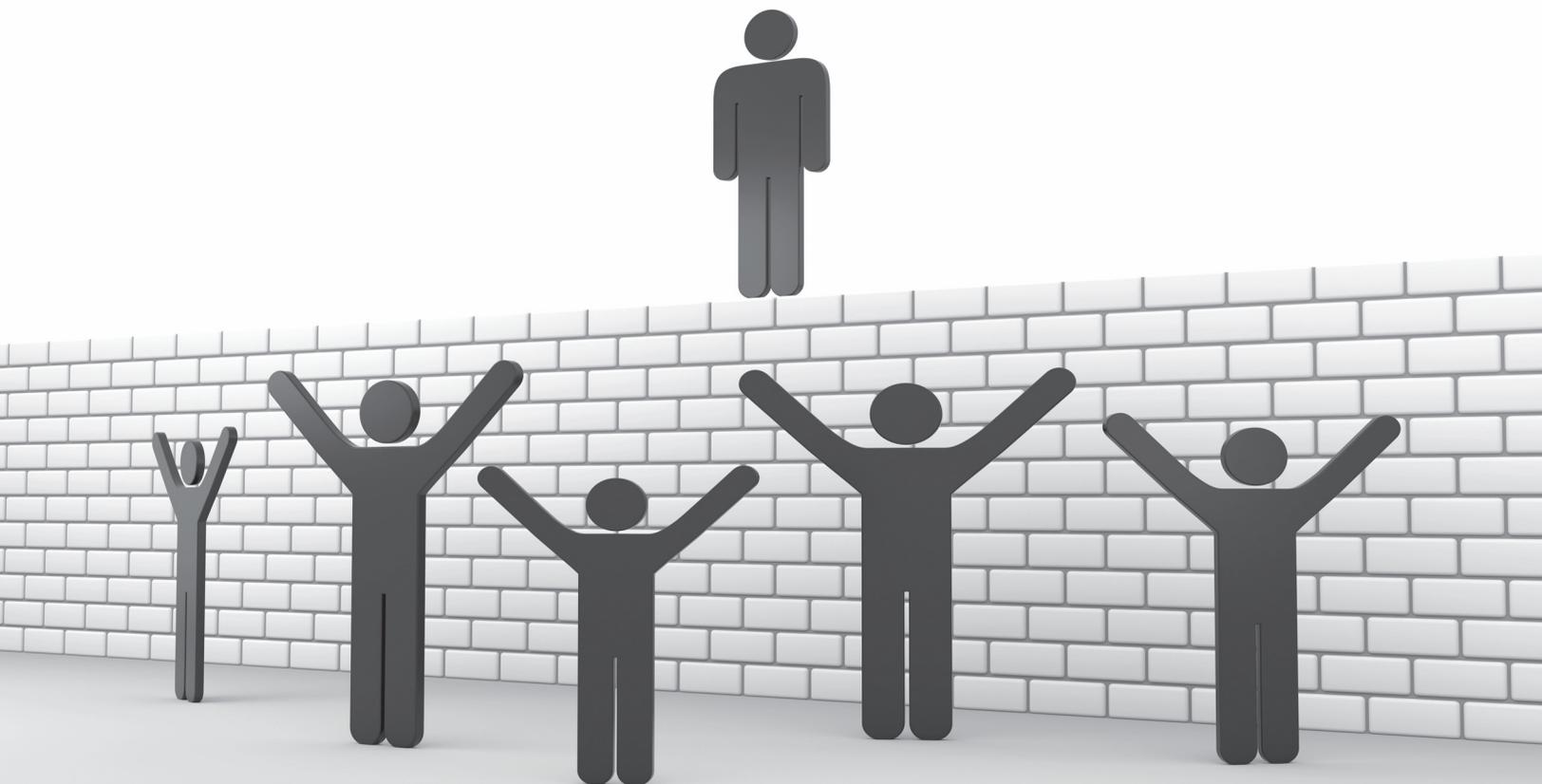


WHAT DO RISK MANAGERS NEED TO KNOW ABOUT IMMIGRATION LAW?

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Risk management professionals must consider every facet of the business, from the most obvious risks common to many enterprises to any unique risks a particular business might have. Losses could result from financial risks such as cost of claims and liability judgments, operational risks such as labor strikes, perimeter risks including political change and strategic risks including management changes or loss of reputation.

Given the vast scope of such obligations, it is not surprising that many risk managers may believe that immigration compliance is a minor issue that is not important, particularly when they have so many other worries and fires to prevent or put out. Some risk managers may feel that

immigration compliance is not a concern because their company is either too small, or does not employ any foreign workers or sponsor anyone for immigration status. Sadly, they are mistaken.

The Form I-9 requires every U.S. employer to review documentation presented by every new employee, regardless of citizenship or position within the company, that demonstrates the worker's legal status and ability to work in the United States. The laws require that employers follow very specific, yet often-times confusing, immigration compliance steps. Paperwork violations alone could result in substantial fines based on certain factors, even if a company does not hire a single foreign worker. In fact, immigration audits and subsequent fines have

become an easy source for a seemingly limitless supply of government revenue that simultaneously enforces laws that may be overlooked by employers, and also pays for the next cycle of audits to come.

