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75,000 Reasons Why Employers Should Timely Comply With Form I-9 Requirements

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Just in time for the holidays is a nicely wrapped reminder from the U.S. Court of Appeals for the Second Circuit about how important it is for employers to timely complete I-9 forms on all employees, and properly retain I-9 records in the event of a government inspection. Before getting into the case, and for the benefit of those of you who still are suffering from a bit too much "holiday cheer," here is a brief primer to bring you back up to speed: The I-9 requirement is an outgrowth of the Immigration Reform and Control Act of 1986 (ICRA), which makes it unlawful to knowingly hire or employ an unauthorized alien. To facilitate the process, ICRA requires employers to collect employment authorization and identity information on workers – via Form I-9 - and to keep records of having done so. The I-9 process itself is relatively straightforward in concept: The employee fills out a portion of the form, and then returns it to the employer along with documents establishing the employee's identity and authorization to work in the United States. The employer then fills out the remainder of the form after having reviewed the appropriate documents. This entire process must be completed within three business days of the date that the employee's employment began. Thereafter, the employer is required to keep the completed I-9 forms for all current employees, and also for all terminated employees for either one year after the employee's termination or three years after hire (whichever is later). With that primer out of the way, let's dive into the case, *Buffalo Transportation, Inc. v. United States,* No. 15-3959-ag (2d Cir. 2016). The case involved a small company based in Buffalo, New York, that transports people to medical appointments. In 2013, Immigration and Customs Enforcement (ICE) conducted a scheduled audit of the business. During the audit, ICE found that 54 I-9 forms had not been completed within three business days of the employees' respective hiring dates – apparently, the forms were prepared only in response to ICE's notice of inspection. To make things worse, ICE also found that the company had not properly retained forms for another 84 terminated employees. Consequently, the agency assessed a fine against the employer of more than $109,000. The company procedurally contested the fines before an administrative law judge (ALJ). After reviewing the evidence, the ALJ agreed that the company had violated the law by failing to fill out I-9 forms and keep them on file as required by law, but nevertheless determined that the fines were excessive. The ALJ reasoned that the company was a small business, it had no prior history of violations, there was no evidence of bad faith, and it had not hired unauthorized workers. Accordingly, the ALJ reduced the penalty by about one-third to $75,600. Unhappy with the ALJ's decision, the company filed a petition for review to the Second Circuit Court

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of Appeals. The appellate court, however, sided with the agency and the ALJ. The company first tried to get around the ALJ's decision by arguing it should have been let off with a warning. However, the appellate court quickly shot that down because the regulations expressly give ICE the discretion to determine if a warning is appropriate. Next, the company claimed it had substantively complied with the I-9 requirements because it kept each employee's identifying documents on file. This too, was dismissed by the appellate court because the regulations expressly state that merely copying and retaining identifying documents does not relieve an employer from its obligations to complete and retain I-9 forms. Moving on to the fine, the company asserted that the ALJ's decision on the fine was arbitrary and should be reversed. The appellate court again disagreed, finding nothing wrong with the ALJ's choice of remedy – and particularly the decision to reduce the fine – based on the relevant facts. Accordingly, the appellate court affirmed the ALJ's decision, including the fine. The case serves as a useful reminder of the significance of failing to comply with the I-9 process. Administrative fines can range from $110 to $1,100 *per form*, depending on the nature of the infraction and number of offenses over time. As this case illustrates, if a company fails to comply with the I-9 process across the board, the fines can add up exponentially. Another point employers should recall is that in the past few years, ICE has collected more than $16 million annually in administrative fines from companies, plus millions more in criminal penalties. Given the emphasis placed on curbing illegal immigration by the incoming administration, it stands to reason that these recent enforcement efforts will continue in the next few years – and very likely will be ramped up against employers who fail to follow the requirements of the law. Employers now may have more than 75,000 additional reasons for why they should comply with I-9.