

# **BEST PRACTICES: PROTECT YOUR COMPANY REGARDING AUDITS AND EMPLOYMENT LAWS**

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**FOR:**

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**DOL WAGE AND HOUR AUDITS  
ISSUES TO ADDRESS IN SELF-AUDIT**

**BY  
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The Department of Labor Wage and Hour Division has increased the number of wage and hour audits being performed in Phoenix, and have focused on service industries and the construction industry. Employers need to conduct regular self-audits to help ensure that they are in compliance with applicable wage and hour laws. When conducting an internal audit, employers should ensure that they are up to date with any new laws, regulations, or interpretations by the DOL that may impact any of their current practices.

**I. CLASSIFICATION OF WORKERS AS EMPLOYEES OR INDEPENDENT CONTRACTORS.**

DOL released a new interpretation of the employee versus independent contractor standards. Companies who use independent contractors should reevaluate their relationships based on the new interpretation. IRS uses control test; DOL, Wage and Hour Administrator's Interpretation 2015-1, uses economic realities test.

Items to consider: Does Company have a written independent contractor agreement? Does Company have a W-9 on file? Does company have business cards and advertising materials or web pages to support that individual or company holds themselves out to do work for others?

**II. CLASSIFICATION OF WORKERS AS EXEMPT EMPLOYEES UNDER WHITE COLLAR MINIMUM WAGE AND OVERTIME REGULATIONS.**

Companies should review any workers that they have classified as exempt from overtime. DOL believes that approximately 6 million workers are misclassified as exempt.

Working foremen who are using tools and performing work alongside the crews are not exempt employees.

New DOL regulations propose increasing the minimum salary level for the exemption from the current standard of \$455/week or \$23,660/year to \$921/week or \$47,892/year, which would be adjusted annually. Final regulations will likely be published in late 2016, and the salary level may be even higher, because DOL may increase the proposed salary level to reflect an annual increase for 2016. The proposed minimum salary level—which is more than twice the current salary level—is equal to the to the 40<sup>th</sup> percentile of weekly earnings for full-time salaried workers based on 2013 data. DOL estimates that 11 million more workers will begin being paid overtime under the new regulations (5 million newly exempt employees and 6 million employees currently misclassified as exempt). Employers should plan ahead on how to deal with transitioning employees from exempt to non-exempt status.

**III. TIMECARDS SHOWING ALL HOURS WORKED – STARTING TIME AND STOPPING TIME, MEAL BREAKS, TRAVEL TIME.**

Timecards or time sheets should reflect all hours worked and should include the starting time and the stopping time, time out for meal breaks, and travel time in a separate entry if paid at a separate rate.

**IV. MINIMUM WAGE - \$7.25/HOUR NATIONALLY; \$8.05/HOUR IN ARIZONA, ADJUSTED ANNUALLY ON JANUARY 1, 2015 – AND OVERTIME OVER 40 HOURS PER WEEK.**

All non-exempt employees should be receiving no less than the minimum wage for all hours worked and overtime for hours over 40 hours in a single workweek.

Overtime is 1.5 times the regular rate, which may include bonuses, piece rate, etc.

The regular rate is an equivalent hourly rate of pay, regardless of how the employee is generally paid. To obtain the regular rate, divide all compensation received for the work week by the number of hours actually worked during the work week. When calculating the regular rate, an employer must include all forms of compensation, including any non-discretionary bonuses, tips and room and board; may exclude discretionary bonus, expense reimbursement, and payments for time not worked (vacation, etc).

**V. PIECE RATE WORKERS – RECORDS, MINIMUM WAGE, AND OVERTIME.**

Piece rate workers are non-exempt. The company must keep records of all hours worked by the piece rate workers and ensure that the piece rate is equal to at least minimum wage for all hours worked.

Overtime for piece rate workers is in ADDITION to the piece rate. OT is equal to an additional half times the regular rate, which is the total piece rate for the week (plus any performance bonus) divided by the total hours worked in the work week. OT is an additional half-time, not time-and-a-half, because the straight time has already been paid as part of the piece rate.

The piece rate must be established before the work is performed. Employers cannot back into a piece rate based on the hours worked or whether overtime was worked.

**VI. PAYMENT OF TRAVEL TIME.**

Regular home-to-work or work-to-home commute is not required to be paid.

Special one-day trips outside of the normal commuting area – travel in excess of regular commute must be paid.

Overnight trips – driver must be paid for all hour; passengers must be paid for time that falls within the regular working hours (regardless of the day of the week – e.g. if work is usually 6:00 am to 3:00 pm, then any travel that occurs between 6:00 am to 3:00 pm any day of the week, even weekends).

All travel between job sites during the day must be paid working time.

**VII. REST AND MEAL PERIODS**

Meal periods must be 30 minutes or more with no work responsibilities if they are unpaid. The meal periods should be on the time cards. Employers should not make automatic deductions for meal breaks.

**VIII. PAYROLL DEDUCTIONS AND PAYROLL DEDUCTION AUTHORIZATION FORMS**

Employers should use payroll deduction authorization form that specifically authorizes any deductions that an employer is going to take.

The only deductions that should be made are those required by law, i.e. taxes, social security, garnishments, and those deductions specifically authorized by employee in writing.

Deductions for tools, uniforms, or damages are strictly scrutinized by DOL. They may not be made if doing so brings the employee below minimum wage (and applicable overtime) for the work week.

**IX. USE OF H2B WORKERS.**

The Phoenix DOL Wage and Hour Office currently has an initiative to review employers who use H2B workers. DOL is focusing on whether the H2B workers are performing work outside of the classification for which their H2B visa was approved and whether they are being paid the correct prevailing wage for the type of work being performed. Companies using H2B workers need to ensure that they are properly classified and paid. Additionally, employers with H2B workers are required to keep certain records in a “public access” file that must be made available to DOL within 72 hours.

**X. FEDERAL CONTRACTOR DAVIS-BACON WAGES AND REPORTS.**

Federal contractors must pay the prevailing wage in the local area for the type of work being performed. Wages are set forth in a prevailing wage determination.

Wages must be paid weekly, even if employer usually pays bi-weekly. Employers must complete a certified payroll report showing the hour worked, wages, fringe benefits, deductions, and total pay for employees working on federal contracts.

OT is 1.5 times the base wage, not including the fringe requirements. The fringe rate is then added to the OT rate to determine the rate paid for OT hours.

All subcontractors on the federal project should have a written subcontract that contains the Davis-Bacon or Davis-Bacon Related Acts prevailing wage contract provisions.

**XI. FEDERAL CONTRACTOR CLASSIFICATION OF WORK PERFORMED.**

Proper classification of the work being performed is essential. DOL generally frowns on the use of the general laborer classification for any work that could be performed by another classification within the wage determination.

The classification should be the same one used by other contractors in the area. Therefore, if the work is generally performed by a “painter” or a “taper” then the employer cannot use the “laborer” classification on the prevailing wage determination.

If unsure of the classification or no classification applies, federal contractor should consult with DOL and/or request wage conformance.

DOL has recently also suggested that employers should consult with the unions if the prevailing wage is a union rate to determine how the union classifies the work being performed.

**INDEPENDENT CONTRACTOR V. EMPLOYEE  
NEW DOL GUIDELINES AND IRS GUIDELINES**

**BY  
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Audits are happening about classification of workers by IRS, DOL, and DES. For the last several years, the DOL has had a campaign focusing on the misclassification of workers as independent contractors. Although this focus has been ongoing for the last several years, it was not until 2015 that DOL issued new guidance on how it will interpret the independent contractor tests and factors. The impact of the new regulations will be that DOL will find more and more workers are employees, rather than independent contractors.

