Employment Verification –

An Employer's Guide to Immigration, Form I-9 and E-Verify

This guide walks you through the many complicated procedures associated with authorizing your workers and maintaining a business that is in compliance with the Immigration Reform and Control Act of 1986 (IRCA). As an employer, you are responsible for verifying that every individual on your workforce is eligible to work in the United States – that means paperwork, and lots of it!

Completing the Form I-9 is a crucial step in the employment process, and one of the most confusing. You may know this to be true if you've ever wondered:

- Where do I get this form? Is it up to date?
- Who do I submit it to? Is there a deadline?
- Which documents are valid? Passports? Driver's licenses? Do they count?
- How can I be sure that I am filling the form out correctly?

Failure to complete the Form I-9 correctly can lead to costly penalties. That's why this publication includes tips and tricks, forms, checklists, and more that will keep you out of trouble and in compliance with the law.

This publication also includes important information on other employment verification issues. Check out these topics if you are unfamiliar with employment verification or want to brush up on what's important:

- how long you should keep verification records (page 11)
- what to do if you discover an invalid Social Security number (page 18)
- how to handle an investigation by the United States Citizenship and Immigration Services (USCIS) or U.S. Immigration and Customs Enforcement (ICE) (page 25)
- how to use the Social Security Number Verification Service (page 19)
- how and when to use the new E-Verify Internet-based verification program (page 73).

Be confident that you are running a legitimate, functional business with your employment lawyer sitting on your bookshelf.

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This publication is an attempt to summarize certain legal principles in the field of employment-related and labor laws and regulations, but should not be considered legal advice. Varying factual circumstances may require special consideration. Should you have any questions, you should contact legal counsel for advice related to specific topics and circumstances.

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– ***from a Declaration of Principles jointly adopted by a committee of the American Bar Association and a Committee of Publishers and Associations.***

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This book, and the entire Human Resources Library, is dedicated to Dick Apland, who spoke his piece, shared a piece and was at peace. Thanks Dad.

About Ballard Spahr

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Chapter 1

Immigration Reform and Control Act

The Immigration Reform and Control Act of 1986 (IRCA), as amended by the Immigration Act of 1990, imposes sanctions on employers for hiring aliens without proper work authorization and for failing to verify employment authorization for all employees. The anti-discrimination provisions of IRCA also prohibit discrimination on the basis of national origin or citizenship status.

The employment verification provisions of IRCA are enforced by the Department of Homeland Security Bureau of Immigration and Customs Enforcement (ICE), and enforcement has never been greater. Enforcement of IRCA began increasing after the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 mandated that significantly more investigators be hired to enforce the immigration laws and that at least half of the investigators be assigned to investigate possible employer sanctions violations. IIRIRA also made significant changes to certain aspects of the employee verification and anti-discrimination provisions. On August 10, 2007, DHS announced it would increase worksite enforcement and increase the number of investigators assigned to investigate possible employer sanctions violations. Additionally, criminal arrests for violations of IRCA increased from 25 in 2002 to over 700 in 2006, over 850 in 2007, and over 1,100 in the fiscal year 2008. Further, in fiscal year 2007 ICE obtained more than $31 million in criminal fines, restitution, and civil judgments as a result of worksite enforcement actions. On July 1, 2009, the Department of Homeland Security issued 652 Notices of Inspection to employers across the country. In one day, more notices were issued than the entire previous year. This appears to be part of the trend to increase worksite enforcement.

Under IRCA, it is illegal for employers knowingly to hire or continue to employ individuals who are not authorized to work in the United States. An employer may violate this section even if the employer did not have actual knowledge that the individual was unauthorized to work in the United States. Knowledge can be established if the employer had information that would lead an employer, through the exercise of reasonable care, to find out that the person was unauthorized. It is important to note, however, that knowledge cannot be inferred from the person's foreign appearance or accent. Good-faith compliance with the verification requirements is a defense to a charge of hiring an unauthorized alien.

The law requires that employers verify employment authorization by completing an I-9 Form for all employees within three days after the employee begins employment. IIRIRA created a good-faith defense for procedural or technical violations in completing the Form I-9. This provision is sometimes referred to as the "Sonny Bono" amendment, named after its sponsor, the California Congressman and one time restaurateur. Employers who commit a technical or procedural

violation in completing the I-9 are excused if they make a "good faith attempt" to comply. This defense does not apply if the employer has failed to cure the violation within ten days after being notified of the failure by ICE or another enforcement agency or if the employer has engaged in a pattern or practice of violations of knowingly hiring or continuing to employ prohibitions.

A failure to complete the I-9 Form correctly and completely may lead to sanctions even if the employee hired is authorized to work. The form needs to be completed within three business days after the start of employment. The I-9 Form must be retained for three years after the date of hire or one year after the date of termination, whichever is later. An employer must always have a Form I-9 on file for every current employee hired after November 6, 1986.

IRCA also makes it an unfair immigration-related employment practice for a person or business to discriminate against any person on the basis of their national origin or citizenship status (except unauthorized aliens). IRCA supplements Title VII of the Civil Rights Act of 1964 in prohibiting discrimination on the basis of national origin. Employers may not have "citizen only" hiring policies and generally may not ask applicants if they are U.S. citizens.

Chapter 2

Anti-discrimination under IRCA

Prohibited conduct

IRCA outlaws discrimination on the basis of national origin or citizenship status (other than unauthorized status). Discrimination on the basis of national origin is also prohibited by the Civil Rights Act of 1964 (Title VII).

While Title VII applies only to businesses that have fifteen or more employees, IRCA's prohibitions apply to employers of four or more employees.

Employers also may not retaliate against employees who have filed a charge of discrimination under the Act.

Under IRCA, employers commit an unfair immigration-related employment practice if they ask for more or different documents in the employment verification process than those required by the verification provisions. The employee is permitted to provide any documents from the List of Acceptable Documents. Employers cannot require employees to provide specific documents. However, under IIRIRA, there is a new standard for discrimination where an employer commits an unfair immigration-related employment practice only if the employee proves the employer intended to discriminate.

Example

An employee presents an apparently genuine green card for Section 2 verification purposes. Later, the human resources manager is notified that the Social Security number the employee provided for payroll records is incorrect. The human resources manager decides to require the employee to complete another I-9.

Example

The employer undergoes an ICE investigation which finds the hiring of undocumented workers and paperwork violations. The employer then implements a policy requiring all non-citizen workers to produce documents issued by the USCIS to show work authorization.

Example

The employer routinely asks all new hires to bring green cards and Social Security cards to the job site. The employer does this to determine whether Section 1 of the I-9 is properly completed. No one is denied employment if the requested documents are not produced.

Enforcement

An ICE representative or any person who believes an employer has engaged in discrimination may file an unfair immigration-related employment practice charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices within the Department of Justice (OSC). The charge must be filed within 180 days after the alleged unfair employment practice. Moreover, the Office of Special Counsel may initiate an investigation without a charge being filed.

The Office of Special Counsel is required to investigate each charge and has the right of reasonable access to evidence in the possession or control of the employer. The Special Counsel will provide the employer notice of the charge within ten days after receiving the charge.

Within 120 days after receiving the charge, the Special Counsel will determine whether to bring a complaint against the employer. If the Special Counsel does not bring a complaint within 120 days, the claimant may do so within 90 days after being notified by the Special Counsel that it is not filing a complaint, provided the charge alleges knowing violations or a pattern and practice of violations. The Office of Special Counsel, however, retains authority to continue its investigation or bring a complaint during that 90-day period.

Any complaint will be brought before an administrative law judge. The employer has a right to answer the complaint and to present evidence to the judge, who then issues an order. The judge may impose any of the penalties listed below.

In addition, applicants or employees of an employer with 15 or more employees can bring charges of discrimination under Title VII or many state civil rights laws to the Equal Employment Opportunity Commission (EEOC). They cannot file a charge with both the Special Counsel and the EEOC.

Penalties

Penalties for discrimination on the basis of national origin or citizenship status include a broad range of relief, including:

- non-monetary remedies
- monetary remedies.

Non-monetary relief

Non-monetary remedies that might be imposed include an order compelling the employer to:

- maintain various records regarding applicants
- hire the individual discriminated against (with or without back pay)
- conform to the Act

- educate employees about their rights and/or post notices regarding employee rights under the Act
- remove disciplinary notices in an employee's personnel file.

Monetary relief

Monetary liability under the anti-discrimination provisions of the Act includes:

- possible back pay for up to two years before the charge was filed
- for a first offense, the employer may be required to pay a civil penalty of $375 to $3,200 for each individual discriminated against
- for the second violation, the employer may be required to pay a civil penalty of $3,200 to $6,500 for each individual discriminated against
- for the third and any further violations, the employer may be required to pay a civil penalty of $4,300 to $16,000 for each individual discriminated against
- for asking for more or different documents than required by the Act, an employer may be fined not less than $110 nor more than $1,100 for each individual discriminated against.

Example

In the case of Incalza v. Fendi North America, Giancarlo Incalza was an Italian national working as a manager of a Fendi store in Beverly Hills on an E-1 visa. When Fendi was purchased by a French company, the E-1 visa was no longer valid work authorization for Fendi employees. Incalza and one other employee were affected. The company helped the other employee acquire an H1-B visa and he continued working for Fendi with no break in service.

Rather than assist Incalza to obtain a different work visa, the company terminated his employment. The company told him, falsely, that nothing could be done about his work authorization status. Incalza asked for unpaid leave in order to get different work authorization. He was engaged to an American citizen and would be able to get temporary work authorization after his marriage. The company refused to grant him leave.

Incalza sued under California law for wrongful termination, breach of an oral contract, and discrimination based on national origin. He alleged that the company had made him promises of continued employment and it breached those promises and acted in a discriminatory fashion when it terminated his employment. The jury made their decision in Incalza's favor and awarded him over $1,000,000.

Fendi appealed. It argued that it was required to terminate Incalza's employment because his visa was no longer valid. The Court rejected this argument, finding that the company could have helped him obtain an H1-B visa as it had with the

other employee or that it could have placed him on unpaid leave to give him time to resolve his employment authorization situation.

The Ninth Circuit reviewed the definitions of employee and employer in the regulations regarding the employment of unauthorized workers and concluded that an employee is only "employed" under the Immigration Reform and Control Act (IRCA) if the employee is actually providing services, not if he is merely on the payroll and on leave. Therefore, the company would not have been in violation of IRCA for knowingly employing an unauthorized worker had it placed Incalza on leave to allow him to seek other work authorization. The Court, however, differentiated Incalza's situation from that of an undocumented worker who did not have any basis or prospect for getting legal work authorization and suggested that immediate termination of such an employee may be more justified than the termination of Incalza's employment, and may be required.

In this case, IRCA was found to have been a pretense for a wrongful termination. The company was not protected from the discrimination and wrongful discharge suit by its strict compliance with IRCA, because the company could have complied with IRCA and still not terminated Incalza's employment.

Intersection between ITAR and anti-discrimination statutes

Title VII of the Civil Rights Act of 1964 prohibits discrimination in hiring, firing, or other employment actions on the basis of an employee's national origin. The statute also prohibits employers from limiting, classifying, or segregating employees or applicants for employment on the basis of national origin, in any way that could have an adverse impact on his employment. Title VII permits discrimination on the basis of national origin only in situations where the employer can prove that the classification is a bona fide occupational qualification (BFOQ) that is reasonably necessary to the normal operation of that particular business. The Immigration Reform and Control Act of 1986 (IRCA) which states that it is unlawful for an employer to knowingly hire or continue to employ an unauthorized alien, also prohibits discrimination in hiring, recruitment or discharge because of an employee's national origin or citizenship status. An employer can defend itself against such claims by proving that national origin is a BFOQ or that discrimination based on citizenship status is required in order to comply with another law or regulation.

These statutes potentially conflict with the International Traffic in Arms Regulations (ITAR). The Arms Export Control Act authorizes the President to control export and import of defense articles and ITAR implements that authority. ITAR states that it is unlawful for an employer to export or import defense-related technology or technical data to unauthorized foreign nationals. This type of information can only be shared with U.S. citizens unless the State Department approves access to a foreign national. While the regulations define a foreign national as a person who is not lawfully admitted for permanent residence in the United States and is not protected under the Immigration and Naturalization Act, it has also been interpreted to consider a person's birthplace, not just their citizenship, when determining which people will be allowed access to the information. An export can occur through a number of mechanisms, including:

- a visual inspection of equipment and facilities
- verbal exchanges of technology
- electronic transfers
- facsimile transmissions
- the application of knowledge gained in the United States to situations abroad or through posting regulated technology on the internet.

Additionally, people affected by ITAR are not only the people who work with the technology, but anyone who could possibly access it, even if they never do. Specific countries are also named in the statute and, because of their relationships with the United States or the United Nations, nationals of these countries nationals will likely be denied licenses and/or approval to access the regulated information. These countries include: Belarus, Cuba, Iran, North Korea, Syria, Venezuela, Burma, China, Liberia, Sudan, Cote d'Ivoire (the Ivory Coast), Congo, Iraq, Lebanon, Rwanda, Sierra Leone, Somalia, Afghanistan Haiti, Libya and Vietnam.

The intersection of these statutes presents a dilemma. While Title VII and IRCA prohibit employers from discriminating against potential or existing employees because of their national origin, under ITAR the same employers are also prohibited from employing foreign nationals, without proper authorization, if their facility contains protected information. A reasonable solution to this dilemma is a conditional employment offer when hiring new employees. Workplaces which contain protected information are aware of their situation (they usually have to obtain licenses for the information) and therefore could extend a job offer to a potential employee on the condition that they receive approval by the State Department for the ITAR position. While this is not an ideal solution, the existence of the conflicting statutes makes it impossible to extend unconditional employment offers to potential employees without first differentiating candidates based on their national origin (which would be illegal) or firing the employee soon after he is hired because he does not meet the State Department's requirements.

Department of Justice investigations

Under IRCA, employers may not discriminate on the basis of citizenship or national origin. It is important that employers do not target individuals (such as Latinos) or ask for additional documents when completing the I-9 Form. Employers may not specify the type of document that an employee presents for purposes of completing the I-9 Form. The employee has the choice from the List of Acceptable document on the back the I-9. An employer may not ask an employee to show identification or complete the I-9 Form until after the person is hired.

An individual may file a charge of discrimination with the Office of Special Counsel of the Civil Rights Division of the Department of Justice. For example, an employee of a company may file a charge of discrimination because the employer did not accept a document for purposes of identification that had the individual's name misspelled on the document. The document was the only document presented for purposes of completing the I-9 Form and was a document from List A documents. The company asked the employee to correct the misspelling. INS refused to reissue an identification card with the appropriate spelling of the person's name.

Companies want to be cautious in the manner in which they reject documents presented for the completion of I-9 Forms. An employer is merely required to properly complete the I-9 Form and

to look at actual documents to determine if they are genuine. The OSC has recently expressed concern about employers being too diligent in the review of documents presented for identification. Employers may want to reevaluate their practices to ensure that employees who are reviewing I-9 Forms and documents are not being overzealous in searching for counterfeit documents. If an employer has a concern about a particular document, the employer can always send the document to ICE for review and approval, but employers want to be cautious that they are not singling out certain groups of individuals and that the employer is not over utilizing this method of approval. Overzealousness in reviewing documents is an area in which the OSC is extremely sensitive and is looking for violations.

Recently, there has been an increase in charges filed with the OSC. For example, already there has been a discrimination charge filed with the OSC based on allegations that the employer failed to properly follow E-Verify (see section/chapter/page) procedures and abide by the requirements and limitations of the program. OSC officials in some states where E-Verify use is the highest have reported a dramatic increase in phone calls to their employee-information lines.

If an individual files a charge of discrimination with the OSC, an employer should provide a complete position statement in response to the charge of discrimination, realizing this may be the first level of discovery for a later administrative hearing. The OSC may request information that employers should address when responding to the charge of discrimination. The OSC may conduct employee interviews, and review completed I-9 Forms. Employers should consider mediation, if it is offered as an option.

Employers should take these matters seriously and consider involving legal counsel as soon as they receive notice that a charge of discrimination has been filed. As discussed previously, penalties can include reinstatement with back pay and monetary fines of up to $375 to $16,000 per employee, depending on whether it is a first or subsequent offense.

Another red flag for the OSC is if employers randomly decide to renew the completion of I-9 Forms on an annual basis or on an arbitrary audit basis. Employers should ensure that they are not requiring employees to complete a new I-9 Form on an annual basis. Once an employer has a properly completed I-9 Form, there are limited circumstances that would cause the employer to have to recomplete the I-9 Form. Those limited circumstances would include completing a pre-audit of a company's I-9 Forms and determining that a particular I-9 Form is incomplete. In that circumstance, it is appropriate to complete a new I-9 Form and attach it to the old I-9 Form to ensure that the company is in compliance with the laws. A company, however, may not randomly select individuals whom they suspect may have counterfeit documents and ask them to present the documents and complete an additional I-9 Form. As red flag issues arise at your company, please check with legal counsel to determine the best way to handle such situations, and steer clear of trouble with either the ICE Enforcement Office or the OSC.

Chapter 3

No-match letter, Form I-9, and compliance

Trapped between inaccurate employee reporting and confusing federal regulations, employers struggle to comply with the differing requirements of governmental agencies without violating anti-discrimination laws.

For example, when a employer receives a Request for Employer Information (otherwise known as a mismatch or no-match letter) from the Social Security Administration (SSA), it can impact the employer's compliance with the rules and regulations of other government agencies, especially if the employer crosses the line between verification and discrimination.

Government agencies

Before looking at the SSA no-match letter and the I-9 Form, we need to identify the agencies involved:

- **The Department of Homeland Security Immigration and Customs Enforcement (ICE)**
  Formerly known as the Immigration and Naturalization Service (INS), ICE enforces compliance with the Immigration Reform and Control Act of 1986 and the Immigration Act of 1990 (collectively IRCA). As a result of this legislation, employers must verify that each of their employees is authorized to work in this country.

  IRCA, however, also subjects employers to severe sanctions if they discriminate against current or prospective employees on the basis of national origin or citizenship. Remarkably, despite the potential for substantial liability under IRCA, the government estimates that many companies are unaware of its provisions.

- **The U.S. Department of Justice, Civil Rights Division, Office of Special Counsel (OSC)**
  The OSC is empowered to investigate and prosecute companies charged with discrimination based on national origin and citizenship status, as well as document abuse and retaliation under various anti-discrimination provisions.

- **The Social Security Administration (SSA)**
  The SSA receives funds for distribution into employees' earnings records – earnings that will eventually be paid out under one of the many programs administered by the SSA.

Therefore, having correct Social Security numbers (SSNs) is vital; those most directly harmed by failure to provide the correct information are the employees who are not building their earnings records.

- **The Internal Revenue Service (IRS)**
  Responsible for administering the nation's tax program, the IRS reported a budget of $10.185 billion and more than 99,000 FTE employees in 2004. IRS oversee the SSA.

