

## HR Connection: HR compliance is easy and cheap, said nobody ever

BY FRANK A. CANIA

I have an idea. Four simple words that have been known to immediately send a current of trepidation through my wife's entire body. However, in this case, everything turned out fine. The idea? Ask some of my clients if I could use their recent questions for the basis of this article. As luck would have it, they said yes, and the questions were on two of my favorite topics  $\frac{3}{4}$  the Fair Labor Standards Act ("FLSA") and Form I-9 compliance!

### FLSA Compliance

**Q.** One of our employees, an engineer, was being careless and dropped a new \$3,000 laptop down the stairs yesterday. It's destroyed and needs to be replaced. I understand that accidents happen. But this isn't the first time this otherwise good employee has carelessly damaged company equipment. Can I deduct the cost to replace the laptop from their salary?

**A.** Yikes! That's an expensive paperweight, um, laptop. The short answer is no; you're not allowed to deduct the cost of the laptop from the employee's salary.

The FLSA does allow for certain "permissible" deduction from the salary of an exempt employee. These include:

- Absences of one or more full days due to personal reasons other than sickness or disability.
- Absences of one or more full days due to illness or disability, if the employer has a bona fide plan, policy, or practice of providing compensation for the lost salary (e.g., paid sick time policy, short-term disability benefits, etc.), even if the employee hasn't qualified for the plan, or has exhausted the plan's benefits.
- To offset the amount an employee receives as jury or witness fees, or for military pay.
- Full- and partial-day absences under the Family and Medical Leave Act.
- Time not worked during the initial or final week of employment.
- Penalties (full and partial days) imposed in good faith for infractions of safety rules of major significance, such as rules related to the prevention of serious danger in the workplace or to other employees.
- Unpaid disciplinary suspensions of one or more full days

### HR Connection

Frank Cania



imposed in good faith for violations of workplace conduct rules, such as harassment and violence, but not rules governing absences, work quality, cash shortages, and damaged equipment.

As you can see, the caveat to the last point makes wage deductions for damaged, or in this case destroyed, equipment impermissible under the FLSA. Further, under New York State labor law, employers are prohibited from making deductions from an employee's wages for "repayment of employer losses, including for spoilage and breakage..." (12 NYCRR 195-4.5(d)).

Although deducting the cost of the laptop from the employee's salary is off the table, other disciplinary actions, up to and including termination of employment, are available and may be appropriate.

### Form I-9

**Q.** If the I-9 form we're using expired last August, why was the new form just released? Also, why should we care if there are a couple of errors on a two-page form that doesn't get submitted to the government?

**A.** Have you ever had a work project that was due on a specific date, but there were no consequences to you for missing the deadline? You understood others were waiting for your output, but they could keep the status quo without significant impact, so, no harm no foul. Right? I've often wondered if that's the thought process at the U.S. Citizenship and Immigration Services ("USCIS") regarding updates to Form I-9. Although the version we've used for the last few years was supposed to expire at the end of August 2019, that date was extended. Finally, exactly five months later,

USCIS released its updated Form I-9 on January 31, 2020.

While the previous version of the form may continue to be used for a short period, employers must begin using the recently released I-9, with an expiration date of 10/31/2022, on or before April 30, 2020. The updated Form I-9 is available at [www.uscis.gov/i-9](http://www.uscis.gov/i-9).

Other than the expiration date, little changed with the recent update. Unfortunately, even with no noticeable changes to Form I-9 or its instructions, I predict employers will continue to make errors on an astounding percentage of the forms they complete. Over more than a decade, I've reviewed thousands of I-9 forms. Over that time, the running error rate continues to be within a few points of 90 percent. Yes, on average, nine of every 10 forms I review contain at least one error.

Why should employers care if there are a couple of errors on a two-page form that doesn't even get submitted to the government? The most obvious and potential-

ly painful reason is the cost of the fines imposed on well-meaning employers for making paperwork errors. First, during an audit by Immigration and Customs Enforcement ("ICE"), a single error, such as the employee failing to enter their birthdate in Section 1, or the employer not entering the employee's start date in Section 2, is enough to result in a fine. Secondly, the fine schedule is based on the employer's error rate, the percentage of forms containing at least one error.

The fine schedule begins with an error rate of nine percent or less, then increases in 10 percent increments up to a rate of 50 percent or more. Corresponding fines begin at \$230 and quickly escalate to \$1,948. That's \$1,948 per form.

Let's look at an example of a small business employer with a total of 30 I-9 forms. With an error rate of nine percent, or 3 of the 30 forms, the penalty is a somewhat manageable \$690 (3 x \$230). Increase the error rate to 50 percent, 15 of their 30 I-9 forms, and the fine jumps to \$29,220 (15

x \$1,948). With an error rate equal to the national average of 76 percent, the fine increases to \$44,804 (23 x \$1,948). Finally, at the 90 percent error rate, the fine is an incredible \$52,596 (27 x \$1,948).

Now that you've seen how quickly the fines can escalate for even a very small business, I suggest asking yourself two additional questions. First, if ICE audited your business tomorrow, what percentage of the I-9 forms would contain errors? Secondly, could your business survive after paying fines totaling thousands, tens of thousands, or even hundreds of thousands of dollars or more?

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