**I. 7/15/15 DOL ADMINISTRATOR'S INTERPRETATION 2015-1 (AI NO. 2015-1) - ECONOMIC REALITIES TEST**

1. Whether the work constitutes an integral part of the hiring party's business.
2. Worker's opportunity for loss or profit depending on his or her own managerial skill.
3. Investment made by the worker.
4. The permanency of the arrangement.
5. The skill, training or certifications required for the work.
6. Degree of control exercised or retained by the hiring party.

The overall theme of AI 2015-1 is whether the worker is economically dependent on the employing company. If the worker is economically dependent on the company, DOL is likely to consider the individual an employee, rather than an independent contractor.

**II. IS THE WORK BEING PERFORMED INTEGRAL TO THE COMPANY'S BUSINESS?**

1. If the work being performed is integral to the company's business, this suggests that the individual is an employee.
2. Carpenter at framing company is integral as opposed to computer programmer developing software for construction company.

**III. DOES THE WORKER'S MANAGERIAL SKILL AFFECT THE WORKER'S OPPORTUNITY FOR PROFIT OR LOSS?**

1. Yes suggests independent contractor.

2. Worker providing cleaning services for corporate clients as directed by company who does not schedule own work, does not solicit additional work from other clients, and only makes more or less money based on hours worked is likely employee;
3. A worker who provides cleaning services for different corporate clients, advertises their services, decides which jobs to perform and when, decides to hire helpers or not, solicits new clients, etc. is exercising managerial skill affecting the opportunity for profit or loss and is more likely independent contractor.

**IV. HOW DOES THE WORKER'S RELATIVE INVESTMENT COMPARE TO COMPANY'S INVESTMENT?**

1. Independent contractor makes significant investment and have risk of loss.
2. Worker providing cleaning services and the company provides vehicle, insurance, and supplies, even though worker occasionally provides supplies or tools, is likely an employee.
3. Worker providing cleaning services who rents an office location, provides vehicles and insurance, regularly provides her own equipment and supplies, and brings her own equipment to the job site for every job is making an investment more like an independent contractor.

**V. DOES WORK REQUIRE SPECIAL SKILL AND INITIATIVE?**

1. AI 2015-1 "Use of special skills is not itself indicative of independent contractor status, especially if the workers do not use those skills in independent way."
2. Highly skilled carpenter providing core services of construction company who is following the processes and procedures of the company, even though skilled, is likely an employee.
3. A highly skilled worker making handcrafted custom cabinets that are made to order and who provides these cabinets to multiple different companies, who determines which orders to take, which order to perform the work, when to order materials and quantity of materials to order, may be demonstrating the skill and initiative of an independent contractor.

**VI. IS THE RELATIONSHIP BETWEEN THE WORKER AND THE EMPLOYER PERMANENT OR INDEFINITE?**

1. Indefinite or permanency suggests employee.
2. AI 2015-1 "The key is whether the lack of permanence or indefiniteness is due to 'operational characteristics intrinsic to the industry' (for example,

employers who hire part-time worker or use staffing agencies) or the worker's 'own business initiative.'”

3. For several years, editor edits only books provided by one publishing house and edits are in accordance with the publishing house's specifications using the publishing house's software. This level of permanence suggests employee.
4. Editor worked intermittently with 15 different publishing houses over the past several years, markets herself to multiple companies, negotiates each separate publishing job, and turns down work for any reason. The lack of permanence or ongoing relationship suggests independent contractor.

#### **VII. WHAT IS THE NATURE AND DEGREE OF THE EMPLOYER'S CONTROL?**

1. DOL has stated that this factor plays a limited role in the totality of the evaluation.
2. A worker's control over their hours (flexible scheduling) or working from home do not indicate that the employer lacks control.
3. Control exercised over a worker due to the nature of the business, regulatory requirements, or customer satisfaction issues still indicates employee status. Reason for exercising control not relevant.
4. Registered nurse who provides services through a registry only after being interviewed by the registry and being trained by the registry, follows the hours and wages set by the registry, and must notify the registry before contacting a client. This degree of control is indicative of an employment relationship.
5. Registered nurse who is listed in Registry but selects each week which clients to contact, may do as many or as few clients as she wants, and negotiates her own wage rate and schedule with the clients, indicates that the registry is not exercising the degree of control that is usual for an employment relationship.

#### **VIII. IRS INDEPENDENT CONTRACTOR GUIDELINES**

1. Behavioral Control
  - (a) Instructions on when, where and how to reach result v. just establishing result.
  - (b) Training in particular manner of accomplishing result.
2. Financial Control
  - (a) Whether worker has unreimbursed expenses.
  - (b) Whether worker makes a significant financial investment.

(c) Whether worker is free to provide services to other companies as well.

(d) The extent to which the worker can make a profit or loss.

3. Type of Relationship.

(a) Whether there is a written contract.

(b) Whether the company provides the worker benefits.

(c) The permanency of the relationship.

(d) The extent to which the services are in integral part of the regular business activity.

**CHECKLIST OF AUDIT ITEMS  
REGARDING I-9 AND IMMIGRATION COMPLIANCE**

**BY  
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**I. IMPORTANCE OF A FULLY COMPLETE I-9 AND INTERNAL AUDIT.**

During an I-9 audit, one of the best defenses that a Company can have is a fully complete I-9 for every employee hired on or after November 6, 1986. Employers should regularly conduct an internal I-9 audit and ensure a the company has complete and accurate I-9 information. Some of the things to look for when reviewing I-9s include, but are not limited to:

1. Does the Company have a Form I-9 for every current employee hired on or after November 6, 1986? This should include owners who are drawing a salary from the company. Always keep the I-9s for current employees, regardless of how old the I-9 form is.
2. Does the Company have a Form I-9 for former employees consistent with the I-9 retention rules?

To determine how long to keep an employee's Form I-9, an employer can use the following formula:

1. Enter date employee started work: \_\_\_\_\_
  - Add 3 years to Line 1.      A. \_\_\_\_\_
2. Termination date: \_\_\_\_\_
  - Add 1 year to Line 2      B. \_\_\_\_\_
3. Which date is later: A or B? Enter later date here. C. \_\_\_\_\_  
Store Form I-9 until this date.

3. Is Section 1 fully complete with the employee's demographic information, including the employee name, address (no P.O. boxes), date of birth, Social Security number?

The name as it is entered on the Form I-9 should also be used for payroll purposes. If Jose Montoya Sanchez uses the name Jose Sanchez on the Form I-9, the company should not use Jose Montoya for payroll.

4. Did the employee check an attestation box in Section 1 identifying their immigration or citizenship status? If they checked "lawful permanent resident" did they include A#? If they checked "alien authorized to work until \_\_\_\_\_" did they include the expiration date of their work authorization and their A# or other information?
5. Did the employee sign and date Section 1?

6. On a two-page I-9, did the Company representative write the employee's name at the top of the page, as it appears in Section 1?
7. Do the documents match the attestation in Section 1? For example, if individual checked "alien authorized to work" and presented a lawful permanent resident card, the company representative should ask them to clarify their status.
8. Is document information fully completed under EITHER List A or List B and List C (not all of them) including name of document, issuing authority, number, and expiration date?
9. Is the employee's date of hire listed in Section 2?
10. Did the employer representative complete their name and position and the company name and address in Section 2?
11. Did the employer representative sign and date Section 2?
12. If the individual is an "alien authorized to work until \_\_\_\_\_," was the I-9 updated in Section 3 (or a new I-9 completed) when the temporary work authorization expired?

It is imperative for employers to have a system to track the employment authorization for individuals whose work authorization is temporary to ensure that the company obtains updated work authorization information on or before the date that the work authorization expires. If an employer allows an employee to work past the expiration of their temporary work authorization, the employer can be charged with knowingly employing undocumented workers.

Generally, if a mistake occurs on a Form I-9, the company should do a new I-9 and staple it to the original I-9. Do not get rid of the original I-9! Even though the original I-9 may contain errors, it is the employer's proof that the company completed an I-9 at the time of hire and must be maintained with the corrected I-9.