Reporting employee identity and status

The I-9 Form

IRCA requires contractors to verify the identity and work authorization of every employee. The employment verification process must be documented with an I-9 form for every person the company hires, regardless of the person's supposed or apparent citizenship.

To complete this form, the company must review all of the original unexpired documents presented by the employee and verify the employee's identity and employability. On the I-9, the company must list certain information about the documents presented by the employee (including title, issuing authority, number, and expiration date, if any).

The company must also state the date employment begins. The Form I-9 must be completed after the offer of employment, and generally within three business days after the employee begins work.

If any of the documents demonstrating authorized status expire during employment, the company must generally update the I-9 by the expiration date of the document; exceptions to this rule include:

- driver's licenses
- U.S. passports
- permanent resident alien cards.

Documentation

There are three types of documents that can be used to demonstrate status:

- documents that establish both identity and employment eligibility
- documents that establish identity
- documents that establish employment eligibility.

The reverse side of the I-9 form has a complete list of acceptable documents, and the employee selects which documents to provide.

As long as the documents appear genuine and reasonable, a company cannot require the employee to produce additional or different documents. As such, a company cannot require an employee to provide a Social Security card as part of the I-9 verification process unless the employee chooses to do so.

Such a requirement on the part of the company could violate multiple anti-discrimination provisions, including the Civil Rights Act of 1964 (which protects employees from discrimination on the basis of national origin).

Remember that IRCA was only enacted in 1986. Therefore, while the IRS has authorized employees to provide their Social Security cards to employers, companies must keep in mind that other laws may prohibit that action if it is deemed to be discriminatory.

Archiving

Companies must also keep I-9s for all current employees. After an employee has resigned or is terminated from the company, the length of time after separation the company must keep the I-9 depends on the duration of employment. An easy way to make sure the company is in compliance with the retention of I-9 forms is to abide by the following rules:

- if employee works less than one year, keep I-9 for three years after separation (<1 year = 3 years)
- if employee works between one and two years, keep I-9 for two years after separation (<2 years = 2 years)
- if employee works two years or more, keep I-9 for one year after separation (2+ years = 1 year)

Many employers photocopy the original documents presented by the employee and attach the copies to the I-9, even though they are not required to do so. Ironically, keeping such photocopies can lead to increased fines and liability.

If ICE investigates the employer and examines copies of the documents previously reviewed by company personnel, the investigator has a chance to second-guess whether or not the documents appear genuine and reasonable. This reassessment provides the ICE with the opportunity to impose higher (and additional) fines.

Therefore, it is better to properly complete the I-9 than to photocopy documents. During the proper completion of the I-9, the company verifies that it has reviewed the documents submitted by the employee and that the documents reasonably appear to be genuine.

Reporting federal wages

The W-2 Form

The IRS instructs companies to file W-2s (Wage and Tax Statements) with the SSA, which processes them to update employees' SSA earnings and IRS tax records. If there is an error in the form, SSA identifies those errors and alerts the IRS for follow-up.

The IRS has delegated the responsibility of obtaining and processing W-2s to the SSA. It is under this delegation that the IRS retains the ability to impose penalties for errors generated by contractors who submit incorrect W-2s.

The W-4 Form

Every company has the responsibility to deduct and withhold taxes from wages as dictated under the Internal Revenue Code, IRC 26 U.S.C. § 3402. In order for the employer to know the amount of wages to deduct and withhold, every employee must complete a signed W-4 (Employee's Withholding Allowance Certificate) on or before the day employment begins. The W-4 details the number of exemptions claimed, which in no event can exceed the number to which the employee is entitled.

If the employee does not provide the company with the W-4, the employee is considered a single person with zero withholding exemptions.

SSA no match letters

An IRS regulation enacted in 1960 (and amended in 1962) states that employees should show their Social Security cards to the hiring company; if they do not have their cards available, but know their SSNs and names exactly as shown on their cards, they can advise the company of their SSNs.

However, if a company does not supply accurate or complete information to the SSA, the SSA has the authority to contact both the employee and the company requesting either the corrected or missing information.

If an employer sends in a report that contains an employee's wages, but with a different name or SSN than shown in the SSA's records, the SSA is supposed to write the employee (rather than the employer) at the address shown on the wage report and request the missing or corrected information.

On the other hand, if the wage report does not show an employee address or has an incomplete address, the SSA will often write to the employer and request the missing or corrected employee information. These letters, often titled "request for employee information," are generally called a "no-match letter."

Consequences of inaccurate wage reports

A person may be subject to civil and/or criminal penalties, including fines and up to five years in prison, for furnishing false information in connection with an earnings record. For the penalties to apply, there must be an intent to deceive with respect to furnishing false SSNs to the SSA.

The SSA has no independent authority to force a company to respond to the no-match letter. Reporting the company to the IRS for failing to file correct information is the only enforcement action the SSA possesses under the regulations.

The SSA informs the IRS of all wage reports filed without proper employee SSNs so that it may determine whether to assess penalties for mistaken filings.

In addition, when an employee or company fails to provide the missing or corrected information, those earnings are deposited into the "earnings suspense file" of uncredited earnings. It is currently estimated that the SSA has more than $500 billion in the earnings suspense file.

Purpose of the SSA no-match letter

Assisting the SSA to properly allocate earnings

The SSA sends the no-match letter to employers when the information an employer reports on the Form W-2 does not match the information in the SSA's database. Discrepancies can result from:

- clerical or transcription errors
- name changes that are not reported
- an individual that has multiple surnames and uses a different surname for employment than appears in their SSA file
- because the employee is using a Social Security number that does not belong to the employee.

Because the information does not match the SSA's records, the SSA is unable to credit the earnings to an individual SSA earnings file, so it is placed in the "earnings suspense file" until the records can be matched and the money properly allocated. The earnings suspense file currently contains more than 225 million mismatched earnings records and is growing at a rate of 8 million to 11 million records pr year. The SSA no-match letters are the SSA's attempt to obtain corrected information in order to properly allocate funds from the earnings suspense file to individual SSA accounts.

The letter may not be the basis for adverse action against the employee

Because a no match may be caused by so many legitimate reasons that do not relate to an individuals' work authorization or immigration status, a no-match letter does not

necessarily mean that an individual is not authorized to work in the United States. On the face of the no-match letter, the SSA reminds employers:

> This letter does not imply that you or your employee intentionally provided incorrect information about the employee's name or SSN. It is not a basis, in and of itself, for you to take any adverse action against the employee, such as laying off, suspending, firing, or discriminating against the individual. Any employer that uses the information in this letter to justify taking adverse action against an employee may violate state or Federal law and be subject to legal consequences. Moreover, this letter makes no statement about your employee's immigration status.

Therefore, employers should not take adverse action based solely on the receipt of the no-match letter. An employer that terminates an employee based on receiving an SSA no-match letter may be at risk for discrimination or wrongful discharge lawsuits.

Procedure for responding to a no-match letter

Although the no-match letter should not be the basis for adverse action and it is not an immigration enforcement tool and makes no statement about an employee's immigration status, Immigration and Customs Enforcement (ICE) view the SSA no-match letter as some indication that an individual may not have status. Therefore, an employer should not merely ignore the SSA no-match letter. It should take steps to demonstrate good-faith efforts to investigate and verify the accuracy of the employee's Social Security number. This procedure is one of the steps that a company could choose to implement.

The Department of Homeland Security (DHS) considers the no-match letter some evidence of undocumented status, so employers should take some actions in response to a no-match letter, rather than completely ignoring the letter.

The procedures outlined in this chapter have been derived from IRS regulations and may help the company provide a good-faith defense if ICE attempts to use the SSA no-match letter as evidence that the company had knowledge regarding an employee's immigration status based on receipt of a no-match letter. Because of the lack of legal guidance in this area, following the procedure outlined is not a guarantee that the company will never face liability if the employee is not authorized to work in the United States, but it is a strategy the company can use.

Dealing with no-match letters

This chapter outlines a procedure for responding to no-match letters. The procedure calls for you to check the company's records to see if error was by the company. If "yes," file a Form W-2C to correct the SSA records. If no, proceed with the following steps:

1. Provide employee with the attached letter and with a W-9 and W-4 and return envelope. Require the information to be returned by next pay day.

2. Keep the returned forms in personnel files. Keep an extra copy in tickler file and solicit an additional W-9 and W-4 from each employee subject to the no-match letter within the first three weeks of November, so that employees subject to a no-match letter complete two sets of forms in the same calendar year.

It is important to note that all of the notices sent by the SSA stress that the company is not to take adverse employment action against the individual based on the no-match letter alone. As such, it is clear that the SSA realizes the delicate situation that employers face when receiving a no-match letter.

Consider working with legal counsel

The company should consider contact immigration or employment counsel. Include with the letters a list of all former employees with the following:

- SSN
- name
- last known address
- termination date.

The company's legal counsel can respond to the SSA on behalf of the company. The company does not need to respond to the SSA directly. Counsel can provide the SSA with the last known address of former employees to allow the SSA to follow-up directly with the employee.

Check the company's records to determine whether the discrepancy is due to a clerical or typographical error by the company when completing the employee's Form W-2.

If the SSA no-match was due to the company's error, file a Form W-2C to correct the error with the SSA.

If the SSA no-match is not due to the company's error, proceed the next step.

Send solicitation letters

Upon receiving notice from the SSA of a no match, a company should send a letter to the employee, as described in the following IRS regulations. At a minimum, the mail solicitation must include:

- a letter informing the employee that he must provide his Taxpayer Identification Number (TIN) and that he is subject to a $50 penalty imposed by the IRS if he fails to furnish the TIN
- a W-9 on which the employee must provide his TIN
- a return envelope for the employee to return the W-9 to the filer which may be (but is not required to be) postage pre-paid.

In addition, the company should keep copies of all correspondence sent to employees (including a copy of the return envelope).

By taking these steps in response to the first two SSA no-match letters, the company should be able to establish that it acted in a responsible manner when notified of the incorrect information.

If the company's records were incorrect and the employee provides corrected information, update the company's records and file a Form W-2C to amend the SSA's records. If the employee provides a completely different name or Social Security number, the company is not required to accept a new identity or new number, but can terminate the employee's employment for providing the company false information. If the Social Security number is one digit different or if two digits are transposed and it was a legitimate mistake, the company can correct its records.

After the employee returns the W-4 and W-9, place them in the employee's personnel file. Keep an additional copy of the W-9 in a separate file as a reminder file. Between November 1 and December 1 of the same calendar year, solicit a second Form W-9 and Form W-4 from each employee that was the subject of an SSA no-match letter. Place the second W-9 and W-4 in the employee file. Therefore, the company should have two W-9 forms and two W-4 forms completed in the same calendar year by each employee that was subject to a no-match letter.

Consider the W-9 Form

When an employee completes a W-9 (Request for Taxpayer Identification Number and Certification), the company has additional proof that reasonable steps were taken to solicit the correct name and SSN.

The W-9 allows companies to rely on the SSN provided by the employee under penalty of perjury and, as such, should be helpful to defend against penalties assessed by the IRS.

The W-4 – an IRS recommendation

The IRS has indicated that a company should re-solicit the information on the employees W-4 Form from the employee in response to an SSA no-match letter. If the employee fails to make the correction, then the employer is required to withhold from the employee's wages as if they had filed a W-4 claiming single with zero exemptions.

Department of Homeland Security regulations regarding Social Security no-match letters

In August 2007, the Department of Homeland Security announced final regulations outlining procedures for employers to follow when they receive a no-match letter. The regulations were to have become effective on September 14, 2007. However, a federal court in California issued an order prohibiting the DHS and SSA from implementing the rules until after a full hearing can be held on whether the SSA records can be used for immigration enforcement. In 2009, the DHS announced it would not implement the regulations. The procedure requires employers to complete another I-9 for employees

who are the subject of a no-match letter if the no match is not resolved within 90 days. When completing the I-9, the procedure requires an employer to refuse to accept certain documents from an employee that has been the subject of a no match, even if the document reasonably appears valid. Because the proposed regulations have never gone into effect, and it is an unfair immigration-related practice for an employer to request more or different documents for purposes of completing the I-9 if done with a discriminatory intent, employers should not follow procedures outlined in the proposed DHS regulations.

Penalties and waivers

A company could be subject to penalty of $50 for the inclusion of incorrect information on any information return. Even if there are multiple errors, only one penalty per return is assessed.

The penalty amount for all failures during any calendar year shall not exceed $250,000. An employee can also be subject to a fine of $50 for failure to furnish his TIN to another person. There is a reduction in the penalty if the correction is made within specified time frames or is considered trivial.

The company may be able to obtain a waiver from a penalty if the failure is due to "reasonable cause," rather than willful neglect; however, the company must show that it acted in a responsible manner both before and after the no match occurred. Note that there are special rules for companies requesting a waiver of penalties because of an error that was attributable to the individual supplying the SSN or TIN.

Conclusion

It is clear to anyone involved in this area of law that confusion exists among companies – and even the agencies themselves – on how to comply with the SSA's directives regarding no-match letters without violating multiple anti-discrimination rules and regulations.

Therefore, it is important to understand the purpose of each government agency and how they accomplish those purposes through the use of specific regulations or policies before deciding how to respond to any no match letter.

Following this procedure may assist an employer in using a good-faith basis defense under IRS regulations. The IRS regulations provide a defense to employers against liability for providing false information to the IRS. According the IRS, employers are entitled to rely on the representation of the employees on the Form W-9 and Form W-4. Both the W-9 and W-4 attest under penalty of perjury that the information provided, including the name and Social Security number, are true and correct. Employers can extend that same argument to other government agencies. There is no guarantee that the company will never face liability. However, an employer risks discrimination and wrongful termination charges if it terminates an employee based only on the no-match letter and it risks ICE using the no-match letter as evidence that the employer knowingly employed an undocumented worker if the company ignores the no-match letter and takes no action at all. The procedure outlined in this chapter is one step that a company could take to help demonstrate its good faith. There is no legal requirement to respond

to SSA no-match letters, so companies have to make a business decision regarding what actions they want to take upon receiving a no-match letter.

SSA no match checklist

- ❑ Compare employment records to the W-2 forms submitted to the SSA to ensure that there were no typographical errors.
- ❑ If the employment records do not match, the Form W-2 use form W-2c to submit corrections to the SSA.
- ❑ Ask employees to check their W-2s against their Social Security cards and to inform the company of any name or SSN differences.
- ❑ Direct an employee who has been identified as having a SSN discrepancy to contact the SSA to resolve the issue.
- ❑ Issue annual reminders to all employees to report any name changes that have occurred because of marriage, divorce, etc. to the SSA.
- ❑ Complete the mail solicitations to all employees identified in no match letters.
- ❑ Have employees complete a W-9 verifying that their SSN is correct under penalty of perjury.
- ❑ Ensure that a valid W-4 is on file for each employee.

Chapter 4

The Social Security Number Verification Service (SSNVS)

The Social Security Administration (SSA) provides a resource for employers to verify that their employees' names and Social Security numbers match the SSA's records. Called the Social Security Number Verification Service (SSNVS), this service allows employers to use the Internet to enter the employee's:

- name (required)
- Social Security number (required)
- date of birth (optional)
- gender (optional)

to verify that the information matches the SSA's database. The employer may verify up to 10 names and Social Security numbers per screen and receive immediate results. The employer also has the option to upload files of up to 250,000 names and Social Security numbers and receive the results the next day. Employers may also use the automated telephone service, Telephone Number Employer Verification (TNEV) to verify the Social Security numbers of up to 10 employees. To use the TNEV, employers registered for the service can call either 800-772-1213 or 800-772-6270 and follow the prompts. Use of the TNEV is subject to the same restrictions as use of the SSNVS. SSNVS and TNEV are the same service, accessed through different means.

Purpose of the SSNVS

The SSNVS is available to employers to allow them to verify that an employee's name and Social Security number match the SSA's records so that the employer's wage reports (W-2 Forms) are accurate when submitted each year. Accurate annual wage reports save employers additional processing costs associated with receiving "no-match" letters or filing corrected Forms W-2C. Additionally, the SSA uses the W-2 Form as the basis for crediting employee's earnings records to encourage employers to verify the accuracy of the reports prior to filing them. If the information submitted by an employer does not match the SSA's records, the SSA generates "no-match" letters to the employer. However, there is no requirement that employers use the SSNVS. Additionally, if employers use information acquired from the SSNVS as the basis for adverse action against an employee, an employer may face liability for violations of state or federal discrimination laws.

Only employers or third parties performing payroll and wage reporting responsibilities for employers are permitted to use the SSNVS. An employee must register and get an access code to use the SSNVS. For more information and registration information, visit:

- www.ssa.gov/employer/ssnv.htm#overview.

The SSNVS Handbook is available at:

- www.ssa.gov/employer/ssnvshandbook.pdf.

Use of the SSNVS

There are several limitations on the use of the SSNVS. The SSNVS is to be used for wage-reporting purposes only. It cannot be used to verify information on applicants, only on current or former employees. It is illegal to use the SSNVS to verify the Social Security numbers (SSNs) of applicants or contractors.

Following a consistent policy

If an employer decides to use the SSNVS, it should follow a uniform, consistent policy. For example, if the employer is going to verify the information on some employees prior to filing its annual wage reports, it should verify the information on all employees. If the employer is going to use it to verify information for newly hired workers, it should verify the information on all newly hired workers uniformly. An employer should not use the system selectively or in a manner that could be considered discriminatory.

Violations of SSNVS rules

The SSA reviews use of the SSNVS. Anyone who knowingly and willfully uses SSNVS to request or obtain information from Social Security under false pretenses violates Federal law and may be punished by one or both of the following:

- a fine of up to $5,000.00

  or

- imprisonment.

The SSA may prohibit an employer from using the SSNVS if the SSA determines there has been misuse of the SSNVS.

SSNVS response

When the SSNVS system provides a response that the Social Security number and name provided do not match the SSA's database, the SSNVS also reminds employers:

- this response does not imply that you or your employee intentionally provided incorrect information about the employee's name or SSN
- this response does not make any statement about your employee's immigration status

- this response is not a basis, in and of itself, to take any adverse action against the employee, such as laying off, suspending, firing, or discriminating against the employee. Doing so could subject you to anti-discrimination or labor law sanctions.

Taking adverse action

Employers are prohibited from taking adverse action against an employee because the employee's name and Social Security number do not match the SSA's records. There are currently more than 17.2 million SSN discrepancies and there is a 4.1% error rate in the SSN database. Approximately 12.7 million of those discrepancies relate to native-born U.S. citizens. This is one of the primary reasons that employers are not permitted to take adverse action based on a Social Security number no-match and why the SSNVS is not an effective immigration compliance tool.

Finally, employers needs to remember that it is not proper to use SSNVS for non-wage reporting purposes, such as identity, work authorization status, credit checks, mortgage applications, etc.

SSNVS handbook and pamphlet

The following are excerpts from the SSNVS handbook and pamphlet, online resources available at the Social Security Administration's (SSA) website at:

- www.ssa.gov/employer/ssnvshandbook.pdf
- www.ssa.gov/employer/ssnvspamphlet.htm, respectively.

