

IMMIGRATION LAW UPDATE

SUMMER 2006

I. INTRODUCTION

Since September 11, 2001, the issue of undocumented aliens has become a national concern. In recent months, this concern has escalated. In May, 2006, the United States Senate passed the Comprehensive Immigration Reform Act of 2006, which would create a new guest worker program and would increase penalties for employing unauthorized workers. Debates over immigration fill the talk radio airwaves. Newspaper headlines across the country scream of immigration reform on both national and local levels. Tens of thousands of immigrants have protested on the streets. The government has conducted raids and arrested employers for harboring illegal aliens.

For employers, these developments are of great concern. It is clear that employer hiring practices will continue to be closely monitored and that the penalties for employing unauthorized workers will increase. This article addresses the major federal law that requires employers to verify the eligibility of all new hires. The article also explains recent action taken by the Department of Homeland Security to ensure compliance with the law and to provide guidance to employers who receive "No-Match" letters from the Social Security Administration, as well as developments in immigration reform.

II. THE IMMIGRATION REFORM AND CONTROL ACT

A. **The Immigration Reform and Control Act Requires Verification of Eligibility for Employment in the United States**

In 1986, Congress enacted the Immigration Reform and Control Act of 1986 (IRCA). The IRCA, as amended, makes it unlawful for any employer to *knowingly* hire a worker who is not authorized to work in this country. The Act was designed to control illegal migration by deterring employers from employing unauthorized workers and eliminating employment opportunity as an incentive for unauthorized persons to enter the U.S. Under IRCA, all employers in the United States, regardless of size, are required to verify the identity and the employment eligibility of all new employees by recording such information on Form I-9.

To enable the employer to complete the form, workers must present documents that establish both the worker's *identity* and *eligibility to work*. Workers generally must

be allowed three business days from the time of hire to produce documentation, and they may not be required to produce any documents until they have actually been hired for a position, unless all workers are asked to do so at the same point in the hiring process.

Note: Federal law prohibits employers with 15 or more employees from discriminating against any person on the basis of national origin in hiring, discharge, recruitment, assignment, compensation or other terms and conditions of employment. The I-9 process may not be used to pre-screen employees for hiring

B. The I-9 Form

The I-9 form contains three sections, as well as a list of the documents that are acceptable for establishing an employee's identity and employment eligibility. The employee must complete Section 1. The employer must complete Sections 2 and 3. It is the responsibility of the employer to make sure that all sections are timely and properly completed.

- **Section 1: Employee Information and Verification.** The first section of the I-9 form is completed by the worker and requires that he or she sign the form *under penalty of perjury*. The worker must supply his or her name, address, date of birth, and Social Security Number ("SSN"). The worker must also check a box indicating whether he or she is a United States citizen, a lawful permanent resident, or an alien authorized to work in the United States.

- **Section 2: Employer Review and Verification.** The second part of the form requires the employer to list the documents that were produced by the worker to verify his or her identity and employment eligibility. There are three groups of documents that a worker may use for this purpose: "List A" documents, "List B" documents and "List C" documents. "List A" documents establish both a worker's identity (who he or she is) as well as eligibility to work (legal work papers). "List B" documents establish a worker's identity. "List C" documents establish a worker's employment eligibility. If a worker provides one document from List A, he or she may not be required to provide any other document to complete the I-9 form. If a worker does not have or chooses not to provide a "List A" document to complete the I-9 form, he or she must choose one document from "List B" and one from "List C" to provide to the employer.

Note: Employers are not permitted to require a particular document(s) or combination of documents. It is the employee's choice as to what he or she wishes to produce.

- Section 3: Updating and Reverification. When an employee's work authorization expires, the employer must reverify on the I-9 form that the worker is still work-authorized and must do so no later than the expiration date indicated on the employee's work authorization. An employee may also reverify authorization (in lieu of completing a new I-9 form), when an employee is rehired within 3 years of the date the I-9 form was originally completed and the employee's work authorization or evidence of work authorization has expired.

