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9th Circuit Upholds \$300,000 Penalty for I-9 Violations

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In many aspects of the law, ignorance is no defense.



The [Immigration and Nationality Act \(INA\)](#) requires employers to verify that their employees are legally authorized to work in the United States. It also prohibits employers from knowingly continuing to employ aliens who aren't authorized to work. The INA calls for penalties of varying amounts for each violation, depending on the nature of the violation. Consequently, penalties can add up quickly when there are widespread violations.

That fact was illustrated by a recent decision from the U.S. 9th Circuit Court of Appeals (which covers Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington), which upheld an administrative decision assessing penalties in the total amount of \$305,050 for some 503 individual violations.

What Does INA Require?

To enforce the requirement that employers verify that their employees are legally authorized to work in the United States, INA regulations require the use of the Employment Eligibility Verification Form, known as the I-9 form. Completed I-9 forms must be kept for at least 3 years or for 1 year after the employee leaves employment, whichever is later, and must be presented to federal agents for inspection upon request. As an entirely separate requirement, the INA prohibits the continued employment of an alien when the employer knows that the person is or has become unauthorized to work.



What Happened to DLS?

In the late 2000s, DLS Precision Fab, a small sheet metal fabricator in Phoenix, Arizona, grew quickly to around 200 employees thanks to a government contract. To manage this workforce and ensure compliance with all legal requirements, the company hired a “well-credentialed” HR director who, unbeknownst to the company, shirked his duty to ensure compliance with the INA.

When Immigration and Customs Enforcement (ICE) officials reviewed DLS’s records, they found almost 500 violations of the I-9 requirements and 15 instances of the continued employment of unauthorized aliens. DLS didn’t dispute those facts. After an administrative enforcement action, an administrative law judge (ALJ) assessed \$305,050 in penalties.

DLS Appeals

DLS raised several issues on appeal.

The “good-faith” defenses. DLS contended that it was entitled to the “good-faith” defenses provided by two provisions of the INA. However, the first provision is limited to charges that an employer knowingly hired, recruited, or referred an ineligible alien, and DLS wasn’t charged with that violation (it was charged with a different violation: continuing to employ an unauthorized alien), so that defense wasn’t applicable. The second provision does in fact apply to alleged failures to complete, retain, or produce I-9 forms, many of the charges against DLS, but it is limited to “technical or procedural” failures, not the substantive failings in question. So it, too, was unavailable.

Statute of limitations. DLS next contended that the 5-year statute of limitations in the INA barred the penalties. The court rejected that defense for all but one of the alleged violations for two reasons: (1) DLS failed to properly raise the defense in its answer to the charges and (2) all but one of the charges were in fact timely.

On the second point, the court ruled that the statute of limitations begins to run on the date on which the claim accrues. In this case, the paperwork violations pertaining to the I-9 forms continued until DLS was no longer required to retain the forms. Therefore, the statute of limitations didn’t begin to run when employees were hired without complete I-9 forms.

Rather, it began to run on the last day that DLS was required to retain the forms. Because all of the I-9s in question were required to be retained by dates that were less than 5 years before the administrative complaint was issued, the I-9 charges were timely. The same was true for all but one of the charges of continuing to employ unauthorized aliens. Only one of those workers left DLS’s employment before the 5-year statute of limitations began to run.

Assessing penalties without a factual hearing. Finally, DLS objected to the fact that, in the administrative proceedings, the ALJ assessed the penalties without holding a hearing on the proper amount of the penalties. In particular, DLS argued that it was entitled to raise an “ability to pay” defense to the amount of the penalties.

The court rejected that contention on the basis that although the ALJ could consider that factor if she had wanted to, the INA doesn’t list ability to pay as a factor in determining the penalty, and



the judge wasn't required to consider it. Therefore, ability to pay wasn't a fact that was significant in determining the amount of the penalties.

As for the statutory factors, there was no factual dispute about any of them, so the ALJ acted properly in determining the penalties in a summary fashion. *DLS Precision Fab LLC v. U.S. Immigration & Customs Enforcement*, Case No. 14-71980 (9th Cir., August 7, 2017).

Takeaways

The 9th Circuit's decision doesn't describe exactly what went wrong with DLS's I-9 process, so we don't know for sure what the company did wrong—whether it was a total failure to complete and retain proper forms or what. Still, there are at least two takeaways.

First, the fact that the company's top management presumably thought that its new HR director was on top of the I-9 process didn't matter because, as in many aspects of the law, ignorance is no defense. The second is that the INA has teeth, and prosecution for violations is often quite simple: You either have proper I-9 forms or you don't. And penalties can be assessed for each missing or inadequate form. Even for small employers, those penalties can be substantial indeed.

All employers would be well served by periodically auditing their I-9 processes and records. Discovering and remedying problems before ICE knocks on the door is immeasurably better than waiting until the knock comes.

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