

IMMIGRATION INFORMATION FOR BUILDERS

The 1986 Immigration and Control Act (IRCA) makes it unlawful to knowingly employ aliens who are unauthorized to work in the United States.

Recent Events

In April 2006, the Department of Homeland Security unveiled what it refers to as "a comprehensive immigration enforcement strategy for the Nation's interior" that includes a "strategic shift" in its attitude concerning worksite enforcement and compliance programs. At about the same time, some residential construction companies reported receiving the formal, three day "Notice of Inspection" document for an I-9 audit, demanding the usual review of company employment records, but also demanding a review of their subcontractors' employment records.

In light of these recent developments, NAHB has prepared the following Q & A sheet to help builder-employers understand their rights and responsibilities.

Q. What is a Form I-9?

A. Federal law places an affirmative duty on employers to verify the identity and work authorization of all persons who are hired. This is accomplished by the mandatory completion of Employment Eligibility Verification Form I-9. Employers are required to keep a completed Form I-9 on file for each of their current employees who were hired after November 7, 1986.

Q. When must the I-9 be completed?

Section 1 of Form I-9 (information supplied by the employee) must be completed and signed by the employee at the time of hire.

Section 2 of Form I-9 (the employer's review and document verification) must be completed and signed by the employer (or an authorized representative) within three (3) business days of the hire.

Q. How long must Form I-9's be retained?

A. Employers are required to retain each Form I-9 for one (1) year after the corresponding employee is terminated, or for at least three (3) years from the date of the hire, whichever is later.

Q. What is an I-9 audit?

A. The Department of Homeland Security's Immigration and Customs Enforcement Agency (ICE), formerly the INS, has the authority, without the necessity of a subpoena, to inspect any employer's Form I-9's to verify compliance and to check its accuracy. This inspection is called an I-9 audit.

Q. Can ICE conduct surprise I-9 audits?

A. No. It is possible that an investigator could show up unannounced at a worksite, but the investigator can not demand an immediate production of I-9 records. Under the law, an employer is entitled to receive a three (3) day notice prior to the I-9 audit. In the past, it has been possible to negotiate with ICE for longer periods before the I-9 audit takes place, perhaps as much as 10-12 business days.

Q. Are builder-employers responsible for their subcontractor employees' I-9 compliance?

A. No. Under the law, builder-employers are not required to complete Form I-9's for the employees of their subcontractors, or to monitor their subcontractors' Form I-9 compliance. But, builders should be aware that it is considered to be an unlawful circumvention of the immigration laws if the builder actually knows that any of its worksite subcontractors are employing unauthorized aliens.

Q. Do builders have to produce their subcontractors' employment records, or a list of their subcontractors?

A. It is not expected that a builder would have possession of a subcontractor's employment records to produce at an I-9 audit, and a builder is not responsible for securing these records from its subcontractors, or for assembling its subcontractors at any location. But, builder-employers are required to cooperate with ICE investigations. Other documents of a builder that are relevant to any investigation can be subpoenaed, including the records that a builder possesses concerning its subcontractors.

Q. Can a builder-employer have an attorney present during the I-9 audit?

A. Employers who are the subject of an I-9 audit have the right to be represented by counsel. Given the new federal "compliance attitude", and its obvious attempt to make builders-employers responsible for subcontractor hiring practices, it is recommended that upon receipt of an I-9 audit notice, counsel be brought in immediately. Any investigative demands, including demands for subcontractor information, should then be referred to the builder-employer's attorney for appropriate action and response.

Q. Can incomplete or inaccurate Form I-9's be corrected?

A. If at any time errors are discovered on a Form I-9, corrections can be made. Corrections to Section 1 (employee information) should be made by the employee, or made in the employee's presence. Corrections to Section 1 should then be initialed and dated by the employee. Corrections to Section 2 (employer review and document verification) should be made by the employer or an authorized representative. Every correction should be initialed and dated by the person actually making the change. Under no circumstances should a Form I-9 ever be backdated or forged. These are criminal violations.

Q. What penalties can be imposed for violations of the Immigration Act?

A. If any deficiency or illegality is found, ICE will issue a Notice of Intent to Fine (NIF) to the employer. Form I-9 paperwork violations are subject to fines of between \$100 and \$1000 per infraction. More serious violations, e.g., hiring unauthorized aliens, are subject to steeper fines. Arrest and imprisonment are possible for those who are found to have engaged in a regular pattern or practice of willful violations.

Q. Can an NIF be contested?

A. Yes. An employer has thirty (30) days to contest the (NIF) by requesting a hearing before an administrative law judge.

Q. Can anything be done to lessen the penalties for unintentional paperwork violations?

A. Yes. Mitigating factors are considered, including the size of the employer, the employer's good faith, a good compliance history, the seriousness of the violation at hand, and whether the employee listed on an incomplete or inaccurate I-9 is actually authorized to work. The presence of mitigating factors can result in a reduction of penalties.

Q. What proactive measures should be taken to avoid an unintentional violation?

A. It is highly recommended that builder-employers conduct regular internal audits of their company's employment records to re-verify the legitimacy and appropriateness of the documents on file, to confirm that all Form I-9's are accurate and complete, and to assure that any temporary work authorizations have not expired.

Q. Where can blank Form I-9's be obtained?

A. Form I-9's can be downloaded from the internet at the following website:
<http://www.uscis.gov/graphics/formsfee/forms/files/i-9.pdf>

Q. Where can instructions for completing Form I-9's be obtained?

Detailed instructions can be found in the U.S. Justice Department publication M-274 "Handbook for Employers - Instructions for Completing Form I-9". Downloadable at:
http://www.osha.gov/pls/epub/wageindex.download?p_file=F6844/I9_Handbook.pdf

Supplemented on October 7, 2005, by U.S. Dept. of Homeland Security, Employer Information Bulletin 102, "The Form I-9 Process in a Nutshell". Downloadable at:
<http://www.uscis.gov/graphics/services/employerinfo/EIB102.pdf>

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