There are some corrections that can be made on the Form I-9 by making a single mark through the incorrect information, writing in the correct information, then initialing and dating the changed information. The employee should correct any information in Section 1, while the employer representative can correct Section 2. Never use white-out or scribble through information on an I-9 form. To determine if a new I-9 is required or if corrections can be made on the existing form, consult with legal counsel.

## **II. RESPONDING TO AN ICE AUDIT OF THE FORMS I-9.**

When ICE initiates an audit, it will generally provide a Notice of Inspection and Subpoena for records. The employers are provided with at least three (3) business days to produce the Forms I-9. Employers should not waive the three business day notice. ICE often will give the employer the opportunity to waive the three business days and turn over Forms I-9 to ICE at that time. Waiving the three day notice is not recommended because the audit process

can be complicated and delicate. The employer should not rush to turn over documents before the three days expires.

**A. NOTICE OF INSPECTION.**

In addition to the Form I-9, ICE will generally request a list of current employees, a list of former employees within the I-9 retention time period, corporate information, business licenses, unemployment quarterly reports, copies of payroll records, W-9s or independent contractor agreements for independent contractors, and E-Verify information. The following are some considerations before turning I-9s and other documents over to ICE:

1. Consider working with legal counsel and having legal counsel review and provide the documents to ICE.
2. Make copies of all Forms I-9 and records provided to ICE.
3. Do an internal review to ensure that there are I-9s for all current employees and all former employees that are within the I-9 retention period. Consult with legal counsel if you identify potential issues.
4. If ICE wants to interview employees, consult legal counsel. Generally managers and supervisors should have the company's legal counsel present.
5. If ICE interviews employees, employees have the right to:
  - a. Tell the agent that the employee does not wish to be interviewed at this time and ask them to schedule the interview with the company's attorney;
  - b. Speak to the agent with the company's counsel present;
  - c. Speak to the agent with private counsel present; or
  - d. Speak to the agent. If the employee does decide to speak with the law enforcement agent, obviously the employee must be truthful, accurate, and complete.

**B. RESULT OF ICE AUDIT.**

After the ICE auditor has concluded the inspection of the employer's Forms I-9 and other requested documents, there are three possible notices that the employer may receive.

**1. Notice of Technical or Procedural Failures.**

This document identifies technical violations identified during the inspection, often referred to as "paperwork violations." The employer is then given ten (10) business days to correct the forms. Uncorrected violations may result in fines or penalties being imposed.

**2. The Notice of Suspect Documents.**

This document advises the employer that based on a review of the Forms I-9 and documentation submitted by the employee, ICE has determined that an employee is unauthorized

to work. The Notice of Suspect Documents also advises the employer of the possible criminal and civil penalties for continuing to employ that individual, therefore, the Company should meet with the employee. The employee must be given a right to contest as explained below. Currently, the Notice allows the employer up to 10 days from the date of receipt of the Notice of Suspect Documents to terminate the individuals identified in the Notice.

ICE may make mistakes. Therefore, it is important that the company meet with the employee who is on the Notice of Suspect Document and provide them with the opportunity to contest ICE's determination and to provide additional information for review by ICE. If ICE receives additional information, it may be able to verify that the person is in fact work authorized.

### **3. Notice of Discrepancies.**

The Notice of Discrepancies is provided when the information on the Form I-9 cannot be verified or is slightly different than the DHS records, and ICE wants additional information from the employee to clarify the discrepancy. ICE provides a notice to the employer to provide to the employee. The employee has to sign the notice and provide additional information or documents to ICE to allow ICE to clarify the discrepancy. For example, a Notice of Discrepancy may be provided if the DL number on the I-9 Form is one digit off of the DL number listed in state records, which may be a typographical error on part of the Company. The employee on the Notice of Discrepancies is allowed to keep working until ICE resolves the discrepancy and either confirms that the person is work authorized or moves them to the Notice of Suspect Documents.

### **4. Warning Notice of Notice of Intent to Fine.**

The final step in the ICE audit is the Notice of Intent to Fine or Warning Notice. ICE issues a Warning Notice if there were some small issues with the I-9 but not a significant number and ICE does not intend to issue fines. The Notice of Intent to Fine identifies all the I-9s that ICE identified with substantive errors and the proposed penalty for each. An employer may appeal the Notice of Intent to Fine and obtain a hearing before an Administrative Law Judge. Companies can also often negotiate settlements and pay an amount less than the proposed fines.

**CHECKLIST OF AUDIT ITEMS  
REGARDING E-VERIFY**

**BY  
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**I. ENROLLING IN E-VERIFY.**

E-Verify is an internet-based program that is jointly administered by the Social Security Administration (SSA) and the Department of Homeland Security (DHS) that checks the information employers enter from an employee's I-9 against the SSA and DHS database and informs employers whether the individual is work authorized or whether there are discrepancies in the records. Nationally, E-Verify is a voluntary program. Under the Legal Arizona Workers Act, Arizona employers are required to use E-Verify for all employers hired on or after January 1, 2008.

**A. ENROLL IN E-VERIFY ELECTRONICALLY AND COMPLETE MEMORANDUM OF UNDERSTANDING AND TRAINING.**

Employers may process E-Verify queries directly or hire a third-party administrator to process E-Verify for the Company. Before using E-Verify, employers must enroll online at <https://e-verify.uscis.gov/enroll/>. Employers are required to electronically sign a Memorandum of Understanding (MOU) that sets out the rules relating to the E-Verify program.

Any employee who will be using E-Verify must complete an online training course and complete a test online before they can be provided access to E-Verify.

**B. COMPLY WITH THE E-VERIFY MOU AND DO NOT DISCRIMINATE.**

Violations of the MOU may result in a company being prohibited from using the E-Verify system. Additionally, violations of the MOU may result in charges of discrimination being filed with the Department of Justice Civil Rights Division Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) enforces the non-discrimination provisions of the Immigration and Nationality Act. Employees who believe that a company has used E-Verify in a discriminatory manner may file a complaint with the OSC, who has received a growing number of E-Verify complaints since states, such as Arizona, have mandated its use.

An employer could be subject to a discrimination charge if it uses E-Verify as a pre-screening tool to verify work authorization of applicants. It could also be subject to a discrimination charge for failing to provide the employee the notice of tentative nonconfirmation and right to challenge the tentative nonconfirmation, selectively using E-Verify, using E-Verify to verify work authorization of existing employees or taking adverse action based on a tentative nonconfirmation. The following is a list of "E-Verify Employer DOs and DON'Ts" from the OSC.

## **DO**

- Use program in a non-discriminatory manner, without regard to the national origin or citizenship status of your employees
- Use program for new employees after they have completed the I-9 Form
- Promptly provide and review with the employee the notice of tentative nonconfirmation
- Promptly provide the referral notice from the Social Security Administration (SSA) or Department of Homeland Security (DHS) to the employee who chooses to contest a tentative nonconfirmation
- Allow an employee who is contesting a tentative nonconfirmation to continue to work during that period
- Check E-Verify daily for updates in connection with the tentative nonconfirmation
- Contact E-Verify if you believe an employee has received a final nonconfirmation in error
- Display the required E-Verify participation poster and the required antidiscrimination poster issued by the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC)

