

Recent OCAHO Decision Reminds Employers to Complete Accurate and Timely I-9 Forms

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By [Andrew W. Merrills](#)

As immigration reform measures proceed through Congress, it is critical that employers are prepared for strict worksite enforcement of I-9 requirements to prevent costly auditing and penalties for paperwork violations or the knowing employment of undocumented workers. A recent decision from the Justice Department's Office of the Chief Administrative Hearing Officer (OCAHO) is a stark reminder to businesses to ensure that their I-9 forms are in order.

As immigration reform measures proceed through Congress, it is critical that employers are prepared for strict worksite enforcement of I-9 requirements to prevent costly auditing and penalties for paperwork violations or the knowing employment of undocumented workers. A recent decision from the Justice Department's Office of the Chief Administrative Hearing Officer (OCAHO) is a stark reminder to businesses to ensure that their I-9 forms are in order. While OCAHO ultimately levied a civil money penalty of \$15,600, it reduced that amount, as a matter of discretion, from the original fine of more than \$25,500 initially sought by U.S. Immigration and Customs Enforcement (ICE).

In *U.S. v Anodizing Industries, Inc.*, OCAHO confirmed that, under current laws and regulations, employers are required to timely and properly complete and maintain Form I-9, Employment Eligibility Verification. In addition, each failure to properly (1) prepare, (2) retain, or (3) produce the forms upon request in accordance with the I-9 rules constitutes a separate violation. The decision further confirmed that failing to prepare an I-9 form when hiring a new employee is substantive in nature, rather than a mere technical failure that might afford the employer a "good faith defense." Moreover, the failure to *timely* prepare Form I-9—within three business days of the employee's commencement of employment—is not only a substantive violation but also a serious one

Other violations characterized as substantive rather than technical in nature include:

- the lack of an employee signature in the section 1 attestation;

- the lack of a signature by the employer’s representative in the section 2 attestation; and
- the omission of proper documents to establish identity or employment eligibility, or the listing of improper documents.

In *Anodizing*, the company’s untimely completion of Forms I-9 on behalf of 25 of its employees and failure to sign and date the section 2 attestation on behalf of one of its employees, both substantive violations, meant that the company could not avail itself of the good faith relief from liability for minor, unintentional I-9 violations. OCAHO drew a distinction between the inadvertent omission of a date, or a delay in entering a date on an existing form that was actually prepared at the appropriate time, and a complete failure to prepare the form at the time of hire—a substantive violation. Rejecting the company’s argument that its errors were of a technical nature in that it merely omitted responses to the questions on the I-9 form, OCAHO held that while “an inadvertent failure to complete certain specific entries in a timely manner may be technical or procedural,” this “does not operate to extinguish the duty to prepare the I-9 in the first instance.”

Employers Should Take a Proactive Approach

The focus on audits and other worksite enforcement actions will likely continue and go hand-in-hand with any immigration reform legislation that is passed. Employers thus are reminded to review their immigration compliance policies and practices.

When reviewing or evaluating compliance programs, it is essential that companies examine their hiring policies and practices, take steps to ensure their workforce is legal by making good faith efforts to verify employment eligibility, and proactively discuss compliance with experienced legal counsel. Reviewing I-9 policies, training persons responsible for I-9 completion, and conducting a self-audit of I-9 records (whether with knowledgeable internal staff or outside immigration counsel) are just a few of the steps a prudent employer should contemplate. In addition, employers should consider using electronic I-9 software to improve I-9 completion accuracy. Completing these steps is likely to reduce potential fines and the chance of other sanctions being imposed should your company be the subject of an ICE I-9 audit. Businesses engaging in unlawful practices should take note of the significant penalties and ensure that they are in compliance with the law.

AUTHOR



Andrew W. Merrills

Shareholder, Raleigh

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