The Social Security Number Verification Service (SSNVS) allows employers to match their record of employee names and Social Security numbers (SSNs) with Social Security records before preparing and submitting Forms W-2. The SSA aims to make sure an individual's name and SSNs on a W-2 matches SSA records because unmatched records can result in additional processing costs for companies, SSA, and can result in uncredited earnings for employees. Uncredited earnings can affect future eligibility to (and amounts paid under) Social Security's retirement, disability and survivors program.

Proper use of SSNVS

SSNVS should only be used for the purpose for which it is intended.

- SSA will verify SSNs and names solely to ensure the records of current or former employees are correct for the purpose of completing Internal Revenue Service (IRS) Form W-2 (Wage and Tax Statement)
- It is illegal to use the service to verify SSNs of potential new hires or contractors or in the preparation of tax returns.

Company policy concerning the use of SSNVS should be applied consistently to all workers, for example:

- If used for newly hired workers, verify information on all newly hired workers.

- If used to verify information on other workers in your database, verify the information for all workers in the entire database.

Third-party use of SSNVS is strictly limited to organizations that contract with employers to either handle the wage reporting responsibilities or perform an administrative function directly related to annual wage reporting responsibilities of hired employees. It is suggested that contracts between the third-party and the employer stipulate that the functions being performed by the third-party contractor relate to wage reporting responsibilities and SSNVS should only be used for wage reporting responsibilities for hired employees. It is not proper to use SSNVS for non-wage reporting purposes, such as identity, credit checks, mortgage applications, etc.

Anyone who knowingly and willfully uses SSNVS to request or obtain information from SSA under false pretenses violates Federal law and may be punished by a fine, imprisonment or both. SSA may ban companies and third parties from the use of SSNVS if SSA determines there has been misuse of the service.

SSA will advise the third party or company when the names and SSNs submitted do not match SSA's records. SSA's response does not imply that the company or its employee intentionally provided incorrect information about the employee's name or SSN. SSA's response does not make any statement about an employee's immigration status.

This response is not a basis, in and of itself, to take any adverse action against the employee, such as laying off, suspending, firing, or discriminating against the employee. If the company relies only on the verification information Social Security provides to justify adverse action against a worker the company may violate State or Federal law and be subject to legal consequences.

What to do if an SSN fails to verify

Follow these steps for each SSN that failed verification:

- Compare the failed SSN with your employment records. If the company made a typographical error, correct the error and resubmit the corrected data.

- If the employment records match the company submission, ask the employee to check his/her Social Security card and inform the company of any name or SSN difference between its records and his/her SSA card. If the company's employment records are incorrect, correct the records and resubmit the corrected data.

- If the company's employment record and the employee's Social Security card match, ask the employee to check with any local SSA Office to resolve the issue. Once the employee has contacted the SSA Office, he/she should inform the company of any changes. The company should correct its records accordingly and resubmit the corrected data.

- If the employee is unable to provide a valid SSN, the company is encouraged to document its efforts to obtain the correct information. (Documentation should be retained with payroll records for a period of three years.)

- If the company is unable to contact the employee, the company are encouraged to document your efforts.

- If the company has already sent a Form W-2 with an incorrect name and/or SSN, then submit a Form W-2c (Corrected Wage and Tax Statement) to correct the mismatch. W-2c services are available through BSO Wage Reporting.

Restrictions on using SSNVS

Do not use SSNVS before hiring an employee

While the service is available to all employers and third-party submitters, it can only be used to verify current or former employees and only for wage reporting (Form W-2) purposes.

The Social Security Administration will review usage of SSNVS to ensure that employers are using it for the proper purposes.

Do not use SSNVS to take action against an employee whose name and SSN do not match

A mismatch does not imply that the employer or the employee intentionally provided incorrect information.

A mismatch does not make any statement about an employee's immigration status and is not a basis, in and of itself, for taking any adverse action against an employee. Doing so could subject the company to anti-discrimination or labor law sanctions.

Third-party use of SSNVS is strictly limited to organizations that contract with employers to either handle the wage reporting responsibilities or perform an administrative function directly related to annual wage reporting responsibilities of hired employees.

- A mismatch is not a basis, in and of itself, for the company to take any adverse action against an employee, such as laying off, suspending, firing, or discriminating.

- Company policy should be applied consistently to all workers.

- Any employer that uses the failure of the information to match SSA records to take inappropriate adverse action against a worker may violate state or federal law.

- The information the company receive from SSNVS does not make any statement regarding a worker's immigration status.

- It is not proper to use SSNVS for non-wage reporting purposes, such as identity, credit checks, mortgage applications, etc.

What to do if a name and Social Security number do not match

- Make sure the company did not make a typographical error.
- The company may ask to see the employee's Social Security card to ensure it has the correct information.
- If the company cannot resolve the error, ask the employee to contact their local Social Security office.

Can third parties use SSNVS

If tax preparers, accountants, payroll agents, payroll service members, or companies process a Form W-2 on another company's Employer Identification Number (EIN), the company can verify names and SSNs on behalf of its clients, but only for wage reporting purposes. The third party only need one User ID (even if the third party represents more than one company).

Chapter 5

How to respond to visits and calls concerning immigration

What to do when approached by government officer

If a government officer (a representative from ICE, OSHA, Police, Border Patrol, Department of Economic Security, etc.) approaches you and requests information on the company or a company employee:

- direct the officer to the supervisor, on-site manager, or company's attorney and allow that person to deal with the officer directly, politely stating:

  > "I am sure that the company will cooperate. However, I am not the person to provide you that information. Let me get my supervisor or our lawyer who can work with you."

If there is no supervisor available or the officer will not wait to allow you to get a supervisor, the supervisor or you could follow the steps outlined below:

- the supervisor should restate:

  > "I am sure the company will cooperate. However, I am not the person to handle your request. Let me get some information and get the person who should handle this for you."

- ask the officer his or her name (or look for his name badge on his shirt, if any)

- ask the officer what agency/department he or she is with (local police, sheriff, DPS, ICE, Border Patrol, Dept. of Economic Security, etc.) or look for any insignia on his uniform

- ask for a business card. If the officer does not have one, write down the information that he or she provides, such as name, agency, badge number, etc.

- if the officer is in plain clothes ask if you could see his official identification (to ferret out imposters or bounty hunters, etc.)

- try to determine why the officer is there, what he or she wants, and if he or she is looking for someone in particular (if the officer requests information about a specific individual,

tell the officer that you are not authorized to provide that information, but you are happy to contact someone who can handle the request)

- if the officer states that he has a subpoena or warrant, ask for a copy so that you may review it and also consider sending it to the company's lawyer to review

- contact the company's designated contact person immediately so that they may communicate with the officer directly by cell phone or in person

Three-day notice for documents

If ICE shows up to review I-9's, they are supposed to provide a three day written notice. Do not waive the three days. Do not voluntarily give ICE any information. Contact the company's designated contact person immediately so that they may communicate with the officer directly by cell phone.

If agent has a warrant for the arrest of an individual

If the agent has a warrant for an employee's arrest, do not interfere with the officer, or you may be arrested for obstruction, etc. Allow the police to arrest the employee but, notify the company's designated contact person immediately so they can handle the incident.

If agent has a search warrant or subpoena for records

If a government officer has a search warrant or subpoena for records, contact your supervisor, if applicable, and the company's designated contact person immediately. A supervisor or manager should:

- ask for and keep a copy of the search warrant or subpoena

- comply with the warrant or subpoena

- attempt to maintain a list or log of documents, records or other things taken away by law enforcement

- contact the company's designated contact person immediately so that they may communicate with the officer directly in person or by phone

- do not argue, resist or get into a confrontation with law enforcement

- if asked by law enforcement if they may take certain documents, records or other things, reply as follows, "only if it is covered by the search warrant." Refrain from providing consent to the removal of documents, records, or things not covered in the search warrant.

If an agent requests SSNs, I-9 Forms, or documents

If law enforcement requests the names and Social Security Numbers of employees, copies of company or employee records or files, or to review employee I-9 Forms, you should politely state (if applicable):

> "I am not the individual authorized to handle such a request, but I would be willing to contact my supervisor. Let me get some information from you and get the person who should handle this."

Then follow the steps outlined earlier in this chapter (see page 1, **Approached by government officer**).

Resist pressure from the agent to consent to provide documents or records even if they threaten to return with a search warrant or subpoena. Tell the agent that you do not have authority to provide the documents, but that you believe the company will cooperate and you will get the appropriate person who can communicate with them.

Contact the company's designated contact person immediately so that they may communicate with the officer directly in person or by phone.

Responding to callers who express negativity towards immigration

Things to keep in mind during the communications

- It is likely that you are being tape recorded.
- Avoid getting caught up in an argument with the caller or visitor. Do not discuss the philosophy or politics of immigration or the current immigration laws (state or federal). Many of the callers or visitors will be fishing for statements that can be used against the company, so each employee needs to use caution when speaking and not say anything that could be taken out of context and used against the company.
- Minimize providing your name. Instead you can refer the caller or visitor to legal counsel, providing their name and contact information. You can also provide a person with a version of the memo in Appendix Q.
- Consider providing a copy of the letter in Appendix K explaining the company's hiring practices. If it is a caller, offer to take the caller's name and address and send them a memo regarding the company's hiring practices.

Things you can do and say

- "Thank you for your interest in the company."

- "The company is committed to employing only those individuals who are authorized to work in the United States. The company has and enforces an immigration compliance policy. The company does not unlawfully discriminate on the basis of citizenship or national origin."

- If the caller or visitor states that he or she knows that the company is employing undocumented workers, state:

  > "If you have specific information regarding a company employee, please provide it to the company in writing so that the company can investigate and take appropriate action. The company requests that you provide your information in writing."

- "Please provide your concerns or any information that you have to the company's legal counsel in writing. Include the name of the employee and any information you have that makes you believe that the employee is not authorized to work in the United States."

- If a person is very pushy or aggressive, you can say:

  > "I do not feel comfortable talking with you about this. Please direct your questions or concerns to the company or the company's legal counsel in writing."

- If a person is at the company in person and refuses to leave and you feel threatened or the person is disrupting business, state:

  > "I need to ask you to leave the business premises so that we can continue to do our jobs and serve our customers. We appreciate your concern and ask that you put any information you have in writing to the company's legal counsel. Thank you. Goodbye."

- If the person still will not leave and is acting disruptive or threatening, you may need to call 911 and involve the police.

How a receptionist might respond to calls regarding Social Security Number mismatches

If an individual calls or comes to the company's office and says, "An employee of your company is using my child's Social Security number," or "An employee of your company is using my Social Security number," stay calm and polite. People are often upset, accuse the company of hiring undocumented workers, and threaten to contact the police or Immigration and Customs Enforcement. Make sure to:

- stay calm and politely state:

  > Thank you for bringing this matter to the company's attention. Let me get some contact information from you so that I can have someone follow up directly with you.

- ask for the following information:
  - the caller's name, including spelling
  - the caller's address
  - the caller's phone number
  - the caller's e-mail or fax number
  - if the caller said that someone was using a child's Social Security number (or someone's other than the caller), ask for the name of the child, including spelling
  - the Social Security number at issue.

Never provide personnel information over the phone. Refer inquires to your supervisor, Human Resources, the General Manager, or the company's lawyer.

If the caller requests information from you, you may tell the caller:

> I am not the person to handle your request. I will pass on your information and someone will be communicating with you.

Chapter 6

I-9 Form

Immigration Reform and Control Act of 1986 and Immigration Act of 1990

In 1986 and again in 1990, Congress vastly expanded employer responsibility for enforcing federal immigration law by imposing substantial penalties upon employers for knowingly hiring aliens who are not authorized to work in the United States.

Under the Immigration Reform and Control Act of 1986, 8 U.S.C. §§ 1324a, 1324b, 1324c, and the Immigration Act of 1990 (collectively, IRCA or the Act), employers must verify that each of their employees is authorized to work in this country. IRCA, however, also subjects employers to severe sanctions if they discriminate against current or prospective employees on the basis of national origin or citizenship. Therefore, IRCA forces employers to walk a fine line between verification and discrimination. Remarkably, despite the potential for substantial liability under IRCA, the government estimates that many employers are unaware of its provisions.

A copy of the I-9 Form appears on page 48 of this manual.

Prohibited employer conduct

IRCA makes it illegal for any person who employs four or more persons to:

- hire, continue to employ, or refer for a fee, an alien knowing that the alien is not authorized to work in the United States
- hire any person without complying with the verification procedures contained in the Act
- discriminate against any person on the basis of national origin or citizenship status.

An employer may not circumvent the Act's prohibitions by using the services of independent contractors in lieu of employees.

Defense

Generally, the only defense to a charge that an employer has hired unauthorized workers is that the employer did not have actual or constructive knowledge of the employee's unauthorized status.

Complying with the verification procedure contained in IRCA creates a good-faith defense to an alleged violation. Failing to comply with the verification procedure creates

a presumption that the employer had constructive knowledge that the employee is not authorized to work in this country.

Verification procedure I-9 Form

The verification procedure requires employers to verify the identity and authorized status of every employee. This process must be documented by completing an I-9 Form (Employment Eligibility Verification Form) for every person the employer hires, regardless of the person's supposed or apparent citizenship.

To complete this form, the employer must review original unexpired documents from the employee and verify the employee's identity and employability. In completing the I-9 Form, the employer must list the following information about the documents presented by the employee:

- title
- issuing authority
- number
- expiration date, if any.

The employer also must state on the I-9 Form the date that employment begins. The form must be completed after the offer of employment. While the regulations technically require the employee to complete Section 1 of the Form I-9 on the first day of employment, the regulations allow the employer three business days after hiring the employee to complete the I-9 Form. The employer must update the I-9 Form within 90 days of the presentation of the receipt that shows the application for replacement documentation, however, if a receipt is properly used on the initial I-9 Form. An employer must complete the I-9 Form by the start of employment for employees who will work three days or less.

Generally, if any of the documents demonstrating authorized status expire during the employment, the employer must update the I-9 Form before the temporary work authorization expires.

Section 1 of the I-9 Form must be completed by the employee. The employee must complete, sign, and date this section. The employee must fill out one the four boxes regarding citizenship.

If the employee does not read English, a translator/preparer can be used to complete Section 1. The employee still must sign his or her name, and the translator/preparer must sign the bottom of Section 1. In the event of an investigation, ICE may interview the translator/preparer.

The current I-9 Form contains a non-inclusive list of various documents that satisfy these purposes. All documents must be unexpired. Moreover, the I-9 Form breaks down the various documents into three columns – A, B, and C.

Documents from A

Column A lists documents that establish both the employee's identity and authorized status. These include such documents as a United States Passport, Lawful Permanent Resident Card and Employment Authorization Card. Various other documents are acceptable. A complete List of Acceptable Documents is contained on the reverse side of the I-9 Form.

If an employee cannot present a single document demonstrating both identity and authorized status, the employer must accept two documents that together demonstrate the employee's identity and authorized status.

Documents form B and C

The documents demonstrating identity are listed in Column B on the I-9 Form and include valid drivers' licenses or voter registration cards. Documents demonstrating authorized status are Column C documents, and include Social Security cards or certified birth certificates.

Many employers choose to photocopy the original documents presented by the employee and attach the copies to the Form I-9, but they are not required to do so. As more fully discussed previously on page 11, **Archiving**, maintaining copies of the back-up documentation may be harmful to employers if ICE investigates your company and reviews copies of the documents reviewed by your company personnel. Currently federal law does not require companies to photocopy documents used for identification.

Both the employer and employee must attest to the Form I-9 under penalty of perjury. The employee verifies that he or she is a United States citizen, a noncitizen national, a permanent resident, or authorized to work in the United States on a temporary basis, and that he or she has presented legitimate documents.

The employer merely verifies that it has reviewed the documents submitted by the employee, and that the documents reasonably appear to be genuine and relate to the person presenting them. Employers may obtain a revised Handbook for Employers dated 04/03/09, which is the last published guidance for employers. You can retrieve the handbook from:

- www.uscis.gov/files/nativedocuments/m-274.pdf

Employers must maintain I-9 Forms for all current employees. Employers may not knowingly use, possess, obtain, accept or receive any forged, counterfeit, altered, or falsely made document submitted by an employee to comply with these verification procedures.

Example

Consider the following facts and decide whether the employer knowingly hired and employed an illegal alien. The record reflects that:

- the hiring manager and the alien grew up together in Mexico

- the alien had been in the hiring manager's house in Mexico when they were younger
- the alien is currently married to the hiring manager's cousin, a U.S. citizen
- the alien's brother called the hiring manager from California
- he asked the manager to hire the alien to work at the manager's Arizona store
- the manager said he would hire the alien
- in response to the manager's question, the brother said the alien had appropriate documentation
- upon arrival at the store in Phoenix, the alien presented to the hiring manager a California driver's license and a Social Security card
- the alien's last name was misspelled on the front of the Social Security card
- the back of the Social Security card did not match any of the exemplars in the INS "Handbook for Employers" on the completion of I-9 Forms
- the alien resided with the hiring manager during his employment
- the alien spoke poor English and testified through an interpreter.

Despite these facts, the court found in favor of the employer. While the administrative law judge (ALJ) had found against the employer, the court reversed because the ALJ had based its decision primarily on:

- the fact that the employer had offered the employee the job before the documents were presented to the employer

  and

- that the employer had failed to compare the reverse side of the Social Security card with the example in the INS Handbook.

There are no regulations, however, that require employers to review examples in the INS Handbook. The ALJ failed to base its decision on the other facts in the case, which could have made the employer liable.

Example
In another case, decided shortly after the employment eligibility verification requirements of IRCA were passed, the Court found that an employer did have knowledge based on the following facts:

- the INS had conducted an I-9 audit and cited the company for paperwork violations that included failing to reverify work authorization when it expired but continuing to employ the individual

- the INS officers had identified several employees that it suspected were using false green cards and provided the company with a list of numbers which, if they were being used at the company, indicated that the person using them was an unauthorized alien. The company did not follow up on the information and allowed the employees to continue working.

- the company failed to complete a Form I-9 for some employees and continued to employ them after the company was cited for paperwork violations regarding the individual and the citation identified him as "an illegal alien."

An employer clearly must take reasonable steps to determine the status of an employee or terminate the individual's employment after ICE indicates that the individual is not authorized to work in the United States or risk charges of "knowingly" employing an unauthorized worker.

Changes in Form I-9 verification procedure

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) changed employment verification procedures significantly. The changes were supposed to become effective no later than September 30, 1997, but the government was not ready to implement the new regulations and distribute new I-9 Forms so a lengthy postponement occurred and a new Form I-9 incorporating the regulations was not issued for over a decade.

Increased enforcement

At the time, the law increased the number of investigators by 300 in each of the three fiscal years following its enactment. Under the Act, at least one-half of the investigators must investigate possible employer sanctions for violations. This means at least 450 new employer sanctions investigators were added in 1998, 1999, and 2000. The Act required at least ten investigators to be assigned to each state.

The law also authorized the Attorney General of the United States to enter into agreements with states or political subdivisions of the states to allow state officers to perform functions of an immigration officer.

