

Immigration Enforcement Continues To Target Employers, Part 1

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Complying with U.S. immigration laws (both at the federal and state level) should be at the top of every employer's 2011 "To Do" list. Not only are you required to comply with the federal employment verification requirements for your employees, but in many states you are required to take additional steps to ensure that your employees are authorized to work. If you are a federal contractor or subcontractor, you have additional verification requirements.

The federal government has also been active ramping up enforcement actions (primarily through audits and investigations), issuing new rules, and implementing outreach programs designed to encourage employees to report abuses in the employment verification process and in their terms and conditions of employment.

Immigration Customs and Enforcement (ICE) is busy conducting I-9 form audits and liberally assessing fines for non-compliance of the Immigration Reform and Control Act. The U.S. Department of Labor Wage and Hour Division is aggressively investigating compliance with the requirements of the H-1B temporary worker program and requiring payment of back wages, interest and civil money penalties for violations of the Immigration and Nationality Act. There is no better time to review your immigration-related practices and policies and take steps to protect your company and your employees.

What follows is an overview of the federal law, focusing mainly on I-9 requirements and penalties for non-compliance. In future issues we'll take a look at other aspects of this complex area of the law.

Immigration Reform And Control Act (IRCA)

In 1986, Congress enacted the Immigration Reform and Control Act (IRCA). IRCA contains provisions requiring employers to verify their employees' identity and employment eligibility, penalties for employment of undocumented workers, *and* prohibitions against discrimination on the basis of citizenship or national origin. **All employers are covered, regardless of the number of employees, and all employers must complete Form I-9 for each person hired after November 6, 1986.**

IRCA prohibits 1) knowingly hiring an individual who is not authorized to work; 2) hiring any individual without verifying identity and work authorization; 3) continuing to employ a person if you know **or should know** the person is not authorized to work; 4) knowingly forging, counterfeiting, altering, or falsifying any

document to satisfy any immigration-related requirement; 5) knowingly using, accepting or receiving any false document to satisfy any immigration-related requirement; 6) discriminating in hiring or firing against a citizen or intending citizen on the basis of national origin or citizenship status; 7) requiring an employee to present any specific document or combination of documents for I-9 purposes; 8) requiring an employee to present more or different documents than are minimally required for the employment verification process; or 9) refusing to honor documents that reasonably appear to be genuine.

It is important to ensure that your I-9 practices are in order and that you are prepared to handle a government audit with a minimal amount of disruption and with the least amount of exposure in terms of fines and other penalties. Here are some things to take into consideration when reviewing your current procedures for completing I-9s.

Current Requirements for Form I-9

On February 2, 2009, the U.S. Department of Homeland Security (DHS) revised the I-9 form. The reversion and new document requirements went into effect on April 3, 2009. Certain aspects of the form were updated August 7, 2009. The current Form I-9 (version 8/07/2009) and handbook can be downloaded from the U.S. Citizenship and Immigration Services (USCIS) website at www.uscis.gov under "Forms."

Starting on April 3, 2009, certain documents were no longer considered to be "Acceptable Documents" for completion of the Form I-9; other documents were no longer acceptable if the document had expired. The following documents are acceptable, if unexpired at the time presented by the employee: 1) U.S. Passport or U.S. Passport Card; 2) Permanent Resident Card or Alien Registration Receipt Card (Form I-551); 3) foreign passport with a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa; 4) Employment Authorization Document that contains a photograph (Form I-766); 5) foreign passport with an unexpired Arrival-Departure Record, Form I-94, bearing the same name as the passport and containing the alien's nonimmigrant status, if that status authorizes the alien to work for the employer (e.g., H-1 or L-1 status); and 6) a passport from the Federated State of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I-94 listing the nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI.

Employees are not required to provide their Social Security numbers in Section 1 unless the employer participates in E-Verify (the employment eligibility verification program – explained in next month's article).