## **DON'T**

- Use program to verify any employee hired on or before November 6, 1986
- Use program to verify current employees, unless permitted as a federal contractor
- Use program for an existing employee previously verified through E-Verify at the time of hire, even as a federal contractor
- Use program selectively based on a “suspicion” that an employee may not be authorized to work in the U.S. or based on national origin
- Use program to pre-screen employment applicants unless you are a State Workforce Agency
- Influence or coerce an employee’s decision whether to contest a tentative nonconfirmation
- Terminate or take adverse action against an employee who is contesting a tentative nonconfirmation, including denying or reducing scheduled hours, delaying or preventing training, mistreating the employee, requiring the employee to work longer hours, requiring the employee to work in poorer conditions, refusing to assign the employee to work on a federal contract or other job, or subjecting the employee to any assumption that s/he is unauthorized to work during this period, unless and until receiving a final nonconfirmation or no show response
- Ask an employee to obtain a printout or other written verification from SSA or DHS when referring that employee to either agency

**DO**

- Accept any Form I-9 List B document with a photo from an employee who chooses to provide a List B document
- Secure the privacy of employees' personal information and the password used for access to the program
- Delay running an E-Verify query for an employee who has not yet been issued a Social Security number until the Social Security number is issued
- Allow an employee who has not been issued a Social Security number to work throughout the period that the employee is waiting for his or her Social Security number to be issued

**DON'T**

- Ask an employee to provide additional documentation of his or her employment eligibility after obtaining a tentative nonconfirmation for that employee
- Request specific documents in order to activate E-Verify's photo tool feature
- Run an E-Verify query for an employee who is waiting for his or her Social Security number to be issued until the employee is issued a Social Security number
- Require an employee to use E-Verify Self Check or present any E-Verify Self-Check documentation

**II. REQUIREMENTS OF E-VERIFY.****A. COMPLETE A FORM I-9 AND INITIATE E-VERIFY FOR NEW HIRES WITHIN THREE (3) DAYS AFTER DATE OF HIRE.**

Within three days after the date of hire, an employer must enter the information from the Form I-9 into the E-Verify system. The SSA and USCIS verify the information and if the information matches the SSA and USCIS data, the system will return an "Employment Authorized" result. If E-Verify provides an "Employment Authorized" result, print the result and staple it to the Form I-9 and no further action is required. If the information does not match the USCIS and SSA data,

**B. IF TNC, MEET WITH EMPLOYEE TO PROCESS TENTATIVE NON-CONFIRMATION AND FURTHER ACTION NOTICE.**

After the employer receives a tentative non-confirmation (TNC) from either the SSA or USCIS, it should first check to see that all information was entered correctly. If the non-confirmation did not result from a typographical error that the employer can fix, the employer must provide the employee with a written notice entitled "Further Action Notice" ("FAN"). The FAN notifies employee of a TNC and right to contest.

The employer must print the notice. If there is no copier available, the employer should print two copies, because the employer must provide one copy to the worker and must have one copy for its own records. The worker must indicate on the notice whether he or she intends to challenge the TNC. Both the employee and the employer must sign the FAN.. One signed copy of the notice should be given to the employee. The employer should retain the other signed copy of the FAN with the individual's Form I-9. Failure to give a signed copy of the FAN may result

in a charge of discrimination against the employer if the employee alleges that he or she was not informed of the tentative non-confirmation.

If the employee is challenging the non-confirmation, the employer is required to select "refer case" and print a second notice called a "Referral Date Confirmation," that contains the date on which the referral is made and the date by which the employee must address the tentative non-confirmation. The employer should keep provide a copy of the Referral Date Confirmation to the employee and keep one for its files, attached to the employee's Form I-9. If the employee does not challenge the TNC, then the employer can close terminate the individual's employment and close the case.

**C. EMPLOYEE HAS EIGHT WORKING DAYS; SSA & DHS HAVE TEN WORKING DAYS TO RESOLVE DISCREPANCY.**

The employee has eight (federal government) working days after receiving the referral letter from the employer to contact the SSA or DHS to try to resolve the discrepancy. The employee is to keep working during this time. The employer must treat this employee the same as it treats employees who received an automatic work authorization and cannot delay the employee's start date or training opportunities based on a tentative nonconfirmation.

The SSA or DHS has ten working days to resolve the case after it receives the referral from the employer, which occurs electronically when the employer provides the employee with a "referral letter." If more time is needed, the employer will receive a "case continuance" notice. The entire procedure is designed to provide a final confirmation or final nonconfirmation within ten business days after the employer enters the information in E-Verify, but this does not always occur.

**D. FINAL NONCONFIRMATION REQUIRES EMPLOYER ACTION.**

If an employee does not challenge a tentative nonconfirmation, the nonconfirmation becomes final. After a nonconfirmation becomes final, the employer must either terminate the individual's employment or notify DHS if it continues to employ an employee after receiving a final nonconfirmation. An employer is subject to fines of \$500-\$1,000 for each failure to notify the DHS that it continued to employ the individual. If the employer continues to employ an individual after a final nonconfirmation, the employer is subject to a rebuttable presumption that it has knowingly employed an unauthorized alien.

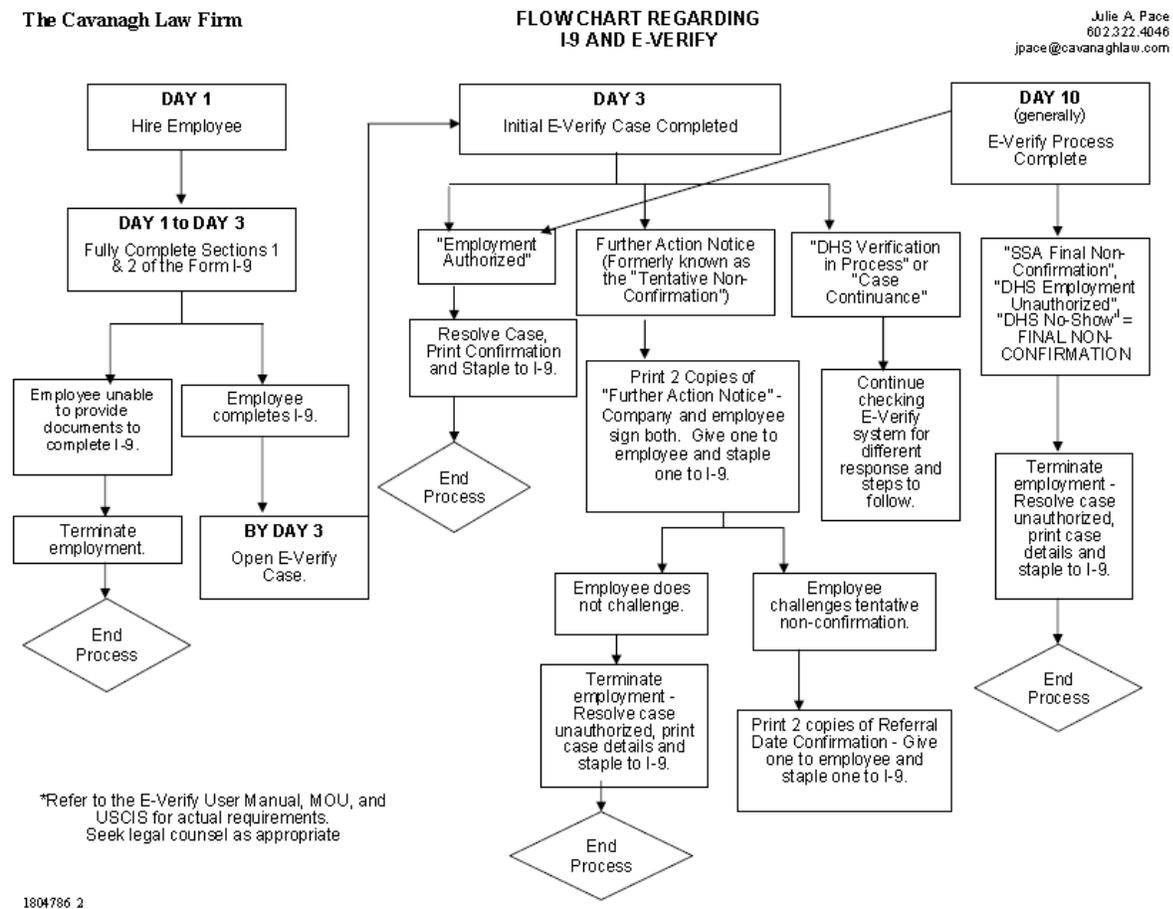
**E. EMPLOYER CANNOT TAKE ACTION AGAINST EMPLOYEE WHO IS CONTESTING TENTATIVE NONCONFIRMATION.**

An employer is prohibited from taking adverse employment action against an employee who is contesting a tentative nonconfirmation. The employee should continue to work during the window of ten business days with which the SSA or DHS has to resolve the discrepancy. The employer cannot treat the employee who is contesting a tentative nonconfirmation any differently than the employee who gets an initial confirmation. If the employee is not challenging the nonconfirmation, the employer should terminate the individual's employment or report to DHS it is not terminating the individual's employment after the nonconfirmation.