New I-9 Form and acceptable documents

The Immigration and Naturalization Service (INS) stated that it would develop a new Form I-9 to comply with this law. More than ten years after the IIRIRA was passed, the INS was renamed the United States Citizenship and Immigration Services (USCIS) with the Immigration and Customs Enforcement (ICE) as the enforcement division. Several versions of the I-9 Form have been released in the past few years. Employers need to use the most current Form I-9. The USCIS issued the new I-9 Form and list of acceptable documents in August 2009. The actual date in the upper corner of the I-9 Form is 8-31-2012.

Good-faith defense

IIRIRA provides employers with a new defense for paperwork violations. IIRIRA creates a good faith defense for procedural or technical violations in completing the Form I-9.

Prior to IIRIRA, employers who committed paperwork violations, such as incomplete I-9 Forms, were subject to penalties. Under IIRIRA, employers are still subject to penalties. However, the new law distinguishes between "substantive" and "procedural or technical" violations. An exemption has been created for employers who commit "technical or procedural" violations if employers made a "good faith attempt" to comply.

The exemption does not apply if ICE has discovered the violation, given the employer ten days to cure the violation, and the employer has failed to cure the violation. Also, this exemption does not apply if the employer has engaged in a "pattern and practice" of paperwork violations.

Employers who commit a technical or procedural violation in completing the I-9 Form are excused if a good faith attempt to comply exists. The new law distinguishes between substantive and procedural or technical" violations.

Enforcement and contesting fines

Immigration and Customs Enforcement (ICE) is primarily responsible for enforcing the Act, although the Department of Labor also has limited enforcement authority. ICE may assess penalties against an employer that it concludes has violated the Act.

ICE initiates this process by serving on the employer a Notice of Intent to Fine. The notice must set forth the alleged violations and proposed penalty.

Within 30 days of the notice being served by ICE, the employer may file a written request for a hearing, which will take place before an administrative law judge. The judge's determination becomes final 30 days after it is served.

Within 45 days after service of the judge's decision, an employer may petition the federal Court of Appeals. If an employer does not comply with a final order, the United States Department of Justice may file an enforcement action in any federal district court.

Penalties

The Act provides for monetary fines on a sliding scale depending upon the number of previous offenses by the employer. The Department of Homeland Security recently increased these penalties to adjust for inflation.

Employing unauthorized aliens

- For the first offense, the employer may be fined $375 to $3,200 per unauthorized alien.
- For the second violation the employer may be fined $3,200 to $6,500 per unauthorized alien.
- For the third and any further violations, an employer may be fined $4,300 to $16,000 per unauthorized alien.

- For pattern and practice violations, the employer may be enjoined or fined up to $3,000 in criminal penalties for each unauthorized alien and/or imprisoned up to six months.

Accepting fraudulent documents

- For the first offense, the employer may be fined $375 to $3,200 per fraudulent document.
- For subsequent violations the employer may be fined $3,200 to $6,500 per fraudulent document.

Violations of the verification procedures

An employer may be fined $110 to $1,100 for each violation.

Joint violations of the verification process and the prohibition on hiring unauthorized aliens

ICE will take various factors into consideration in assessing the appropriate penalty, including:

- the size of the business
- the employer's good faith
- the seriousness of the violation
- whether the individual was actually an unauthorized alien
- the history of violations by the employer.

Thus far, courts have interpreted the good-faith requirement as imposing a substantial burden on the employer to demonstrate that it acted reasonably and honestly. Courts have concluded that negligence, mistake, and ignorance of the law do not satisfy the good-faith standard. Moreover, this defense is not available to an employer who fails to complete the Form I-9.

Document fraud

Penalties are no less than $275 and no more than $2,200 for the first offense and no less than $2,200 but no more than $5,500 for subsequent offenses and possible imprisonment for no more than five years for anyone who prepares, files, or assists another in preparing an application for immigration benefits or support documentation with "knowledge or reckless disregard of the fact that such application was falsely made or, in whole or in part, does not relate to the person on whose benefit it was or is submitted."

The term "falsely made" means preparing or providing an application or document "with knowledge or in reckless disregard of the fact that it contains a false, fictitious, or fraudulent statement or material misrepresentation."

Harboring illegal aliens

Employers who knowingly hire 10 or more illegal aliens in a 12-month period are subject to civil penalties and imprisonment of more than 5 years if the employer had actual knowledge that the aliens were unauthorized and the fact that the aliens were brought into the United States illegally.

Pattern and practice violations

If an employer is found to have engaged in a "pattern or practice" of knowingly employing unauthorized workers, the employer may be subject to criminal penalties. Criminal sanctions may include either or both of:

- a fine of $3,000 per unauthorized worker

  or

- imprisonment for six months.

I-9 Forms and pre-audit steps to prevent liability

- Employees hired after November 6, 1986, must have properly completed I-9 Forms.
- Review I-9 Forms for completeness.
- Employee must fill out, sign, and date Section 1 – completing the entire section. The regulations technically require Section 1 to be completed on the first day of employment, but employers are permitted three business days to complete the entire form.
- There is no requirement that the employee present any documents to complete Section 1- employers may not request documents to verify information provided in Section 1. To do so may be an immigration-related unfair employment practice.
- If the employee does not read English, a translator/preparer can be used to fill out Section 1. The employee is still required to sign his or her name. The translator/preparer must also sign at the bottom of Section 1. ICE may interview the translator/preparer during an investigation.
- The employee must check one of the four boxes regarding citizenship in Section 1. If the employee has a permanent resident alien card, the employee should check box 3, Permanent Resident. If the employee has an EAD card, the employee should check box 4.
- If information is missing, have new I-9 Form completed with current date. Keep both old and updated I-9 Forms together.
- Keep I-9 Forms separate from personnel files.
- Always keep current employees' I-9 Forms. After an employee has resigned or is terminated from the company, the length of time after separation the company must keep

the I-9 depends on the duration of employment. An easy way to make sure the company is in compliance with the retention of I-9 Forms is to abide by the following rules:

  - If an employee works less than one year, keep I-9 for three years after separation (<1 year = 3 years).
  - If an employee between one year and two years, keep I-9 for two years after separation (<2 years = 2 years).
  - If an employee works two years or more, keep I-9 for one year after separation (2+ years = 1 year).

- Do not maintain a copy of back-up documentation, as long as I-9 Form is properly completed, unless otherwise required, for example, by state law (for example, in Colorado).
- Consider whether or not to keep back-up copies of documents received from individuals who present counterfeit, false or suspect documents. On the one hand, this can be helpful when dealing with ICE as it can be used to show that an employer takes verification seriously. On the other hand, when dealing with the Office of Special Counsel of the Department of Justice (OSC), this documentation will provide a list of individuals they may want to interview to seek out discriminatory verification efforts.
- The I-9 Form will be used by ICE as evidence in any ICE investigation.
- ICE suggestions regarding review of documents.
  - Application for Social Security card is not proper identification. An employer may accept a receipt from the Social Security Administration for an employee who has lost his or her Social Security card and is waiting for a new card for an existing number.
  - Employees must present original unexpired documents, not photocopies.
  - Social Security cards are not immigration documents, but can be used to establish employment authorization. Social Security cards have been issued since 1936, and have been revised more than 20 times. The following provides some information about Social Security card validation:
    - if Social Security card starts with a "9," it is a temporary SSN and cannot be used for employment purposes
    - issue date of card is on reverse side (for example, 1-88)
    - all cards issued after 1983 include:
      1. columns on right and left side should be raised when touched
      2. if card held under magnifying glass, employer should see "Social Security Administration" throughout card

3. the signature line should consist of microline printing of the words "Social Security Administration" in a repeating pattern.

- cards issued after April 1995 should read "Social Security Administration" on the seal in lieu of "Health Human Services." Cards issued prior to 1980 may have a seal that reads "Social Security Board."
- do not accept laminated, metal or plastic reproductions of Social Security cards.
- Social Security cards marked "not valid for employment" or "valid for work with DHS authorization" are not acceptable to show work authorization
- if an employee informs the company that his Social Security number is invalid and provides the correct number, the employer should file a Form W-2C with the Social Security Administration for years in which employer reported income and withholding under the incorrect number. The company does not need to amend employment tax returns.

Make sure that the names on the documents generally appear to match the name the person is using on the I-9 Form and any other employment-related documents. Paychecks should be made payable to the same name used on I-9 Form and qualifying documents.

Recommendations regarding I-9 Forms

Employers can significantly lessen the likelihood of litigation and liability under the Act by taking the following steps:

- Train specific individuals to handle completion of I-9 Forms and centralize this process. Maintain records of all training provided.
- Conduct a pre-audit.
- Advise all supervisors and human resources representatives about IRCA and IIRIRA.
- Note that discrimination on the basis of citizenship is generally illegal.
- Recognize that employment decisions cannot be made on the basis that an individual's work authorization will expire at some point in the future.
- Keep detailed records regarding verification procedures.
- Do not specify for employees what documents need to be presented. Rather, allow the applicant/employee to review a list the employer maintains separately or simply review the list contained on the Form I-9.
- If necessary, have the list of acceptable documents translated into another language.

- Be aware that requiring employees to present a permanent resident card may constitute a violation of the Act if intent to discriminate is shown.

- Remember that an employee is not required to provide documents to verify information in Section 1, and an employer may not ask for documents.

- Do not question the employee about documents that appear to be genuine.

- Be consistent in applying the verification procedures. Verify each employee's status in the same manner and at the same time (for example, the first day of employment).

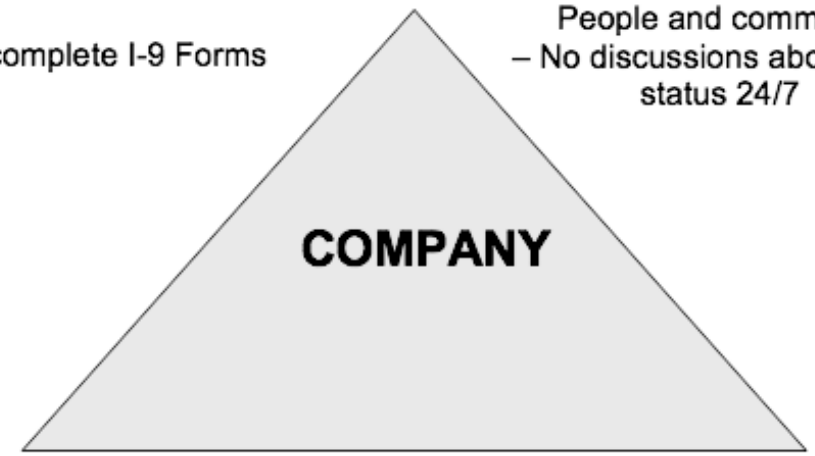
- Singling out employees, particularly if they look "foreign" or have an accent, leads to potential discrimination claims.

- An I-9 Form and employment authorization verification should be completed only after the employee has been hired.

- Make sure your company has established a tickler system regarding the expiration dates of documents such as temporary work cards. Companies may want to begin notifying employees six months prior to the expiration date to ensure the employee has sufficient time to obtain a new card.

- The Social Security Administration can be contacted at (800) 772-6270 to verify up to 10 employees' Social Security numbers using the Telephone Number Employer Verification system (TNEV). Employers may also use the online Social Security Number Verification Service (SSNVS) at www.socialsecurity.gov/employer to verify employee's Social Security numbers. Employers must be registered with the Social Security Administration before using the TNEV. Do not arbitrarily select some individuals for verification. Apply any policy uniformly.

Avoiding "Knowingly"



- Response to government investigations
- ICE investigations
- Response to requests for personnel documents
- Response to inquiries
  - SSA
  - DES
  - Police
  - Citizens
- SSA no-match
- Response to customers or third parties

- New hire packet
- W-9 forms
- Employment policies and handbooks
- Anti-harassment, anti-discrimination policies
- Avoiding national origin discrimination
- Agreements with leased employment agencies
- Contract provisions (delay, immigration compliance)
- Attorney-client privilege

Chapter 7

Tips to complete the I-9 Form

The I-9 Form contains three separate and distinct sections:

1. Section 1: Employee Information and Verification
2. Section 2: Employer Review and Verification
3. Section 3: Updating and Reverification.

These tips are designed to assist managers in properly filling out I-9 Forms. These tips do not cover all of the rules and regulations, but cover the basics:

- do not fill out an I-9 Form until the employee is hired
- use the new I-9 Form – the revision date at the bottom of the I-9 Form is 2/2/09
- use black or blue ink on the I-9 Form
- do not use different color or type of ink in the same section
- do not have more than one handwriting in the same Section (unless person filling out Section 2 is also preparer/translator)
- do not use pencil
- expiration date of documents must be written as month/day/year (do not use day/month/year)
- do not keep photocopies of documents unless otherwise required by state law (for example, in Colorado) or by E-verify (for example, permanent resident card) – instead learn to complete the form correctly
- if a new form must be redone after an employee has worked at the company, the old I-9 Form should be stapled to the new form and kept together.

Please refer to applicable rules and regulations for requirements and more details. Please consult with legal counsel for individual circumstances and questions.

Section 1 – Employee income and verification

Here are a few things to keep in mind for completing Section 1:

- Section 1 of the I-9 Form must be completed on or before the employee's first day of work
- the employee should complete Section 1. It is important to review Section 1 and have employee complete any missing information before completing Section 2.
- highlight the sections for employee to fill out in Section 1 so employee does not miss any boxes.

The employee must do the following to complete Section 1:

- enter personal information, including full name and address
- mark the appropriate checkbox to confirm employment eligibility
- the employee should only fill out the information for the box checked: either document number for box 3 **or** work authorization expiration date and document number for box 4
- employee should read, sign, and date the form
- if a preparer or translator assists the employee, the preparer/translator should enter his or her name and address, signature, and date in the appropriate spaces.

Additional tips for completing Section 1

- Do not complete Section 1 for the employee unless you are serving as translator/preparer.
- Section 1 must not have any missing information.
- If there is no middle name/initial or maiden name a dash should be inserted by the employee.
- Make sure the address is complete, including city, state and zip code.
- Review the employee's completed form and if anything is missing or wrong have employee redo a new I-9 Form and start over.
- Do not ask for any document to substantiate the information provided by the employee in Section 1.
- Make sure date is written as month/date/year.
- Make sure employee has not signed or dated the translator/preparer section.
- Make sure the employee signs and dates Section 1 in the proper spot.

- The employee's name on Section 1 should match the name on the documents provided for Section 2.

Section 2 – Employer review and verification

Section 2 of the I-9 Form must be completed within 3 business days of the date the person starts working. It is the employee's choice which documents he/she presents. Acceptable documents are listed on the form included with this Section. All documents must be unexpired. The documents presented by employees from the list of acceptable documents are used to establish identity and work eligibility. The employer personally reviews the original documents, completes Section 2, and signs and dates the I-9 Form.

An employee must present either an acceptable document from List A **or** acceptable documents from both List B and List C.

- List A contains a list of acceptable documents that verify both identity and work eligibility (only one document needs to be shown to complete Section 2 under the List A column – do not fill anything in under the List B or List C column if the employee shows you a List A document)

- List B contains a list of acceptable documents that verify identity

- List C contains a list of acceptable documents that verify work eligibility.

The employee must show you a List B and a List C document and you need to complete Section 2 under the List B and List C column. The same person who is the employer representative must both review the original documents and fill out and sign Section 2. The employee chooses the documents to present to the employer.

For List A or Lists B and C, the employer representative reviews the original documents and records the following information for each one:

- document title

- issuing authority

- document number

- expiration date (if any).

Under "Certification," you record:

- the employee's start date (sometimes estimated)

- your signature

- your name, title, organization name and address

- the date.

Additional tips for completing Section 2

- Do not use whiteout.
- Do not cross out mistakes or scratch out mistakes.
- If a mistake occurs during completion of the form, start over with a new form.
- Do not tell an employee what documents to produce but instead have the employee review the list of acceptable documents and choose what documents the employee wants to produce.
- If you use a List A document, do not fill out List B and List C documents.
- Your responsibility under Section 2 is to certify you examined the original documents and they appeared genuine and reasonable.
- Your responsibility under Section 2 is to check to make sure the photo or the description of the person reasonably matches the person showing the documents to you (for example, height, age, race or gender) the employee must present original unexpired documents.
- Do not accept photocopies of documents. Only original documents are acceptable.
- If the employee cannot produce original documents to complete the I-9 Form, the employee cannot work at the company.
- Do not accept SSNs that are 000-00-0000 or 123-45-6789. Also, SSNs that start with 9 are generally not acceptable.
- An application to obtain a SS card is not acceptable, but a document from SSA indicating the person has applied for a replacement or lost SS card is acceptable.
- It may be helpful to review the DHS Handbook, which provides additional tips.

Section 3 – Employment reverification

Section 3 of the I-9 Form can be used for employment reverification when an employee's work authorization expires, when an employee's name changes (for example, marriage or divorce), or when an employee is rehired.

Section 3 of the I-9 Form, employment reverification, must be completed when an employee's work authorization nears expiration but he/she is currently eligible to work on a different basis or under a new grant of work authorization. Reverification must be completed on or before the expiration date of the document used and recorded in Section 1. Employers should develop a system to remind employees four to five months prior of the expiration date that the employee needs new authorization by the expiration date or the employee cannot continue to work for the

company. The employer does not need to reverify US Passports or drivers licenses when they expire.

The employer must do the following to complete Section 3 **(**the same person must both review the documents and fill out and sign Section 3):

- the employee presents a document that reflects that the employee is authorized to work in the U.S. (see List A or C)
- review the document and record the following information under Section 3
    - new name (if applicable)
    - date of rehire (if applicable)
    - document title
    - document number
    - expiration date (if any)
- sign and date Section 3.

Additional tips to complete Section 3

- The document title must be spelled out.
- The same document used to initially fill out the form does not need to be shown. The employee can select any List A or C document.
- Complete Section 3 in its entirety.
- Only fill out Section 3 once. Use a new I-9 Form for future updates.
- If authorization expires again, fill out Section 3 of a new I-9 Form and staple to old form.
- Emphasize the importance of honesty, fairness, and consistency within the evaluation procedure.
- Include information on how to deal with potential problems in an evaluation, such as incomplete information regarding the employee or factual disputes.
- Require that the supervisor review the job description of the employee prior to the performance evaluation.

FORM I-9

OMB No. 1615-0047; Expires 06/30/09

Department of Homeland Security
U.S. Citizenship and Immigration Services

Form I-9, Employment Eligibility Verification

Instructions

Read all instructions carefully before completing this form.

Anti-Discrimination Notice. It is illegal to discriminate against any individual (other than an alien not authorized to work in the United States) in hiring, discharging, or recruiting or referring for a fee because of that individual's national origin or citizenship status. It is illegal to discriminate against work-authorized individuals. Employers **CANNOT** specify which document(s) they will accept from an employee. The refusal to hire an individual because the documents presented have a future expiration date may also constitute illegal discrimination. For more information, call the Office of Special Counsel for Immigration Related Unfair Employment Practices at 1-800-255-8155.