Work-eligible persons who are unable to present a required original document may present a receipt if the receipt is for a replacement document of an original document that was lost, stolen, or damaged. You cannot accept a receipt for a new document (following the expiration of the previously held document - such as an extension of an expiring work authorization card). The receipt is valid for 90 days and at the end of that period, the employee must present the *replacement* document to complete Form I-9. The employee may also present a Form I-94 indicating temporary evidence of permanent resident status (containing an I-551 stamp and a picture of the individual). The employee must present a Form I-551, Permanent Resident Card by the expiration date listed on the temporary I-551 stamp or within one year from the date the I-94 was issued if the I-551 stamp does not have an expiration date. Finally, the employee may present a Form I-94 indicating unexpired refugee admission status. After 90 days, the person must present either an unrestricted social security card or a Form I-766 employment authorization document.

Completing Form I-9

Employees must complete Section 1 of the I-9 form before work commences. The employer must complete Section 2 of the I-9 form by the end of the third business day after the employee starts work even if the employee is not scheduled to work for some or all of that period. For employees hired for three days or less, the entire form must be completed prior to commencement of work. There is no prohibition against verification

before employment begins, as long as you have made an offer of employment. The I-9 process must not be used to pre-screen or for discriminatory purposes.

While employees are required to complete Section 1 of the form, **the employer is ultimately responsible for ensuring that all sections of the I-9 form are properly completed.** New employees are required to present original documents proving identity and employment eligibility. The Form I-9 contains a list of acceptable documents to complete the process. You must accept either a List A document (proving both identity and work eligibility), or both a List B (proving identity) and a List C document (proving work eligibility).

The employer (or an authorized representative) is responsible for completing Section 2 of the I-9 form by examining the original documents presented by the employee and recording the document title, issuing authority, number and expiration date, if applicable, in the appropriate columns in Section 2. The employer must then certify that the original documents: 1) reasonably appear to be genuine; 2) relate to the individual; and 3) authorize the individual to work. The certification also contains a blank for insertion of the date that work commenced.

You may make copies of the documents presented by the employee, but it is not required. Whatever policy you adopt with regard to photocopying documents presented, you must ensure that the policy is consistently followed and that you do not discriminate against any employee. If you elect to photocopy presented documents, attach the copied documents to the respective I-9 form. The copies may be used to correct problems identified during a periodic self-audit or in advance of a government audit. Just photocopying documents does not constitute compliance and will result in penalties if the I-9 form is not also properly completed.

Special Situations

Re-Hires: A new I-9 form does not need to be completed for persons re-hired within three years of completing a prior I-9 form. You can instead update the prior I-9 form by confirming that the employment eligibility document originally presented remains valid. If so, you are required to record the re-hire date in Section 3 of the form.

But be sure that you use the current version of the I-9 form. For example, if the employee was originally hired on January 1, 2009, was terminated on January 1, 2010, and is being rehired on January 1, 2011, you would be able to complete Section 3 of a new I-9 form (version dated 8/7/2009) and attach it to the I-9 form completed by the employee and the company on January 1, 2009. In the alternative, you may elect to complete a new I-9 form in a rehire situation even though it has been less than three years since the employee was originally hired.

Use Of Agents: An employer can rely upon a referral from a state employment service agency if the employer properly retains appropriate documentation of the referral certifying the employee's employment eligibility. You may also delegate verification obligations to a third party or agent, but you are ultimately liable for compliance with verification requirements and hiring prohibitions.

Reverification: If the employee's work authorization document has an expiration date, you must reverify the employee's right to work prior to the expiration of the current work authorization document. Failure to make a timely reverification is almost always construed as knowingly continuing the employment of an alien who lacks authorization to work. Reverification is accomplished by examining a new work authorization document and completing Section 3 of the form (again make sure you are using the correct and current version of the I-9 form). Do not reverify identity documents, such as U.S. passports, permanent resident cards, and driver's licenses, even if they expire after the date that the I-9 form was completed.

Retention Of I-9 Forms And Documents

An employer must have an I-9 form for every **current** employee hired after November 6, 1986. When an employee is terminated, it is a good practice to remove that employee's I-9 form from the Active Employee I-9

binder and place it in a Terminated Employee I-9 binder and calculate the date that the terminated employee's I-9 form may be purged.

The earliest date that an I-9 form for a terminated employee may be purged is the later date of the following two dates: three years from the date the employee starting working; and one year from the date the employment terminates. Once both of those date requirements have been satisfied and you have reached the later date, you should purge the I-9 form. The purged form should be shredded to protect sensitive information.