An employee cannot face any adverse employment consequences based on a tentative nonconfirmation. An employer may not delay the employee's start date, delay training, or otherwise treat an employee with a tentative nonconfirmation differently than an employee that received an instant confirmation. An employer cannot speed up an agreed-upon start date based on a confirmation from E-Verify, because this would be disparate treatment of employees based on results from E-Verify. If the employer generally offers training to employees in the first ten days of employment, it must provide the same training to the employee with the tentative nonconfirmation.

### III. E-VERIFY FLOWCHART.

The E-Verify steps and timing of the steps are summarized in the flow-chart below.



**CHECKLIST OF AUDIT ITEMS  
REGARDING EMPLOYMENT POLICIES AND HANDBOOKS**

**BY  
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**I. TYPES OF POLICIES TO INCLUDE IN HANDBOOK**

1. Anti-Harassment, Anti-Discrimination, and No Retaliation
2. Equal Employment Opportunity
3. At-Will Employment
4. Employee Code of Conduct
5. Discipline
6. Constructive Discharge;
7. Drug and Alcohol
8. Safety
9. Workplace Violence
10. Smoking
11. Computer, Internet and Social Networking
12. Surveillance and Monitoring
13. Searches
14. Attendance and Tardiness
15. Leaves of Absences
  - a. FMLA
  - b. USERRA
  - c. Discretionary
16. Confidentiality
17. Conflicts of Interest

18. Non-Compete, Anti-Solicitation, Anti-Raiding, and Anti-Pirating
19. Immigration and E-Verify
20. Payroll Policies
  - a. Hours of Work and Time Records
  - b. Rest and Meal Breaks
  - c. Paydays
  - d. Final Payment
  - e. Overtime
  - f. Minimum Wage Reporting Policy
  - g. Payroll Deductions
  - h. Wage Attachments
21. Benefits
  - a. Benefits
  - b. Holidays
  - c. Vacation
  - d. Personal Days
  - e. Jury Duty
  - f. Military Leave of Absence
  - g. Crime Victim Leave of Absence
22. Personal Appearance/Dress Code
23. Workers' Compensation/Return to Work
24. Grievance and Alternative Dispute Resolution
25. Employee Acknowledgment Forms

## **II. NLRB IMPACT ON HANDBOOK POLICIES.**

In recent years, the National Labor Relations Board ("NLRB") has taken aim at employer handbooks. Standard polices, like a confidentiality policy, if not carefully drafted, have been

interpreted by the NLRB as having a chilling effect on the Section 7 rights of employees. Section 7 provides that employees have the right to take concerted activity (including communications) relating to the terms or conditions of employment. Therefore, in order to avoid an unfair labor practice charge, it is important to carefully draft and revise policies with an eye towards a possible NLRB challenge. Policies that have been challenged include but are not limited to:

**A. CONFIDENTIALITY POLICIES**

Care must be taken to ensure that confidentiality policies are not so broadly worded that they prohibit employees from discussing the terms and conditions of employment, including but not limited to wages, benefits, and working conditions. A generic prohibition on disclosing “company information” has been found to be unlawful. Definitions or examples of confidential information are favored by DOL.

**B. SOCIAL MEDIA POLICIES**

Employers need to ensure that their social media policy is limited in the same manner as the confidentiality policies. Additionally, prohibitions against making negative comments about the company or managers have been found to be unlawful. Policies that prohibit false and malicious statements have been upheld.

**C. POLICIES PROHIBITING GOSSIP OR DISPARAGING REMARKS OR POLICIES REGARDING POLITENESS OR NOT BEING RUDE**

The NLRB has struck down an overboard no gossip policy and noted that policies that prevent employees from talking about another's personal life when the individual was not present or an individual's professional life without the individual's supervisor present would restrict employees from discussing the terms and conditions of employment and chill their right to engage in concerted activities. A policy that an employee is expected to work in a cooperative manner with management/ supervision, co-workers, customers, and vendors has been upheld.

**D. NO SOLICITATION/NO DISTRIBUTION POLICIES.**

Employers cannot have a blanket policy prohibiting solicitation or distribution by employees, although they can prohibit most third party solicitation/distribution as long as the rule is equally applied. Employees can be prohibited from solicitation during their working time (which does not include breaks) or distributing materials during working time or in work locations (which would not include a break room). Policies should be applied uniformly relating to all types of solicitation or distribution. If employees are allowed to solicit sales for a child's fund raiser or a sports pool but are prohibited from soliciting fellow employees for union membership, this may result in an unfair labor practice charge.

**E. AT-WILL POLICIES.**

An at-will policy that does not allow for any exceptions has been found to be overly broad, because it does not allow for the possibility that the employee's will become represented by a union and have negotiated employment rights.

### **III. POSTERS**

Below is a list of employment-related postings required at the workplace.

#### **A. POSTINGS REQUIRED BY FEDERAL LAW**

1. Fair Labor Standards Act and Federal Minimum Wage Poster;
2. Family and Medical Leave Act (if 50 employees or more);
3. Employee Polygraph Protection Act
4. Equal Employment Opportunity
5. Job Safety and Health (OSHA);
6. Uniformed Services Employment and Reemployment Rights Act (USERRA); and
7. E-Verify, if applicable.

#### **B. POSTINGS REQUIRED BY ARIZONA**

1. Discrimination is Prohibited in Employment;
2. Employee Safety and Health Protection by Arizona Division of Occupational Safety & Health (ADOSH);
3. Work Exposure to Bodily Fluids;
4. Workers' Compensation Notice;
5. Work Exposure to Methicillin-resistant Staphylococcus Aureus (MSRA), Spinal Meningitis, or Tuberculosis (TB)
6. Arizona Minimum Wage Notice;
7. Notice to Employees you are Covered by Unemployment Insurance;
8. No Smoking Poster; and
9. Constructive Discharge.

**CHECKLIST OF AUDIT ITEMS  
REGARDING DRUG AND ALCOHOL POLICIES**

**BY  
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**I. BENEFITS OF DRUG & ALCOHOL FREE WORKPLACE POLICY.**

Drug and alcohol abuse has caused American businesses to lose an estimated \$100 billion annually due to accidents, health care costs, lost productivity, and liability. It is estimated that the rate of accidents for drug users is 16 times that of nonusers.

Drug testing employees can provide numerous benefits to employers, including potentially reducing the number of workplace accidents, increasing employee productivity, and lowering health and liability insurance. Workers compensation carriers may offer a discount to employers who maintain a drug and alcohol free workplace policy and program.

Unlike some states, Arizona provides employers wide discretion in establishing drug and alcohol free workplace policies. There are no mandatory requirements for drug and alcohol testing policies. If, however, employers wish to obtain the protections against lawsuits that are provided by the Arizona Drug Testing Statute, then the employer must adopt a written drug and alcohol policy and a drug testing program that meets the requirements of the statute. Three of the significant benefits of the law are that employers who follow the guidelines in the statute will be protected against:

1. lawsuits filed by employees who were disciplined or discharged because of a positive drug test;
2. lawsuits filed by employees who disagree with test results or lawsuits based on false positive test results, unless the employer knew or clearly should have known that the result was error and ignored the true test result because of reckless or malicious disregard for the truth or the willful intent to deceive; and
3. claims for unemployment compensation filed by discharged employees, whether they were discharged for refusal to take a test or because of a positive test.

