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▶ Key Employment Issues for U.S. Employers in the Hospitality Industry

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AFFORDABLE CARE ACT: PREPARING FOR THE EXCHANGES AND EMPLOYER MANDATE



Federal-, State-, or Hybrid-Operated Exchanges

- Intended to be a marketplace for the purchase of health benefits.
- Goals: reduce costs
 - Lower premiums
 - Control administrative costs
 - Attract more insurance carriers: competition



Federal-, State-, or Hybrid-Operated Exchanges

- Two types
 - Individual exchanges – solely for purchase of the individual coverage
 - Subsidies and cost sharing limits on out-of-pocket costs are available **only** on the individual exchange and **only** for those who do not have access to affordable employer-sponsored minimum essential coverage



Federal-, State-, or Hybrid-Operated Exchanges

- Two types (cont'd)
 - SHOP exchanges—exchange for the purpose of small group coverage (fewer than 100 employees)
 - ***No subsidies and cost-sharing limits*** are available on the SHOP exchanges
 - Group and individual premium payments are aggregated by exchange and paid to insurer



The Exchange

- Must comply with the new insurance standards
 - Insured plans must offer “essential health benefits” and are subject to limits on cost sharing
 - Premiums can not be based on a person’s health status:
 - Rates may only be based on age, tobacco, coverage tier (family and individual) and geographic area (rating area)



The Exchange

- Employers must provide written notice to employees about state health insurance exchange information, eligibility for tax credit or cost-sharing reduction, and possible loss of employer contribution
- Model notice available at:
www.dol.gov/ebsa/healthreform



The Exchange

- Employers will have to notify employees about the exchanges
- The exchanges will be required to notify an employer if its employee qualifies for a subsidy
 - ID of employee, determination that employee is eligible for the subsidy, notice that the employer may be subject to a “play or pay penalty” and a right to appeal (details not yet known)



The Exchange

- Determination is made based on the information provided by the employee (100%-400% Federal Poverty Level (FPL))
- HHS will establish an appeals process for employers



Impact on Employers: Play or Pay Mandate

- For calendar-year plans, large employers (50 or more FTEs) must offer health coverage, including minimum essential coverage, to all FTEs (and their children), under an eligible employer-sponsored plan
- Delayed if on a fiscal year; safe harbor for 95% of coverage



Impact on Employers: Play or Pay Mandate

- Cont'd.
 - Either offer “qualified and affordable” insurance:
 - **A qualified plan** is one that is expected to pay at least 60% of allowed charges and meet “minimum value” benefit standards. (DOL “MV” calculator)



Impact on Employers: Play or Pay Mandate

- **An affordable plan** is one where employee contributions do not exceed 9.5% of the employee's household income. (IRS Safe Harbor: W-2 (end of calendar year on Box 1 – does not include nontax-employee benefits); rate of pay (at beginning of the year: salary rate or hourly rate x 130 hours and compare amount of contribution) or FPL)



Impact on Employers: Play or Pay Mandate

- OR:
 - Opt out and pay fines to the government:
 - Monthly penalties



Calculating Employees

- Number of employees: “50” is the magic number
 - Full-time employees: 50 employees working at least 30 hours/week:
 - Excludes full-time seasonal employees who work fewer than 120 days during a given year



Calculating Employees

- Cont'd
 - Part-time employees: specific formula for translating aggregate number of part-time employees into a number of full-time equivalent employees (FTEE) an employer has in any one month: the aggregate of all work hours of all part-time employees in a month \div 120 = # FTE employees



Calculating Employees

- Example:
 - Firm has 35 FTE (working 30+ hours/week)
 - Firm also has 20 PTE's who work 24 hours/week (96 hours/month)
 - 20 employees x 96 hours = 1920 / 120 = 16 FTEE
 - 35 FTE + 16 FTEE = 51 Employees.
 - Firm would be a “large employer”



Calculating Employees

- FT employees: those who you expect to work at least 30+ hours in a week; (monthly reviews allowed)
- All other employees: variable hour employees
 - **Safe Harbor** for determining if a variable hour employee is a “full time” employee



Calculating Employees

- If a variable hour employee averages 30 hours or more per work week during a “standard measuring period,” he/she must be treated as an FTE (and offered coverage) during a subsequent stability period
- Standard measuring period can be from 3-12 months. Stability measuring period can be from 6-12 months; administrative period (up to 90 days) can apply between the two periods



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EMPLOYER MANDATE PENALTIES



Employer Mandate

- Beginning January 1, 2015, an applicable large employer is subject to an assessable payment if:
 - The employer fails to offer at least 95% of its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan and any full-time employee is certified to receive a premium tax credit or cost-sharing reduction



Employer Mandate

- Beginning January 1, 2015, an applicable large employer is subject to an assessable payment if:
 - The employer offers its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage, *but* the coverage either is not affordable or does not provide minimum value, and any full-time employee is certified to receive a premium tax credit or cost-sharing reduction



When Is Coverage Affordable?