What Is the Purpose of This Form?

The purpose of this form is to document that each new employee (both citizen and noncitizen) hired after November 6, 1986, is authorized to work in the United States.

When Should Form I-9 Be Used?

All employees, citizens, and noncitizens hired after November 6, 1986, and working in the United States must complete Form I-9.

Filling Out Form I-9

Section 1, Employee

This part of the form must be completed no later than the time of hire, which is the actual beginning of employment. Providing the Social Security Number is voluntary, except for employees hired by employers participating in the USCIS Electronic Employment Eligibility Verification Program (E-Verify). **The employer is responsible for ensuring that Section 1 is timely and properly completed.**

Noncitizen Nationals of the United States

Noncitizen nationals of the United States are persons born in American Samoa, certain former citizens of the former Trust Territory of the Pacific Islands, and certain children of noncitizen nationals born abroad.

Employers should note the work authorization expiration date (if any) shown in **Section 1**. For employees who indicate an employment authorization expiration date in **Section 1**, employers are required to reverify employment authorization for employment on or before the date shown. Note that some employees may leave the expiration date blank if they are aliens whose work authorization does not expire (e.g., asylees, refugees, certain citizens of the Federated States of Micronesia or the Republic of the Marshall Islands). For such employees, reverification does not apply unless they choose to present in Section 2 evidence of employment authorization that contains an expiration date (e.g., Employment Authorization Document (Form I-766)).

Preparer/Translator Certification

The Preparer/Translator Certification must be completed if **Section 1** is prepared by a person other than the employee. A preparer/translator may be used only when the employee is unable to complete **Section 1** on his or her own. However, the employee must still sign **Section 1** personally.

Section 2, Employer

For the purpose of completing this form, the term "employer" means all employers including those recruiters and referrers for a fee who are agricultural associations, agricultural employers, or farm labor contractors. Employers must complete **Section 2** by examining evidence of identity and employment authorization within three business days of the date employment begins. However, if an employer hires an individual for less than three business days, **Section 2** must be completed at the time employment begins. Employers cannot specify which document(s) listed on the last page of Form I-9 employees present to establish identity and employment authorization. Employees may present any List A document **OR** a combination of a List B and a List C document.

If an employee is unable to present a required document (or documents), the employee must present an acceptable receipt in lieu of a document listed on the last page of this form. Receipts showing that a person has applied for an initial grant of employment authorization, or for renewal of employment authorization, are not acceptable. Employees must present receipts within three business days of the date employment begins and must present valid replacement documents within 90 days or other specified time.

Employers must record in Section 2:

1. Document title;
2. Issuing authority;
3. Document number;
4. Expiration date, if any; and
5. The date employment begins.

Employers must sign and date the certification in **Section 2**. Employees must present original documents. Employers may, but are not required to, photocopy the document(s) presented. If photocopies are made, they must be made for all new hires. Photocopies may only be used for the verification process and must be retained with Form I-9. **Employers are still responsible for completing and retaining Form I-9.**

Form I-9 (Rev. 02/02/09) N

For more detailed information, you may refer to the *USCIS Handbook for Employers* (Form M-274). You may obtain the handbook using the contact information found under the header "USCIS Forms and Information."

Section 3, Updating and Reverification

Employers must complete **Section 3** when updating and/or reverifying Form I-9. Employers must reverify employment authorization of their employees on or before the work authorization expiration date recorded in **Section 1** (if any). Employers **CANNOT** specify which document(s) they will accept from an employee.

A. If an employee's name has changed at the time this form is being updated/reverified, complete Block A.

B. If an employee is rehired within three years of the date this form was originally completed and the employee is still authorized to be employed on the same basis as previously indicated on this form (updating), complete Block B and the signature block.

C. If an employee is rehired within three years of the date this form was originally completed and the employee's work authorization has expired **or** if a current employee's work authorization is about to expire (reverification), complete Block B; and:

1. Examine any document that reflects the employee is authorized to work in the United States (see List A **or** C);
2. Record the document title, document number, and expiration date (if any) in Block C; and
3. Complete the signature block.

Note that for reverification purposes, employers have the option of completing a new Form I-9 instead of completing **Section 3.**

What Is the Filing Fee?

There is no associated filing fee for completing Form I-9. This form is not filed with USCIS or any government agency. Form I-9 must be retained by the employer and made available for inspection by U.S. Government officials as specified in the Privacy Act Notice below.

USCIS Forms and Information

To order USCIS forms, you can download them from our website at www.uscis.gov/forms or call our toll-free number at 1-800-870-3676. You can obtain information about Form I-9 from our website at www.uscis.gov or by calling 1-888-464-4218.

Information about E-Verify, a free and voluntary program that allows participating employers to electronically verify the employment eligibility of their newly hired employees, can be obtained from our website at www.uscis.gov/e-verify or by calling 1-888-464-4218.

General information on immigration laws, regulations, and procedures can be obtained by telephoning our National Customer Service Center at 1-800-375-5283 or visiting our Internet website at www.uscis.gov.

Photocopying and Retaining Form I-9

A blank Form I-9 may be reproduced, provided both sides are copied. The Instructions must be available to all employees completing this form. Employers must retain completed Form I-9s for three years after the date of hire or one year after the date employment ends, whichever is later.

Form I-9 may be signed and retained electronically, as authorized in Department of Homeland Security regulations at 8 CFR 274a.2.

Privacy Act Notice

The authority for collecting this information is the Immigration Reform and Control Act of 1986, Pub. L. 99-603 (8 USC 1324a).

This information is for employers to verify the eligibility of individuals for employment to preclude the unlawful hiring, or recruiting or referring for a fee, of aliens who are not authorized to work in the United States.

This information will be used by employers as a record of their basis for determining eligibility of an employee to work in the United States. The form will be kept by the employer and made available for inspection by authorized officials of the Department of Homeland Security, Department of Labor, and Office of Special Counsel for Immigration-Related Unfair Employment Practices.

Submission of the information required in this form is voluntary. However, an individual may not begin employment unless this form is completed, since employers are subject to civil or criminal penalties if they do not comply with the Immigration Reform and Control Act of 1986.

Paperwork Reduction Act

An agency may not conduct or sponsor an information collection and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The public reporting burden for this collection of information is estimated at 12 minutes per response, including the time for reviewing instructions and completing and submitting the form. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: U.S. Citizenship and Immigration Services, Regulatory Management Division, 111 Massachusetts Avenue, N.W., 3rd Floor, Suite 3008, Washington, DC 20529-2210. OMB No. 1615-0047. **Do not mail your completed Form I-9 to this address.**

OMB No. 1615-0047; Expires 08/31/12

Department of Homeland Security
U.S. Citizenship and Immigration Services

Form I-9, Employment Eligibility Verification

Read instructions carefully before completing this form. The instructions must be available during completion of this form.

ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work-authorized individuals. Employers CANNOT specify which document(s) they will accept from an employee. The refusal to hire an individual because the documents have a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Verification *(To be completed and signed by employee at the time employment begins.)*

Print Name: Last | First | Middle Initial | Maiden Name

Address *(Street Name and Number)* | Apt. # | Date of Birth *(month/day/year)*

City | State | Zip Code | Social Security #

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

I attest, under penalty of perjury, that I am (check one of the following):

- ☐ A citizen of the United States
- ☐ A noncitizen national of the United States (see instructions)
- ☐ A lawful permanent resident (Alien #) _____
- ☐ An alien authorized to work (Alien # or Admission #) _____ until (expiration date, if applicable - *month/day/year*)

Employee's Signature | Date *(month/day/year)*

Preparer and/or Translator Certification *(To be completed and signed if Section 1 is prepared by a person other than the employee.) I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.*

Preparer's/Translator's Signature | Print Name

Address *(Street Name and Number, City, State, Zip Code)* | Date *(month/day/year)*

Section 2. Employer Review and Verification *(To be completed and signed by employer. Examine one document from List A OR examine one document from List B and one from List C, as listed on the reverse of this form, and record the title, number, and expiration date, if any, of the document(s).)*

List A	OR	List B	AND	List C
Document title:				
Issuing authority:				
Document #:				
Expiration Date *(if any)*:				
Document #:				
Expiration Date *(if any)*:				

CERTIFICATION: I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on *(month/day/year)* _____ **and that to the best of my knowledge the employee is authorized to work in the United States. (State employment agencies may omit the date the employee began employment.)**

Signature of Employer or Authorized Representative | Print Name | Title

Business or Organization Name and Address *(Street Name and Number, City, State, Zip Code)* | Date *(month/day/year)*

Section 3. Updating and Reverification *(To be completed and signed by employer.)*

A. New Name *(if applicable)* | B. Date of Rehire *(month/day/year) (if applicable)*

C. If employee's previous grant of work authorization has expired, provide the information below for the document that establishes current employment authorization.

Document Title: | Document #: | Expiration Date *(if any)*:

I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Signature of Employer or Authorized Representative | Date *(month/day/year)*

LISTS OF ACCEPTABLE DOCUMENTS

All documents must be unexpired

LIST A Documents that Establish Both Identity and Employment Authorization	OR	LIST B Documents that Establish Identity	AND	LIST C Documents that Establish Employment Authorization
1. U.S. Passport or U.S. Passport Card		1. Driver's license or ID card issued by a State or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address		1. Social Security Account Number card other than one that specifies on the face that the issuance of the card does not authorize employment in the United States
2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551)				2. Certification of Birth Abroad issued by the Department of State (Form FS-545)
3. Foreign passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa		2. ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address		3. Certification of Report of Birth issued by the Department of State (Form DS-1350)
4. Employment Authorization Document that contains a photograph (Form I-766)		3. School ID card with a photograph		
		4. Voter's registration card		4. Original or certified copy of birth certificate issued by a State, county, municipal authority, or territory of the United States bearing an official seal
5. In the case of a nonimmigrant alien authorized to work for a specific employer incident to status, a foreign passport with Form I-94 or Form I-94A bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, as long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the form		5. U.S. Military card or draft record		
		6. Military dependent's ID card		
		7. U.S. Coast Guard Merchant Mariner Card		5. Native American tribal document
		8. Native American tribal document		6. U.S. Citizen ID Card (Form I-197)
		9. Driver's license issued by a Canadian government authority		
		For persons under age 18 who are unable to present a document listed above:		7. Identification Card for Use of Resident Citizen in the United States (Form I-179)
6. Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI		10. School record or report card		8. Employment authorization document issued by the Department of Homeland Security
		11. Clinic, doctor, or hospital record		
		12. Day-care or nursery school record		

Illustrations of many of these documents appear in Part 8 of the Handbook for Employers (M-274)

Form I-9 (Rev. 08/07/09) Y Page 5

IMMIGRATION COMPLIANCE POLICY AND ACKNOWLEDGEMENT FORM

The company is committed to employing only those individuals who are authorized to work in the United States. The company does not unlawfully discriminate on the basis of citizenship or national origin. In compliance with the Immigration Reform and Control Act of 1986, each new employee, as a condition of employment, must complete the Employment Eligibility Verification Form I-9 and present documentation establishing identity and employment eligibility. The Federal Government currently provides approximately 24 documents from which employees may choose to show the company at the time company completes Section 2 of the I-9 Form.

I understand that the company will only hire individuals who are authorized to work in the United States.

I understand that the company does not unlawfully discriminate on the basis of citizenship or national origin.

I understand that under federal law I am required to provide the company with valid and accurate documents to establish my identity and my authorization to work in the United States and I am required to complete Section 1 of the Form I-9 completely and truthfully.

By my signature below, I affirm that I am legally eligible for employment in the United States.

I hereby state that all information provided to the company on the Form I-9 is true and accurate. I am aware that false statements, misrepresentations of fact, or material omissions may result in the termination of my employment.

I understand that I am an at-will employee, and that the company and I both have the right to terminate my employment at any time, for any reason or no reason, with or without cause, and with or without notice. I understand that violation of the company's policies and practices, including the Immigration Law Compliance Policy, may result in discipline, up to and including termination.

I understand and agree to comply with all of the company's policies, practices, and procedures.

Employee Name (Print):_____

_____

Employee Signature Date

Chapter 8

Expiration dates and I-9s

This chapter addresses the use of documents containing expiration dates when completing an I-9 Employment Eligibility Verification Form. The chapter discusses when documents with expiration dates must be reverified and the I-9 Form updated. In addition, this chapter addresses the circumstances under which a receipt for an application for a document verifying employment eligibility may be used when completing the I-9 Form.

Documents with expiration dates

Several documents acceptable for use on the I-9 contain expiration dates, including passports, driver's licenses, permanent resident cards (I-551), and employment authorization documents (EADs), such as the Form I-766. Some of the documents must be reverified upon expiration, while others do not. Whether or not the document must be reverified depends largely on whether the employee's eligibility to work in the United States expires when the document expires.

It is slightly misleading to speak of "reverifying documents," because it is technically an employee's eligibility for employment in the U.S. that the employer is verifying, not the document establishing the employee's work eligibility. An employer may not require an employee to present a renewed or unexpired version of the document that has expired. Upon expiration of a document, the employee may present any document on List A or List C of the I-9 Form that verifies employment eligibility. The expiration of a document merely triggers the duty to reverify employment eligibility. With that stipulation, this chapter will continue to speak in terms of reverifying documents.

United States passports

The regulations regarding employment eligibility verification allow an employer to accept an unexpired U.S. passport or passport card as proof of eligibility for employment in the United States. Citizens and nationals of the United States are automatically eligible for employment in the United States. The expiration of a United States passport will not affect an employee's eligibility for employment in the United States, because the employee is a citizen. Therefore, when a United States passport that was used on an I-9 expires, it does not need to be reverified and the I-9 does not need to be updated.

List B documents

Documents on List B of the I-9 Form are used to establish an employee's identity. They are not used to verify employment eligibility. Documents on List B must be unexpired when the I-9 is completed, but do not have to be reverified after they expire. Because eligibility to work in the United States may change, documents used to establish work eligibility may have to be reverified. However, an individual's identity should not

change, so logically documents used solely to establish identity do not have to be reverified.

Form I-551 "green card"

An employer is not required to reverify employment eligibility when the Permanent Resident Card or Alien Registration Receipt Card, Form I-551, expires. Forms I-551 are issued only to lawful permanent residents of the United States. The expiration of the Form I-551 does not affect a lawful permanent resident's authorization to work in the United States. However, expired Forms I-551 must be renewed so that cardholders will have evidence of their status when applying for new employment, traveling outside the United States, and certain other benefits. Note, however, that temporary evidence of permanent resident status, such as a temporary I-551 stamp on a foreign passport, must be reverified upon expiration.

Documents that trigger the employer's duty to reverify

While all documents presented for I-9 purposes must be unexpired at the time the I-9 Form is completed, only some documents trigger the employer's duty to reverify the employee's employment eligibility upon expiration.

Documents triggering the requirement to reverify employment eligibility upon their expiration include:

- a foreign passport with an I-551 stamp
- an employment authorization document, such as form I-766 or Form I-94
- any other employment authorization document issued by the Department of Homeland Security not listed under List A.

The U.S. Citizenship and Immigration Services Division of the Department of Homeland Security (USCIS) recommends employers remind employees of the date of expiration of documents on the I-9 at least 90 days in advance of the expiration, because it may take CIS 90 days to process an application for an employment authorization card. The employer must reverify on the I-9 Form that the individual is authorized to work in the U.S. not later than the date the work authorization expires. Receipt for an application for a document to replace a document that has expired does not verify authorization to work in the United States.

Receipt for application for a document verifying employment eligibility

The receipt for application for a replacement document is acceptable as proof of authority to work in the U.S. only if the original document was lost, stolen, or damaged. The receipt should indicate that it is for a replacement card, not a newly issued card. The employee must present the replacement document to the employer within 90 days of being hired or before the employee's current authorization to work in the United States expires (for work verification documents that

have to be reverified when they expire). Receipt for an application to replace an expired document proving work eligibility is not acceptable. Therefore, a receipt acknowledging application for an Employment Authorization Document (Form I-766) is not acceptable to reverify eligibility for employment after the Employment Authorization Document expires. The new employment authorization document must be obtained prior to the expiration of the current document. The regulations make clear that when reverifying eligibility for employment in the United States, the replacement document must be presented by the date the employment authorization expires.

Chapter 9

US Immigration and Customs Enforcement

What was formerly INS is now two organizations, the United States Citizenship and Immigration Services (USCIS) and U.S. Immigration and Customs Enforcement (ICE). On March 1, 2003, the Homeland Security Act of 2002 transferred the functions of the former INS from the Department of Justice to the Department of Homeland Security.

Notice of investigation

Employers generally will receive a letter from ICE indicating that an ICE investigator will meet with the employer no sooner than three days later and that the employer should have all original I-9 Forms available for the ICE investigator to review.

Maintenance of I-9 Forms

Employers are not required to maintain I-9 Forms in any particular order. Employers do not need to alphabetize the forms if the forms are not normally kept in alphabetical order. Employers may produce the I-9 Forms in the manner in which they generally maintain them.

Copying I-9 Forms before investigator arrives

Employers, however, should make copies of all I-9 Forms before the ICE investigator arrives. Generally, the ICE investigator will take all the original I-9 Forms. ICE does lose documents. Also, in some cases, a company is subject to an inspection, but it may not hear from ICE for more than two years before receiving the Notice of Intent to Fine. Furthermore, the company is without any I-9 Forms during this time period if it has not made copies of such forms.

ICE review and response

The ICE investigator will generally remain at your company for a very short time on this first visit. The investigator's goal is to pick up the documents and be as inconspicuous to your employees as possible.

Employees identified as reverification or counterfeit documents

Generally, after a short period of time, the ICE investigator will forward a chart to the company identifying employees with counterfeit documents or who need reverification. Upon receipt of this chart, the company is required to reverify documents.

The company is generally precluded from discharging employees who have previously provided counterfeit or suspect documents merely based on the individual being included on the ICE investigator's chart. The company is supposed to allow the employee to present documents for reverification and completion of a new I-9 Form.

The company should send a notification letter to employees requiring reverification. The letter should inform the employee that he or she must provide documents within a reasonable time (three days, one week, etc.) or the employee will be terminated. Technically, the employee is not supposed to work for the employer until the reverification process has occurred. ICE investigators, however, generally provide a reasonable time for employers to reverify documents. Some employers suspend the employee without pay until the employee presents valid documents, or the deadline to provide such document expires and the employee is discharged if the employee has failed to comply.

Employee surveys/raids

ICE investigators also may return to conduct employee surveys. Sometimes they will bring buses to remove individuals from the workplace. Numerous investigators may arrive to interview employees and surround the facility while the employee surveys are being conducted.

Employers should consider certain issues when ICE inspects your workplace. ICE investigators almost always carry firearms and companies should determine the best location for the investigators to conduct employee surveys.

Safety and compliance with OSHA

Employers should seek to ensure that the employee surveys are conducted safely, as OSHA requires employers to make the workplace safe. Some circumstances could place ICE directly at odds with OSHA's requirement that work be performed safely, including government investigations by ICE.