Penalties For Prohibited Practices

ICE is responsible for enforcing the requirements of IRCA. ICE conducts audits of I-9 forms to determine an employer's compliance with the requirements of the law. If they determine that there have been violations of the requirements, the agency is authorized to assess fines. Paperwork violations (including failing to properly complete, retain, and/or make available for inspection the I-9 form) may result in a penalty of \$110 to \$1,100 for each individual for whom verification was improper or omitted.

The amount of any penalty will be determined based on the size of the business (revenue, payroll and number of employees), the good faith of the employer, the seriousness of the violation, whether the employee was unauthorized, and the history of the company with regard to previous violations. A good faith attempt to comply with the requirements of IRCA may be sufficient to avoid penalties. ICE considers electronic storage of I-9 forms to be a good faith compliance factor if the system used meets all requirements.

If an employer is found to have engaged in a pattern or practice of knowingly hiring unauthorized aliens (or continues to employ aliens despite knowing they are not authorized to work in the U.S.), it may be subject to fines of up to \$3000 per employee and/or six months imprisonment.

If ICE determines that you have knowingly hired or continued to employ an unauthorized worker (hired after November 6, 1986) the following fine schedule will be used:

- first violation = \$375 to \$3,200 per unauthorized worker;
- second violation = \$3,200 to \$6,500 per unauthorized worker;
- third and subsequent violations = \$4,300 to \$16,000 per unauthorized worker.

It is also illegal for a person or entity "knowingly and intentionally [to] discriminate or engage in a pattern or practice of knowing and intentional discrimination" against any person, other than an unauthorized alien, with respect to hiring or discharge from employment based on national origin, citizenship, or intending citizen status. The IRCA discrimination provisions do not apply to employers with three or fewer employees. Civil fines for first, second and third and subsequent violations of the discrimination provisions are the same as those listed above.

IRCA discrimination provisions prohibit retaliation against persons who initiate, assist, or participate in discrimination charges. And it's unlawful to specify what documents an employee may present to prove identity or employment eligibility. Nor can you insist upon presentation of more documents than are minimally necessary to complete the I-9 form. Finally, you may not refuse to accept documents that appear to be reasonably genuine.

Collectively, these amended discrimination provisions are referred to as "document abuse." The document abuse prohibitions apply to all workers, regardless of citizenship or immigration status. Civil penalties for first, second and third and subsequent violations of the discrimination provisions are the same as listed above.

The U.S. Department of Justice is engaged in a vigorous outreach program and is encouraging employees to

report abuses in the I-9 process (e.g., refusing to hire individuals who are not U.S. citizens, requiring that an individual present a permanent resident card, etc.). Employers found to have engaged in unfair immigration-related practices may be required to hire or reinstate (with or without back pay) employees subjected to the discrimination, post notices regarding employee rights and employer obligations, and/or educate personnel involved in hiring and employment verification as to the requirements of the law.

Beginning in the Spring of 2006, DHS began using the criminal provisions of the U.S. code to enforce immigration law. As a result, where DHS believes that the employer is knowingly employing illegal workers, a criminal indictment is a possibility. In addition, if your I-9 compliance is poor, or if you employ a substantial number of undocumented workers, DHS may conclude that the employer should have known that those workers were illegal despite the fact that they may have presented documents that reasonably appear to be genuine on their face.

It is a crime to:

- bring or attempt to bring an alien to the United States other than through a DHS designated port of entry;
- transport or attempt to transport or move such alien within the United States;
- conceal, harbor, or shield from detection, or attempt to conceal, harbor, or shield from detection, such alien;
- encourage or induce an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that it will violate the law;
- engage in any conspiracy to commit any of the preceding acts, or aid or abet the commission of any of the preceding acts; or
- knowingly hire at least 10 illegal aliens within a 12 month period.

Possible penalties for these violations range from 5 to 20 years imprisonment.

The good faith provision of the law which allows persons committing technical or procedural failures on an I-9 form up to 10 days to correct such failure without penalty, does not apply to a person or entity that has engaged, or is engaging in a pattern or practice of employing, recruiting, or referring unauthorized aliens.

In our next issue we'll talk about e-verify, ICE audits, DOL investigations of H-1B situations, and state laws.

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