# Is Your I-9 Policy Vulnerable to Immigration and Customs Enforcement Sanctions? A Review

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As you probably know, Form I-9 is a mandatory employment eligibility verification form. Completion of the I-9 by both employer and employee must occur within three days of hire for every employee hired after November 6, 1986, regardless of nationality or immigration status.

I-9 violations can occur even if your entire workforce is legal. A paperwork violation can be something as simple as failing to date or sign the I-9 Form. Fines can range from $110 to $1,100 per paperwork violation, but increase exponentially for knowing violations. For instance, employers convicted of having knowingly hired illegal aliens or continuing to employ aliens who are or became unauthorized to work may face fines of up to $3,000 per employee and/or six months' imprisonment.

The Obama administration has made it clear that Immigration and Customs Enforcement (ICE) of the Department of Homeland Security will be seeking out and sanctioning employers in an effort to stop the employment of illegal aliens. To make good on that promise, ICE issued over 650 notices to inspect I-9s on a single day in 2009, which was more than it issued in all of 2008. Although hospitals have not to date been a specific target for enforcement action by ICE, there has been a tremendous increase in enforcement actions over the past several years. Consequently, hospital employers must evaluate their current I-9 policies.

## What about Independent Contractors' Workers' I-9s?

Using an independent contractor or subcontractor whose illegal workforce is working on your premises is a vulnerable point for ICE sanctions against your hospital. ICE can deem these workers to be your employees under two circumstances: (1) by indications of there being an employer/employee relationship, extremely broadly defined by the amount of control your managers exercise over these workers, or (2) by your having actual or "constructive knowledge" of the independent contractor's workforce being illegal.

Let us look at the two most common types of independent contractors found in the hospital setting and apply them to the above. The first is independent contractor companies such as cleaning or maintenance services. To avoid liability based on knowledge of their workers' illegality, your HR department should not review the independent contractor's workers' I-9s. First, reviewing these workers' I-9s would give your organization either actual or constructive knowledge of a potentially illegal worker. Second, doing so may also be evidence of an employer/employee

relationship with the worker.

Knowing or having constructive knowledge that the independent contractor's employees on your premises lack employment authorization can be considered harboring, a felony carrying a maximum of 10 years' imprisonment and the greater of $250,000 in fines or twice the gain these workers afforded your company. Wal-Mart agreed to a settlement with ICE of $11 million in penalties for turning a blind eye to a subcontractor that cleaned Wal-Mart's premises with an illegal workforce. ICE defines constructive knowledge as "knowledge which may be fairly inferred through notice of certain facts and circumstances which would leave a person, through the exercise of reasonable care, to know about a certain condition."

At a minimum, there are several protective measures you can take if you use such independent contractors. Have your agreements with any independent contractor reaffirm an independent contractor relationship, confirm the legality of its workforce and provide indemnification of your hospital in the event you are targeted by ICE for any illegal workers on your premises. Note that this protection may still not absolve your hospital of liability if the independent contractor's workforce is illegal and is being supervised, controlled and otherwise treated like employees by your managers. Train your managers to treat independent contractors and its workers as such, and not as hospital employees.

The second form of independent contractor often found in a hospital setting is a doctor performing services as a locum tenens. Once again, do not review this doctor's I-9 or ask for employment authorization, since by doing so you may acquire knowledge of his employment authorization as well as risk having him considered to be your employee. Instead, reaffirm the independent contractor relationship in his contract and have him certify that he is employment authorized and will indemnify the hospital for any sanctions or attorneys' fees resulting from an ICE investigation. It is also good practice to require the doctor to produce an opinion letter from an immigration attorney that his immigration status has been reviewed and that he is indeed authorized to work in the U.S.

In assessing the risk of sanctions by ICE based on illegal workers employed by an independent contractor, you should not rely upon an IRS determination by your filing an SS-8 as to whether an independent contractor relationship exists. In a case litigated in 1993, the court did not follow the IRS determination but instead relied upon the definitions of "employee" and "independent contractor" found in the Aliens and Nationality Chapter of the Code of Federal Regulations:

"The term employee means an individual who provides services or labor for an employer for other wages but does not mean independent contractors as defined in paragraph (j) of this section…

"(j) The term independent contractor includes individuals or entities who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results. Whether an individual or entity is an independent contractor, regardless of what the individual or entity calls itself, will be

determined on a case-by-case basis. Factors to be considered in that determination include, but are not limited to, whether the individual or entity supplies the tools or materials; makes services available to the general public; works for a number of clients at the same time; has an opportunity for profit or loss as a result of labor or services provided; invests in the facilities for work; directs the order or sequence in which the work is to be done and determines the hours during which the work is to be done."

Even if a hospital's independent contractor meets the definition quoted above, the hospital is still liable if it knows or has constructive knowledge of the workers' illegal status, such as it might acquire through examining the individuals' I-9s.

### Some Questions to Determine If Your Hospital Would Survive an ICE Audit

Some initial questions to use in determining whether your hospital would survive an ICE audit are the following:

- When does your HR Department use Form I-9s? Are job applicants completing them as part of the hiring process or once they are hired?
- Is your HR Department copying blank I-9 forms for completion? If so, are they copying a current vs. outdated I-9 and if so, is it complete?
- How are your HR managers and your employees correcting any mistakes or completing any omissions in the I-9?
- How and where does your organization maintain its I-9s?
- Is HR requesting certain documentation from the employee in completing the I-9?
- Is HR copying that documentation, and if so, is it being kept?
- Where is such supporting documentation kept?
- Do you know when an I-9 must be updated or reverified?
- Do you have a "tickler" system for employment authorization documentation that has an expiration date, and if so, do you know how much time you should give an employee to supply current documentation?
- Do you know the I-9 retention rules, and does your organization have a written policy about their retention and destruction?
- If your hospital acquires a business and its employees, do you know if you are liable for errors in the previous owners' I-9s?
- Does your hospital use subcontractors or independent contractors? If so, are you properly protected in the event that a member of its workforce on your premises is illegal?
- Are your managers trained not to treat the independent contractors' workers as employees?
- Can HR easily access and retrieve I-9 documentation if requested by a 72-hour ICE Notice of Inspection?

### Conclusion

The best way to avoid I-9 and related problems is to be pro-active. Don't wait for an ICE Notice of Inspection or worse, an unannounced raid, to deal with defective or missing I-9s or to ascertain exposure through your independent

contractor. To avoid problems with ICE, have clear, consistent I-9 policies in place; conduct your own I-9 internal audit on a regular basis; and review your independent contractor relationships.





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