I-9 Verification Process and Compliance

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Daniel is a named partner who is board certified in Labor and Employment. He represents private and public employers in the areas of employment, labor, and immigration issues. He helps companies with any employment matter that may arise in the workforce, whether it involves human resources consulting, representation during a government investigation, or defending a client in litigation or arbitration. Daniel provides value to his clients by helping them implement best practices and resolve employment disputes in and out of court. In addition to helping companies navigate the complex areas of employment law, he regularly represents companies during high stake ICE raids and investigations and helps implement Form I-9 best practices.

I-9 Verification Process and Compliance

I. INTRODUCTION

Every employer should be familiar with the employment and immigration compliance issues that arise in relation to the Form I-9 ("I-9"). As the U.S. Immigration and Customs Enforcement ("ICE") continues to conduct more investigations of employer I-9 records, attorneys should counsel clients on best practices to complete the I-9 verification process and ensure a compliant workforce. In the news recently, ICE required Chipotle restaurant franchises to terminate over 350 employees, issued over $1 million dollar fine to Abercrombie & Fitch for failing to properly comply with I-9 requirements. ICE indicated it would continue its efforts to investigate both Fortune 1000 and smaller employers throughout the nation. In addition to ICE's initiatives, employers should be aware that the U.S. Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC") enforces the anti-discrimination provisions of the Immigration and Nationality Act ("INA"), which prohibits discriminatory hiring, termination or recruitment practices based upon an individual's national origin or citizenship status, prohibits unfair documentary practices during the I-9 verification process, and protects against retaliation or intimidation.

Therefore, at a minimum, employers must ensure they have and retain an I-9 for every employee (citizens and noncitizens). With the large number of undocumented workers and identity fraud in the labor market and the increasing activity by the federal government to enforce I-9 requirements, it is important for employers to identify what I-9 compliance issues may exist in their workforce. Along with dealing with the nuances of filling out the form itself, employers also must comply with Title VII issues interrelated to I-9 verification.

This article provides an overview of recent ICE investigations and penalties assessed against employers as well as recent OSC investigations brought against employers for discriminatory practices. Additionally, this article provides a brief overview of the statutory framework for I-9 verification as well as relevant employment law statutes. Finally, the article discusses best practices that employers can implement to avoid worksite enforcement action.

II. OVERVIEW OF IMMIGRATION LAWS

Under the Immigration Reform and Control Act ("IRCA") passed in 1986, employers cannot *knowingly* hire or continue to employ individuals without employment authorization. Knowingly[1] includes both actual knowledge and constructive knowledge. The regulations define constructive knowledge as "knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition." 8 C.F.R. § 274a.1(l)(1). Examples of constructive knowledge

[1] 8 C.F.R. § 274a.1(l)(1) (listing examples of constructive knowledge and explaining that the term *knowing* includes not only actual knowledge but also knowledge that may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition)

include situations where an employer fails to complete or improperly completes I-9s; where an employer has information available that puts them on notice of possible ID fraud; where the employer continues to employ the employee without looking into suspicious information/activity in relation to the identity of an employee; where the employer acts with reckless disregard during the I-9 process; or where the employer fails to re-verify an expired work authorization document.

A. *Penalties for Violating IRCA*

An employer that violates IRCA by knowingly hiring illegal aliens[2] faces tough penalties. Depending on the number of times the employer has previously violated IRCA, civil penalties can range from $375 to $16,000 for each undocumented worker. Employers who engage in a "pattern or practice" of knowingly hiring illegal aliens may also be fined up to $3,000 for each unauthorized alien and imprisoned for not more than six months. In addition, under Executive Order 12989, the employer may be banned from procuring government contracts for one year.

III. OVERVIEW OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT ("ICE")

Formed in 2003, in response to the terrorist attacks of 9/11, ICE is the largest investigative agency in the Department of Homeland Security. ICE carries out its mission of protecting the security of the American people by enforcing the nation's immigration and customs laws. As part of this mission, ICE actively investigates employers to determine whether they hire individuals authorized to work in the United States.