A 2011 amendment to the Arizona drug testing statute, designed to address the Arizona Medical Marijuana Act, among other changes, also protects employers against lawsuits based on actions taken by the employer based on the good faith belief that an employee used or possessed drugs during work or when on the employer's premises or were impaired at work. It also protects employers from lawsuits based on actions taken to exclude an employee from performing safety sensitive functions when the employer acts on a good faith belief that an employee is engaged in the current use of any drug, legal or illegal, if the drug could cause impairment.

## **II. ELEMENTS OF A DRUG AND ALCOHOL FREE WORKPLACE AND TESTING**

To satisfy the Arizona Drug Testing Statute and obtain the protections against litigation, a drug testing program must address the following elements:

### **1. Persons subject to testing.**

Any person in the service of the employer, including management and officers, must be subject to the drug and alcohol testing policy.

NOTE – Federal DOT regulations establish drug and alcohol testing rules for Commercial Drivers License Drivers. DOT can impose fines of up to \$10,000 for failure to comply with the DOT drug testing requirements.

### **2. Costs of the test.**

The employer must pay all actual costs of the testing of current employees. The employer may, but is not required to, pay the costs for drug testing of prospective employees. In addition, the employer must pay reasonable transportation costs to current employees if the required tests are conducted at a location other than the employee's normal work site.

### **3. Written Policy.**

In order to benefit fully from the protections of the law, the employer must prepare and distribute a written policy before conducting any testing. A.R.S. § 23-493.04. The statute requires that the policy contain certain specific items, including, but not limited to:

- a. a description of which employees will be subject to testing;
- b. the circumstances under which testing may be required;
- c. the substances for which tests may be given;
- d. a description of the testing methods and collection procedures to be used;
- e. the consequences for refusal to submit to a test and the potential adverse action based on results of the test;
- f. the rights of the employer to obtain the written test results and to explain a positive result in a confidential setting; and
- g. the employer's policy regarding confidentiality of the results.

### **4. Type of Testing.**

An employer may require random testing, as well as testing for any job-related purpose consistent with business necessity, such as pre-hire testing, post-accident testing, reasonable

suspicion testing, testing of all employees in a job category in order to promote safety, or testing of all employees to maintain productivity, quality, or security.

## **5. Consequences of Positive Test Result.**

The employer's written policy should define the consequences of a positive test result. Such consequences can include termination of employment, suspension without pay, or rehabilitation and counseling with follow-up drug testing.

### **(a) Confidentiality.**

An employer must keep the drug and alcohol testing result information confidential. Additionally, the employee has a right to obtain a copy of the test result, and to explain a positive test result to the employer in a confidential setting.

### **(b) Testing Methods.**

Testing may be based on samples of urine, blood, breath, saliva, hair, or other substances. The sample collecting and testing must be performed under reasonable and sanitary conditions, with scientifically accepted analytical procedures, by a laboratory approved or certified by the U.S. Department of Health and Human Services, the College of American Pathologists, or the Arizona Department of Health Services.

### **(c) Diluted Test Results.**

An employer's policy should define the actions that it may take if the test results are inconclusive or diluted. Employers faced with an inconclusive test result based on dilution have several options. Employers may elect to immediately retest the individual, along with instructing the employee to drink less water or refrain from using a diuretic for at least 24 hours, subject to the individual's medical condition. Alternative, the employer may require a different type of specimen from the employee, *i.e.*, hair, saliva, or blood.

## **6. Medical Marijuana Cards.**

An employer's policy should include statements to address compliance with the Arizona Medical Marijuana Act. The Arizona Drug Testing Statute was amended in 2011 to address medical marijuana. A.R.S. 23-493 *et seq.*, protects employers against lawsuits if the employer terminates or take other adverse action against an employee in a safety sensitive position based on a good faith belief that the employee used, possessed or was impaired by medical marijuana or was impaired by another drug while at work. A good faith believe must be based on facts such as observed conduct or behavior, reports by reliable third parties, results of drug or alcohol tests, lawful video surveillance, and other reliable information.

**KEY LIST OF ITEMS REGARDING  
EEOC AND ACRD CHARGES OF DISCRIMINATION**

**BY  
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The EEOC and ACRD are handling thousands of charges of discrimination. The agencies accept allegations to investigate based on race, ethnicity, national origin, religion, disability (physical or mental), sex, gender, pregnancy, age (40 or over), sexual orientation, and more. Factors to consider when your Company receives a charge of discrimination:

**A. MEDIATION**

When a Company receives a charge of discrimination, it has the opportunity to mediate. Think about who attends, the goals, bring a side settlement agreement, and prepare for the mediation with documents and information so that the matter can be resolved.

**B. POSITION STATEMENT.**

The position statement is submitted to the EEOC as part of its investigation. It is the first level of discovery. Make sure to be fully complete with the Company's position, be strategic on word choice, understand the laws at issue, attach exhibits, and attach declaration, as appropriate.

**C. EEOC INTERVIEWS.**

At times, the EEOC will want to interview individuals as part of its investigation. Be prepared. Decide whether to allow the investigator to tape-record.

**D. REQUESTS FOR INFORMATION.**

The agencies may seek a broad range of documents, including employee names, address and phone numbers.

**E. SUBPOENAS.**

The EEOC at times will issue subpoenas to obtain information.

**F. EEOC DECISION: NOTICE OF RIGHT TO SUE LETTER AND DISMISSAL OR CAUSE FINDING.**

A notice of right to sue letter means the agency is dismissing the matter but the individual has 90 days to file a lawsuit. A Cause finding means the company can engage in conciliation with the EEOC to resolve the matter.

**G. CONCILIATION.**

Negotiations to settle matter. EEOC includes other requirements in settlement at this stage, including training, reporting, press release, and other items.

**H. LAWSUIT.**

If matter is not resolved at agency, individual can pursue a lawsuit.

## KEY ISSUES REGARDING ADOSH

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The Federal Occupational Safety and Health Administration (“Federal OSHA”) generally develops and enforces safety and health standards and methods of enforcement. Federal OSHA permits individual states to assert jurisdiction over safety and health issues within their borders, as long as the state plan is approved and certain federal requirements are satisfied. In Arizona, the Industrial Commission of Arizona (“Industrial Commission”) and its Arizona Division of Occupational Safety & Health (“ADOSH”) have the responsibility of administering the federally-approved state OSHA plan. The state law and regulations incorporate the federal law and regulations, and the state’s administration of its OSHA standards is subject to review by the federal government under the federally-approved state plan.

### **I. PENALTIES FOR VIOLATIONS OF OCCUPATIONAL HEALTH AND SAFETY LAWS ARE SCHEDULED TO INCREASE IN 2016.**

The increase will equal the percentage increase in the cost-of-living adjustment established by the Consumer Price Index between October 1990 and October 2015. This is the first time OSHA penalties have been increased since 1990. Federal OSHA will also be required to adjust their penalties based on the cost-of-living adjustment on a yearly basis moving forward.

- a. The maximum penalty for other-than-serious violation will increase to about \$12,476 (current maximum is \$7,000).
- b. The maximum penalty for a serious violation will increase to about \$12,476 (current maximum is \$7,000).
- c. The maximum penalty for a repeat violation will increase to about \$124,765 (current maximum is \$70,000).
- d. The minimum penalty for a willful violation will increase to about \$8,912 and the maximum penalty will increase to about \$124,765 (current minimum is \$5,000, and current maximum is \$70,000).
- e. Failure to Abate: Maximum of about \$12,476 per day (current maximum is \$7,000).

