on construction companies and other businesses that rely heavily on foreign workers. ICE also shifted its focus from prevention to sanctions by abandoning the threat of mass deportation in favor of penalizing companies that employ undocumented workers. To complicate the problem, immigration battles raging in Arizona and other states, along with high unemployment rates, have led various groups to begin “outing” companies they believe are employing illegal foreign workers instead of unemployed Americans.

Contractors should gain knowledge about these issues and be prepared. By understanding the legal rights and obligations under existing immigration laws, construction businesses can comply with these requirements and be ready for future government audits or other immigration compliance reviews. In addition, construction businesses should stay informed on new immigration compliance initiatives, such as the government’s online employee verification system known as E-Verify.

### **Who Must Complete an I-9 Form?**

All current employer obligations stem from the Immigration Reform and Control Act of 1986 (IRCA), which makes it unlawful to “knowingly hire or continue to employ” workers who are not legally authorized to work in the United States. Through this law, all employers must complete an Employment Eligibility Verification form (I-9 form), for every new hire within three days of starting work. The only people not subject to I-9 form requirements are workers employed by leasing agencies or contractors, workers who perform occasional domestic work in a private home, those employed for fewer than three days, certain agricultural workers and independent contractors.

A question that frequently arises in the construction industry is whether small businesses or family-operated businesses must complete I-9 forms. Some of these companies assume they do not have to complete the forms because their employees are family members and friends they already know. But the government does not make such distinctions. Even if the employee is your

spouse or has been your friend since grade school, you must still complete an I-9 form. In fact, all employees hired after November 1986 must have a completed I-9 form.

### **How Can Mistakes Be Avoided?**

A carpenter's rule of thumb is to "measure twice, cut once." Use this same rule as a best practice for completing I-9 forms—plan and prepare carefully before putting a pen to paper. Understand what you are doing and why, and then pay attention to the details.

The I-9 form requests two types of documentation:

1. Documents that verify the employee's identity, such as a driver's license or photo identification card; 2. Documents that verify the employee's authorization to work in the United States, such as a social security card, birth certificate or work authorization papers. Some types of documents, such as passports and government-issued work authorization papers, may satisfy both requirements.

A simple but common mistake employers make is not writing down information from these documents on the I-9 form—simply reviewing the document is not enough. If an employee produces a state driver's license, for example, the employer must write on the form that the document is a driver's license and include the state where the license was issued, the license number and the license expiration date.

Other common mistakes include failing to complete the employer portion and failing to sign and date the form. These mistakes usually occur when the person completing the form has not been trained on properly filling it out. Many smaller companies do not have dedicated human resources personnel, and completing new employee paperwork falls to the payroll or accounting clerk. Regardless of who completes the paperwork, that person must be familiar with the I-9 form and the employer's obligations and restrictions in completing the form. This means reading the form, understanding the requests and knowing what to ask (and what not to ask). Employers should also consult with their labor counsel for training and guidance.

If a construction business owner decides to outsource the human resource function, he or she should have someone in management review all completed I-9 forms before filing. Even seemingly minor "technical" mistakes can result in monetary fines, and the employer will need to complete a new form for that employee.

To recognize fraudulent documents, employers must act reasonably and in good faith when reviewing an employee's documentation. While sophisticated forgeries may not be obvious, documents with blurry or illegible language, missing or misspelled words or numbers, conflicting information between documents and other obvious flaws (such as a license issued two years in the future) should raise red flags.

Finally, employers cannot discriminate against applicants or employees based on their citizenship or national origin. If employees have valid documentation establishing their right to work in the United States, an employer cannot refuse to hire them simply because they are not American citizens. The IRCA specifically prohibits employers from requesting specific types of

documents or refusing to accept certain documents that are listed on the I-9 form. Employers must accept any listed document that reasonably appears genuine and relates to that employee.

### **What Is E-Verify?**

Much debate has surrounded the government's E-Verify system in recent years, but few employers actually use it or understand its shortcomings. E-Verify is a free, Internet-based employee eligibility verification system provided by the Department of Homeland Security and the Social Security Administration. It has been advertised to employers as an easy, fast and reliable way to electronically verify the employment eligibility of newly hired employee. However, since its inception, many critics complain that E-Verify has a high error rate. In addition, employers have reported that its use is more time-consuming than promised. For these and other reasons, the government has repeatedly postponed a full rollout of E-Verify for all employers.

### **Can Current Construction Employees Be Re-Verified?**

Employers cannot re-verify their entire workforce or certain employees (there are a few exceptions) and must deny any requests to do this because it is unlawful. As long as an employer properly completes I-9 forms at the time of hire (and submits the employee's information through E-Verify when applicable), the employer has satisfied its obligations.

Only two of the exceptions to this rule are likely to arise. First, employers who contract with the federal government are required to E-Verify their new hires. And these employers must re-verify all employees who work on the project subject to the government contract. Second, employers must re-verify the work eligibility (but not the photo identification) of employees whose temporary work authorization has expired. This requirement provides another reason for employers to maintain copies of employees' supporting work documents.

### **What Documents Should Be Copied and Retained?**

Employers and their attorneys remain split on whether to photocopy supporting documents provided by employees. Some argue against keeping copies because the documents may reveal problems with the forms later. Others argue that employers should keep copies to demonstrate their good faith efforts in verifying employees' work eligibility. I encourage employers to copy and retain those documents since they may be used to show the employer's compliance efforts in case the I-9 form goes missing or was not fully completed. Employers should store the I-9 forms and supporting documents separately from personnel folders and other personnel documents. If a company is audited or conducts a self-audit, it will be much easier to obtain the collection of I-9 forms than to go through personnel folders.

### **The Truth About E-Verify**

**Fact:** E-Verify does not replace the requirement of reviewing employment eligibility documents and completing the I-9 form. E-Verify may only be used after the I-9 form is completed, and the I-9 form information should be used to submit E-Verify requests.

**Fact:** Using E-Verify is only mandatory for those companies with federal government contracts or subcontracts that contain a Federal Acquisition Regulation E-Verify clause and those companies that are required by state law to use E-Verify.

**Fact:** Employers may voluntarily choose to use E-Verify for their new hires.

**Fact:** Once an employer registers to use E-Verify, the employer is legally obligated to use it for every new hire. Failure to use E-Verify may result in debarment from federal contracts and could trigger a government audit. In addition, a company can be subject to civil and criminal penalties if it is discovered later that the company hired a worker without valid work authorization and did not use E-Verify for that employee.

**Fact:** If an employer is required to use E-Verify or volunteers to use E-Verify, the employer must use it uniformly. An employer who uses it selectively to screen new hires or employees will run afoul of employment discrimination laws based on race, national origin and citizenship and may be subject to civil suit and criminal penalties, including jail time.

### ***Online Resource***

#### **Ensure Compliance**

The government provides a free, 69-page Handbook for Employees: Instructions for Completing Form I-9, which is available at [www.uscis.gov/files/form/m-274.pdf](http://www.uscis.gov/files/form/m-274.pdf). This handbook contains detailed instructions, explanations and guidance on completing the form.

*Melissa C. Angeline, Esq., is senior counsel at the law firm of Cohen Seglias Pallas Greenhall & Furman, PC, located in Philadelphia, Penn.*

*Construction Business Owner, April 2011*