ICE generally uses two procedures, immigration enforcement actions (also referred to as "raids") and notice of inspections ("NOIs"), to investigate whether employers are complying with I-9 requirements and that employers hire authorized workers.

IV. IMMIGRATION COMPLIANCE UNDER PRESIDENT OBAMA

Under the Obama Administration, ICE shifted from arresting the employees to penalizing the employers. Rather than mainly conducting unannounced raids at employer work sites, under Osama's direction, ICE is focusing its efforts on conducting notice of inspections ("NOIs") as a constant enforcement tool to ensure employers are properly hiring individuals who are authorized to work. For example, on July 1, 2009, ICE issued NOIs to 652 businesses nationwide. The number of NOIs issued on that day alone, surpassed the total number of NOIs issued in the 2008 fiscal year. ICE in 2010 continued its NOI initiative and conducted approximately 2,000 NOI investigations and most recently in February 2011, ICE issued another 1,000 NOIs to employers throughout the nation. ICE has recently issued a government memorandum stating that it will continue such I-9 enforcement through the year 2014.

V. WHAT IS AN "NOI?"

[2] The Immigration and Nationality Act Section 101(a)(3) defines "alien" as any person who is not a citizen or national of the United States. For purposes of this chapter, the term "undocumented worker" and "undocumented immigrant" will be used in place of the term "illegal alien."

Notices of Inspection "NOIs" are basically an ICE government investigation of an employer's I-9s. The investigation is somewhat analogous to a Department of Labor or Equal Employment Opportunity Commission investigation, however the investigation and conclusion is much more systematic. Upon receiving the NOI, the employer has 72 hours to produce their I-9s and other related employment records and documentation. Documents requested, during this quick turnaround, include such things as the original I-9s, an employee roster or payroll report, monthly payroll reports, tax statements, Articles of Incorporation, and business licenses. After receiving the documents, ICE forensic auditors and attorneys identify any compliance violations to assess fines and penalties. NOIs lay the groundwork for possible criminal prosecution of employers who knowingly violate the law as well as civil fines.

Upon submission of the documents requested in the NOI, the ICE agents or auditors will review and analyze the employee I-9s for compliance. Based on the inspection of the I-9s, ICE will issue subsequent letters such as the Notice of Intent to Fine (NIF), Notice of Suspect Document, Notice of Inspection Results, Warning Notice, Notice of Discrepancies, and Notice of Technical or Procedural Failures.

VI. THE FORM I-9

The Form I-9 is the most important document of an employee's personnel file—without one an employee is not authorized to work for a company. As such, a company must ensure that an I-9 is completed anytime a person is hired to perform labor or services in the United States. This requirement applies to anyone hired after November 6, 1986.[3]

The U.S. Citizenship and Immigration Services ("USCIS") requires that the employer and employee complete an I-9 within three business days of the first day of work. The Form I-9 is made up of three sections with different requirements for each section.

A. *Section 1 of the I-9*

The employee fills out Section 1 of the I-9 the first day she begins work. While the employee fills out this section, the employer is still responsible for reviewing the section to ensure that the employee fully and properly completed it. Common errors associated with Section 1 include: (1) failure to check the employee's attestation as to legal status; (2) no signature of the employee; (3) the preparer/translator block is not filled out if the employee had assistance in filling out Section 1 and; and, (4) failing to fill out the social security number if the employer participates in the E-Verify Program.

B. *Section 2 of the I-9*

The employer is responsible for filling out Section 2 of the I-9. In order to complete this section, the employee must present an original document or documents that establish their identity and employment authorization to work for the employer. The employee needs to present

[3] *See* U.S. Citizenship and Immigration Services, Handbook for Employers Instructions for Completing Form I-9, 1/5/2011, http://www.uscis.gov/files/form/m-274.pdf.

these documents to the employer within three business days of the date employment begins. The I-9 incorporates three different lists of acceptable documents. List A documents establish both identity and employment authorization. List B documents establish identity only. Finally, List C documents only establish work authorization. The employee can choose which documents she wants to present to the employer from these lists. The employer then must fully complete Section 2 after examining the original document(s) presented by the employee. In order to complete the section, the employer has to examine either one document from List A; **or** one document from List B **and** one document from List C.