Safety issues, therefore, should be adequately addressed with the ICE investigator prior to the start of the inspection. If the ICE investigator requests that the employer call all employees to a specific location for a meeting, the employer should be cautious to ensure that if employees try to escape during the meeting, they are not exposed to unnecessary injury. For example, if the company calls a meeting but places all employees within a locked, fenced yard that contains razor wire or barbed wire across the top of the fence, there is a high risk that employees may be hurt if they try to escape. It may be better to have ICE investigators conduct their employee surveys at disperse job sites, if possible.

Preparing for media coverage

Another issue for employers to address is the media and helicopters. ICE sometimes conducts high profile raids, and the media shows up to obtain coverage of the raid. The company should consult with ICE ahead of time and request that ICE not contact the media. The media, however, does listen to police scanners. Furthermore, the media thrives on tips provided by various individuals and entities. Trade secrets should be protected prior to a raid if the company suspects the media may arrive during the raid.

Staging areas

Employers also may want to designate an appropriate staging area for the ICE investigators and their vehicles, including buses, as well as the media. Employers will need to consider an area or two for interviews, and a holding area for individuals who ICE will be removing from the job site.

Post investigation

Notice of intent to fire

After an investigation is complete, it may take some time for an employer to learn whether it will be fined by ICE. A notice of intent to fire may be issued. Most matters are resolved through a negotiation and settlement process.

Examples of real life ICE enforcement actions

The Department of Homeland Security on April 19, 2006 conducted a raid on IFCO Systems North America, Inc. (IFCO), the largest pallet services company in the U.S. (headquartered in Houston). The government arrested seven current and former managers of IFCO pursuant to criminal complaints issued in a New York federal court. All seven managers were charged with conspiring to transport, harbor, encourage, and induce undocumented persons to reside in the U.S. for commercial advantage and private financial gain, in violation of the immigration laws. 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 to the criminal arrests, ICE agents conducted "consent" searches or executed criminal search warrants at more than 40 IFCO plants and related locations in 26 states that resulted in the apprehension of approximately 1,187 unauthorized IFCO employees. The consent searches and search warrants were conducted at locations in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, new Jersey, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, South Carolina, Virginia, and Utah.

The government's investigation of IFCO began over a year before the raids, and the government alleges that:

- IFCO officials transported illegal aliens to and from work; paid rent for the housing of illegal alien employees, and deducted money from the aliens' monthly paycheck to cover these expenses

- it was common for IFCO to hire workers who lacked Social Security cards or who produced bogus identification cards

- IFCO hired an informant for ICE, reimbursed the informant for obtaining fraudulent identity documents for other unauthorized employees, used the informant to recruit other illegal workers and advised the person and other unauthorized employees on how to avoid law enforcement detection

- approximately 53.4 percent of Social Security numbers contained on IFCO's payroll of roughly 5,400 workers during 2005 were either invalid, did not match the true name registered with the Social Security Administration for that number, or belonged to children or deceased persons

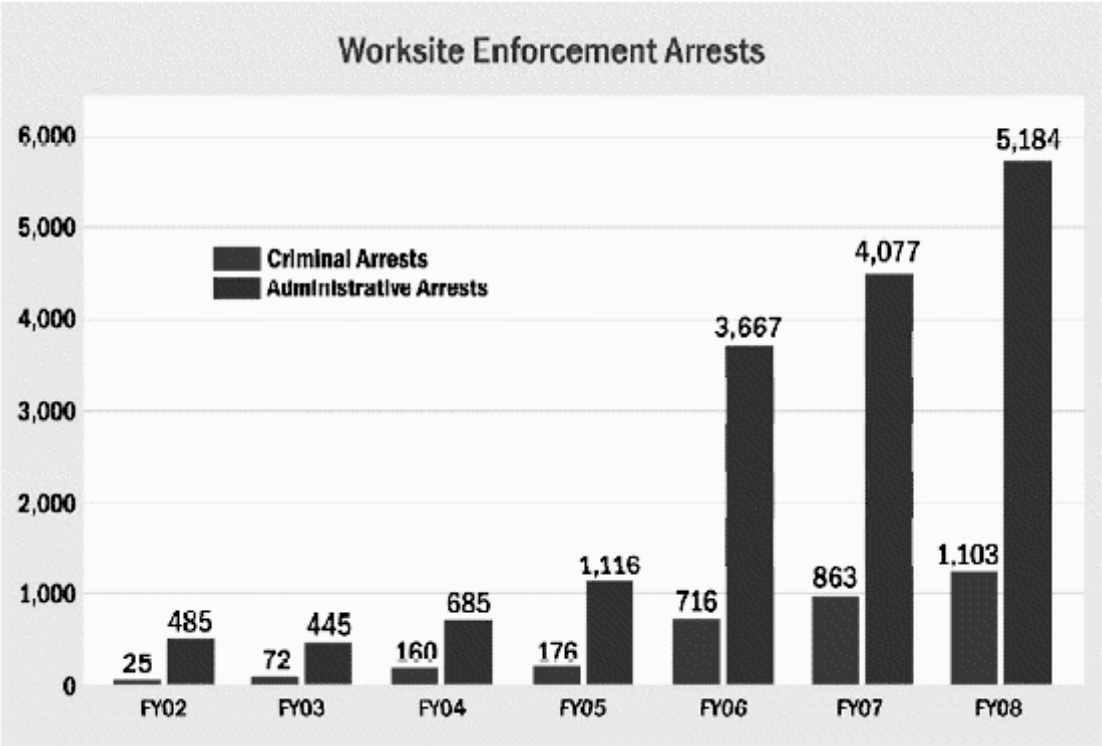
- the Social Security Administration sent at least 13 written notifications to IFCO about such discrepancies on its payroll records in 2004 and 2005.

Chapter 10

Trends in criminal enforcement of immigration sanctions and I-9 audits

Increased criminal enforcement against employers

Over the past few years, ICE has shifted its enforcement philosophy to emphasize criminal sanctions over fines. Julie L. Myers, then Assistant Secretary of Homeland Security for ICE, compared fines for unlawful hiring practices to an "average traffic ticket," and noted that under the new enforcement strategy, offending employers "now face jail time and risk significant asset forfeiture." This graph shows an increase in worksite enforcement arrests both criminally and administratively. The last three years has seen more than triple the arrests as compared to the previous time periods.



Trend to harsher penalties

In addition to the prohibition against hiring unauthorized workers, authorities may also criminally charge employers under statutes prohibiting harboring unauthorized workers and under money laundering statutes. The penalties for these criminal offenses include fines, prison time, and forfeiture of assets used in the offense. The government is increasingly pursuing employers under these alternate statutes because their fines are much harsher than those for unlawful hiring and contain forfeiture provisions. It is essential for employers to implement effective policies and procedures to avoid possible criminal liability.

Felony harboring

The Immigration Reform and Control Act (IRCA) makes it a felony for any person to:

- bring or attempt to bring a person into the United States knowing that they are an unauthorized individual
- move or attempt to transport a person within the United States knowing or recklessly disregarding the fact that they are an unauthorized individual
- conceal, harbor, or shield from detection, or attempt to conceal, harbor, or shield from detection, any person knowing or recklessly disregarding the fact that they are an unauthorized individual
- encourage or induce an unauthorized individual to come to, enter, or reside in the United States, knowing or recklessly disregarding the fact that such action will be in violation of the law
- conspire to commit, or aiding and abetting the commission of, any of the above
- bring in or attempt to bring an unauthorized individual into the U.S. when knowing or recklessly disregarding that they are an unauthorized individual and do not have prior authorization to enter the U.S.
- knowingly hire for employment at least ten individuals with actual knowledge that said individuals are unauthorized individual.

Penalties

Criminal sanctions for violations of the harboring statute include:

- up to ten years imprisonment for bringing an unauthorized individual into the U.S. or conspiring to do so
- up to ten years imprisonment for transporting, concealing/harboring, or encouraging an unauthorized individual to come to the U.S. illegally if the act was done for the purpose of commercial advantage or private financial gain
- up to five years imprisonment for transporting, concealing, harboring, encouraging an unauthorized individual to come to the U.S. illegally, or aiding

and abetting if the act was not done for the purpose of commercial advantage or private financial gain

- up to 20 years imprisonment for any violation of the IRCA in which the unauthorized individual causes serious bodily injury or places any person's life in jeopardy
- up to death or life imprisonment for any violation of the IRCA that results in the death of any person
- up to ten years for bringing in or attempting to bring in an unauthorized individual knowingly or recklessly; more than three years if done for commercial advantage, financial gain, or reason to believe the alien will commit a felony; five to fifteen years if it is a third offense or greater
- up to five years for knowingly employing ten or more unauthorized individual in a 12-month period
- fines of the greater of $250,000 or twice the defendant's gain. Organizations can be fined up to $500,000.

Forfeiture

An additional serious consequence of felony harboring offenses is the forfeiture power contained in IRCA. It allows the government to subject any conveyance used in the commission of a violation, the gross proceeds of such violation, and any property traceable to such conveyance or proceeds to seizure and potential forfeiture. The significant financial consequences of such seizures have made the harboring statute the preferred tool for ICE in their recent enforcement actions against employers.

Example

In July 1999, the Immigration and Nationalization Service (INS) informed Golden State Fence that at least 15 of its employees were unauthorized workers. At that time Golden State agreed to fire these workers. In September 2004, as a result of an audit of military contractors, ICE determined that at least 49 of Golden State's employees were unauthorized workers, and three were on the list that INS provided to Golden State in 1999. In 2005, ICE executed search warrants on Golden State, finding evidence in hiring records that Golden State had rehired unauthorized workers named in previous audits, and that their employees' Social Security numbers did not match Social Security Administration records.

Golden State's president and vice-president pled guilty to knowingly hiring 10 or more unauthorized workers in a 12-month period. Melvin Kay, Golden State's president and founder, was sentenced to three years probation, six months of home confinement, and a $200,000 fine. Michael McLaughlin, the vice-president, was sentenced to the same probation and confinement with a $100,000 fine. A condition of the plea agreement required the company to forfeit $4.7 million in assets. Assistant Secretary Myers cited the case as proof "that employers who knowingly and blatantly hire illegal workers will pay dearly for such transgressions."

Example

ICE started its investigation of IFCO – a manufacturer of wooden pallets, crates and containers – in September 2005 when an employee called to report Hispanic employees tearing up their W-2 forms. The employee reported that a manager told him they were doing so because they were unauthorized workers with fake Social Security cards and no intention of filing taxes. On April 19, 2006, agents executed search warrants and arrested several managers on felony and misdemeanor charges.

The indictment alleged a conspiracy among several of the company's managers to harbor unauthorized workers, to encourage and induce them to enter the U.S., and to transport them within the U.S. The government alleged that the conspiracy harbored the workers by moving unauthorized workers between IFCO plants to avoid arrest and by allowing them to use multiple Social Security numbers and identities during the course of employment, and on occasion providing them with such numbers and identities. When the conspirators could not find Hispanic laborers in the vicinity of a new plant, they would allegedly recruit and transport undocumented laborers to the site of the new plant, provide them with housing, and give them other financial assistance like check-cashing and purchase of food, clothing, and personal items. The aiding and abetting charge carries a five year maximum, and all other charges carry a maximum ten year sentence and $250,000 maximum fine.

On December 19, 2008, ICE announced a settlement with IFCO. IFCO agreed to pay a total of $20.7 million to resolve the criminal ICE investigation. $18.1 million was civil fines for the immigration violations. $2.6 million represented FLSA backpay and penalties resulting from overtime violations relating to the undocumented workers.

In the settlement agreement, IFCO accepted responsibility for the unlawful conduct of its managers and employees. The agreement was reached before the company was to be indicated by the US District Court for Northern District of New York.

IFCO will not be prosecuted as a company. However, IFCO employees may still face criminal charges. Seven IFCO managers were charged in a superceding indictment on January 23, 2009, for various federal offenses, including conspiracy to harbor and encourage unauthorized foreign nationals to reside in the United States, conspiracy to defraud the United States, harboring unauthorized workers, and transporting unauthorized workers. Those charged include the Senior VP of Human Resources, the Senior VP of Finance and Accounting, the VP of New Market Development, the controller of pallet services, a human resources manager, and a new market development manager, and an operations manager of new market development for the Cincinnati area. According to the January 2009 indictment, all seven managers conspired to harbor unauthorized workers and induce them to work in the U.S. Four of the managers are charged with conspiracy to defraud the IRS and SSA by submitting false payroll information to those companies. Various of the managers are charged with harboring and with transporting unauthorized workers.

To date, nine IFCO managers have entered guilty pleas related to hiring and harboring unauthorized workers.

Example

The United States v. Tyson Foods case is a valuable example of how an effective corporate compliance policy can help to establish a company's innocence at trial. The Department of Justice began investigating Tyson Foods in 1997. Federal agents posing as smugglers of unauthorized workers tried to persuade local managers to hire the undocumented workers they brought to Tyson's local plants from Mexico. At the same time, Tyson's upper management volunteered the company for a pilot employee verification system offered by the government. When they independently uncovered evidence of false documentation, they alerted the government and worked on a joint investigation.

DOJ continued its secret investigation and obtained a 36-count indictment against Tyson in 2001. The indictment alleged that Tyson had conspired to violate IRCA by hiring 136 undocumented workers. It further alleged that Tyson created a corporate culture that condoned hiring undocumented workers. Tyson argued that despite the shortcomings of their hiring system, upper management had not conspired to break immigration laws, as evidenced by their status as one of the first companies to volunteer for the government's pilot verification program.

At trial, Tyson employed a "rogue employee" defense, arguing that the lower level managers who broke the laws were acting against upper management's stated policy. Tyson's CEO and Compliance Officer both testified that upper management was committed to compliance with immigration laws. Records documenting Tyson's attempts to comply were key evidence for the defense. On cross-examination, the government's witnesses, who were Tyson lower-level managers, admitted that they understood that their conduct was against corporate policy and hidden from senior management. The trial judge dismissed 24 of the charges related to immigrant smuggling, and the jury acquitted Tyson of the remaining 12 charges.

Example

On May 12, 2008, ICE conducted the largest criminal worksite enforcement operation in U.S. history at the Agriprocessors kosher meatpacking plant in Postville, Iowa. Agents arrested 389 workers, and charged 302 with immigration violations. This was the most ever arrests at a single worksite. Ultimately, 297 pled guilty and were sentenced. In the affidavit for the search warrant, Senior Special Agent David Hoagland said that ICE sought the warrant to investigate allegations of harboring unauthorized workers, a pattern and practice of hiring unauthorized workers, misuse of Social Security numbers, and aggravated identity theft.

Anonymous sources alleged several incidents that led to the raid. One source alleged that a human resources manager laughed when presented with a situation where Social Security cards from three separate employees had the same Social Security number. Sources reported that an Agriprocessors' supervisor was helping unauthorized workers to falsify vehicle registrations and that another employee

was referring them to sources for falsified official documents. Several sources reported a manager who hired employees without any identification, issued their paychecks to an unknown name and SSN, and cashed the checks on site. In many cases, the employees without documentation were allegedly paid below minimum wage. Agents seized the site's computer system, identification documents, biometric information, and company employee records to investigate harboring charges. Later indictments indicate that 96 fake green cards and employment applications were seized.

Two Agriprocessors supervisors were arrested in July 2008. Charges against the supervisors included aiding and abetting aggravated identity theft and encouraging unauthorized foreign nationals to reside illegally in the United States. One supervisor pled guilty to charges of conspiracy to hire unauthorized workers and aiding and abetting the hiring of unauthorized workers. In November 2008, the former CEO, three managers, and a human resources employee were indicted on 12 counts, including conspiracy to harbor unauthorized workers for profit, harboring unauthorized workers for profit, conspiracy to commit document fraud, aiding and abetting aggravated identify theft, and aiding and abetting document fraud.

A 99 count superceding indictment was filed January 16, 2009. Many of the charges relate to money laundering, bank fraud, and making false statements to a bank. The indictment alleges that the company's executives certified legal compliance to the bank while knowing the company employed unauthorized aliens.

Money laundering

Generally, money laundering is using proceeds from a "specified unlawful activity" with knowledge that the money came from a crime. Felony harboring is listed as a "specified unlawful activity," but misdemeanor hiring is not. Charges for aiding and abetting money laundering and conspiracy to launder money are also available to prosecutors.

Prosecutors use the money laundering offense in employer immigration enforcement for several reasons. It allows them to introduce evidence of defendant's gain and how the defendant spent the money after it was laundered that would likely not be admissible otherwise. This tends to make juries less sympathetic with defendants. Money laundering also has longer available sentences and increases the amount of the defendant's property that is forfeitable. While "illegal proceeds" are forfeitable under the harboring statute, all money "involved in" a money laundering violation may be subject to forfeiture.

Prohibited conduct

There are several types of money laundering, but all require the defendant to know that the property involved in the transaction is the proceeds of a "specified unlawful activity." It is unlawful to conduct a financial transaction:

- conducted in the proceeds of a specified unlawful activity with intent to promote specified unlawful activity

- conducted in the proceeds of a specified unlawful activity with intent to commit tax evasion or make a false statement on tax document
- designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of proceeds of specified unlawful activity
- designed in whole or in part to avoid a transaction reporting requirement under state or federal law
- conducted in more than $10,000 in proceeds of specified unlawful activity.

Penalties

Criminal sanctions for money laundering offenses include:

- up to ten years in prison for each violation (each transaction is a separate violation) in the fifth category above
- up to 20 years in prison for each violation in categories 1 through 4 above
- fines of up to twice the amount laundered in each violation in the fifth category above
- fines of the greater of $500,000 or twice the amount laundered for each violation listed under **Prohibited conduct**.

Forfeiture

Money laundering forfeiture authorizes the forfeiture of all property "involved in" the money laundering offense, which may be more than the "gross proceeds" forfeiture in a harboring offense. The government can use criminal forfeiture to get a money judgment that is executable against any of the defendant's property. In satisfying such a judgment, defendants are jointly and severally liable (all defendants are responsible for the entire value of the judgment until it is paid in full).

Example

HV Connect, Inc. (HVC) was a temporary employment agency that contracted with companies to supply temporary workers. On Oct. 12, 2006, Trung Nguyen, a company official, pleaded guilty to bringing in and harboring certain unauthorized individuals, mail fraud, wire fraud, conspiracy and money laundering. An ICE investigation revealed that most of HVC's employees were not lawfully present and did not possess employment authorization. The investigation resulted in the arrest of 33 unauthorized workers unlawfully employed through HVC.

HVC provided housing and transportation to the unauthorized employees and assisted them in obtaining fraudulent permanent resident cards, Social Security cards, driver's licenses, and other identification documents. HVC had earned over $5.3 million for supplying the unauthorized labor force. On March 14, 2007, ICE agents obtained a Final Order of Forfeiture for property owned by Nguyen that had approximately $100,000 in equity.

