

I-9 COMPLIANCE & SOCIAL SECURITY "NO MATCH" LETTERS

The Immigration Reform and Control Act of 1986 (the "IRCA") requires employers to verify the employment eligibility of employees, and provides penalties for employers who knowingly hire or continue to employ a foreign national who is not authorized to work in the United States. The IRCA was enacted in an effort to stop illegal immigration and visa overstay. By requiring U.S. employers to verify the work authorization status of new hires -- and by creating financial and criminal liability for non-compliance -- Congress sought to enlist employers in the fight against illegal immigration. Although most agree that the IRCA has not been highly successful in slowing illegal immigration, the bureaucratic burden of employment verification remains a legal obligation for employers. In this edition of the *Employment Law Advisor*, we provide an overview of I-9 compliance requirements for employers. We also discuss the related issue of responding to "No Match" letters from the Social Security Administration.

THE BASICS OF I-9 COMPLIANCE

All employees (including U.S. citizens) hired after November 6, 1986 must document their identity and eligibility to work in the U.S. This is done using Form I-9, which contains certifications by both the employer and the employee. An employer can comply with its burden of employment eligibility verification by following the instructions for completing Form I-9, which are summarized below.

- Form I-9 compliance only applies to employees; verification of employment eligibility is not required for true independent contractors. (A discussion of the differences between employee and independent contractor status is beyond the scope of this ELA but was addressed in our February 2005 ELA.)
- On or before the first day of employment (after the hiring decision has been made), the employee must complete Section 1 of Form I-9. The employee must provide certain identifying information and certify that he/she is (i) "a citizen or national of the United States;" (ii) "a Lawful Permanent Resident" ("green card" holder); or (iii) "an alien authorized to work in the United States" until a date certain. The employee must sign and date Section 1. The employee may use a preparer and/or translator to complete Section 1 if the employee is unable to do so on his/her own, in which case the preparer/translator must complete the certification block of Section 1.
- Within three (3) business days of the first day of employment, the employer must complete Section 2 of Form I-9 by examining

documentary evidence of the employee's identity and eligibility to work. The employee must present original documents to the employer for review (photocopies are not acceptable and the only exception to this requirement is that an employee may present a certified copy of a birth certificate). The types of acceptable documents are listed on the back of Form I-9. The employee may provide either: one document from List A (which establishes both identity and employment eligibility, *e.g.*, a U.S. passport) or one document from List B (which establishes identity only, *e.g.*, a driver's license) together with one document from List C (which establishes employment eligibility only, *e.g.*, a U.S. social security card issued by the Social Security Administration). The employer must accept the employee's choice of documents to establish identity and authorization to work. In other words, the employer cannot require the employee to produce specific documents. An employer also cannot require more or different documentation.

- In reviewing documents, the employer's obligation is to review the documents presented by the employee and certify that they "appear on their face to be genuine and to relate to the employee." If the documents presented appear to comply, then they should be accepted and the employer should not question the employee about them. Employers are held to a standard of reasonableness, and are not expected to be experts in detecting fraudulent documents. For example, documents that appear on their face to have been tampered with or documents having obvious typeovers or whiteouts would fail the reasonableness test and should not be accepted. Social security cards that contain more than nine digits or that begin with "000" are other examples of obvious document fraud.
- An employee who cannot provide acceptable documentation within three business days cannot continue in employment.
- If an employee indicates in Section 1 that his or her work authorization will expire on a future date, then the employer must re-verify the employee's renewed employment authorization before that expiration date. The employer must document the re-verification in Section 3. We recommend that employers implement a system that reminds them automatically, and with sufficient advance notice that a given employee's authorization will expire. Sufficient advance notice will allow employees to apply for and receive replacement authorization in time.
- If the employee is authorized to work in the United States, but is unable to present the required documents within three business days because they were lost, stolen or destroyed, he/she must present a receipt for the application of the replacement documents within three business days and the actual documents within ninety days.