Section 2 of the I-9 generally includes the following errors (1) listing documents in the wrong column on the I-9; (2) accepting too many documents; (3) accepting invalid documents; (4) not completing the date of hire; (5) not completely filling out the section; and (6) the employer or authorized representative fails to sign the form.

C. *Section 3 of the I-9*

Section 3 is used when an employee's work authorization expires, or when an employee is rehired, or when an employee changes his or her name. An employer does not have to fill out Section 3 for a Legal permanent resident card that expires after an employee is hired. Common errors include: (1) not re-verifying the employee's authorization documents; (2) not updating temporary receipts; and (3) not updating any names changes that are on the new documents.

D. *Retention of Form I-9s*

Employers must retain the I-9 of an employee during the term of their employment. Upon termination, employers are required to retain I-9s for all employees for three years after the date they hire the employee; or one year after the date the employment is terminated, whichever is later. I-9s can be retained in paper, microfilm, microfiche, or electronically. The I-9s should be stored separate from other personnel files. Retention is necessary in case ICE decides to audit the employers' I-9s.

E. *Substantive versus Technical or Procedural Violations*

Employers who engage in "good faith compliance" with the I-9 requirements are exempt from civil liability. Good faith compliance occurs when ICE or another enforcement agency notifies and explains a failure to the employer and the employer then voluntarily corrects the failure within ten business days after the notification. This ten day correction rule, however, is only available to those violations that are considered "technical" or "procedural" and not "substantive" violations.

Guidance issued by the former Immigration and Naturalization Service ("INS") explain what are and are not substantive or procedural violations. Substantive violations include: (1) failing to fill out an I-9; (2) not printing the employee's name on the I-9; (3) not marking whether the employee attests to being a United States Citizen, Lawful Permanent Resident, or alien authorized to work; (4) reviewing or verifying improper List A, B or C documents; and (5) not completing Section 2 within three business days of hiring the employee.

Even when technical violations exist on the I-9s, the good faith defense may still not be available. Despite mere technical violations, an employer will not be in good faith compliance under the following circumstances: (1) the employer committed the technical or procedural failure "with the intent to avoid the requirement" of the Immigration and Nationality Act; (2) the employer committed the technical or procedural violation in "knowing reliance" on the ten day correction period; (3) the employer corrected or attempted to correct the technical or procedural failure "with knowledge or reckless disregard of the fact that the correction or attempted correction contains a false, fictitious, or fraudulent statement or material misrepresentation, or has no basis in law or fact"; (4) the employer prepared the I-9 "with knowledge or reckless disregard of the fact that the form contains a false, fictitious, or fraudulent statement or material misrepresentation, or has no basis in law or fact,"; and (5) the employer engaged in a violation that was previously subject to a legacy INS or ICE Warning Notice, a Notice of Intent to Fine, or a Notification of Technical or Procedural Failures Letter.

VII. FRAUDULENT DOCUMENTS AND IDENTITY FRAUD IN THE WORKPLACE

IRCA requires employers to confirm the identity and work authorization status of its employees. Despite safeguards such as I-9s and E-Verify, employers have a difficult time detecting identity fraud if the documentation presented by the employee is based on a real identity. Because the I-9 process requires employers to accept only unexpired documents, an employer is more likely to spot the use of fraudulent documents. This is especially true of employers with large Hispanic workforces. Employers most often see fraudulent documents in the form of ID and driver's license, Social security Cards, Permanent Resident Cards, and Employment Authorization Cards ("EADs"). To fight the prevalence of these fraudulent documents, both state and federal entities have issued new identity documents with increased security features.

Because the employment decisions of a company's human resources representative or manager can subject the entire company to civil and criminal liability, employers should implement policies or training to ensure that the managers responsible for completing the I-9s of the company are versed with its requirements and help minimize the possible liability associated with the I-9 and continuing ICE investigations.