C. Recordkeeping Requirements

Employers are required to retain I-9 forms for three years from the date of hire or one year after the date of termination, whichever is later. While there is no express statutory or regulatory requirement that I-9 documents for active employees be stored separately from other documents related to the employee's employment, it is prudent to do so.

Upon request, all I-9 forms subject to retention must be made available to an authorized official of the Department of Homeland Security, Department of Labor, and/or the Office of Special Counsel for Unfair Immigration-Related Employment Practices of the Department of Justice. In the event of an audit by the Department of Homeland Security, storing I-9 forms separately will allow you to produce relevant I-9 data without releasing employee personnel files. Separate filing will also make a self-audit easier to conduct. I-9 forms should also be kept separate from employee personnel files to help avoid charges of discrimination based on the information contained on the forms concerning an employee's age and/or national origin.

D. Copying Documents

There is no requirement that the employer copy documents provided by workers to establish their identity or employment eligibility. If copies of documents are made, the copies must be kept with the I-9 form. Maintaining such documents may help defend a claim that the employer accepted fraudulent documents. Maintaining documents will also allow you to conduct self-audits easier. The office of the Chief Administrative Hearing officer has found that photocopying documents and attaching those copies to the I-9 form to be a mitigating factor in the imposition of penalties.

Note: If you decide to make copies of documents, you must do so for all employees to avoid possible discrimination claims. Do not copy documents of individuals of one particular national origin.

E. Verification of Eligibility

The anti-discrimination and document abuse provisions of IRCA prohibit employers from rechecking an employee's employment authorization documents except in very limited situations. Once the I-9 process is completed, the employer has fulfilled its duty to ensure that it employed an authorized worker. No further action is required by the employer, unless the employer receives "actual or constructive knowledge" that an employee does not have employment authorization. What constitutes actual or constructive knowledge is discussed in Section II (B).

F. Audits of I-9 Forms Conducted by Third Parties

If you have retained a third party to recruit or secure employees and you have concerns that this third party has not properly completed the I-9 forms, you may review them along with any supporting documentation. If any changes need to be made, they should be initialed and dated. If the information provided is not sufficient, you should re-verify the information. To avoid any discrimination claims, you should audit all I-9 files completed by the third party.

G. Use of Independent Contractors

Employers are generally not required to verify the employment eligibility of workers who are clearly independent contractors or employees of independent contractors, and who do not work under the direction or control of the employer. However, an employer may not knowingly use an independent contractor relationship to obtain the services of unauthorized workers; if the employer knows or has reason to know that the contractor uses such workers, the employer will be liable for IRCA violations.

Note: An employer cannot evade the requirements of IRCA through the use of independent contractors or by sticking its head in the sand.

Many employers who enter into relationships with independent contractors address IRCA obligations by including an employment verification clause in their independent contractor agreements. Such clauses typically require the independent contractor to warrant that it has verified the employment eligibility of all workers, that verification documentation has been completed, and that the independent contractor's employees are authorized to work in the United States. It is also common for a contractor to attempt to secure an indemnity provision under which the independent contractor agrees to defend and indemnify the employer for any liability arising out of claims that the contractor's employees are unauthorized to work. Since immigration reform has been placed in the national spotlight, more and more employers are requesting subcontractors

to provide copies of I-9 forms pertaining to each individual worker placed on the employer's premises or worksite.

Employers who do not research the contractors they utilize do so at their peril. For example, in one case the U.S. Immigration and Customs Enforcement raided 60 Wal-Mart stores, resulting in the discovery of 245 illegal immigrants working as night janitors and cleaners for the company through an independent cleaning service. Wal-Mart agreed to pay \$11,000,000 to resolve charges that it violated IRCA resulting from this incident.