### **II. THE SELF-CRITICAL PRIVILEGE (OR HEALTH AND SAFETY AUDIT PRIVILEGE) MAY PROTECT CERTAIN INFORMATION RELATED TO AN INTERNAL AUDIT FROM DISCLOSURE TO ADOSH.**

The Health and Safety Audit Privilege provides that “any part of an audit report conducted by an organization is privileged and is not admissible as evidence or subject to

discovery” in a legal or equitable civil action or in an administrative proceeding. A.R.S. § 12-2323(A). In addition to not being admissible in judicial and administrative proceedings, a state agency employee is prohibited from requesting, reviewing, or otherwise using any privileged part of an audit report during an agency inspection of a regulated facility. A.R.S. § 12-2323(D).

So, in most instances, information gathered by an employer while conducting an internal audit of its safety policies, practices, and procedures or of its compliance with applicable occupational safety and health law will be privileged. The purpose of this privilege is to encourage businesses to always analyze and improve workplace safety.

**III. HAVE A SAFETY PLAN IN PLACE AND ALWAYS MAKE SURE YOU ARE ANALYZING AND UPDATING YOUR SAFETY PLAN.**

Enhancing workplace safety can be accomplished by creating a culture of safety. A culture of safety is created by regularly discussing safety, issuing a safety manual, and educating employees on workplace safety.

Companies should keep up to date with new safety issues as they arise and update the business’ safety plan accordingly. Having a safety officer or safety committee charged with this responsibility will help ensure that it is accomplished.

In addition, the business should establish accident investigation procedures that include items such as:

- a. Who to notify when an accident occurs.
- b. Who notifies first-responders, OSHA, etc.
- c. Who will conduct the investigation.
- d. The investigator’s qualifications.
- e. What is done in response to investigation reports.
- f. A timeframe within which hazards must be corrected.

Investigations should always be conducted by properly trained employees, often times by a supervisor.

Another way to ensure safety is to have daily tool box talks (or similar safety related meetings). Discuss specific topics each day and have each of the employees in attendance sign in.

**IV. KEEP IN MIND THE ISOLATED EMPLOYEE MISCONDUCT DEFENSE IN THE EVENT YOU ARE SUBJECT TO AN ADOSH INSPECTION.**

An affirmative defense to OSHA citations is the employee misconduct defense. The employee misconduct defense requires a party to prove:

- (1) it established a work rule or policy adequate to prevent the violation;
- (2) it effectively communicated the rule or policy to employees;
- (3) it established methods for discovering violations of work rules, and yet did not know about an isolated violation of work rules; and
- (4) it established effective enforcement of the rule when violations are discovered.

Companies will have a higher likelihood of being able to assert this defense if they have a well-developed safety plan that is regularly updated and enforced.

V. **WHEN INVESTIGATING WORKPLACE ACCIDENTS, CONSIDER WHETHER THE INVESTIGATION SHOULD BE PRIVILEGED.**

In most states, manager or supervisor statements may be admissions by the company. To protect the confidentiality of statements or interviews, seek legal counsel when obtaining or recording the statements. Interviews conducted by counsel may be subject to the attorney-client or work product privilege.

Employers must be aware that reports can generally be used by parties in litigation arising out of the accident. This applies to civil lawsuits, OSHA proceedings, etc. The investigator may be deposed or required to appear as a witness at trial. Employers should consider whether it wants a report to be subject to an applicable privilege.

An employer may want a report to be privileged in situations where there is additional exposure, e.g. a fatality. In such a situation, the employer should engage counsel in the investigation and drafting of the report. The attorney-client privilege applies when report includes communications between employer and counsel. A privilege is also created for reports created in anticipation of litigation. The employer, however, must understand that not all reports, however, are necessarily created in anticipation of litigation.

**CHECKLIST OF ITEMS  
REGARDING PAYROLL AND YEAR-END REQUIREMENTS**

**BY  
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**I. CHECKLIST FOR IRS FORMS W-2 AND 1095-C**

**A. OVERVIEW OF NEW IRS FORM 1095-C.**

For calendar year 2015, most employers are aware that employees must receive IRS Form W-2 by February 1, 2016. Not all employers, however, are aware that employees must receive IRS Form 1095-C on February 1, 2016 as well.

The IRS Form 1095-C will supply the information that the IRS needs to carry out enforcement efforts. IRS Form 1095-C, along with IRS Form 1094-C, the transmittal form for IRS Form 1095-C, will help the IRS determine:

1. Compliance with the individual mandate which requires that individuals obtain minimum essential coverage (“MEC”).
2. Individual eligibility for premium tax credits or cost-sharing reductions for coverage obtained on the Marketplace.
3. Compliance with the employer mandate which requires employers with 50 or more full-time equivalent (“FTE”) employees to offer affordable minimum value coverage to full-time employees and their dependent children.

Virtually all employers will need to file IRS Forms 1094-C and 1095-C. Only small employers with less than 50 full-time equivalent employees offering no coverage or only fully-insured coverage are exempt from reporting.

The IRS Form 1094-C is used to report employer summary information to the IRS. It serves as a cover sheet for IRS Form 1095. IRS Form 1095-C is used to report employee-specific information. One is given to each full-time employee and each covered employee. Both forms are filed with the IRS and a copy of Form 1095 is provided to each covered under an employer's health plan.

Individuals must receive IRS Form 1094-C on or before February 1, 2016. Individuals who were a full-time employee for at least one month during the reporting year should receive this form. The IRS must receive IRS Form 1094-C and IRS Form 1095-C by February, 29, 2016 if filing on paper, or March 31, 2016, if filing electronically. If an employer files 250 or more IRS Form 1095-Cs, it is required to file IRS reports electronically.

Individual statements must be provided to employees by mail unless recipient affirmatively consents to receive the statement electronically. Statement can be provided by email or by information on how to access the statement on the employer's website.

## **II. PENALTIES FOR FAILING TO FILE IRS FORMS W-2 AND 1095-C.**

On June 29, 2015, President Obama signed the Trade Preferences Extension Act (the “Act”) into law. In addition to containing several revenue offsets, the Act significantly increased penalties for incorrect information returns, including IRS Form W-2 and IRS Form 1099. These increased penalties now apply to IRS Forms 1094-C and 1095-C relating to compliance with the ACA.

The potential penalties include:

1. The general penalty for failure to file a required information return with the IRS will increase from \$100 per return to \$250 per return.
2. The cap on the total amount of penalties for such failures during a calendar year will increase from \$1,500,000 to \$3,000,000.
3. If a failure relates to both an information return (e.g., a Form 1095-C required to be filed with the IRS) and a payee statement (e.g., that same Form 1095-C required to be furnished to the individual), these penalties are doubled.
4. If a failure is caused by intentional disregard, the new \$250 penalty noted above is doubled to \$500 for each failure, and no cap applies to limit the amount of penalties that can be applied with respect to that calendar year.

The IRS has articulated specific enforcement policies for the first year of ACA filing which is the 2015 calendar year. Specifically, the IRS will not penalize employers that can show they made good faith efforts to comply with the IRS Forms 1094-C and 1095-C reporting requirements. According to the IRS, if the employer attempts to complete the forms, but the information reported is incorrect or incomplete, that reporting failure may be excused under the IRS enforcement policy. If, however, the employer does not file or provide a required form by the deadline, the IRS has suggested that the good faith standard would not apply.