In addition to ensuring that such a training module provides the I-9 basics, these policies should focus on steps such as checking social security number congruence, looking for common ID theft indicators such as the prevalence of Puerto Rican social security numbers, and addressing identity theft complaints from innocent bystanders. In addition to these safeguards, employers might want to consider using E-Verify. Administered by the Department of Homeland Security, Social security Administration, E-Verify is an internet based system that allows an employer, using the information provided on the I-9, to determine the eligibility of an employee to work in the United States. While E-Verify is not for every employer and employers should consult with an attorney to determine whether E-Verify should be implemented, it is one way to establish good faith compliance with the Form I-9.[4]

[4] Some states require employers to enroll in E-verify. Furthermore, employers that have federal contracts may need to enroll in E-verify as a term and condition of the contract.

VIII. ICE NOTICE OF INSPECTIONS CASE EXAMPLES

Some interesting ICE NOI investigations dealing with employer I-9 compliance include the following:

Lone Star Bakery Inc., 2011.[5] ICE conducted an NOI and required the employer, which provides baked goods to restaurants and food service operators, to terminate 200 of the 500 people it employs at two plants in the town southeast of San Antonio. The NOI identified about 200 of their employees to be in the country illegally when their names did not match up with their social security numbers. As such, Lone Star Bakery was forced to fire the workers from their 400,000 square foot China Grove production plant, just outside San Antonio.

Chipotle Mexican Grill, 2011.[6] Chipotle Mexican Grill was forced to terminate at least 350 employees at its 50 Minnesota restaurants after a federal immigration NOI identified these individuals as illegal workers. As of March 2011, this investigation is still pending and it is expanding to facilities in Washington, D.C. and Virginia.

Abercrombie & Fitch, 2010.[7] ICE reached a $1,047,110 fine settlement agreement with the clothing retailer Abercrombie & Fitch for numerous technology-related deficiencies in the company's electronic I-9 system. According to the ICE press release, the settlement was reached as a result of a NOI audit of Abercrombie & Fitch's retail stores in Michigan. It appears that the audit revealed severe problems with the company's electronic I-9 system, which led ICE to question the integrity of the underlying I-9s and compound the assessed penalties and fines. Despite the apparent failure of the I-9 system to achieve its ultimate goal, ICE reported that there was no evidence that the company knowingly hired any undocumented workers (which would have led to even more severe fines).

The case, *United States of America v. Snack Attack Deli, Inc. d/b/a Subway Restaurant #3718*,[8] tells the familiar story of a small Subway franchise restaurant in North Carolina that had neglected its employment eligibility verification responsibilities for several years and failed to complete I-9s for its employees (e.g., the company produced only 11 I-9s for the 108 employees and had only partially completed the 11 forms that were produced). The Department of Justice, Office of the Chief Administrative Hearing Officer (OCAHO) has published a decision regarding an employer's liability for I-9 violations and the proper weight of various factors used

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[5] Jason Burch, *Bakery Fires 200 After ICE Audit*, SAN ANTONIO EXPRESS-NEWS, Feb. 23, 2011, *available* at http://www.mysanantonio.com/news/local_news/article/Bakery-fires-200-after-ICE-audit-1024833.php

[6] Miriam Jordan, *A CEO's Demand: Fix Immigration*, THE WALL STREET JOURNAL, Dec. 19, 2011, *available at* http://online.wsj.com/article/SB10001424052970204058404577105712886931338.html?KEYWORDS=chipotle#articleTabs=article.

[7] Immigration and Customs Enforcement, News Releases, *Abercrombie and Fitch Fined after I-9 Audit* (Sept. 28, 2010), http://www.ice.gov/news/releases/1009/100928detroit.htm

[8] *U.S. v. Snack Attack Deli, Inc., d/b/a Subway Restaurant #3718*, OCAHO No. 09A00025, *available at* http://www.justice.gov/eoir/OcahoMain/publisheddecisions/Looseleaf/Volume10/1137.pdf.

to assess the amount of civil fines. Faced with a potentially crippling fine of $111,078 for 108 distinct I-9 violations, the restaurant requested a hearing with OCAHO to dispute both its liability and the assessed fines. In ruling on the government's motion for summary judgment, the Administrative Law Judge, Ellen Thomas, agreed with ICE that the violations were serious and that the employer lacked good faith. On balance though, the Judge considered the company's small size and the general state of the economy to be more important considerations that weighed in favor of a reduced penalty. While the $27,000 fine is still substantial for this lone Subway restaurant, there are several important lessons to be learned.

