12 Steps To Immigration Compliance in 2012

By Shanon R. Stevenson

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Although the Presidential candidates will not be delving into all the volatile details of immigration in an election year, employers should tackle immigration issues to avoid monetary penalties and criminal sanctions. Here are twelve steps all employers should take in 2012 to comply with the myriad of immigration laws:

1. **Conduct An Annual I-9 Audit**

- The I-9 audit should be conducted by someone other than the person responsible for completing I-9s because the individual completing I-9s often repeats the same error.
- Correctable errors on the I-9 should be fixed, the change should be initialed and dated, and the words “Per Self Audit” should be placed beside the correction.
- Some I-9 errors cannot be corrected. For example, if the employer completed Section 2 of the I-9 later than three business days from the employee’s first date of work for pay, the date cannot now be changed to show a timely completion.

2. **Incorporate Immigration Policies in Handbooks**

- Ensure immigration policies are in place, up-to-date, and followed.
- Develop and disseminate an immigration-related notification and response policy so all employees know how to handle unannounced government visits, including site visits from the H-1B Fraud Investigation Unit.

3. **Audit H-1B Public Access Files**

H-1B employers are required to maintain a public access file for each H-1B worker and must make the file available for public examination within one working day after the Labor Condition Application (“LCA”) is filed with U.S. Department of Labor (“USDOL”). The public access files for most employers must contain:

- A copy of the certified LCA;
- Documentation of the wage rate to be paid to the H-1B worker;
- An explanation of how the actual wage was calculated (e.g. copy of the pay scale);
- Documentation used to established the prevailing wage for the position;
- A copy of the internal notice of posting given to the union/employees; and

- A summary of the benefits offered to U.S. workers in the same occupation as the H-1B worker and an explanation of any differentiation in benefits.

Employers must retain all records one year beyond the end date on the LCA or, if a complaint is filed, until the complaint is resolved.

4. **Properly Withdraw H-1Bs**

- If an Employer terminates an H-1B worker or the worker resigns before the end of the three-year period of authorized admission, the employer should notify the U.S. Citizenship and Immigration Service ("USCIS") in writing of the end of the employment and withdraw the underlying LCA with USDOL to avoid accrual of front pay and back pay damages.

- The employer is also required by law to pay for the reasonable cost of the terminated H-1B worker's return transportation to his or her home country.

5. **Implement Hiring/Application Practices that Avoid Discrimination Claims**

An employer can lawfully ask whether an applicant has unrestricted authorization to work in the U.S. An employer cannot, however, request specific details about an applicant's citizenship status or adopt an across-the-board policy of only hiring U.S. citizens.

6. **Abide by E-verify**

Employers cannot terminate or take any other adverse action against an employee who contests a tentative non-confirmation ("TNC") of an E-Verify query while the TNC is in process. The employee is allowed eight federal government work days to contact the appropriate federal agency to correct the data.

7. **Do Not Ignore SSN No Match Letters**

There is no clear guidance from the government on how an employer should respond to No-Match Letters received in 2012. Employers should check their records and give the employee a reasonable amount of time to correct any discrepancy. If the employee indicates that s/he visited the U.S. Social Security Administration ("SSA") or the USCIS and the situation is resolved, the employer should note the actions taken to resolve the discrepancy in the event of an audit.

8. **Implement Export Control Practices**

Under the Export Administration Regulations ("EAR") and the International Traffic in Arms Regulations ("ITAR"), releases of controlled technology to foreign persons in the U.S. are "deemed" to be an export to the person's country of nationality. Thus, employers need to determine if export control licenses are required for foreign national employees.

9. **Avoid Taking a Hands-off Approach to Immigration**

As the petitioner, the employer signs immigration petitions under the penalty of perjury. Therefore, the employer should consult its own immigration attorney who will fully inform the employer about its legal obligations - rather than relying on an attorney retained by the employee.

10. **Avoid Passing Immigration Fees onto Employees in Violation of the Law**

For instance, USDOL regulations require the employer to pay for all fees and costs associated with applying for the first step of the three-step permanent residence process for foreign national employees. Thus, such fees and costs cannot be passed onto the employee or deducted from their pay.

11. **Utilize Contract Employees Properly**

Although employers are not required to complete I-9s for independent contractors, the USDOL and U.S. Department of Justice take the position that employers are obligated to do so if the contractors should be classified as employees. Similarly, if an employer uses H-1B contractors, USCIS will scrutinize the end-user to determine which employer truly exercises control over the contractor to determine which employer should be filing the H-1B work visa petition.

12. **Budget Time and Expenditures for Immigration**

Although many countries, such as the U.S. and Canada, allow for expedited immigration processing for intra-company transferees, employers need to allow sufficient lead time and budget for receiving the proper immigration approvals prior to sending an employee on a work assignment abroad. The time to consult your immigration attorney is when a candidate is in consideration for a transfer, not when the candidate is already working in another country without authorization.