H. The USCIS On-line Employment Eligibility Verification Pilot Program

The USCIS currently operates a Basic Pilot program that allows employers to obtain automated confirmation of a newly hired employee's work authorization after the I-9 form has been completed. This program has recently been made available through the Internet to employers who volunteer to participate. Employers who participate in this program must still complete an I-9 form with all new hires and then submit the information into a web-based system to access the Social Security Administration ("SSA") for prompt on-line confirmation or non-confirmation of employment authorization. If insufficient information is available to confirm eligibility, questions are sent to the USCIS for confirmation and the employer is asked to have the employee contact the SSA or USCIS.

I. IRCA Penalties

IRCA provides an array of penalties for employment violations.

- An employer who has committed "paperwork violations" for mistakes in completing I-9 forms or failure to maintain I-9 records is subject to penalties of \$110 to \$1,100 for each violation.
- An employer who knowingly hires or continues to employ foreign nationals not authorized to work in the United States is subject to first offense civil fines of \$275 to \$2,200 for each unauthorized worker, and fines of up to \$11,000 for subsequent offenses.
- If it is established that the employer has a "pattern or practice" of knowingly hiring or continuing to employ unauthorized workers, criminal penalties, including fines and prison terms, are possible.
- Employers who commit document fraud – e.g., fraudulently completing an I-9 form or knowingly accepting a forged or counterfeit document for verification purposes – are subject to first offense fines of up to \$2,200 for each occurrence and up to \$5,500 for subsequent offenses.
- Employers who knowingly hire or continue to employ unauthorized workers may be barred from participating in contracting relationships with the federal government.

IRCA penalties may also be assessed against an employer who used unauthorized workers through a relationship with an independent contractor and who knew or had reason to know that the workers were ineligible for employment in the United States.

II. SSA “NO-MATCH” LETTERS

A. What is a “No-Match” letter?

An SSA “No-Match” letter is a letter sent by the SSA when the names or SSN’s listed on the employer’s W-2 forms do not agree with the SSA records. Thousand of these “No-Match” letters are sent to employers each year. The purpose of the no-match letter is to notify workers and their employers of the discrepancy, and that employees are not receiving proper credit for their earnings, which can affect future retirement or disability benefits administered by the SSA.

Note: A “No-Match” letter does not automatically mean that the employee is not authorized and should not be treated as such

The fact that an individual employee’s social security number does not match SSA’s records does not necessarily mean that the workers is an alien unauthorized to work in the United States. Several legitimate reasons may exists as to why an employer’s records may not match the SSA’s:

- the individual’s name may have changed due to marriage or divorce;
- SSA or the employer may have made clerical errors in the spelling of the name or the number; or
- the employee may have provided an incomplete or incorrect name or number.

Of course, there is a possibility that the social security number does not match because the employee provided the employer with a fraudulent social security number or social security card.

B. DHS Issues Proposed Safe Harbor Procedures

The rise in “No-Match” letters has caused continued confusion among employers who do not want to violate the law. An employer’s response to a “No-Match” letter requires delicate balancing of the two equally important (yet sometimes competing) underlying policies in IRCA - employers must not “knowingly” employ unauthorized workers, but employers must not discriminate based on national origin, race or citizenship status. Because the SSA has no enforcement powers regarding “No-Match” letters, many employers throughout the years have either ignored them or passed them on

to the employee without further action. Significantly, the new proposed rule makes clear that a “No-Match” letter can be a specific basis for finding that an employer had constructive knowledge of employing an unauthorized employee. Thus, it is crucial that an employer not ignore a “no-match” letter.

On June 14, 2006, however, the DHS published proposed amendments to immigration regulations to provide clear guidance to employers regarding the appropriate steps to take after receiving a “No-Match” letter. The proposed rule provides safe-harbor procedures that, if followed, will provide certainty that DHS will not find the employer in violation of their legal obligation not to continue to employ an alien unauthorized to work in the United States.