United States of America v. DJ Drywall, Inc., 2010 WL 3405198, ICE filed a three-count complaint alleging that DJ Drywall, Inc. violated 8 U.S.C. Section 1324a(b) and 8 C.F.R. § 274a.2(b) (2010) by failing to prepare I-9 forms for ten (10) named individuals (Count I); failing to properly complete section 2 of the I-9 forms for forty-seven (47) named individuals (Count II); and failing both to ensure that nine (9) individuals properly completed section 1 of their I-9 forms, and to complete properly section 2 of the I-9 forms for those individuals (Count III). Civil monetary penalties were sought in the amount of $4,228.00 for Count I; $22,534.00 for Count II; and $4,554.00 for Count III, or a total of $31,316. After an appeal of the penalties assessed, the court ordered DJ Drywall, Inc. to pay a total of $32,316.00 in civil monetary penalties.

IX. ANTI-DISCRIMINATION AND IMMIGRATION LAWS

Under the anti-discrimination provisions of IRCA, four different types of conduct are prohibited: (1) citizenship or immigration status discrimination; (2) national origin discrimination; (3) unfair documentary practices during the I-9 process (document abuse); and (4) retaliation. In addition to IRCA, Title VII of the Civil Rights Act of 1964 ("Title VII") also prohibits discrimination based on national origin.

Employers need to be aware of discrimination issues that might arise during the I-9 process. The OSC in the Civil Rights Division of the Department of Justice ("DOJ") is specially tasked with enforcing the anti-discrimination provisions of IRCA and the INA, which protect U.S. citizens and certain work authorized individuals from employment discrimination based upon citizenship or immigration status. The INA also protects all work authorized individuals from national origin discrimination, unfair documentary practices relating to the employment eligibility verification process, and from retaliation.

Employees who believe they are a victim of discrimination may elect to file discrimination charges directly with OSC office within 180 days of the alleged act of discrimination. OSC may investigate charges for up to 210 days after receipt of the charge. During the final 90-day period, the OSC and/or the filing party may chose to file an administrative complaint against the employer.

Complaints are then tried before an Administrative Law Judge ("ALJ") who is trained to hear immigration-related employment discrimination cases. ALJ decisions are directly appealable to the federal circuit courts of appeals. Settlements or successful adjudications may result in civil penalty assessments, back pay awards, hiring orders and the imposition of injunctive relief to end discriminatory practices.

OSC also conducts outreach and education programs to educate employers, potential victims of discrimination, and the general public about their rights and responsibilities under the INA's anti-discrimination and employer sanctions provisions.

In March 2010, OSC and USCIS entered into a collaborative agreement. Under the agreement, USCIS will share with OSC information regarding potential discrimination resulting from employer misuse of the E-Verify system. This information will include data from searches run through E-Verify, including citizenship status. Due to this heightened awareness, employers need to be especially sure to implement their I-9 compliance procedures across their workforce so as to not unfairly target foreign workers.

A. *Disparate Treatment or Impact ("Document Abuse")*

Disparate treatment or impact may occur when the employer treats individuals differently on the basis of national origin or citizenship status in the I-9 process. Four basic categories of document abuse can occur during the I-9 process. These include: (1) improperly requesting that the employee produce more documents than required by the I-9 to establish identity or work authorization; (2) improperly requesting that an employee provide a specific document to prove identity or work authorization; (3) improperly rejecting documents that reasonably appear to be genuine and belong to the employee presenting them; and (4) improperly treating groups of applicants differently based on their nationality or race.

