When I-9 Compliance Goes Too Far

Employers are required to verify that all new hires have employment authorization and can prove their identity, but at the same time, they are not allowed to require more or different documents than those deemed acceptable by the regulations.

A unit of the Justice Department, the Office of Special Counsel for Immigration-Related Unfair Employment Practices, enforces the rules against over-documenting employees and investigates claims of discrimination based on immigration status. Our client contacted us when informed that OSC was investigating them based on data OSC received from the E-Verify system. From that data, OSC concluded that our client was unfairly insisting that their legal immigrant workers only present documentation issued by the immigration service, rather than other acceptable documents, during the new hire process. Based on past cases OSC has prosecuted or settled and the number of hires the company had each year, the company faced a possible civil penalty in the tens of thousands of dollars.

Because the employer had several manufacturing sites and significant turnover of staff at each of those sites, we first contacted OSC and were able to determine that the cause of their concern was a particular plant location in Texas. We were able to limit the scope of document production to I-9s and associated documents from that site, as well as policy related documents about the company's I-9 and E-Verify practices. We helped prepare

the company's Human Resources employees for interviews with OSC staff about their hiring practices, and we assisted the company in preparing clarifying amendments of their hiring and onboarding processes. We conducted training of Human Resources staff involved in onboarding about the problem of over-documentation and provided resources for staff to use if there were questions about documentation that new hires presented. By the end of the investigation, we were able to obtain a "no violation" finding from the Office of Special Counsel.