As previously stated, an employer can be subject to both criminal and civil penalties if it is determined that it had actual or constructive knowledge that it was employing alien unauthorized workers. What constitutes “actual or constructive knowledge” is determined on a case-by-case basis. Such knowledge can be inferred where the employer (i) Fails to complete or improperly completes the I-9¹; (ii) Has information available to it that would indicate that the alien is not authorized to work . . . ; or (iii) Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf. 8 C.F.R. § 274a.1(l); See New El Ray Sausage Co., Inc. v. U.S.I.N.S., 925 F.2d 1153 (9th Cir. 1991) (employer's constructive knowledge that its workers were unauthorized aliens was sufficient to support finding that employer was liable under IRCA, even if employer lacked actual knowledge; INS had provided employer with specific, detailed information of employees suspected of being unauthorized which required that employer re-verify authorization); Mester Mfg. Co., v. U.S. I.N.S., 879 F.2d 561 (9th Cir. 1989); (employer had constructive knowledge that alien worker was unauthorized, even if no employee had actual specific knowledge of unauthorized status; employer was put on notice that three aliens were suspected of green card fraud, employer was instructed how to confirm that information, and employer made no further inquiry and failed to take appropriate corrective action).

The new proposed rule makes clear that a “No-Match” letter can be a specific basis for finding that an employer had constructive knowledge of employing an unauthorized employee. Thus, it is crucial that an employer not ignore a “No-Match” letter. Employers should development internal policies and practices to ensure that it does not allow these letters to fall through the cracks. Employers should also implement sufficient training for those individuals who either receive a “No-Match” letter in their official capacity or are responsible for responding to a “No-Match” letter.

¹ See Maka v. U.S. I.N.S., 904 F.3d 1351 (9th Cir. 1990) (good-faith defense under IRCA was not available to employer who did not complete verification form for unauthorized alien).

C. Employer Response to “No-Match” Letters

According to the DHS proposed rule, an employer who receives a “No-Match” letter should take the following step:

- Check for Clerical Errors: Within 14 days of receiving the “no-match” letter, the employer must determine whether the discrepancy results from a typographical, transcribing or similar clerical error in the records. If there is such error, the employer should verify that the corrected name and social security number match the SSA’s or DHS’s records, correct the error with the SSA or DHS per the instructions in the no-match letter or in another reasonable manner, and make record of the manner, date, and time of the verification and correction. The employer should also update its records to prevent a re-occurrence of the issue. All of these steps must be completed within 60 days of the employer’s receipt of the no-match letter.
- Ask Employee to Confirm Records. If the above actions do not resolve the discrepancy, the employer must ask the employee to verify that the employer’s records are correct. As above, this request should be made within 14 days of the employer’s receipt of the “no-match” letter. If the records are incorrect, the employer must verify that the corrected name and social security number match the SSA’s or DHS’s records, correct the error with the SSA or DHS per the instructions in the “no-match” letter or in another reasonable manner, and record the manner, date, and time of the verification and correction. The employer should also update its records to prevent a re-occurrence of the issue.
- Employee Must Resolve Discrepancy. If the employee indicates that the employer’s records are correct, then the employer should ask the employee to resolve the discrepancy personally with the relevant agency (such as by visiting a local SSA office, and bringing original documents or certified copies required by SSA, which might include documents that prove age, identity, citizenship or alien status, and other relevant documents, such as proof of a name change, or by mailing these documents or certified copies to the SSA office, if permitted by SSA.) The employer should do this within 14 days. The employee may be given up to 60 days from receipt of the “no-match” letter to correct the discrepancy. Within 3 additional days (63 days total), the employer must verify that the employee has in fact resolved the discrepancy.
- Verification. If the discrepancy is not resolved within 60 days of receiving a “no-match” letter, or the employer needs to verify that the employee resolved the discrepancy directly with DHS or SSA, the employer must, within 63 days of receiving the “no-match” letter complete a new I-9 form for the employee, as if the employee was newly hired. There are some

special rules, however, in completing the new I-9 Form. No document containing the SSN or alien number that is the subject of the “no-match” letter, and no receipt for an application for a replacement of such a document may be used to establish employment authorization or identity or both. Also, the employer may only accept documents containing a photograph of the employee to establish identity or both identity and employment authorization.