B. *National Origin Discrimination*

National origin discrimination occurs when an employer treats employees differently based upon their national origin in regard to hiring, the I-9 process, firing, or recruitment or referral for a fee. National origin covers a person's place of birth, country of origin, ancestry, native language, accent, or an individual looking or sounding "foreign."

C. *Citizenship Status Discrimination*

An employer discriminates against an employee based on their citizenship status when the employer treats the employee differently based upon their citizenship or immigration status in regard to hiring, I-9 process, firing, or recruitment or referral for a fee. Under IRCA an employer is required to treat U.S. citizens, recent permanent residents, temporary residents under the IRCA legalization program, asylees, and refugees equal.

D. *Retaliation*

An employer violates IRCA, for example, when it intimidates, threatens, coerces, or otherwise retaliates against an employee because the employee has filed an immigration-related employment discrimination charge or complaint; has testified or participated in any immigration-related employment discrimination investigation, proceeding, or hearing; or otherwise asserts her rights under the IRCA's anti-discrimination provisions.

E. *Complying with the Anti-Discrimination Provisions*

In order to properly comply with the anti-discrimination provisions of IRCA, employers should be sure to steer clear of the following practices during the I-9 process:

- Requesting different verification documents based upon an individual's national origin or citizenship status;
- Requesting to see employment eligibility documents before hire and completion of the I-9 because an individual looks or sounds "foreign;"
- Refusing to accept a document or hire an individual because the document has a future expiration date;
- Requesting, during the re-verification process, that the employer present a specific document;
- Limit jobs to U.S. citizens, unless U.S. citizenship is required for the specific position by law.

X. OSC CASE SAMPLES

Some interesting OSC cases dealing with I-9 discrimination issues include the following:

Robison Fruit Ranch, Inc. v. U.S., C.A.9 1998, 147 F.3d 798. Employer petitioned for review of decision of ALJ in Executive Office of Immigration Review, which ruled that the employer had violated the "document abuse" provision of IRCA, which prohibits employers from requesting more or different documents from prospective employees than required to satisfy IRCA's requirements. A policy or practice by an employer in requiring employees to produce two items of identification to establish eligibility for employment did not create additional burdens to any class of applications or constitute differential treatment of authorized aliens and citizens, and thus did not result in discrimination, showing of which would be required to establish that practice violated "document abuse" provision of Immigration Reform and Control Act, which prohibits employer from requesting more or different documents from prospective employees than required to satisfy IRCA's requirements.

Catholic Healthcare West, 2010.[9] The OSC reached a settlement agreement with Catholic Healthcare West ("CHW") to resolve allegations that CHW engaged in a pattern or practice of citizenship status discrimination by imposing unnecessary and discriminatory requirements to employment for work-authorized individuals. CHW is the eighth largest hospital provider in the nation, operating facilities in California, Nevada and Arizona. According to the department's findings, CHW required non-U.S. citizen and naturalized U.S. citizen new hires to present more work authorization documents than required by federal law, but permitted native born U.S. citizens to provide documents of their own choosing. The INA prohibits employers from imposing different or greater employment-eligibility verification (I-9) standards on the basis of a worker's citizenship status. Under the terms of the settlement, CHW agreed to pay $257,000 in civil penalties–the largest amount of civil penalties ever paid to resolve such allegations – and

[9] U.S. Department of Justice, Justice News, *Justice Department Settles Allegations of Immigration-Related Employment Discrimination Against Catholic Healthcare West* (Oct. 19, 2010), http://www.justice.gov/opa/pr/2010/October/10-crt-1166.html.

$1,000 in back pay to the charging party. CHW has also agreed to review its past I-9 practices at all of its 41 facilities in order to identify and compensate any additional victims of over-documentation who have lost wages as a result, and to devise and implement policies and procedures for ensuring best practices with regard to hiring and employment eligibility verification. Further, CHW agreed to train its recruitment personnel on their responsibilities not to discriminate and provide periodic reports to the department for three years.