Example

On July 20, 2006, two corporations in Kentucky pleaded guilty to criminal charges of harboring unauthorized individuals and money laundering in connection with a scheme that provided unauthorized workers to Holiday Inn, Days Inn and other hotels in Kentucky. As part of the plea, Asha Ventures, LLC, and Narayan, LLC, agreed to pay $1.5 million in lieu of forfeiture and to create internal compliance programs. Through their agents, the companies employed numerous unauthorized workers at hotels in London, Kentucky, who were often paid by check made payable to fictitious cleaning companies. On October 20, 2006, Ventures and Narayan were sentenced in the Eastern District of Kentucky to one year supervised probation and each company was fined $75,000.

Misdemeanor hiring of aliens

Prohibited conduct

IRCA makes it a misdemeanor for any person to engage in a "pattern or practice" of the following:

- hire, recruit, or refer an individual for a fee knowing that the individual is not authorized to work in the U.S
- hire an individual for employment without complying with IRCA's employment verification requirements
- hire, recruit, or refer an individual for a fee without complying with IRCA's employment verification requirements
- knowingly continue to employ an individual who has become unauthorized for employment, even if their hiring was authorized.

Penalties

Criminal sanctions for violations of the hiring statute include:

- up to $3,000 for each unauthorized individual

  and

- up to six month imprisonment for the entire pattern.

Forfeiture

There is no forfeiture provision associated with the misdemeanor offense.

Good-faith defense

Employers who attempt to comply with the employment verification system have a good-faith defense against the criminal charge unless the enforcement agency gives the employer notice of a technical or procedural failure and the employer fails to correct the problem within ten days.

Frequency of use

The misdemeanor charge for IRCA violations has fallen out of favor due to ICE's expressed preference for the harsher penalties and forfeiture provisions of the harboring and money laundering statutes.

Further civil consequences

The Racketeer Influenced and Corrupt Organizations Act (RICO) includes civil penalties for persons and organizations who engage in a "pattern of racketeering activity." These penalties allow private plaintiffs to collect triple damages, costs of the lawsuit, and attorney's fees against defendants who commit any act that falls under the statute's list of "racketeering activity."

Inclusion of IRCA violations

Certain acts that would be indictable under the IRCA (for example, harboring unauthorized individuals, aiding or assisting unauthorized individuals on entering the U.S., and importing unauthorized individuals for immoral purpose) are considered racketeering activity under RICO if the act was committed for the purpose of financial gain. Therefore, corporate defendants who violate the IRCA provisions mentioned previously could "be forced to provide high levels of compensation to the plaintiff, be restricted from engaging in future business activities, and even lose its business completely."

Potential liability

Private liability for RICO violations includes:

- treble damages to private plaintiffs
- the cost of the plaintiff's suit and attorney's fees
- court order for defendant to divest from the enterprise
- court order restricting defendant's future investment
- court order forcing "dissolution or reorganization" of defendant's enterprise.

To bring a RICO suit, a plaintiff must plead:

- the defendant's violation of RICO

  and

- an injury to the plaintiff's business or property

  and

- causation of the injury by the defendant's violation.

Example

After the Tyson trial mentioned on page XX, a class of current and former Tyson employees authorized to work in the U.S. brought suit against Tyson for violating RICO, in the Trollinger v. Tyson Foods case. The class alleged that Tyson conspired to knowingly bring unauthorized immigrants into the country, employ them, and conceal them from government detection in violation of IRCA's harboring provision. The class argued that this conspiracy enabled Tyson to pay all of its employees less than the going market wage, thus paying the plaintiffs less than they otherwise would be paid. The court dismissed all but one of these claims because the plaintiffs were unable to make a sufficient factual showing that Tyson had acted knowingly, but the parties continue to trial on the remaining claim.

Example

Valenzuela v. Swift began on December 12, 2006, when ICE officials arrested 1,282 undocumented workers on administrative immigration violations at Swift & Company meat packing plants around the country. ICE did not bring charges against Swift officials resulting from the raids. Three days later, eighteen Swift employees filed suit against Swift & Company, alleging that Swift hired undocumented workers in violation of RICO to "illegally depress and artificially lower" its employees' wages. On December 20, 2007, the court ruled that Swift is potentially liable for any depression in wages that the plaintiffs can show (at trial) was caused by management's harboring of undocumented workers. Therefore, at the upcoming trial, the plaintiffs can recover treble damages, costs, and fees if they are able to show that Swift knowingly employed unauthorized aliens that it assisted in obtaining false documentation.

Chapter 11

E-Verify

In an attempt to address problems with the employment of unauthorized workers and the employment verification procedures, the federal government, under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), created three employment eligibility verification pilot programs:

- the Basic Pilot Program
- the Citizens Attestation Program
- the Machine Readable Program.

The only one that continues to be in use is the Basic Pilot Program, which has been renamed E-Verify and is jointly administered by the Social Security Administration (SSA) and the Department of Homeland Security (DHS).

Several states have passed laws that require some employers (those with state government contracts) to use E-Verify. The federal government also recently passed regulations requiring companies with federal contracts to use E-Verify. Other states, such as Arizona, require all employers to use E-Verify. On a national level, however, E-Verify remains a voluntary program.

Nuts and bolts of using E-Verify

Registration online

Employers can register for E-Verify online at:

- https://e-verify.uscis.gov/enroll/.

Employers should not enroll until they are ready to begin verifying employment eligibility through the program. Employers are required to sign a Memorandum of Understanding (MOU) that identifies the responsibilities of the employer, the SSA, and the DHS.

Every employee that uses E-Verify for the company must complete an online tutorial and proficiency test. The tutorial may take up to two hours. In addition, each user should maintain a copy of the E-Verify User Manual, an approximately 80-page manual describing the E-Verify process employers must follow.

Memorandum of Understanding

Employers must sing a Memorandum of Understanding (MOU). The MOU may be "signed" electronically by checking a box online saying "I agree that I have read and

agree with the terms and conditions of the MOU, and am authorized by my company to act on its behalf with respect to the E-Verify program. I understand that I must complete the electronic registration in order for the MOU to take effect." This is one of the first pages of the registration process. By completing the registration, the company is committing itself to comply with the MOU.

The company should print the MOU from this screen and ensure that all employees who will be using E-Verify for the company have read and understand the MOU. DHS warns that violations of the MOU may lead to legal liability for the company under federal or state law, including Title VII of the Civil Rights Act of 1964 and the anti-discrimination provision of the Immigration and Nationality Act.

In the MOU, employers agree to follow the program requirements, including the following:

- the employer may not submit an inquiry to E-Verify until after an employee is hired and an I-9 has been completed for the employee
- the employer may use E-Verify to confirm the employment eligibility only for new employees, and not for employees hired before the employer signed the MOU
- the employer must agree not to discriminate against employees based on national origin or citizenship status.
- the employer must post notices provided by DHS regarding its participation in E-Verify and must post anti-discrimination notices issued by the DOJ Office of Special Counsel
- the employer may not use E-Verify to selectively verify employment eligibility. If used, it must be used for all new hires, regardless of their race, ethnicity, national origin, or citizenship status
- the employer may not use E-Verify to reverify the employment eligibility of an employee whose original work authorization documents have expired
- the employer must provide the employee copies of the written Notice of Tentative Non-Confirmation, if applicable, and the opportunity to resolve the tentative non-confirmation
- the employer must not take adverse action against an employee while the employee is challenging a tentative non-confirmation, unless the employer obtains knowledge (as defined in 8 C.F.R. § 274a.1(1)) that the employee is not authorized to work
- the employer must take steps to safeguard the information used for E-Verify and ensure it is not used for any purpose other than employment eligibility verification
- the employer must continue to use E-Verify while the MOU is in effect. The employer may formally terminate the MOU and close using the program upon 30

days written notice to SSA and DHS. The employer may request termination of its involvement in E-Verify online from the "Site Administration" page on the program.

Discrimination charges for violating the MOU or E-Verify requirements

The DHS warns that violations of the MOU may lead to legal liability for the company under federal or state law, including Title VII of the Civil Rights Act of 1964 and the non-discrimination provision of the Immigration and Nationality Act. The Department of Justice Civil Rights Division Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) enforces the non-discrimination provisions of the Immigration and Nationality Act. Employees who believe that a company has used E-Verify in a discriminatory manner may file a complaint with the OSC, who has received a growing number of E-Verify complaints since states, such as Arizona, have mandated its use.

An employer could be subject to a discrimination charge if it uses E-Verify as a pre-screening tool to verify work authorization of applicants. It could also be subject to a discrimination charge for failing to provide the employee the notice of tentative non-confirmation and right to challenge the tentative non-confirmation, selectively using E-Verify, using E-Verify to verify work authorization of existing employees or taking adverse action based on a tentative non-confirmation. The following is a list of E-Verify Employer Dos and Don'ts from the OSC.

DO	DON'T
Use program to verify employment eligibility of new hires.	Use program to verify current employees.
Use program for all new hires regardless of national origin or citizenship status.	Use program selectively based on a "suspicion" that new employee or current employee may not be authorized to work in the U.S., or based on national origin.
Use program for new employees **after** they have completed the I-9 Form.	Use program to pre-screen employment applicants.
Provide employee with notice of Tentative Nonconfirmation (TNC) promptly.	Influence or coerce an employee not to contest a Tentative Nonconfirmation (TNC).

Provide employee who chooses to contest a Tentative Nonconfirmation (TNC) promptly with a referral notice to SSA or DHS.	Terminate - or take other adverse action against - an employee who is contesting a Tentative Nonconfirmation (TNC) unless and until receiving a Final Nonconfirmation.
Allow an employee who is contesting a Tentative Nonconfirmation (TNC) to continue to work during that period.	Ask an employee to obtain a printout or other written verification from SSA or DHS when referring that employee to either agency.
Post required notices of the employer's participation in E-Verify and the antidiscrimination notice issued by OSC.	Ask an employee to provide additional documentation of his or her employment eligibility after obtaining a Tentative Nonconfirmation (TNC) for that employee.
Secure the privacy of employees' personal information and the password used for access to the program.	Request specific documents in order to use E-Verify's photo tool feature.

Use of E-Verify for entire company or site-by-site basis

Companies may register to use E-Verify at individual work sites and not use it at the entire company. Each site that verifies the employment authorization of employees at that site must sign its own Memorandum of Understanding. If the company's human resource functions are centralized, the central office can perform the employment verification for all sites. Employers may use E-Verify for individual worksites or may use it for their entire company. However, employers should be aware of state laws that may impact their use of E-Verify. For example, Arizona law requires Arizona employers to use E-Verify. Other states require contractors with state contracts to use E-Verify.

Outsourcing employment verification duties

Additionally, an employer can outsource employment authorization verification to a third party service provider called a Designated Agent. However, if a company outsources its employment verification under E-Verify, it will still be required to sign a Memorandum of Understanding and be assigned a unique number that the service provider will use only for that company.

Verification process

Completing a Form I-9

Employers start the employment verification process in essentially the same way that they would if not using E-Verify, by completing a Form I-9. This cannot be done until

after a company hires an individual. E-Verify places one limitation on the I-9. The employer may accept a List B document to establish identity only if the List B document contains a picture. However, the employee still is able to choose whether to produce either:

- one List A document

  or

- one List B and one List C document.

The employee may still choose which document from the list to show, as long as the List B document has a photograph. If the employee presents a Permanent Resident Alien Card or a Form I-766 Employment Authorization Document, the MOU requires the employer to copy and maintain a copy of the permanent resident card or employment authorization document and must use the copy to verify the photo against the DHS database. This requirement does not exist for Designated Agents. In addition, the requirement is inconsistent with Federal I-9 regulations, which require an employer to either keep copies of all documents used to complete the I-9 or no documents used to complete the I-I but prohibits keeping them selectively. Therefore, USCIS has instructed the authors of these materials that employers who do not keep photocopies of the I-9 supporting documents may copy the permanent resident card or I-766 for purposes of using the photo tool only, then destroy the copies pursuant to the employer's policy not to keep photocopies of I-9 supporting documents.

The E-Verify Users Manual reminds employers that they must accept the documents the employee provides, with the single limitation that the List B document must contain a picture. It also reminds employers that they may not request documents to verify information that the employee provided on Section 1. The employee alone is responsible for the information in Section 1 of the I-9. The employer is only responsible for making sure it is complete.

Entering information in E-Verify

The employer must enter information from Sections 1 and 2 of the Form I-9 into E-Verify, including:

- last name
- first name
- Social Security Number
- date of birth
- date of hire
- citizenship status
- alien registration or I-94 number (if applicable)

- type of document verified on the Form I-9 with expiration date.

SSA and USCIS verification of data

The SSA first verifies if the name, date of birth, Social Security number, and citizenship status reported match the SSA's records. Inquiries regarding non-citizens are routed to the USCIS to verify the work authorization of the employee. If the information entered matches the SSA and USCIS databases, then no further action is required. The employer is provided a confirmation number and must retain a record of the confirmation number on the Form I-9 or print the confirmation screen and attach to the Form I-9.

Tentative non-confirmation

If the SSA is unable to verify the information, the employer will receive an "SSA tentative non-confirmation." If the USCIS is unable to verify that the worker has proper work authorization, the employer will receive a notice, "DHS verification is in progress." An immigration status verifier will manually check the USCIS records if an automatic verification cannot be provided. If, after the manual check, USCIS cannot verify the employee's work authorization, the employer will receive a "DHS tentative non-confirmation." DHS plans to more than triple the number of status verifiers it has on staff to accommodate the increased use of E-Verify.

Providing notice of tentative non-confirmation

After the employer receives a tentative non-confirmation, it should first check to see that all information was entered correctly. If the non-confirmation did not result from a typographical error that the employer can fix, the employer must provide the employee with a written notice entitled "Notice to Employee of Tentative Non-Confirmation." The notice form is generated by E-Verify. The employer must print the notice. If there is no copier available, the employer should print two copies, because the employer must provide one copy to the worker and retain one copy for the employer's files. The worker must indicate on the notice whether he or she intends to challenge the non-confirmation. Both the employee and the employer must sign the notice. One signed copy of the notice should be given to the employee. The employer should retain the other signed copy of the Notice to Employee with the individual's Form I-9. Failure to give a signed copy of the Notice to Employee of Tentative Non-Confirmation may result in a charge of discrimination against the employer if the employee alleges that he or she was not informed of the tentative non-confirmation.

If the employee is challenging the non-confirmation, the employer is required to print a second letter, called a "referral letter," that contains information about how to resolve the non-confirmation. The referral information from the referral letter is transmitted electronically to the DHS or the SSA. Both the employer and the employee must sign the referral letter. Again, one signed copy of the referral letter must be given to the employee. One signed copy of the referral letter must be retained with the individual's Form I-9.

Days to resolve discrepancy

The employee has eight working days after receiving the referral letter from the employer to contact the SSA or DHS to try to resolve the discrepancy. The employee is to keep working during this time. The employer must treat this employee the same as it treats employees who received an automatic work authorization and cannot delay the employee's start date or training opportunities based on a tentative non-confirmation.

The SSA or DHS has ten working days to resolve the case after it receives the referral from the employer, which occurs electronically when the employer provides the employee with a "referral letter." If more time is needed, the employer will receive a "case continuance" notice. The entire procedure is designed to provide a final confirmation or final non-confirmation within ten business days after the employer enters the information in E-Verify, but this does not always occur.

Final non-confirmation requiring employer action

If an employee does not challenge a tentative non-confirmation, the non-confirmation becomes final.

In the case of an SSA tentative non-confirmation, the employee should notify the employer when he or she visits the SSA. The employer must check the employee's information through E-Verify at least 24 hours after the employee informs the employer he or she has visited the SSA office but no later than ten working days after the employer sent the referral information to the SSA. If the employee does not contact the SSA, the employer should resubmit the employee's information for verification no later than ten working days after the employer sent the referral to the SSA.

The employer will then receive an employment authorization confirmation or an SSA final non-confirmation. The employer may also receive a notice that DHS verification is in progress if the SSA issue was resolved because the information matches SSA's records but the SSA does not have employment authorization information for the individual.

In the case of a DHS tentative non-confirmation, ten business days after the employer makes the referral, it should check the employee's information for verification through E-Verify. It will receive either an employment authorized notice, an employment unauthorized notice (final nonconfirmation) or a DHS no show response. The DHS no show response is provided if the employee failed to contact the DHS within ten days after the referral. The no show response is considered a final non-confirmation.

After a non-confirmation becomes final, the employer must either terminate the individual's employment or notify DHS if it continues to employ an employee after receiving a final non-confirmation. An employer is subject to fines of $500 to $1,000 for each failure to notify the DHS that it continued to employ the individual. If the employer continues to employ an individual after a final non-confirmation, the employer is subject to a rebuttable presumption that it has knowingly employed an unauthorized alien.

Employee contesting tentative non-confirmation

An employer is prohibited from taking adverse employment action against an employee who is contesting a tentative non-confirmation. The employee should continue to work during the window of ten business days with which the SSA or DHS has to resolve the discrepancy. The employer cannot treat the employee who is contesting a tentative non-confirmation any differently than the employee who receives an initial confirmation. If the employee is not challenging the non-confirmation, the employer should terminate the individual's employment or report to DHS it is not terminating the individual's employment after the non-confirmation.

An employee cannot face any adverse employment consequences based on a tentative non-confirmation. An employer may not delay the employee's start date, delay training, or otherwise treat an employee with a tentative non-confirmation differently than an employee that received an instant confirmation. An employer cannot speed up an agreed-upon start date based on a confirmation from E-Verify, because this would be disparate treatment of employees based on results from E-Verify. If the employer generally offers training to employees in the first ten days of employment, it must provide the same training to the employee who is challenging a tentative non-confirmation.

Problems with E-Verify

E-Verify has several drawbacks as an employment verification vehicle. It requires employees to have a computer and internet access to use the program. E-Verify has a high rate of tentative non-confirmations and erroneous non-confirmations. Additionally, it is unable to detect fraud and identity theft. There is also a potential to allow access to employees' personal, confidential information. Additionally, misuse of E-Verify may lead to discrimination and unfair employment practices.

Computer and Internet access

E-Verify is a computer-based system that requires employers to have a computer and Internet access. There is no telephonic equivalent that would allow employers to verify employment eligibility.

Because E-Verify requires employers to enter personal, confidential information regarding employees, employers must use care to protect the information. If an employer does not have a computer with Internet access, the employer may be tempted to use a public computer, such as a computer at a public library. However, use of a public computer raises serious confidentiality and privacy concerns. If the information could be recovered by other computer users, they would have all the information they needed to steal a person's identity. The employer could be liable for that loss.

E-Verify is not ready to go national

In June 2007, officials from the Government Accountability Office (GAO) testified before the House Ways and Means Subcommittee on Social Security in response to inquiries regarding E-Verify. According to the SSA, 4.1% of the Social Security records

contain errors that would result in incorrect feedback under E-Verify. The error rate was even higher for individuals born outside of the United States.

The GAO estimated that if the federal government were to require all employers to use E-Verify, the DHS and SSA would be required to hire hundreds more employees and need several hundred million dollars. The DHS claims that right now E-Verify confirms 92% of response within seconds (other reports suggest that the number is closer to 85%), but that expanding the number of users will increase the number of potential errors. Therefore, the time and personnel required to respond to tentative non-confirmations would be immense.

