

Employment Eligibility Immigration Compliance: Managing I-9 and E-Verify Risk in the Healthcare Industry

Contributed by Gregory Siskind, Siskind, Susser, P.C. and John Fay, LawLogix Group, Inc.

Increasing government worksite investigations, stricter E-Verify laws and regulations, and the need for companies to streamline their human resource operations in a still-fledgling economy, have made employment eligibility immigration compliance, often referred to as "I-9 Compliance," critical for employers across the U.S. The healthcare industry, in particular, is vulnerable to I-9 compliance issues, simply by virtue of its size and predicted growth potential. According to the Bureau of Labor Statistics, the healthcare industry provided 14.3 million jobs for wage and salary workers in 2008.¹ Further, the BLS estimates that healthcare will generate 3.2 million new wage and salary jobs between 2008 and 2018, more than any other industry, largely in response to rapid growth in the elderly population.² Each one of these new hires will need to be verified for employment eligibility in the U.S., a process that is often ignored, forgotten, or performed incorrectly.

Informal studies have found that a typical organization that completes I-9s using pen and paper will often have errors on more than half of their I-9 forms.³ If left untouched, these issues can lead to government penalties, potentially as severe as the revocation of a business license, as well as discrimination and other damage claims by affected employees. I-9 compliance can also arise in the context of mergers and acquisitions where acquiring companies can inherit the liability of the target company. Fortunately, the road to I-9 compliance is well-paved with best practice

guidance from experienced attorneys, smart electronic tools, and war stories from employers that have learned these lessons the hard way.⁴

Employment Verification: A Brief History of IRCA, the Form I-9, and Enforcement

In 1986, Congress was debating many of the same questions raised in the news today regarding "illegal immigration" and the best way to gain control of the US borders.⁵ The debate ultimately ended with passage of the Immigration Reform and Control Act of 1986 (IRCA), and its ratification by President Ronald Reagan.⁶ Central to IRCA was a section that created an employer sanctions system that requires all employers in the United States to verify the identity and employment authorization of nearly all employees hired since the law was passed in 1986. These provisions essentially made every employer in the country a deputy of the Immigration and Nationality Service (INS) by requiring them to take responsibility for verifying that their employees are authorized to work in the U.S.⁷ IRCA also made it unlawful to knowingly hire a person who is not authorized to work in the U.S., or to continue employing such a person.

Shortly after the law passed, the INS created the Form I-9, Employment Eligibility Verification, to enable employers to document that they have met their obligations regarding verifying the identity and work authorization of their employees.⁸ The Form I-9, often dubbed the most complicated one-page

© 2010 Bloomberg Finance L.P. All rights reserved. Originally published by Bloomberg Finance L.P. in the Vol. 3, No. 11 edition of the Bloomberg Law Reports—Health Law. Reprinted with permission. Bloomberg Law Reports[®] is a registered trademark and service mark of Bloomberg Finance L.P.

The discussions set forth in this report are for informational purposes only. They do not take into account the qualifications, exceptions and other considerations that may be relevant to particular situations. These discussions should not be construed as legal advice, which has to be addressed to particular facts and circumstances involved in any given situation. Any tax information contained in this report is not intended to be used, and cannot be used, for purposes of avoiding penalties imposed under the United States Internal Revenue Code. The opinions expressed are those of the author. Bloomberg Finance L.P. and its affiliated entities do not take responsibility for the content contained in this report and do not make any representation or warranty as to its completeness or accuracy.

form in America, has three parts.⁹ Section 1 asks for basic biographical information and requires the employee to certify that he or she is a citizen, a non-citizen national, a permanent resident or an alien authorized to work under another status. The second section is completed by the employer who must verify the documents an employee presented to prove their identity and right to work and that the paperwork was completed in a timely manner. The third section is reserved for employers who must periodically update the I-9 form or re-verify work eligibility of those employees that possess only temporary work authorization.¹⁰

After IRCA's implementation, the INS initiated an educational program to ensure compliance with the new requirements.¹¹ Copies of the I-9 Handbook for Employers (M-274) were mailed to millions of employers and also distributed by national trade and business associations. The INS focus was clearly on educating the public, and enforcement was gradually implemented against egregious violators of the law that were knowingly hiring undocumented workers. This employer-centric focus, often referred to as "shaking the tree" was not particularly successful by most accounts. Without significant civil or criminal penalties against employers, many organizations simply did not consider I-9 compliance a serious risk worth managing.

