

Are You Employing Illegal Aliens? Do You Really Want to Know?

By Kirk A. Carter, Esq.

Since 1987, employers have been required by law to verify that every employee they hire is entitled to work in the United States. Compliance requires that an I-9 Employment Eligibility Verification form be completed for each and every new hire. Significant fines and penalties can be imposed on those who knowingly hire illegal immigrants or permit them to work after discovering that they are not legal. What's more, the failure to document compliance, even if all your employees are legal, can result in penalties being assessed. To minimize the exposure to possible fines or penalties, employers with medium to large size workforces should periodically audit their I-9 records.

The Immigration Reform and Control Act of 1986 ("IRCA") made it illegal for any U.S. employer to:

1. Hire, recruit or refer for a fee an alien knowing he or she is unauthorized to work;
2. Continue to employ an alien knowing he or she has become unauthorized; and
3. Hire, recruit or refer for a fee, any person (citizen or alien) without following the record keeping requirements of the Act.

The purpose of the employer sanctions provisions is to eliminate the major incentive for illegal immigration to the United States: the ready availability of employment.

The employer sanctions provisions contain two exemptions. The first, a "grandfather" clause exempts from its provisions the continuing employment of unauthorized aliens hired on or before November 6, 1986, the date of the law's enactment. The second exempts "independent contractors" from the employment verification and sanctions provisions, provided the service provider falls within the strict definition of independent contractor. This includes "individual entities who carry on independent business, contract to do piece work according to their own means and methods, and are subject to control only as to results." Indicia of independence include:

- Who supplies tools/materials;
- Whether services are available to public;
- Whether work is done for other clients;
- Whether there is an opportunity for profit or loss as a result of the labor; and
- Who determines order, sequence, and time work is done.

IRCA requires every employer to verify the work authorization for each non-exempt employee within three (3) days of hire. Immigration form I-9, entitled "Employment Eligibility Verification" is utilized for this purpose. This form is divided into three sections. The first is completed by the prospective employee and includes their name, date of birth, address, and social security number. It also requires the employee to attest to being: a citizen; a permanent resident (a/k/a "green card" holder) or an alien authorized to work through a certain date, which must be signed and dated by the employee.

In the second section, the Employer is required to review and verify documentation which establishes both the identity of the employee and their entitlement to work in the United States. This can be accomplished by viewing a single document such as a U.S. passport or a green card, or through a combination of documents, the most common being a drivers license (to establish identity) and an unrestricted social security card (to establish employment eligibility). The employer cannot dictate which document or documents the employee presents without exposing itself to potential liability under the anti-discrimination provisions of IRCA.

The third section is for updating and re-verification. In those instances where the employee's entitlement to work is limited in duration, i.e. their green card or employment authorization document expires on a certain date, the employer is required to update and re-verify the employee's continued right to work in the United States. Without such documentation, the employer may not continue to employ the worker without exposing itself to potential fines for paperwork violations, or worse, liability for knowingly employing an alien not authorized to work. Such knowledge may be constructive or actual.

The number of possible documents that can be presented and the quality of those documents often leaves the employer or their human resource manager confused and unsure if their worker is legal or not. Documents containing clear alterations, variations in print type and misspelled words are indicators that the document presented has likely been altered or may be fraudulent and should put an employer on notice to inquire further. If there is nothing unusual or suspicious about the document an employer need not dig any deeper as they might uncover facts that require the termination of a highly-valued employee. IRCA requires that the employer act in good faith, but does not make the employer a guarantor of each employee's entitlement to work. Thus fines are

only imposed if the employer “knowingly” hires or continues to employ an alien not authorized to work in the United States, or fails to properly complete an I-9 form for an employee subject to the provisions of IRCA.

Each employer must keep I-9’s and supporting documents on file to establish that such verification has taken place, and present such records for inspection by the Bureau of Citizenship and Immigration Services (“BCIS” formerly known as the “INS”) or the Department of Labor upon request. An employer who fails to verify the employment authorization of workers hired after November 6, 1986, may be subject to fines under IRCA even if no illegal aliens have been employed. Fines for failure to comply with the employment verification system, i.e. paperwork violations, range from \$100 to \$1,100 per employee. Fines for employment of unauthorized aliens are substantially higher and range between \$250 and \$11,000 per unauthorized alien. They may also include criminal charges being brought against the employer.

In conclusion, all employers are required by law to verify the employment eligibility of each new hire. Failure to properly complete an I-9 Employment Eligibility Verification form can result in the imposition of fines, which may be further compounded if it is determined that the employer “knowingly” hired or continued to employ an unauthorized alien. For

employers who have not instituted a compliance program we recommend that an “immigration audit” be conducted every two to three years and that all personnel records be reviewed to determine which employees require the completion of an I-9 and which are “grandfathered.” Any missing or incomplete I-9 forms should be properly completed and the date of any changes or additions should be properly noted. While late completion will not insulate the employer from liability for paperwork violations, it is a mitigating factor and can often reduce the scope and size of any fine that may be imposed.

Should you have any questions on IRCA or the employment verification and sanctions provisions discussed herein, please feel free to contact one of the attorneys in our Immigration Practice Group.

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www.fletcherilton.com



Kirk A. Carter

P: 508.532.3514

F: 508.532.3114

E: kcarter@fletcherilton.com

Fletcher Tilton PC
Attorneys at law

THE GUARANTY BUILDING

370 Main Street, 12th Floor
Worcester, MA 01608
TEL 508.459.8000 FAX 508.459.8300

THE MEADOWS

161 Worcester Road, Suite 501
Framingham, MA 01701
TEL 508.532.3500 FAX 508.532.3100

CAPE COD

1579 Falmouth Road, Suite 3
Centerville, MA 02632
TEL 508.815.2500 FAX 508.459.8300

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