John Jay College, 2010.[10] John Jay College, a New York City public college in the City University of New York system, agreed to pay $23,260.00 in civil penalties and $10,072.23 in back pay to a former employee in order to settle a lawsuit filed by the DOJ in 2010. The lawsuit alleged that John Jay College engaged in a pattern or practice of citizenship status discrimination by requesting documents issued by the DHS from non-U.S. citizens, but not from U.S. citizens, during the employment eligibility verification Form I-9 process. As part of the settlement, John Jay has also agreed to train its recruitment personnel on their responsibilities not to discriminate, implement a policy prohibiting discrimination on the basis of citizenship status, and provide periodic reports to the DOJ for three years. The OSC, which conducted the investigation in this matter, will continue to monitor John Jay College to ensure compliance with the settlement agreement.

ValleyCrest Landscape Companies, 2010.[11] OSC reached a settlement agreement with ValleyCrest Landscape Companies to resolve charges of hiring discrimination against U.S. citizens and other work-authorized domestic workers at its Virginia locations. Under the agreement, ValleyCrest will modify its hiring policy to extend significantly the time period during which it will recruit U.S. workers for jobs that would otherwise be filled with H-2B temporary visa holders. Specifically, ValleyCrest will recruit and hire domestic workers up until two weeks before H-2B workers are scheduled to begin work. It has also made other changes to its personnel practices and will provide full back pay of $11,173 to a U.S. citizen who applied for but was not given a job.

XI. EMPLOYER BEST PRACTICES

A good faith defense is available when an employer violates IRCA or the INA. To take advantage of the available defense, employers should implement certain protocols to reinforce immigration compliance policies and practices.

ICE recommends that employers follow the subsequent best hiring practices: [12]

(1) Enroll in the U.S. Department of Homeland Security E-Verify system and use it for all hiring.

[10] U.S. Department of Justice, Justice News, *Justice Department Settles Employment Discrimination Suit Against John Jay College* (May 19, 2010), http://www.justice.gov/opa/pr/2010/October/10-crt-1166.html.

[11] U.S. Department of Justice, Justice News, *Justice Department Settles Citizenship Status Discrimination Matter Against ValleyCrest Landscape Companies* (May 14, 2010), http://www.justice.gov/opa/pr/2010/May/10-crt-577.html.

[12] ICE's Best Hiring Practices can be viewed online at http://www.ice.gov/partners/employers/worksite/besthire.htm.

(2) Enroll in the Social Security Number Verification Service ("SSNVS") which allows employers to match their record of employee names and social security numbers ("SSNs") with Social security records before preparing and submitting Form W-2.

(3) Provide training to management with annual updates on how to manage the completion of the I-9 and how to detect possible fraudulent use of documents in the I-9 process and workplace.

(4) Permit the I-9 and E-Verify process to be conducted only by individuals who have received the recommended I-9 training.

(5) Arrange for an biannual I-9 audit by an external auditing firm involved in the I-9 process.

(6) Establish a policy and protocol for responding to no-match letters received from the Social security Administration.

(7) Establish and maintain safeguards against use of the I-9 and E-verify verification process for unlawful discrimination.

(8) Establish a Tip Line for employees to report activity relating to the employment of unauthorized aliens, and a protocol for responding to employee tips.

(9) Establish a protocol to provide the Company with immigration auditing privileges for any contracts with contractors/subcontractors and insist that contracts with contractors/subcontractors incorporate an immigration compliance clause.

XII. CONCLUSION

Correctly filling out the I-9 form is vital to ensure compliance with immigration and employment laws. Failing to or incorrectly completing I-9s can lead to an investigation by ICE and lead to possible civil and criminal liability. Employers should implement compliance programs and procedures not only to make certain that I-9s are accurately completed, but also to establish good faith defenses provided by IRCA and avoid adverse employment issues related to the I-9 process. Furthermore, an employer who implements I-9 policies that generally coincide with ICE's recommendations will avoid an OSC investigation. In short, to ensure that the government does not come knocking on your client's door, employers need the assistance of attorneys to advise and assist with the implementation of proper I-9 policies and procedures.