The enforcement strategy changed dramatically following the September 11, 2001, terrorist attacks, which led to the formation of the Department of Homeland Security, and its chief enforcement arm, Immigration and Customs Enforcement (ICE).¹² In the post 9/11 world, ICE initially focused on worksites related to critical infrastructure and national security, such as nuclear power plants, defense facilities, and airports (known internally as Operation Tarmac).¹³ Later in April 2006, ICE began a new initiative to target employers engaged in the use of unauthorized workers through high-profile raids, targeting mostly bad-faith actors.¹⁴ While these investigations attracted significant media attention, their overall effectiveness was questionable. By all accounts, raids were extremely

expensive, and many felt the focus should be on employers.

I-9 Form Enforcement Today: Employer-Focused Again

In 2004 President George W. Bush began to push for comprehensive immigration reform that has set off a national debate that has only grown more heated. The tough politics surrounding immigration have led to a dramatic increase in immigration enforcement activity. In 2009, ICE implemented a bold new worksite enforcement strategy to create an employer "culture of compliance" through administrative Form I-9 audits and the imposition of "meaningful civil fines" for mistakes made in the process.¹⁵ True to its word, since July 2009, ICE has conducted more than 1,600 Form I-9 investigations, leading to 164 final orders imposing more than \$4 million in fines.¹⁶ In addition, recent announcements from ICE indicate that I-9 investigations will continue full steam in the year ahead, with additional auditors being hired and a new centralized Auditing Center being established to assist with administrative reviews. ICE intends to conduct these I-9 investigations based upon "credible leads," which may consist of complaints from disgruntled employees and information-sharing from other government agencies. ICE has also been known to target certain employers, most notably those in construction, hospitality, retail and other industries with high turn-over and frequent reports of undocumented workers.

The I-9 Risk for Healthcare Employers

The resurgence of I-9 audits and civil penalties as the government's weapon of choice casts a much wider net than the raid approach, potentially affecting many well-intentioned employers that have simply de-prioritized I-9 compliance over the years. Healthcare employers, in particular, are an attractive target, given the relative size of the industry and the diversity of its workforce. Many employees in the healthcare industry are on part-time schedules where others are working long

hours at institutions which need staffing around the clock. Shift work is common in some occupations, such as registered nurses, as well as in other emerging segments including home healthcare services.¹⁷

Maintaining I-9 compliance over such a diverse entity can be challenging at best, and many employers struggle with organizational complexities. It's a familiar story: the responsibility for completing I-9s is relegated to a few people who happen to be spread out at various locations or departments. Training is often nonexistent (HR representatives basically teach themselves), and policies vary widely across locations. It's a perfect storm for I-9 mistakes, disparate treatment of employees, and eventual government scrutiny. To make matters even more complicated, employers also need to pay attention to the Form I-9's online companion, E-Verify, which has been growing rapidly during the past 3 years.

E-Verify Use on the Rise

E-Verify, formerly known as the Basic Pilot Program, is the Department of Homeland Security's free Internet-based system that employers can use to electronically confirm the employment eligibility of newly hired employees.¹⁸ The system, authorized and created under a 1996 law known as IIRAIRA, compares social security number (SSN) data and information in DHS' immigration databases to the employee's name and other Form I-9 information to confirm the information matches the employee's I-9. If an employee's information does not match the government databases, DHS will notify the employer of the non-confirmation. In turn, the employer is then instructed to contact the employee and provide the worker an opportunity to contest and correct the problem.¹⁹ DHS boasts that E-Verify automatically confirms 96.9% of employees as work authorized either instantly or within 24 hours. The remaining employees either receive final non-confirmations (2.8 percent) or are later confirmed after resolving the mismatch (0.3 percent).²⁰