- The cost for self-only coverage under the employer's lowest cost option may not exceed 9.5% of household income
 - IRS “Affordability” Safe Harbor
 - A required contribution for self-only coverage is affordable if it does not exceed 9.5% of employee's Form W-2 wages
 - Alternative “rate of pay” and “poverty line” safe harbors available



When Does Coverage Provide Minimum Value?

- A plan provides minimum value if the plan's share of the total allowed costs of benefits provided under the plan is at least 60% of those costs
 - Minimum value calculator available on HHS website



If Employer Fails to Offer Minimum Coverage

- Example (assumes payment for 12 months):
 - ABC Hotel has 100 full-time employees
 - ABC Hotel does not offer health insurance coverage
 - One full-time employee purchases health insurance on an exchange and receives a federal subsidy (credit or cost-sharing reduction)



If Employer Fails to Offer Minimum Coverage

- Cont'd
 - ABC Hotel is subject to penalty tax of \$2,000 x number of actual full-time employees (first 30 not counted)
 - Penalty tax = \$140,000 (70 x \$2,000)



If Employer Offers Minimum Essential Coverage that Is Not “Affordable” or Does Not Provide “Minimum Value”

- **Example:**
 - ABC Hotel has 100 full-time employees
 - ABC Hotel offers minimal essential coverage
 - ABC Hotel’s coverage is “unaffordable”
 - 20 employees purchase health insurance on an exchange and receive a federal subsidy (credit or cost-sharing reduction)



If Employer Offers Minimum Essential Coverage that Is Not “Affordable” or Does Not Provide “Minimum Value”

- Cont'd
 - ABC Hotel is subject to penalty tax of \$60,000 ($\$3,000 \times 20$ employees enrolled in exchange with subsidy)
 - Example assumes penalty for 12 months
 - Penalty subject to cap of [total full-time employees – 30 x \$2000]



Recommended Actions

- Compare the cost of providing coverage to the potential penalties
- Consider how decision to “pay” (i.e., not offer coverage) might affect employee recruitment, retention and morale
- Watch for employer mandate regulations and other guidance this year



Impact of Delay

- Despite delay to 2015, employers should still know whether their coverage is affordable and provides minimum value because:
 - Individual mandate (effective January 1, 2014)



Impact of Delay

- Exchange application requests that employees ask employers whether coverage provides minimum value and for information about affordability
- Federally run exchanges will randomly audit employers regarding information provided
 - No audits for state-run exchanges until 2015, so they will rely on applicant attestations



Impact of Delay

- Exchange notices (October 1, 2013)
 - DOL sample notice for advising employees of coverage through exchanges solicits information about affordability and minimum value
 - Although optional, may want to disclose to preempt inquiries from employees and federal exchanges



Impact of Delay

- SBCs (for 2014 coverage)
 - SBCs must now state whether coverage provides minimum value.
 - Confirm insurer/TPA making required disclosure because employer ultimately liable



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PAY PRACTICES AND TIP CREDITS



Rules on Time Keeping

- Employer must designate a 7-day work week
- Employer must have detailed, accurate and verifiable timekeeping system for “hours worked”



Typical Problem Areas

- No timekeeping system
 - USDOL will use employee's estimate
- Confusing property access with timekeeping
 - If employee is required to report for preliminary work, must record all time



Rules on Working Time

- Employer controls the hours spent
- Employee is not free to leave premises
- Employer is aware of activity and approves
- Activity for employer's benefit
- Employee is not free to engage in his/her own activities during the time period



Typical Problem Areas

- Donning & doffing uniforms
 - If required, employer must pay
- Meal periods & breaks
 - If less than 30 minutes, employer must pay
- Volunteer time
 - If it is for employer's benefit, employer must pay



Rules on Minimum Wage

- Employer must pay at least minimum wage for hours worked up to 40 per work week



