

HR Compliance Law Bulletin

Practical and Effective HR Management Advice

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Spotlight

I-9 form deficiencies lead to \$1 million fine

by Maureen Minehan

Could you be fined \$1 million for immigration violations even if you never hire an unauthorized worker? While it sounds crazy, that is exactly what happened to retailer Abercrombie and Fitch last year. U.S. Immigrations and Customs Enforcement (ICE) fined Abercrombie \$1.05 million for violating the Immigration and Nationality Act even though no evidence of wrongful employment was found.

Abercrombie's error? "Deficiencies" in its electronic I-9 verification system. While ICE's audit found no evidence Abercrombie ever knowingly hired unauthorized workers, "the audit uncovered numerous technology-related deficiencies in Abercrombie & Fitch's electronic I-9 verification system," ICE says.

"Employers are responsible not only for the people they hire but also for the internal systems they choose to utilize to manage their employment process and those systems must result in effective compliance," Brian Moskowitz, special agent in charge of ICE Homeland Security Investigations for Ohio and Michigan, said when announcing the fine.

Sea change

Greg Grant, a partner at Shulman Rogers in Potomac, Maryland, says the fine is changing the way businesses and employment lawyers view I-9 compliance. "The

sea change is compliance isn't just about hiring anymore; it's about sweating the details. The Abercrombie & Fitch case gave this a lot of visibility because it wasn't an unsophisticated employer and there was a \$1 million penalty."

Broad applicability

Debra Dowd, a partner at LeClairRyan in Richmond, Virginia, agrees and says employers need to understand they can have compliance problems even if they believe immigration issues does not affect them. "In workshops, we'll often ask how many of the attendees are affected by immigration. A few hands will go up. Then we tell them that everyone is affected because every employer is subject to the I-9 requirement. There are small businesses that don't even know what the I-9 is. Everyone is vulnerable."

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—Brian Moskowitz,
Special Agent in charge of ICE/HIS
for Ohio and Michigan

Contributors

Maureen Minehan
 Laura Starczewski, Esq.

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POSTMASTER: Send address changes to, HR Compliance Law Bulletin, 610 Opperman Drive, P.O. Box 64526 St. Paul, MN 55164-0526.

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 St. Paul, MN 55164-0526
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email: west.customerservice@thomsonreuters.com
 west.thomson.com/quinlan
 ISSN 1553-8958

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The challenge, Dowd says, is that I-9 compliance is confusing. “It’s complicated. The government recently released a 69-page handbook to explain how to fill out a one-page form.”

Growing enforcement

Still, it is important employers ensure they are in compliance because ICE has made it clear that greater enforcement is a goal. “We are pleased to see Abercrombie working diligently to complete the implementation of an effective compliance system; however, we know that there are other companies who are not doing so. This settlement should serve as a warning to other companies that may not yet take the employment verification process seriously or provide it the attention it warrants.”

How to reduce potential liability

Steps employers should take to reduce potential liability include:

Know your obligations. Employers are required to complete and retain a Form I-9 for each individual they hire for employment in the United States. This form requires employers to review and record the individual’s identity and employment eligibility document(s) and determine whether the document(s) reasonably appears to be genuine and related to the individual. Additionally, an employer must ensure that the employee provides certain information regarding his or her eligibility to work on the Form I-9.

Establish clear collection and retention policies. “Designate someone to be responsible for I-9s. Make sure that person is educated and trained in I-9 requirements. Make sure they have access to a knowledgeable third party to ask questions,” Dowd says.

“Determine where you’re going to keep the records. They need to be separate from personnel files,” Grant says.

“Have workable tickler system in place to remind you when an I-9 needs to be reviewed and an employee needs to show new evidence of eligibility. Also determine when and how you will purge records when it’s permitted,” Dowd says.

Collect or do not collect supporting documents. “Decide whether to retain the documents used to prove eligibility. The law doesn’t require it, but you may decide to do it anyway. If so, figure out what your policy is and stick to it. Don’t copy the documents for some employees and not others,” Dowd says.

“If you only keep the documents for certain employees it could point to a discriminatory practice if those employees all fit into protected categories. Either take the documents from all employees, not just ones you worry about, or don’t take them at all,” Grant says.

Confirm compliance of electronic systems. “As Abercrombie found out, all systems are not created equal,” Dowd says.

Maureen Minehan is a Washington, D.C.-based freelance business writer specializing in human resource management.

Supreme Court Spotlight

Court rules on how far Title VII’s antiretaliation provision extends

Citation: *Thompson v. North American Stainless, LP*, 111 Fair Empl. Prac. Cas. (BNA) 385, 2011 WL 197638 (U.S. 2011)