Until recently, most healthcare employers had little incentive to register for E-Verify, unless they were looking to reduce or eliminate Social Security mismatch letters or improve the accuracy of their wage and tax filings. Over the past two years, however, E-Verify participation has been increasing dramatically, due to federal and state regulations and laws. The first such regulation was implemented in 2008 and allows certain foreign student employees with degrees in science, technology, engineering, or math to extend their work authorization if their employer is enrolled and participating in the E-Verify program.²¹ The most far-reaching E-Verify regulation went into effect in September 2009, when the United States Citizenship and Immigration Services (USCIS) implemented the "federal contractor rule" which requires certain federal contractors and subcontractors to use E-Verify for all new hires, as well as current employees who will directly perform work under a federal contract, with some narrow exceptions.²²

Health care employers that contract with federal agencies such as hospitals that provide services to federal employees are included in the tens of thousands of employers covered by the rule. These new regulatory provisions and requirements have led many employers to enroll in E-Verify at an ever-increasing rate. According to the USCIS, roughly 1,400 employers register for E-Verify every week.

The Financial and Legal Burdens of E-Verify

While the E-Verify system has been touted by many as a successful program to reduce unauthorized employment, it is not without its detractors. Many organizations argue that E-Verify enrollment and participation can cost employers thousands of dollars in external training, policy-making, and other administrative activities.²³ Certain large employers have also reported erroneous mismatches that far exceed the USCIS statistics. Resolving these "false negatives" adds additional cost to the process, both in the form of lost productivity for the worker who needs to contact SSA or DHS as well as the HR

representative who needs to provide assistance and follow-up. Moreover, the National Immigration Law Center points out that E-Verify is susceptible to abuse and misuse by employers who intentionally or unintentionally violate the program rules. For example, studies have shown that employers have improperly restricted work assignments, delayed job training, or even terminated employees upon receiving an initial mismatch.²⁴

In response to these concerns, USCIS has implemented several new E-Verify initiatives designed to increase employer compliance, prevent unlawful employment discrimination, and deal with identity theft. These initiatives include the establishment of a Monitoring and Compliance (M&C) branch²⁵; E-Verify hotline for employees; and a cooperative agreement with ICE regarding compliance issues.²⁶ The M&C Branch uses the E-Verify hotline and advanced database tracking technology (often referred to as “data mining”) to monitor E-Verify submissions to spot incorrect use of the system (whether accidental or otherwise). This could include submitting an employee multiple times through E-Verify; submitting multiple instances of the same SSN; using E-Verify on an existing employee where this is not permitted; or engaging in selective use of E-Verify. Any of these actions could be referred to ICE for worksite investigation or the Department of Justice for discrimination issues.

Federal Contractor Issues

E-Verify “data mining” can be especially troubling for healthcare employers that are awarded federal contracts containing the “E-Verify clause” which mandates E-Verify for all new hires and existing employees (either assigned to the contract or the entire workforce).²⁷ The sheer number of E-Verify cases submitted by federal contractors provides the M&C branch with a lot of data to scrutinize and many reasons for employer concern: Based on employer size, does it appear that an organization is selectively using E-Verify? If you have registered with E-Verify under several different accounts

(based on the employer’s tax ID), will these raise red flags? What happens if you are unable to verify your entire workforce within the 180-day timeframe (assuming you have elected to do so)? By and large, the USCIS has assured us that these situations are correctible as long as the employer is acting in good faith and documenting all of its attempts at compliance. Therefore, from a risk management perspective, employers are well-advised to keep detailed notes and logs of their E-Verify policies and any issues that may arise.

What about contractors who have not enrolled yet because they have not received a qualifying contract “with the clause?” Is there a danger that USCIS might be actively monitoring to see if a particular organization has properly enrolled as a federal contractor and is actively using the system? Thus far, the USCIS has maintained that it has no interest (or capability for that matter) to monitor this sort of compliance. Rather, the M&C branch merely checks to see if employers are using the system properly and also provides public reports of those employers (with 5 or more employees) that are enrolled as federal contractors — making all of us a “Big Brother” of sorts.²⁸ Employers that use subcontractors also need to verify that their subcontractors are using E-Verify, although this duty only appears to require the prime contractor to verify enrollment (not actual/ongoing use).²⁹