Typical Problem Areas

- Room & board
 - May be considered part of wages if:
 - it is primarily for the benefit of the employee
 - the cost is “reasonable”
 - the employer complies with additional recordkeeping requirements
 - *Tax issue:* cost of room & board is treated as wages



Typical Problem Areas

- Duty meals
 - Meals provided on employer's premises for employer's convenience are excludable from wages
 - Restaurant and food service employees
 - Inability to obtain meal within a reasonable period
 - Restricted meal period
 - Emergency call
 - *Tax issue:* employer may deduct only 50% of the expense for the meal; anything above is income to the employee



Typical Problem Areas

- Duty meals (cont'd)
 - Tip credit
 - Tips are not services charges
 - Tips are gratuities given at customer's discretion
 - Service charges are imposed by the employer



Typical Problem Areas

- Tip credit (cont'd)
 - Tip credit can be used if:
 - Employer notifies employee of FLSA tip credit provisions
 - Employee retains 100% of the tips
 - Employees makes more than \$30/month in tips



Typical Problem Areas

- Tip credit (cont'd)
 - Employer may deduct amount of tips received from minimum wages due *provided* the employer has records to prove the amount of tips actually received
 - *Caution:* Employer may not pay less than \$2.13 per hour in direct wages
 - *Caution:* Watch for state laws governing tips and service charges



Rules on Overtime

- Overtime paid for hours worked in excess of 40 per work week (some states require OT after 8 hours per day)
- Overtime is based on the employee's "regular rate" of pay, not base rate



Typical Problem Areas

- Differentials
- Premiums
- Incentive payments
 - Porterage
 - Service charges
 - Commissions
- Bonuses
- Methods for calculating overtime



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EXEMPT v. NON-EXEMPT



Exempt v. Non-Exempt Basics

- Employees whose jobs are governed by the FLSA are either "exempt" or "non-exempt"
- Non-exempt employees are entitled to overtime pay; exempt employees are not
- A majority of employees covered by the FLSA are non-exempt



Exempt v. Non-Exempt Basics

- Some employees are exempt from the overtime pay provisions, some from both the minimum wage and overtime pay
- Salary vs. non-salary not a always good indicator



How is the Difference Construed?

- Exemptions are narrowly construed against the employer asserting them. The ultimate burden of supporting the application of an exemption rests on the employer
- Exemptions are typically applied on an individual workweek basis. Employees performing exempt and non-exempt duties in the same workweek are normally not exempt in that workweek



Exemption by Definition

- Some jobs are classified as exempt by definition
- Example: "**outside sales**" employees are exempt and "**inside sales**" employees are non-exempt
 - Vacation Ownership/Timeshare salespeople are non-exempt inside sales
 - Sales managers may be exempt
 - Marketing people may be exempt



Exemption by Definition

- Whether an employee is exempt or non-exempt, consider:
 - How much he/she is paid
 - How he/she is paid
 - What kind of work he/she does



Exemption by Definition

- With few exceptions, to be exempt an employee must:
 - Be paid at least \$23,600 per year (\$455 per week)
 - Be paid on a salary basis, and also
 - Perform exempt job duties
- According to DOL, most employees must meet all three "tests" to be exempt



Exemption Test

- **Salary level test**
 - Employees who are paid less than \$23,600 per year (\$455 per week) are non-exempt
 - Employees who earn more than \$100,000 per year are almost always exempt



Exemption Test

- **Salary basis**
 - Generally, an employee is paid on a salary basis where the employee has a "guaranteed minimum" amount of money to be earned per paycheck
 - Does not have to be entire amount, just minimum



Exemption Test

- Duties test: three categories of exempt employee duties
 - Executive
 - Employee supervises two or more other employees, has management as the primary duty of the position, and has some input into the job status of other employees
 - Professional
 - Traditional "learned professions" are exempt. Look for advanced knowledge, degrees and specialized training



Exemption Test

- Duties test: three categories of exempt employee duties (cont'd)
 - Administrative
 - High level employees doing non-manual work that is directly related to management business operations; involves the exercise of independent judgment and discretion about matters of significance



Non-Exempt Wait Staff

- FLSA applies to restaurant and food businesses grossing \$500,000 per year
- Rule of thumb - employer must meet minimum wage and overtime pay at all times



Non-Exempt Wait Staff

- It is illegal to deduct from wait staff pay such things as:
 - Cash shortages
 - Required uniforms
 - Customer walk-outsif the deduction reduces employee's wages below the minimum wage or cuts into overtime pay



Typical Issues

- If uniforms are required by the employer, the cost of the uniform **MUST** be considered to be a business expense of the employer
- If the employer requires the employee to bear the cost, such cost may not reduce the employee's wages below the minimum wage or cut into overtime compensation
- Examples include: T.G.I. Friday's uniform, housekeeping uniform, etc.