- Termination. If the employer cannot verify the employee’s authorization to work through this process, the employer must terminate the employee or risk being found to have knowingly employed an unauthorized alien. If the employee can provide appropriate documentation, the employer may continue to employ the employee and, if the employee later turns out to be an unauthorized alien, the employer will not be held to have constructive knowledge of the employee’s status.

It is recommended that employers follow this “safe harbor” procedure to avoid the risk of being found to have constructive knowledge that an employee is unauthorized to work. It should be noted that the proposed safe harbor rule does not preclude the DHS from finding that an employer had actual knowledge that an employee was an unauthorized alien.

III. IMMIGRATION REFORM

A. National Reform

In December 2005, the U.S. House of Representatives passed the Border Protection, Antiterrorism, and Illegal Immigration Reform Act of 2005 (H.R. 4437). In May, 2006, the United States Senate passed the Comprehensive Immigration Reform Act of 2006 (S. 2611). Both bills provide for increased penalties against employers who hire unauthorized workers. The House bill uses a sliding scale based on the number of offenses (with penalties as low as \$15,000 or as high as \$40,000). Under the Senate bill, civil penalties for hiring or continuing to employ an unauthorized worker would range from \$500 to \$4,000 for each violation. If an employer were found to be a repeat offender over the past year, the fines would increase to \$4,000 to \$10,000 per violation. Repeat offenders over the past two years could be fined between \$6,000 and \$20,000 per violation. The criminal penalties are also substantial. Employers could face up to three years imprisonment for engaging in a pattern and practice of violations and be fined as high as \$20,000. Significantly, the Senate bill also provides that a contractor could be held liable for the actions of a subcontractor.

B. State Reform - Georgia

Given that many people are unhappy with the policies of the federal government with regard to illegal immigration, many states are considering or passing legislation to address the issue within their borders. Georgia is no exception. The Georgia Security

and Immigration Compliance Act (the "GSICA") was signed by Governor Sonny Perdue on April 17, 2006 and becomes effective July 1, 2007. Some of the relevant provisions are as follows:

(a) The GSICA requires that a contractor or subcontractor doing business with any state or local government agency use a federal work authorization program to verify the legal status of all new hires. This legislation will become effective July 1, 2007, for employers, contractors or subcontractors with 500 or more employees; July 1, 2008, for those with 100 or more employees, and July 1, 2009, for the smallest employers.

(b) The GSICA establishes penalties for human trafficking. Penalties of up to 20 years in prison may be imposed for anyone involved in subjecting a person to forced labor or sexual servitude. Effective July 1, 2007.

(c) The GSICA prohibits employers from claiming wages of \$600 or more paid to illegal immigrants to be claimed as a tax deduction. Effective Jan. 1, 2008. The GSICA also require that a 6 percent state income tax be withheld from the wages for an illegal immigrant when an IRS form 1099 has been filed. Effective July 1, 2007.

IV. RECENT WORKSITE ENFORCEMENT

In June 2006, an immigration raid at Washington's Dulles airport resulted in the arrest of 55 illegal aliens, some of whom had access to the tarmac and secure areas of the airport, and in one case an alien with a security badge.

In May 2006, a two-year investigation into the use of illegal aliens in the Northern Kentucky home-building trade led to the arrest of a contractor who was charged with harboring illegal aliens. In response to the raid, the ICE issued the following warning of which employers should take notice: "ICE has no tolerance for corporate supervisors who harbor illegal aliens for their workforce and deny labor opportunities for legitimate American employees. . . This enforcement action demonstrates how we will use all our investigative tools to bring these individuals to justice, no matter how large or small the company."

In April 2006, ICE agents arrested seven current and former managers of a pallet company pursuant to criminal complaints issued in the Northern District of New York. The managers were charged with conspiring to transport, harbor, encourage and induce illegal aliens to reside in the United States for commercial advantage and private financial gain. The conspiracy charge carries a penalty of up to 10 years in prison and a fine of up to \$250,000 for each alien with respect to whom the violation takes place. Two other IFCO employees were arrested on criminal charges relating to fraudulent documents. In addition, over 1,100 employees were arrested.

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