

Form I-9 Violations Cost Employer \$173,250 in Penalties Even Though No Illegal Aliens Employed

By Sara Goldsmith Schwartz, Schwartz Hannum PC

The United States Department of Justice (“DOJ”) recently imposed a \$173,250 fine on a contractor of drywall services for violations of the federal Form I-9 reporting requirements. This is a stark reminder that failure to implement and maintain a compliant Form I-9 program can be very costly to employers.

The employer in this proceeding was Ketchikan Drywall Services, Inc. (“KDSI”), a seasonal, project-oriented business employing crews of between three and forty workers on projects lasting from a few days to a month. KDSI hired workers for specific projects and laid them off when the projects ended. KDSI recalled workers for other projects if their work was satisfactory.

The United States Department of Homeland Security, Immigration and Customs Enforcement (“ICE” or the “Government”) demanded that KDSI produce the original Form I-9 for each employee who worked for KDSI during the preceding three years. The Government then sought \$286,624.25 in penalties for 271 alleged Form I-9 violations, as follows:

- \$45,581.25 for KDSI’s alleged failure to prepare a Form I-9 for 43 employees;
- \$69,377.00 for KDSI’s alleged failure to ensure that 65 employees properly completed Section 1 of the Form I-9 (in this section, the employee must attest to his or her status in the United States);
- \$115,192.00 for KDSI’s alleged failure to properly complete Section 2 of the Form I-9 for 110 employees (in this section, the employer must attest that specific documents were examined to establish the individual’s identity and eligibility for employment in the United States); and
- \$56,474.00 for KDSI’s alleged failure to properly complete both Section 1 and Section 2 of the Form I-9 for 53 employees.

KDSI requested and obtained a hearing before the DOJ, admitting 130 of the alleged 271 violations and contesting the remainder. KDSI also challenged as unreasonable the penalty sought by the Government.

Upon review of the matter, the DOJ determined that KDSI committed 225 of the alleged 271 violations and

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that an appropriate penalty was \$770 per violation, totalling \$173,250. Acknowledging that the permissible penalties in this case ranged from only \$24,750 (\$110 per violation) to \$247,500 (\$1,100 per violation), the DOJ concluded that KDSI’s penalty belonged in the higher end of this range, *even though no workers were actually found to be unauthorized aliens, and KDSI had no history of previous violations.*

In explaining its decision to award such a large penalty, the DOJ stated that KDSI “[did] not demonstrate a good faith effort to ascertain what the law requires or conform its conduct to it” given that KDSI had delegated its Form I-9 functions “to employees who were not qualified to perform the task.” The DOJ also emphasized that failure to properly complete Section 1 and Section 2 of the Form I-9 “is always a serious violation” and that failure to prepare a Form I-9 at all “is among the most serious of paperwork violations.”

As this case illustrates, the Government is casting a wide net in its search of Form I-9 violations and levying heavy penalties against employers. Accordingly *all* employers should be sure to:

- Complete a Form I-9 for each new employee within three business days of hire;
- Oversee proper completion of both the employee at-

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testation and the employer attestation sections of the Form I-9;

- Keep, with the Form I-9, copies of any documents that the employee produces to establish identity and eligibility to work in the United States (employers are not required to copy the documents they examine, but, if they do, must keep them with the Form I-9);
- Retain the original signed Form I-9 for either three years after the date of hire or one year after the employee's employment is terminated, whichever is later;
- Satisfy the detailed federal regulations covering electronic preparation and storage of Form I-9, if applicable; and
- Maintain the ability to make these forms available to ICE for inspection on three days' notice, as failure to do so is an independent violation of federal law.

An excellent way to get started, or to maintain an existing compliant Form I-9 program, is to provide on- or off-site training to those supervisors, managers and human resources officials involved in the Form I-9 function.

Please feel free to contact us if you have any questions about Form I-9, would like to discuss Form I-9 training for your organization, or need assistance in responding to a Form I-9 audit.



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