Tips and Overtime

- Overtime must be paid at a rate of at least one and one-half times the employee's regular rate of pay for each hour worked in excess of 40 hours per week



Sample Hospitality Exemptions

(OT- overtime; MW – minimum wage)

- Amusement/recreational employees in national parks/forests/Wildlife Refuge System - OT
- Domestic employees who live-in - OT
- Fruit & vegetable transportation employees - OT
- Local delivery drivers and driver's helpers - OT



Sample Hospitality Exemptions

- Motion picture theater employees - OT
- Sugar processing employees - OT
- Switchboard operators - MW & OT
- Taxicab drivers - OT
- Computer professionals- OT & MW if meet exemption tests
- Seasonal and recreational establishments- OT, MW



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BEST PRACTICES IN IMMIGRATION COMPLIANCE



Overview

- Best practices for Form I-9 compliance
- Tips for completing the “not-so-new-anymore” Form I-9
- How to avoid getting caught in the anti-discrimination trap (due diligence v. over/under-documentation)
- What to expect if you are the subject of an ICE I-9 audit
- Immigration reform and what it means for the hospitality industry



Immigration-Related Acronyms

- **DHS** – Department of Homeland Security
- **ICE** – Immigration and Customs Enforcement
- **I-9** – Employment Eligibility Verification form
- **IMAGE** – ICE Mutual Agreement between Government and Employers



Immigration-Related Acronyms

- **INA** – Immigration & Nationality Act
- **IRCA** – Immigration Reform and Control Act
- **NOI** – Notice of Inspection
- **OSC DOJ** – Office of Special Counsel, Department of Justice
- **SAVE** – Systematic Alien Verification for Entitlements



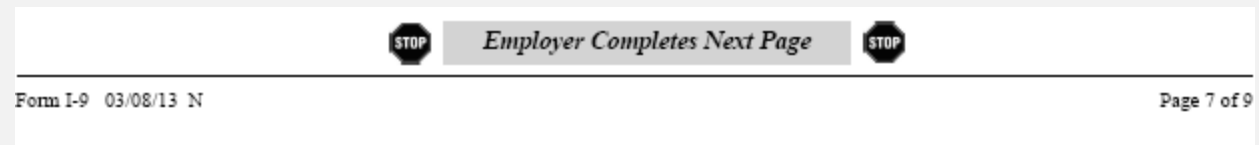
Immigration-Related Acronyms

- **SSA** – Social Security Administration
- **SSNVS** – Social Security Number Verification System
- **TNC** – Tentative Non-Confirmation
- **USCIS** – U.S. Citizenship and Immigration Services



Form I-9

- New form effective May 7, 2013



- IRCA requires employers to verify the *identity* and *employment eligibility* of their employees and creates criminal and civil sanctions for employment related violations



Form I-9

- Section 274A (b) of the INA, codified in 8 U.S.C. § 1324a(b), requires employers to verify the identity and employment eligibility of all individuals hired in the United States after November 6, 1986
- Employers are required by law to maintain for inspection original forms I-9 for all current employees



I-9 Best Practices

- Form I-9 for all employees hired have 11/86 – Failure to Present Substantive Verification Violation
- E-Verify as a best practice
 - Federal contractor
 - State mandate (private v. public employers)
 - Subcontractor
 - Contractual agreement



I-9 Best Practices

- Internal training and compliance program
 - Written hiring and I-9 policy
 - Photocopy documents
 - Plan of action in the event of a DHS, DOL or state agency audit
 - Personnel only/restricted areas



I-9 Best Practices

- Completion, storage and retention of the Form I-9
 - I-9s behind “lock and key”
 - Must maintain I-9s for period of time after termination; once that period is over you can dispose of the I-9s
- SSA no-match letters and SSNVS
- SSNVS is not an immigration tool



I-9 Best Practices

- Annual Form I-9 audits by an external source, such as immigration counsel – ICE best employment practice, too – see: <http://www.ice.gov/image/best-practice.htm>



