

5th Circuit decides in employer's favor on \$226K in fines for alleged I-9 deficiencies

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On August 11, 2016, the U.S. 5th Circuit Court of Appeals (whose rulings apply to all Texas employers) threw out an administrative law judge's decision to fine Employer Solutions Staffing Group (ESSG) \$226,000 for its alleged failure to properly complete Section 2 of the Form I-9 for 242 of its employees. ESSG was fined for its standard operating procedure of having a corporate representative in Texas examine the original documents presented by employees and having another corporate representative in Minnesota examine photocopies of the same documents and sign the verification form.

The 5th Circuit ruled that at the time of the enforcement action against ESSG, "corporate attestation" was permissible, meaning an employer met the Form I-9 attestation requirements as long as the same business entity examined the original documents and completed Section 2.

The court reasoned that at the time of the enforcement action against ESSG, the available Form I-9 and relevant regulations did not provide clear guidance on whether the person who inspected the employee's documents had to be the same person who completed the employer attestation in Section 2. At the time ESSG was fined, the Section 2 attestation read:

I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on

(month/day/year) _____ and that to the best of my knowledge the employee is authorized to work in the United States.

Therefore, the court determined that because the law was unclear, it was reasonable to conclude that compliance was achieved as long as the same business entity inspected the original documents and completed the attestation.

This decision is bittersweet for employers. In 2013, prior to the 5th Circuit's decision but after ESSG was fined \$226,000, U.S. Immigration and Customs Enforcement (ICE) issued clarifying instructions stating that the person who examines an employee's documents must be the same person who signs Section 2. However, this decision may be beneficial to employers that are facing fines for the same issue if their Form I-9s were completed prior to the 2013 instructions. *Employer Solutions Staffing Group v. OCAHO*, No. 15-60173 (5th Cir., Aug. 11, 2016).

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