To understand what immigration compliance involves, it is essential to point out that immigration law is a complex and perplexing mess of statutes, regulations and court decisions that is overseen and enforced in various ways by several government agencies. From the Department of Homeland Security's Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE) and U.S. Citizenship and Immigration Services (USCIS), as well as the Department of Justice's Office of Special Counsel for

Immigration-Related Unfair Employment Practices (OSC) and the Department of Labor's Wage and Hour Division (W&H), the last thing any risk manager wants to have to deal with is a government audit or investigation, and the litigation over fines that could result due to a lack of compliance.

FORM I-9

The primary immigration compliance issue is a lack of I-9 compliance. A risk manager may think that an I-9 policy is in place, yet any policy must properly interpret the legal requirements and must also be strictly followed. For example, a payroll and human resource service company in Minnesota thought that their remote completion of a section of the Form I-9 was acceptable. As a result, they contested liability for 242 I-9 paperwork violations found after an ICE audit involving the company's W-2 employees. Unfortunately for that company, their policies were found to violate immigration law, and in January of 2015 they were ordered to pay civil money penalties totaling \$227,251.75. Similarly, in July of 2015 an events planning company was hit with \$605,250.00 in civil money penalties due to their failure to properly complete a portion of the Form I-9 after an ICE audit determined that a total of 797 I-9s were incomplete. The company's I-9 policy relied on a union form that included a portion of the I-9 form. This reliance was deemed to be misplaced and found to be non-compliant. These examples should serve as warnings for risk managers to not take the I-9 process lightly.

To avoid similar mistakes, risk managers need to be prepared for an audit by ensuring that their immigration policies and practices are compliant. Considering that government agencies expect that companies have all documents ready for inspection in as little as three days, a lack of compliance could result in a panic when an audit notice is issued. Having immediate legal counsel involved when an audit notice is received is crucial to allow sufficient time to assess, correct and deliver the documents to the investigators. Yet, what is most helpful is having an effective and compliant Form I-9 program and policy in place before an audit occurs. A best practice is to also conduct self-audits by reviewing a sampling of the company's past compliance efforts so that mistakes can be identified and corrections can be made to ensure future compliance. For companies with multiple offices, having an immigration compliance officer with designees at each location is also recommended, as is periodic Form I-9 refresher training for human resource personnel.

Likewise, when a risk manager must prepare for a merger or acquisition of another business and its employees, the newly acquired company's I-9 practices could expose the acquiring company to violations. An I-9 review is important to make sure there are no deficiencies with the incoming Form I-9s. Often times this step is not prioritized as high as it should be in a merger situation.

Ultimately, a written policy that outlines compliance procedures from verification, completion and corrections of the Form I-9 to storage, document maintenance, and re-verification is fundamentally important. Such a policy affirms the company's commitment to immigration regulations, and if accompanied by self-audits, may serve as a valuable tool when an audit, or a merger or acquisition, occurs. Even if an audit uncovers employees that are working without authorization, the company should be able to demonstrate that it acted in good faith, and complied with all I-9 requirements to mitigate, and possibly avoid, penalties and fines.

Of course, no good deed goes unpunished, particularly when it comes to OSC investigations relating to unlawful I-9 document abuse. For example, in 2014 a California healthcare company settled with the DOJ and paid \$119,313.00 in back pay to an employee and \$88,678.00 in civil penalties. The claim of document abuse was brought because the company required foreign born applicants and employees to produce more, different, and specific documents to prove their employment eligibility verification, while native born U.S. citizens were allowed to produce documents of their choice. Also in 2014, a major airline company had to pay \$208,000 and set up a \$55,000 back pay fund because it required lawful permanent resident employees, but not U.S. citizen employees, to complete additional Form I-9s and provide additional proof of employment after hire. Such a requirement is specifically prohibited by the Immigration and Nationality Act. Consequently, any I-9 policy must carefully take into consideration document abuse and strive to avoid it.

E-VERIFY

E-Verify is another immigration compliance issue that risk managers need to address. E-Verify is a web-based program set up by the U.S. government to allow employers to submit information from an employee's Form I-9 to receive confirmation that an employee is employment authorized. While some states require employers to use E-Verify, others do not mandate it. Having set policies and procedures for com-

panies who do use E-Verify, as well as proper training of human resource personnel, is critical to avoid a lack of compliance. This is because E-Verify allows the government to data mine information that employers enter into the system from their employee's Form I-9. As a result, government agencies can use E-Verify to investigate discrepancies without an audit and assert claims of document abuse based on statistics, even when there are no actual complaints.

For example, USCIS referred a case to OSC, when it discovered that a Seattle food manufacturing company required work authorized, non-U.S. citizens to produce specific documents during the E-Verify process, but did not require the same for U.S. citizens. The company had to pay \$40,500 in civil penalties for alleged discriminatory practices. A concrete company from Texas did the same thing, but also selectively utilized E-Verify to confirm employment eligibility of individuals it knew or believed to be non-U.S. citizens or foreign born. The result was \$115,100 in civil penalties.

CONCLUSION

The government has set up the Form I-9 and E-Verify to ensure that only authorized workers are allowed to be employed in the U.S. If employers properly carry out their obligations in good faith, they can potentially save the company from exposure in many other areas, as one investigation can quickly turn into multiple investigations from various other agencies. Therefore, risk managers need to be concerned with the double-edged sword of immigration compliance and allegations of discrimination that can be made despite good faith intentions to correct mistakes. By ensuring their company has implemented carefully thought out policies on I-9 and E-Verify procedures and that human resource personnel are properly educated and trained, risk managers can mitigate risks and fulfill their obligations by preventing fines, public relations disasters, and the general harm an investigation can cause to a company's hard earned reputation.



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