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COMPLIANCE ON THE JOB SITE: E-VERIFY AND IRCA BASICS FOR CONTRACTORS

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Employers, including contractors and subcontractors in Minnesota, face strict obligations when hiring non-citizen employees. Failure to comply with federal and state laws can result in fines, criminal penalties, or loss of government-contracting eligibility. Employers must understand verification duties, documentation rules, and anti-discrimination requirements to stay compliant and protect their businesses.

Federal Requirements: IRCA and Form I-9

The Immigration Reform and Control Act of 1986 (IRCA) prohibits employers from knowingly hiring or continuing to employ unauthorized workers. To ensure compliance, every employer must complete Form I-9 for each new hire to verify identity and work authorization. Acceptable documents include a U.S. passport, permanent resident card, or employment authorization document.

The IRCA provides an affirmative defense to employers who complete the I-9 process in good faith. The affirmative defense may mitigate fines and criminal penalties, even if an unauthorized worker is hired, even if technical mistakes occur. (8 C.F.R. § 274a.4.) To maintain the defense, contractors should ensure all forms are accurate, signed, and stored securely for inspection.

E-Verify and Government Contracts

The federal government's E-Verify website allows employers to confirm an employee's work eligibility via an electronic forum. The federal E-Verify system is voluntary unless the employer has federal contracts or subcontracts that contain the Federal Acquisition Regulation (FAR) E-Verify clause. Similarly, in Minnesota, E-Verify is required for certain state contracts. Specifically, Minn. Stat. § 16C.075 requires that contractors and subcontractors on state service contracts over \$50,000 certify that they use or are implementing E-Verify for all new employees performing work for the state.

More importantly, when employers act in good faith and use E-Verify, they can invoke the "rebuttable presumption" of compliance with IRCA. *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 131 S. Ct. 1968, 1972 (2011). In other words, an employer who utilizes E-Verify, in good faith, and hires an ineligible worker, is presumed to have complied with IRCA. The government entity accusing an employer of violating the IRCA bears the burden of proving that the employer knew the worker's unauthorized status.

During these uncertain times, E-Verify is an indispensable tool in helping contractors and subcontractors mitigate the risk of violating the IRCA and losing government contracts. Employers should maintain documentation showing enrollment, training, and E-Verify results. Additionally, being well-organized can reduce the time spent stressing and responding to IRCA violation allegations.

Avoiding Discrimination in the Verification Process

Employers must balance verification with fairness. The IRCA prohibits:

1. Requesting more or different documents than required for I-9 purposes;
2. Rejecting documents that appear genuine; and
3. Treating employees differently based on citizenship or national origin.

Training personnel who hire and/or onboard employees is essential to prevent discriminatory verification practices that could lead to costly investigations, civil fines, criminal penalties (when there is a pattern or practice of violations), a court order requiring the payment of back pay to the individual discriminated against, and/or a court order requiring the employer to hire the individual discriminated against.

Additionally, employers must retain I-9 forms for three years after hire or one year after termination, whichever is later. Having someone knowledgeable in E-Verify compliance—including subcontractor monitoring and proper documentation management—is essential for a business's audit readiness. This expert ensures individuals hiring and onboarding employees are complying with state and federal laws while also ensuring records are accurately maintained and conducts regular self-audits to catch and correct issues before regulators intervene.

Conclusion

For Minnesota contractors and subcontractors, worker eligibility compliance is both legally required and a business necessity. Noncompliance brings potential civil and criminal penalties, as well as reputational harm and a reduction in competitiveness in future bidding. By following IRCA and using E-Verify, maintaining clear records, and ensuring subcontractor accountability, employers can mitigate the risk of penalties and maintain their reputation in the public's eye.

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