The State and Local E-Verify Maze

Aside from the obligations imposed by the federal contractor rule, E-Verify is still a voluntary program at the federal level. The challenge for employers, however, occurs at the state and local levels. In the absence of comprehensive immigration reform, many states, cities and local counties have taken matters into their own hands, enacting laws, ordinances, and regulations imposing employment eligibility verification requirements and severe penalties for noncompliance on employers. Several states, including Arizona, Mississippi, South Carolina, and Utah have made E-Verify mandatory for all employers in the state, whereas many others

have enacted laws which affect only state or local contractors.³⁰

To further complicate matters, many state laws have been enacted without any accompanying guidance, leaving many questions and legal issues unanswered. The end result is a constantly changing labyrinth of E-Verify requirements and obligations that is particularly tricky for multi-state employers such as those in the healthcare industry. Some of this uncertainty may be addressed when the U.S. Supreme Court hears an appeal to the Legal Arizona Workers Act (LAWA), a 2007 Arizona state law which requires all employers in the state to participate in E-Verify and imposes sanctions on employers who hire unauthorized workers. *Chamber of Commerce of the U.S. v. Candelaria* will come before the Supreme Court in the Fall 2010, with a decision expected in Spring 2011. Although the law only applies to Arizona employers, the Court's decision could have a profound impact on the growing patchwork of state (and local) E-Verify requirements.

Managing I-9 and E-Verify Risk through Best Practices, Training and Tools

The road to I-9 and E-Verify compliance for most organizations starts with a thorough self-examination of existing paper I-9s, E-Verify submissions (if applicable), standard operating procedures, and past practices. While there are many do-it-yourself guides available on the Internet and elsewhere, consulting an immigration or employment lawyer who is familiar with I-9 and E-Verify issues can save employers hours of research and provide a solution tailored to the organization. After reviewing an employer's I-9 compliance program, attorneys will typically recommend undertaking several steps:

1. Conduct a preventative internal audit of the I-9 files to see if there is a pattern of violations requiring correction. The law permits employers to correct certain technical or procedural violations on

the I-9 forms as part of the employer's good faith efforts.

2. Establish a regular training program (led by immigration counsel) for human resource professionals regarding I-9 compliance rules. This training should cover the basics of I-9 completion, retention, reverification, and anti-discrimination issues. If the employer experiences frequent turn-over, it's advisable to schedule these trainings on a quarterly or semiannual basis.
3. Establish uniform company policies regarding I-9 and E-Verify practices to address those frequently asked questions. These can include questions such as whether to make photocopies of supporting documents; how to handle remote hires; and procedures for communicating E-Verify mismatches.
4. Implement a reverifications tickler system to ensure I-9s that show expiring work authorization are checked in a timely manner.
5. Centralize the I-9 recordkeeping process by delegating oversight responsibility to a key group of HR managers. These individuals can serve as in-house experts for questions that arise from the field or liaisons with outside counsel for tricky situations.

Modernizing a Compliance Function: Electronic I-9 Systems with Integrated E-Verify

Despite all of these best efforts at compliance, many employers still find the paper-based I-9 process to be error-prone and inefficient. With increasing E-Verify use, there is also the needless retyping of I-9 data from a paper form to a web screen. Fortunately, the regulations allow employers to use electronic I-9 and E-Verify systems, which offer numerous benefits to organizations looking to improve and streamline their employment eligibility verification process.³¹

Some of the more common (yet important) advantages include the following:

- Prevent costly errors and omissions on the I-9 form, through validation alerts and warning messages which force the user to complete the form properly;
- Automate reminders, notifications and on-screen warnings for important dates, such as signing deadlines, reverifications, and E-Verify tasks;
- Transmit I-9 information seamlessly to E-Verify, preventing mistakes which can lead to costly mismatches;
- Centrally manage the I-9 program across multiple worksites with secure user roles and privileges;
- Securely maintain electronic I-9s and archival (paper-based) I-9s in a digital format for easy retrieval;
- Automatically notify HR when old I-9s can be purged for terminated employees once federal retention requirements are satisfied; and
- Provide compliance and usage reports to assist in self-auditing or external investigations.