• Employers must retain completed I-9s for three years after the date of hire or one year after the date employment ends, whichever is later. The law does not require employers to make photocopies of verification documents to attach to the Form I-9 (if the employer does so, this practice should be followed consistently for all employees). Enacted in 2004, the Electronic Storage and Signature Act allows for the electronic storage of, and electronic signatures on, I-9 forms. Once the implementation details are spelled out in regulations, this new provision should increase record-keeping efficiencies for larger employers.

AVOID DISCRIMINATORY PRACTICES

It is unlawful for employers to discriminate against anyone in hiring, discharging, or recruiting because of that person's national origin or citizenship status (so long as they are eligible to work). The I-9 process may not be used to pre-screen employees for hiring. Employers also cannot specify which documents they will accept from an employee and cannot ask the employee to provide different or more documentation than what is set forth in the requirements. Note that employers may not refuse to hire an individual because the individual's work authorization document has an expiration date. Moreover, employers cannot hold one group of employees to more exacting standards out of concern for their work status. Rather, employers should treat all employees the same way in connection with completing I-9 forms to avoid any question of discrimination.

WHAT ARE THE PENALTIES FOR FAILING TO COMPLY WITH THE IRCA?

Failing to comply with the IRCA may subject an employer to the following fines and penalties:

- A civil penalty ranging from \$110 to \$1,100 per violation for failing to comply with the IRCA's recordkeeping requirements.
- A civil penalty from \$275 to \$2,200 for a first offense of knowingly hiring or continuing to employ an unauthorized foreign national, a penalty from \$2,200 to \$5,500 for second offenses, and civil fines of \$3,300 to \$11,000 for every offense after the second offense.
- If the employer engages in a pattern or practice of violating the IRCA, the employer may be subject to a criminal penalty of up to \$3,000 for each unauthorized employee and imprisonment for up to six months.

• In determining the extent of the penalty to assess, the Citizenship and Immigration Service will look at a number of factors, including: (i) the size of the employer's business; (ii) the good faith of the employer (for example, in attempting to keep accurate and up-to-date I-9 forms); (iii) the seriousness and extent of the hiring or recordkeeping violation; (iv) the involvement of the unauthorized employee in the verification process; and (v) the employer's history of previous violations.

NOT IN COMPLIANCE? CONDUCT AN INTERNAL AUDIT.

What should an employer do if it is not in compliance? One approach we recommend is that an employer conduct an internal audit of its I-9 records and procedures, and fix as many problems as possible prior to a potential governmental audit. Common problems include employees without any I-9 on file, missing signatures and missing or incorrect dates, and unchecked status boxes. The fact that the employer took action to correct problems will demonstrate its good faith, and may reduce the risk of penalties.

RECENT CHANGES IN FORM

The DHS announced on June 21, 2005 that a newly updated version of the Form I-9 is now available. The revised form makes no material changes to the old I-9 form. It simply deletes references to the former Immigration and Naturalization Service (INS) and the Department of Justice (DOJ), and substitutes references to the USCIS and the DHS. Form I-9s with edition dates of "(Rev. 05/31/05)N" or "(Rev. 11/12/91)N" in the lower right corner also can still be used by employers to fulfill employment verification requirements.

SOCIAL SECURITY "NO MATCH" LETTERS

Responding to "No Match" letters from the Social Security Administration ("SSA") is an issue that is related to I-9 compliance, and must be handled carefully. The SSA processes information reported on W-2s to credit employee earnings for social security purposes. If the social security numbers on W-2s do not match those on file with the SSA, then the SSA will issue a "No Match" letter to the employer. Upon receipt of a "No Match" letter, an employer first should review its own records to make sure the problem is not due to a typographical or clerical error. If the employer has been using the SSN provided by the employee, then the next step is to notify the employee that his or her SSN is non-matching and ask him or her to visit an SSA office to correct the problem. Employers should never jump the gun and assume that the employee lacks work authorization based only on the "No Match" letter.

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