## **III. CHECKLIST FOR IRS FORMS W-2 AND 1095-C.**

In completing IRS Forms W-2 and 1095-C, it is recommended that:

1. Employer should ensure adequate payroll supplies to complete the year and to begin the new year, including blank checks, blank IRS Forms W-2, and blank IRS Forms 1095-C.
2. Employers should verify the accuracy of the employee addresses and obtain complete social security numbers for all spouses and dependents that are covered under the employer's group health plan. For forms submitted to the IRS for ACA reporting, an employer must enter complete social security numbers for spouses and dependents that are covered under the group health plan. Social security numbers may be truncated to only show last 4 digits on employee statements.

3. Employers should determine the months during the calendar year for which coverage for each eligible employee under the plan was available. Employers should also determine the number of full-time employees for each month during the calendar year. Additionally, employers should determine each full-time employee's share of the lowest cost monthly premium for self-coverage offered to that full-time employee by calendar month. This information is needed for IRS Forms 1094-C and 1095-C.
4. Employers should verify that all "manual" checks written to employees during the year have been accounted for and updated in the system.
5. Employers should verify that withholding has been made properly, or withhold from the final paycheck for taxable fringe benefits.

**KEY MISTAKES MADE REGARDING  
THE AFFORDABLE CARE ACT**

**BY  
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1. Reimbursing employees for all or part of their individual health premiums or paying individual health premiums directly for employees.
2. Entering into a self-funded health plan without understanding that the discrimination rules for self-insured plans apply.
3. Failing to educate employees about diagnostic tests needed for wellness incentives at the beginning of the plan year before some employees have their annual physicals.
4. Asking about the quantity of alcohol consumed or the reasons why an employee fails to exercise on health risk assessments.
5. Providing wellness incentives that are not *de minimis* or providing cash or a gift cards as wellness incentives and not including those incentives in an employee's income.
6. Treating a Summary of Benefits as a Summary Plan Description.
7. Refusing to offer group health coverage to Medicare Eligible Employees.
8. Failing to update plan documents on eligibility requirements for coverage.
9. Applying a waiting period that is longer than 90 days such as the first of the month after the employee has been eligible to receive coverage for 90 days.
10. ACA Employer Reporting is required for this year. Only small employers with less than 50 full-time equivalent employees offering no coverage or only fully-insured coverage are exempt from reporting. Employees must receive IRS Form 1095-C on or before February 1, 2015. This form requires that employers compile complete social security numbers for spouses and dependents that are enrolled in a group health plan. Failure to develop a communication strategy to employees results in the HR Department or Benefits Department from being bogged down with questions.

## **CHECKLIST OF AUDIT ITEMS REGARDING RETIREMENT PLANS**

**BY  
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DOL and the IRS regularly audit retirement plans. Often many mistakes identified in an audit are avoidable. These avoidable mistakes costs an employer millions in fines that often cannot be charged against a plan. Specifically, in 2014, the IRS and the DOL collected nearly \$600 million.

When we are either representing an employer during an IRS or a DOL audit or conducting a self-audit on behalf of an employer, we often encounter the following errors:

**1. A failure to update the plan document with the mandatory retirement plan law changes or changes in the operation of a plan.**

There are two types of amendments - discretionary and mandatory. A discretionary amendment must be adopted by the end of the plan year in which they are effective. A discretionary amendment is an amendment that a plan sponsor makes by choice such as adding an employee loan feature. In contrast, mandatory amendments are made to comply with changes in tax law requirements for qualified plans. These tax laws often have specific required amendment dates.

It is important to remember that the plan document and summary plan description must match. If the plan is amended, employers must update the summary plan description or issue a summary of material modifications describing plan updates.

**2. A disregard of employee loans met the requirements of the plan documents.**

Failures on plan loans are one of the top 5 problem areas identified by the IRS audits and is a top issue with the DOL. One of the simplest things that many employers fail to do is to follow a plan's loan procedures.

The plan's loan procedures detail the plan's requirements relating to taking out and paying back a plan loan. For instance the loan document will typically lay out what happens if a loan goes into default, how long the participant has to pay the loan back, and which funds or accounts the loan will be drawn from. Employers should review the plan loan procedures to make sure they are doing what it says they will do. If plan loans are made, both the IRS and the DOL will ask to see plan loan procedures during an audit.

In addition, many employers may fail to give complete loan paperwork to the participant, including the loan agreement and promissory note. These forms must follow specific legal guidelines, and they must be given to participants before they take a loan. Employers will be required to provide the loan agreement and promissory during a plan audit.

### **3. A failure to routinely and promptly deposit employee contributions.**

Deposits of employee contributions are considered time when they can reasonably be segregated from employer assets as part of weekly, bi-weekly or regular payroll, and then turned over to the plan trustee. During an audit, the DOL will examine all of an employer's payrolls to determine the date that contributions can reasonably be segregated from the employer's assets, and the earliest date that the employer was able to get those funds into trust. The DOL will then dictate that the plan sponsor must use that date as the maximum deadline for making contributions.

Informally, DOL has indicated that it thinks three days should be the maximum timeframe for turning deposits of employee contributions over to the plan trustee. There is an exception for small plans. Specifically, there is a seven-day safe harbor for small plans with fewer than 100 participants. It is important to note that DOL may conclude that a specific plan's maximum timeframe may even be fewer than three days depending on the payroll information provided by the employer.

### **4. A disregard of the minimum required distribution rules.**

The IRS requires minimum required distributions for individuals who reach age 70 ½ and whose employment is separated. These individuals must begin receiving a required amount of funds out of their defined contribution plan accounts, or must begin receiving their accrued benefit under a defined benefit plan. If those distributions are not made, it is a plan qualification error. Therefore, it is important for an employer to keep in good contact with the participant population, to find these people and start paying them out on time.

### **5. A failure to provide distribution paperwork for separating employees.**

Plan administrators must give to the separating employee documentation on their distribution rights. The document should include election and rollover forms that the employee must complete, as well as descriptions of optional forms of benefit.

### **6. A disregard of the ERISA fidelity bond requirements.**

ERISA generally requires that every fiduciary of an employee benefit plan and every person who handles funds or other property of such a plan be bonded. The bond amount must be for at least 10 percent of the amount that a plan official handles, subject to a \$500,000 maximum amount per plan with respect to any plan official. The maximum required bond amount is increased to \$1,000,000 for plan officials of plans that hold employer securities. Bonding errors discovered during a plan audit often arise due to the failure to keep a copy of the bond certificate, failure to keep to maintain the required amount, failure to name the plan as the insured, and failure to cover all individuals who handle plan assets.

**7. Failure to issue black out notices.**

If an investment fund is changed, and if during the changeover period the participants cannot take a distribution, hardship withdrawal or loan out of that fund, or they cannot move their money into a different fund during that period, then that period is referred to as a "blackout." If a blackout period is for more than three business days, then the plan administrator must provide a notice to the plan participants at least 30 days before the blackout period.

Employers must make sure that the blackout notices are properly distributed. Employers should maintain and keep a copy of blackout notices in their plan records, since they will be required to demonstrate to the DOL that the notices were provided if the plan gets audited.

**8. A disregard of a plan's investment policy or guideline.**

During an audit, the DOL will review a plan's investment policy or guidelines to ensure that the plan adheres to the policy or guidelines it has adopted. Plan fiduciaries must comply with their plan's investment policy or guidelines. Further, plan committee members should always refer to the investment policy when meeting to discuss any changes to plan investments, and it is helpful to note that reference in the minutes of those meetings.

**9. A failure to hold plan committee meetings.**

During an audit, the DOL will ask for copies of plan committee minutes. The plan committee should meet at least once a year. At each of those meetings, someone should take notes and write committee minutes.

**10. A disregard or recordkeeping requirements when changing plan recordkeepers.**

When changing plan record keepers, plan administrators should ensure the underlying documents and information get transferred from the previous record keeper to the new record keeper. By doing so, all required plan information will be available in case of a plan audit. The DOL often requests information for several years. DOL will not accept as an excuse the fact that the records were destroyed or can no longer be obtained from the previous record keeper.