While the advantages of electronic I-9 systems are often clear, some specific requirements must be addressed before adopting a particular system. The Regulations at 8 C.F.R. § 274a.2(e) provide the minimum requirements for an electronic I-9 software application. Employers should be particularly cautious of data security and privacy issues in keeping an I-9 record in electronic format. Under the regulations, employers must utilize a secure I-9 system that limits access to authorized personnel, provides a backup for recovery of records, ensures that employees are trained to minimize the risk of alteration of the data, and provides a detailed audit trail showing the dates of system access, identity of the users, and the particular action taken. In evaluating an electronic I-9 system, employers must ensure that all of these elements are met and exceeded. As healthcare employers are well aware, a breach of security can

expose an organization to private actions by employees and potential issues during a government investigation.

Employers Should Focus on I-9 Compliance

The Form I-9 has often been viewed as just another administrative step in the on-boarding process, leading many employers to assume that compliance should be relatively straightforward or not that important in the grand scheme of risk management. The tides, however, are clearly changing with I-9 enforcement, immigration-related anti-discrimination suits, and E-Verify rules and monitoring on the rise. The Obama Administration has made it clear that all employers, including health care companies, are fair game and subject to scrutiny. Employers facing these challenges and looking to reduce risk should strongly consider a top-to-bottom evaluation of their current I-9 and E-Verify practices to identify deficiencies, correct errors, and implement new best practices with technology to stay ahead of the curve.

Greg Siskind is a founding partner of Siskind Susser. He writes several books including the annually published J-1 Visa Guidebook, the American Bar Association's Lawyers Guide to Marketing on the Internet and SHRM's Employers Immigration Compliance Desk Reference. In 1994, he created www.visalaw.com, the first immigration law firm web site in the world. He also blogs on immigration at <http://blogs.ilw.com/gregsiskind>. Greg also currently serves on the Board of Governors of the American Immigration Lawyers Association and is the chair of the Immigration Law Affinity Group of the American Health Lawyers Association.

John Fay is Vice President of Products and Services & General Counsel at LawLogix, a leader in I-9 and E-Verify compliance software. He is also a prolific blogger on I-9 and E-Verify issues, most recently launching the LawLogix Compliance Blog, which can be accessed at <http://electronici9.com>.

¹ Bureau of Labor Statistics, U.S. Department of Labor, Career Guide to Industries, 2010-11 Edition, Healthcare, on the Internet at <http://www.bls.gov/oco/cg/cgs035.htm> (last visited September 20, 2010).

² *Id.*

³ The I-9 error rate is based on the authors' own experience with I-9 audits as well as informal discussions with other attorneys in the field.

⁴ See, e.g., Steven Greenhouse, *Wal-Mart to Pay U.S. \$11 Million in Lawsuit on Immigrant Workers*, The New York Times, March 19, 2005.

⁵ H.R. Rep. No. 682, 99th Cong. 2d Sess., pt. 1, at 56-62 (1986).

⁶ Pub. L. No. 99-603, 100 Stat. 3359 (1986).

⁷ INA § 274A(a)(1)(B), 8 USC §1324a(a)(1)(B).

⁸ See 8 C.F.R. § 274a.2(a)(2) for regulatory provision. The Form I-9 is available for download on the USCIS web site at <http://www.uscis.gov/files/form/i-9.pdf> (last visited September 20, 2010).

⁹ The Form I-9 Handbook for Employers (M-274) is 65 pages in length. See USCIS web site at <http://www.uscis.gov/files/form/m-274.pdf> (last visited September 20, 2010).

¹⁰ *Seeld. at 5 – 13.*

¹¹ See U.S. Department of Justice, Immigration and Naturalization Service, "Second Report on

¹² See The Homeland Security Act of 2002 (P.L. 107-296).

¹³ See ICE Worksite Enforcement Fact Sheet at <http://www.ice.gov/doclib/pi/news/factsheets/worksite031805.pdf> (last visited September 20, 2010).

¹⁴ For a list of worksite enforcement cases which occurred during this time period, visit http://www.ice.gov/pi/news/factsheets/worksite_cases.htm (last visited September 20, 2010).