Tips for the Form I-9 – Section 1

Section 1. Employee Information and Attestation <i>(Employees must complete and sign Section 1 of Form I-9 no later than the first day of employment, but not before accepting a job offer.)</i>				
Last Name (Family Name)		First Name (Given Name)		Middle Initial
Address (Street Number and Name)		Apt. Number	City or Town	State
Date of Birth (mm/dd/yyyy)		U.S. Social Security Number	E-mail Address	
			Telephone Number	

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

I attest, under penalty of perjury, that I am (check one of the following):

- A citizen of the United States
- A noncitizen national of the United States *(See instructions)*
- A lawful permanent resident (Alien Registration Number/USCIS Number): _____
- An alien authorized to work until (expiration date, if applicable, mm/dd/yyyy) _____. Some aliens may write "N/A" in this field. *(See instructions)*

For aliens authorized to work, provide your Alien Registration Number/USCIS Number OR Form I-94 Admission Number:

1. Alien Registration Number/USCIS Number: _____

OR

2. Form I-94 Admission Number: _____

If you obtained your admission number from CBP in connection with your arrival in the United States, include the following:

Foreign Passport Number: _____

Country of Issuance: _____

Some aliens may write "N/A" on the Foreign Passport Number and Country of Issuance fields. *(See instructions)*

3-D Barcode
Do Not Write in This Space

Signature of Employee: _____	Date (mm/dd/yyyy): _____
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Section 1

- SSN required for E-Verify; otherwise voluntary
- Email address and telephone number voluntary, but used by USCIS for TNCs (if e/ee provides such, and you use E-Verify, you must enter email address in system)
- Attestation section critical – substantive verification violation



Tips for the Form I-9 – Section 2

Section 2. Employer or Authorized Representative Review and Verification
(Employers or their authorized representative must complete and sign Section 2 within 3 business days of the employee's first day of employment. You must physically examine one document from List A OR examine a combination of one document from List B and one document from List C as listed on the "Lists of Acceptable Documents" on the next page of this form. For each document you review, record the following information: document title, issuing authority, document number, and expiration date, if any.)

Employee Last Name, First Name and Middle Initial from Section 1: _____

List A Identity and Employment Authorization	OR	List B Identity	AND	List C Employment Authorization
Document Title: _____		Document Title: _____		Document Title: _____
Issuing Authority: _____		Issuing Authority: _____		Issuing Authority: _____
Document Number: _____		Document Number: _____		Document Number: _____
Expiration Date (if any)(mm/dd/yyyy): _____		Expiration Date (if any)(mm/dd/yyyy): _____		Expiration Date (if any)(mm/dd/yyyy): _____
Document Title: _____		<div style="border: 1px solid black; padding: 10px; width: fit-content; margin: auto;"> <p>3-D Barcode Do Not Write in This Space</p> </div>		
Issuing Authority: _____				
Document Number: _____				
Expiration Date (if any)(mm/dd/yyyy): _____				
Document Title: _____				
Issuing Authority: _____				
Document Number: _____				
Expiration Date (if any)(mm/dd/yyyy): _____				

Certification

I attest, under penalty of perjury, that (1) I have examined the document(s) presented by the above-named employee, (2) the above-listed document(s) appear to be genuine and to relate to the employee named, and (3) to the best of my knowledge the employee is authorized to work in the United States.

The employee's first day of employment (mm/dd/yyyy): _____ (See instructions for exemptions.)

Signature of Employer or Authorized Representative	Date (mm/dd/yyyy)	Title of Employer or Authorized Representative
_____	_____	_____



Section 2

- Insert employee name
- One or the other, but not all three
- Photocopying documents and attaching to I-9 – not acceptable
- Insert date of hire
- Do not complete Section 1; photocopy documents and attach w/o completing Section 2 or complete Section 2 at a later date



Miscellaneous Information

- I-94 card issued by CBP is being phased out
- Standard for the I-9: “reasonableness”
- Don’t forget about I-9s where there is a merger or acquisition
- Helpful “Immigration Compliance and Background Screening” blog:
<http://www.immigrationcomplianceinsights.com/>