¹⁵ See ICE Press Release at <http://www.ice.gov/pi/nr/0907/090701washington.htm> (last visited September 20, 2010).

¹⁶ While ICE has not formally published recent I-9 enforcement statistics, the agency has announced these figures in recent conferences and outreach events. See "Brave New World for All of Us – Highlights from the IMAGE Employer Training Conference, <http://www.electronic9.com/?p=685> (last visited September 20, 2010).

¹⁷ See Bureau of Labor Statistics, U.S. Department of Labor, Career Guide to Industries, 2010-11 Edition, Healthcare, on the Internet at <http://www.bls.gov/oco/cg/cgs035.htm> (last visited September 20, 2010).

¹⁸ The Basic Pilot program was established by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), P.L. 104-208, 8 U.S.C. § 1324a.

¹⁹ See E-Verify User Manual (Form M-574), United States Citizenship and Immigration Services, (June 2010) available at <http://www.uscis.gov/USCIS/E-Verify/Customer%20Support/E-Verify%20User%20Manual%20for%20Employers%20R3%200-%20Final.pdf> (last visited September 20, 2010).

²⁰ See USCIS E-Verify Statistics and Reports, available at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=7c579589c db76210VgnVCM100000b92ca60aRCRD&vgnnextchannel=7c579589c db76210VgnVCM100000b92ca60aRCRD> (last visited September 20, 2010).

²¹ 8 C.F.R. §§ 214.2(f), 214.3(f), 274a.12, as amended by 73 Fed. Reg. 18944-18956 (Apr. 8, 2008).

²² See FAR Case 2007-013, Employment Eligibility Verification, 73 Fed. Reg. 67651 (Nov. 14, 2008).

²³ See "How Expanding E-Verify Would Hurt American Workers and Business," Immigration Policy Center, March 2, 2010, at <http://www.immigrationpolicy.org/just-facts/how-expanding-e-verify-would-hurt-american-workers-and-business> (last visited September 20, 2010).

²⁴ See "Fatal Flaws: Social Security Administration Shows Us How E-Verify Doesn't Work," January 15, 2010, at <http://immigrationimpact.com/2010/01/15/fatal-flaws-social-security-administration-shows-us-how-e-verify-doesn-t-work/> (last visited September 20, 2010).

²⁵ See DHS Final Rule: Privacy Act Exemptions for USCIS Compliance Tracking and Management System, 75 Fed. Reg. 51619 (August 23, 2010).

²⁶ See "DHS Unveils Initiatives to Enhance E-Verify," Department of Homeland Security, March 17, 2010, at http://www.dhs.gov/ynews/releases/pr_1268843939770.shtm (last visited September 20, 2010).

²⁷ See E-Verify Supplemental Guide for Federal Contractors (Form M-574A), United States Citizenship and Immigration Services, October 21, 2009, available at [http://www.uscis.gov/USCIS/Controlled%20Vocabulary/Native%20Documents/Supplemental%20Guidance%20for%20Federal%20Contractors%20090109%20FINALa\(1\).pdf](http://www.uscis.gov/USCIS/Controlled%20Vocabulary/Native%20Documents/Supplemental%20Guidance%20for%20Federal%20Contractors%20090109%20FINALa(1).pdf) (last visited September 20, 2010).

²⁸ See E-Verify Federal Contractors List Page at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=46e8d207dd128210VgnVCM100000082ca60aRCRD&vgnnextchannel=>

534bbd181e09d110VgnVCM1000004718190aRCRD (last visited September 20, 2010).

²⁹ See supra note 27, E-Verify Supplemental Guide for Federal Contractors (Form M-574A), at 20.

³⁰ See, e.g., Legal Arizona Workers Act, Ariz. Rev. Stat. § 23-211 to 23-214 (Supp. 2007); Concerning Measures To Ensure That An Illegal Alien Does Not Perform Work On A Public Contract For Services, And Making An Appropriation In Connection Therewith, Colo. Rev. Stat. § 8-17.5-102.

³¹ 8 C.F.R. § 274a.2(e), as finalized by 75 Fed. Reg. 42575 (July 22, 2010).