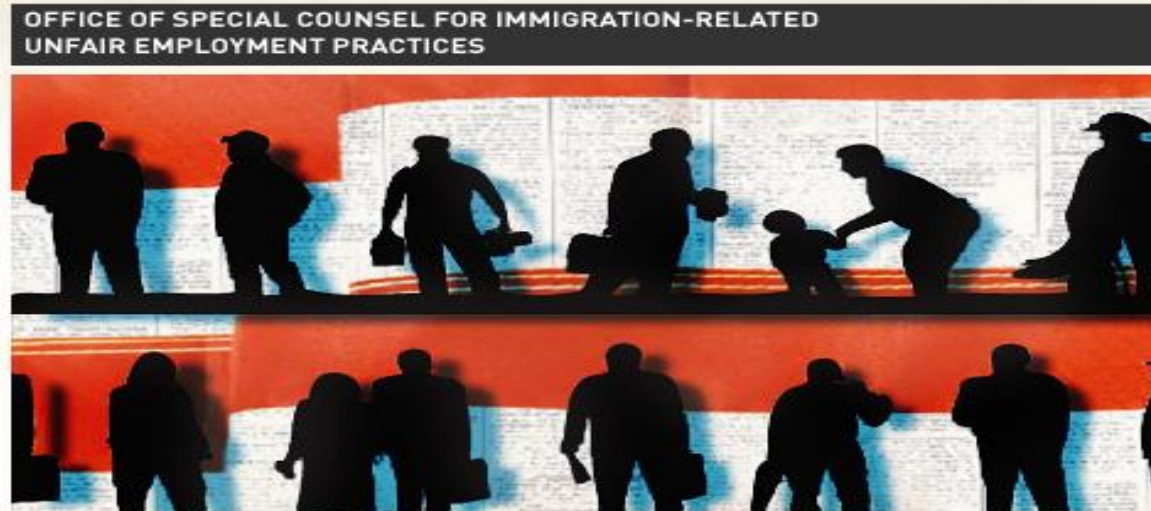


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Anti-Discrimination Issues

Employer hotline: 1-800-255-8155



The Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) enforces the anti-discrimination provision (§ 274B) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b.

This federal law prohibits: 1) **citizenship status discrimination** in hiring, firing, or recruitment or referral for a fee, 2) **national origin discrimination** in hiring, firing, or recruitment or referral for a fee, 3) **document abuse** (unfair documentary practices during the employment eligibility verification, Form I-9, process, and 4) **retaliation or intimidation**.



Possible Scenarios

- Citizenship or immigration status discrimination with respect to hiring, firing and recruitment or referral for a fee by e/ers with > 4 e/ees
 - Cannot treat individuals differently because they are, or are not, U.S. citizens or work authorized individuals
- Unfair documentary practices related to verifying the employment eligibility of employees



Possible Scenarios

- National origin discrimination with respect to hiring/firing and recruitment or referral for a fee by e/ers with 3-15 e/ees (EEOC is > 15 e/ees)
 - Cannot treat individuals differently because of their place of birth, country of origin, ancestry, native language, accent, or because they are perceived as looking or sounding “foreign”
- Retaliation/intimidation



Examples of Unacceptable Behavior

- Do not ask all Latino-looking or sounding individuals to present additional or different documents to be “super sure” they are work authorized
- Do not ask permanent residents who present a List A document (permanent resident card) to also present a SSN card



ICE Audit – What to Expect

- ICE issues NOI requesting copies of original Forms I-9 and other supporting documents
 - Random or tip/lead driving
 - Best result is receipt of a compliance letter
 - Notice of inspection results
- Role of immigration lawyer and a company's Honesty Policy



ICE Audit – What to Expect

- Best is warning notice; worse is notice of intent to fine
 - Civil penalties start at \$110 per violation for I-9 substantive/technical violations, e.g., failure to present and/or properly complete the I-9
 - Civil penalties start at \$375 for substantive violations, e.g., knowing hire and/or continuing to employ
 - Fee matrix (tiers and fine percentage)



ICE Audit – What to Expect

- Notice of discrepancies and suspect documents
 - General rule is 10 days for Notice of Suspect Documents, but that's not entirely on point



CIR and E-Verify

- S. 744 – The Border Security, Economic Opportunity, and Immigration Modernization Act
- H.R. 1772 – The Legal Workforce Act



CIR and E-Verify

- Form I-9 and E-Verify
 - Mandatory E-Verify rolled out over a period of time and E-Verify for e/ee's with expiring work authorization
 - Form I-9 may go paperless in the future
 - Identity authentication either through greater use of Photo Tool or other authentication measures
 - Greater use of technology to complete the I-9, such as video conference



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