Employers misuse E-Verify

Studies have shown that employers using E-Verify do not fully understand the requirements and restrictions of the program. The study found several employer practices that did not comply with the requirements of E-Verify that are considered prohibited employment practices, including:

- using E-Verify for pre-employment screening
- taking adverse action against an employee while tentative non-confirmation results are being resolved
- failing to maintain proper security of the information
- failing to follow through on dismissal when a tentative non-confirmation was not resolved and became a final non-confirmation
- failing to properly notify employees of a tentative non-confirmation.

Identity theft or document fraud

E-Verify is highly susceptible to document fraud and identity theft. An employee could use valid documents in a fraudulent manner and the employer could receive a confirmation of work authorization that was false. For example, an non-citizen from Russia with valid documents could lend them to his cousin, an unlawful worker that happens to look like him, and E-Verify would provide a confirmation of employment eligibility.

An employee could use fraudulent documents that contain some valid information, and get a confirmation of work authorization from E-Verify. For example, if Heidi stole Julie's identity and made fraudulent documents with Julie's name, date of birth, and Social Security number but Heidi's picture, E-Verify would provide a confirmation, as long as the information entered into the system matched Julie's correct information. However, if Heidi were to keep her own date of birth and use Julie's Social Security number, E-Verify would provide a tentative non-confirmation.

The system is not designed to identify if an identification is being used at multiple worksites, so the same information could be used by multiple parties at different companies. The system would not identify that the documents had been used more than once.

Flawed non-confirmation results

Because of errors in the SSA's database or the DHS database, because of delays in information being input into those databases, because of limitations on data-input format, or because of user error by E-Verify user, E-Verify provides erroneous nonconfirmation results. Studies vary, but all agree that between 8% and 20% of E-Verify inquiries result in a tentative non-confirmation that requires additional work by the SSA or DHS to resolve. Inquiries that required manual verification by the DHS to resolve often take longer than the ten business days that are allotted under the program.

Example

Swift & Company, the third largest processor of fresh pork and beef in the United States, started using the Basic Pilot Program when it was first introduced in 1997. It completed an I-9 on all new employees and verifies work authorization through the Basic Pilot Program. Swift was so zealous in verifying the employment eligibility of its employees that in 2001, the Department of Justice Office of Special Counsel sued Swift for unfair immigration-related practices because the company allegedly went too far in trying to verify employee's work eligibility. The DOJ sued for $2.5 million. The case was settled for $200,000 with no admission of wrongdoing by Swift.

Despite its long-term use of the Basic Pilot Program and its reputation as being overzealous when verifying employment eligibility, ICE raided six Swift production facilities and arrested 1,283 employees who were allegedly using false documents -- completely stolen identifications that slipped through the Basic Pilot Program. The raids and loss of employees cost Swift $30 million. Approximately 275 former Swift employees have been charged with identity theft or use of fraudulent documents. Additionally, 19 Swift employees were arrest in July 2007 and were charged with harboring illegal aliens. The arrests included human resources personnel and a union representative. Swift continues to be a target of investigation, despite the fact is has been using the Basic Pilot Program (now E-Verify) for ten years.

Chapter 12

E-Verify regulations for federal contractors and subcontractors

On June 6, 2008, President Bush amended an executive order originally issued by President Clinton requiring all federal contractors to comply with the Immigration and Nationality Act as amended by the Immigration Reform and Control Act. The executive order requires all federal contractors to use an electronic employment eligibility verification system, designated by the Department of Homeland Security, to verify the employment eligibility of:

- all persons hired during the contract term by the contractor to perform employment duties within the United States

  and

- all persons assigned by the contractors to perform work within the United States.

The premise of the executive order is that contractors that employ unauthorized workers (even unknowingly) are less stable and dependable and have higher turnover, therefore undermining the overall efficiency and economy in government contracting. A more stable workforce will promote efficiency and economy in government contracting. The President has the authority to prescribe policies and directives governing federal procurement that would promote an economical and efficient procurement system. It is this authority that President Bush relied on when issuing the executive order, and which the federal contracting agencies relied when issuing the final rules implementing Bush's executive order.

The Department of Homeland Security has designated E-Verify as the electronic employment eligibility system for federal contractors to use. With limited exceptions, federal contractors have to use E-Verify for all employees hired in the United States to work at any job site during the time period the company is working on the federal contract. In addition, the contractor is required to use E-Verify for all employees assigned to the federal contract, even existing employees. A special enrollment and memorandum of understanding (MOU) is required to be signed by federal contractors. This MOU will allow them to use E-Verify for current employees without violating the MOU, while other employers still violate the E-Verify requirements if they use the system to verify work authorization for existing employees. Federal contractors still may not use E-Verify as a screening tool for applicants and must use E-Verify only after hiring a new employee.

The final regulations implementing the amended executive order were published in the Federal Register on November 14, 2008. The regulations implementing the E-Verify requirements of the Executive Order became effective on September 8, 2009. The regulations were originally to be implemented on January 15, 2009, but the implementation date was delayed at least four times to

allow the Obama Administration time to analyze the regulations, and because of a lawsuit in federal court attempting to stop the implementation of the Federal Contractor E-Verify Regulations. Please note that the lawsuit challenging the regulations is still pending.

Regulations requiring federal contractors to use E-Verify

Covered prime contracts

The E-Verify requirements apply to contracts covered by the Federal Acquisition Regulations (FAR), with certain exceptions and limitations.

- The prime contract (as defined by the federal government) must exceed the simplified acquisition threshold. The current threshold is $100,000. Therefore, the rules do not apply to small contracts with a value of less than $100,000. This requirement does not flow down to subcontracts of a covered prime contract.

- Prime contracts whose period of performance is less than 120 days are not covered by the E-Verify requirements. Again, this requirement does not flow down to subcontracts of a covered prime contract. The logic here is that federal contractors have 30 days to enroll in E-Verify after being awarded the contract and 90 days after enrollment to complete the E-Verify requirements. Thus any contract of fewer than the 120 days is exempted from the rules.

- Contracts for work performed only outside of the United States are not covered. The regulations define United States as all 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and Guam. Therefore, the rule reaches work done in those locations, as well as all employees in any of these locations.

- COTS is defined as a commercial item that is sold in substantial quantities in the commercial marketplace and offered to the government without modification in the same form in which it is sold in the commercial marketplace.

  Contracts for the acquisition of commercially available off-the-shelf items (COTS), include but are not limited to:

  - items that would be COTS items but for minor modifications,

  - items that would be COTS items if they were not bulk cargo, or

  - commercial services that are part of the purchase of a COTS item and are performed by the COTS provider.

- The regulations apply only to solicitations issued and contracts awarded after September 8, 2009, with the exception of indefinite-delivery/indefinite-quantity contracts (as defined by the federal government). Federal agencies may amend – on a bilateral basis – existing indefinite-delivery/indefinite-quantity contracts to include the E-Verify requirements for future orders if the remaining period of

contract performance extends at least six months after the effective date of the final rule and the remaining performance under the contract is substantial.

The covered subcontracts

Most of the limitations that apply to the prime contract do not apply to the subcontracts, but there are limitations on which subcontracts are covered by the E-Verify requirements. The FAR regulations define a subcontract as all subcontracts to furnish supplies or services for performance on a prime contract or under another subcontract. A subcontract includes, but is not limited to, purchase orders and changes or modifications to purchase orders. The E-Verify requirements apply to subcontracts on a covered prime contract:

- that is for commercial or noncommercial services (except for commercial services that are part of the purchase of a COTS item) or for construction
- has a value of more than $3,000
- includes work performed in the United States.

The E-Verify requirements apply to subcontracts of covered prime contracts, even if the duration of the subcontract is less than 120 days. If the subcontractor does not have any subcontract running longer than 30 days, the subcontract term would end before the subcontractor is required to enroll in E-Verify. If the subcontract period runs beyond 30 days, however, the subcontractor would be required to enroll in E-Verify.

The subcontractor is covered by the E-Verify requirements only for the duration of the subcontract, not for the duration of the prime contract.

Covered employees

All newly hired employees

Once a company is awarded a federal contract, it must use E-Verify for all new hires at the Company, whether or not they are going to work on the contract. Federal contractors do not have the option to enroll some work sites but not others, which is an option for E-Verify users who are not federal contractors. All employees and all work sites are covered by the Federal Contractor E-Verify regulations.

What is considered part of the company depends on how the legal entity is organized. The legal entity that signs the federal contract or subcontract is bound by the E-Verify obligation. It does not necessarily extend to related companies, but it does extend to the entire legal entity that signed the contract. The government has noted, however, that each contractor has the ability to incorporate or organize itself as it chooses, so whether a related company is part of the contracting entity is to be determined on a case by case basis. The general rule, however, is that the entity that signs the contract is the only entity covered by the regulations. If there is one location within the company that does most of the federal contracts, the company may want to consider a separate entity to perform the federal contracts if it does not want to do E-Verify for all of the newly hired employees at all of the company's locations.

All employees assigned to the federal contract

The new Federal Contractor Employment Eligibility Rule requires companies with covered federal contracts or subcontracts to use E-Verify to confirm the employment eligibility of all employees "assigned to the contract." "Employee assigned to the contract" means an employee who was hired after November 6, 1986, who is directly performing work, in the United States, under a contract that is covered by the regulations. An employee is not considered to be directly performing work under a contract if the employee:

- normally performs support work, such as indirect or overhead functions

  and

- does not perform any substantial duties applicable to the contract.

Employees who normally perform support work, such as indirect or overhead functions, and do not perform substantial duties applicable to the contract are not considered employees assigned to the contract. For example, a mailroom clerk who delivers mail to the program office supporting the contract, as well as other offices, would not be required to go through the E-Verify process.

Working on a proposal, as opposed to working on an awarded contract, does not constitute work under the contract for determining if an employee is assigned to the federal contract.

The length of time an employee is working on a covered federal contract or subcontract is not relevant to the determination of whether the employee is considered "assigned to the contract." If the employee is directly performing work under a contract, even on an isolated or intermittent basis, then they are considered "assigned to the contract." For example, if a construction company had a project that fell behind due to weather delays and decided to send an additional crew to the job site for two days to help catch up with the construction schedule, the additional crew – even though they worked only a couple days on the project – would be considered covered by the E-Verify requirements and would have to follow the E-Verify process.

Exempt employees

Federal contractors are not required to use E-Verify again for any employee whose employment eligibility was previously verified through E-Verify by that contractor. Once a company has E-Verified an employee, it does not have to repeat the E-Verify process for the employee.

The regulation contains two additional exceptions. Contractors are not required to use the E-Verify system for employees who hold an active U.S. Government clearance of confidential, secret or top secret. Contractors also are not required to use E-Verify for any employee who has undergone a complete background check and been issued credentials pursuant to Homeland Security Presidential Directive (HSPD) - 12, Policy for Common Identification Standard for Federal Employees and Contractors.

The E-Verify requirements

Based on comments received from the public, the final rules extended the deadlines for contractors to complete the required E-Verify queries. They also impose different timing requirements depending on whether the federal contractor is already enrolled in E-Verify as a federal contractor on the date the contract is awarded or has yet to enroll as a federal contractor. The rule accomplishes its purpose by requiring the federal contracting agencies to insert a clause in all contracts that contains the following requirements.

Enroll in E-Verify as a federal contractor

The Department of Homeland Security, along with the federal contracting agencies, have created a new E-Verify MOU for federal contractors. Under the existing E-Verify system, employers may not use E-Verify to confirm the work authorization of existing employees – only of employees who were hired after the company enrolled in E-Verify.

The regular employer MOU provides that it is a violation of the MOU for the employer to use E-Verify to check the status of existing employees. Under the Federal Contractor Employment Eligibility Verification Rules, federal contractors must use E-Verify for certain existing employees. Therefore, the regular MOU and limitations on E-Verify are modified for federal contractors.

Companies who are already enrolled in E-Verify as regular employers will be required to update their status with E-Verify through the "Maintain Company" page in E-Verify and sign a Federal Contractor MOU when they obtain federal contracts and begin using E-Verify pursuant to the Federal Contractor Employment Eligibility Verification Rules. The E-Verify procedures – the actual processing of information, right to challenge a tentative non-confirmation, etc. – will all remain the same.

Federal contractors will also be required to go through an E-Verify tutorial designed specifically for federal contractors. Existing E-Verify users who become federal contractors will also be required to complete the tutorial before using E-Verify pursuant to the Federal Contractor Employment Eligibility Verification Rules. Therefore all of the employees who have already completed the E-Verify tutorial once will be required to complete a separate tutorial before they can be registered users for the company once it changes its status to that of a federal contractor user, rather than a general employer.

Once a company's federal contract has ended, it should update its company status with E-Verify through the Maintain Company page, and the company will not longer be able to run existing employees through E-Verify after the expiration of the federal contract. Additionally, after completing a federal contract, federal contractors (who are not otherwise required to use E-Verify by state law, agreement with ICE, etc.) may terminate their enrollment in E-Verify using the "Request Termination" link in the E-Verify system. If the federal contractor fails to request termination, the E-Verify MOU and all its requirements remain in place. Therefore, the employer should either continue to use E-Verify or request termination, and not merely stop using the program after completing a federal contract.

Requirements for employers not enrolled as federal contractors when the contract is awarded

Employers who are not already enrolled as federal contractors when the contract is awarded may register for E-Verify at:

- https://e-verify.uscis.gov/enroll/StartPage.aspx?JS=YES.

The company representatives who will use the E-Verify system must take an online tutorial and pass a test before they may use the E-Verify system.

Contractors (or subcontractors) who are not enrolled in E-Verify at they time they are awarded a federal contract must meet a few requirements.

- **Within 30 days after the contract is awarded**, the federal contractor must enroll in E-Verify as a federal contractor.

- **Within 90 days after enrolling in E-Verify** as a federal contractor, begin to use E-Verify to verify the employment authorization of all new hires who are working in the United States, whether or not assigned to the contract. The E-Verify query must be initiated within 3 business days after the employee's date of hire.

- **Within 90 days after enrolling in E-Verify or 30 days after the employee is assigned to the contract**, whichever date is later, initiate an E-Verify query on every employee assigned to the contract, including existing employees who were employed by the company prior to its enrollment in E-Verify. The company can exclude any employees hired prior to November 6, 1986.

- A federal contractor does not have to reverify any employee for whom the company has already completed an E-Verify query. Therefore, if a federal contractor was previously enrolled in E-Verify as a general employer, it is not required to run another E-Verify query on an employee after it is awarded a government contract. Once through E-Verify at any time during the individual's employment with the company will satisfy the rule.

Requirements for employers already enrolled as federal contractors when the contract is awarded

Employers who are enrolled in E-Verify as federal contractors when they are awarded the contract have to meet slightly different requirements.

- If the company has been enrolled in E-Verify for 90 days or more, it must initiate E-Verify queries on all new hires who are working in the United States, whether or not assigned to the contract, within three business days after the employee's date of hire. This requirement becomes effective **immediately**.

- If the company has been enrolled in E-Verify as a federal contractor for less than 90 days, the company begins to use E-Verify to verify the employment authorization of all new hires who are working in the United States, whether or not assigned to the contract. The E-Verify query must be initiated within 3 business days after the employee's date of hire.

- **Within 90 days after the date of the contract award or 30 days after the employee is assigned to the contract**, whichever date is later, initiate an E-Verify query on every employee assigned to the contract, including existing employees who were employed by the company prior to its enrollment in E-Verify. The company can exclude any employees hired prior to November 6, 1986.

"All new employees" requirement not applicable to certain contractors

Certain federal contractors have the option to verify employment authorization using E-Verify for only employees assigned to a contract, and are not required to use E-Verify for newly hired employees not assigned to the contract. The following federal contractors may choose to use E-Verify only for employees assigned to the federal contract:

- institutions of higher education

- state or local government

- the government of a federally recognized Native-American tribe

- a surety performing under a takeover agreement entered into with a Federal agency pursuant to a performance bond.

Option to use E-Verify for all existing employees

In a new provision that was not part of the proposed rules, the final rule provides that federal contractors may elect to use E-Verify to verify the employment authorization of all existing employees hired after November 6, 1986, rather than just the existing employees assigned to a federal contract.

If a contractor elects this option, it must initiate the E-Verify query within 180 days after enrolling in the E-Verify program or notifying the E-Verify operations of the contractor's decision to exercise this option, which can be done by updating the company profile through the "Maintain Company" page in E-Verify. The E-Verify queries for the entire workforce must be initiated within 180 days after updating the company's profile in E-Verify.

Limited exception to the requirements

Exceptional cases

The FAR regulations provide one glimmer of hope for federal contractors. The regulations provide that in exceptional cases, the head of the contracting activity

may waive the E-Verify requirement for a contract or subcontract or a class of contracts or subcontracts, either temporarily or for the period of performance. This waiver authority may not be delegated.

It is possible that federal contractors could negotiate with head of contracting activity for the agency with which they are contracting and show exceptional circumstances that would justify leaving the E-Verify requirements out of the contract. It is the contractor who must negotiate this. Subcontractors, unfortunately, would not have much opportunity to negotiate the federal contractor E-Verify requirements, because once it is in the prime contract, it must be included in the covered subcontracts.

It is not clear how widely the head of contracting activity will be willing to apply this exception. In the comments to the final rules, the contracting agencies formulating the rule stated: The head of the contract activity can wave the E-Verify clause requirements in exception cases. The definition of exceptional cases is undefined. It is intentionally not defined to allow flexibility to use this waiver as unique situations arise within each agency. Examples of exceptional cases might include: natural disasters, military war fighter needs, and FAA emergencies.

Indefinite-delivery/indefinite-quantity contracts

If a federal contractor has existing indefinite delivery/indefinite quantity contracts that will be in effect March 2010, the contracting agency is instructed under the regulations to modify those contracts on a bilateral basis to include the E-Verify requirements for future orders. The government cannot unilaterally insert the E-Verify requirements into existing indefinite-delivery/indefinite-quantity contracts, providing the company an opportunity to negotiate over whether the E-Verify requirements will be added to the existing contract.

Penalties for violations of the E-verify requirements

The preliminary comments to the final rule made clear that federal contractors must strictly adhere to the limitations and requirements of the E-Verify program, as modified for federal contractors. The comments before the final rule emphasized that contractors who use the E-Verify system to unlawfully discriminate against individuals in hiring and employment violate Title VII, as well as the Immigration and Nationality Act Section, and are subject to civil penalties and termination of participation in the E-Verify program after suspension and debarment procedures.

The Department of Homeland Security or the Social Security Administration may terminate the federal contractor's E-Verify MOU or deny access to the E-Verify system if the federal contractor violates the MOU or misuses E-Verify. If this occurs, the agency that terminates the federal contractor's E-Verify use is required to report the termination of the federal contractor's E-Verify privileges to a suspension or debarment official, and the federal contractor may be suspended or debarred.

During the period between termination of the federal contractor's MOU and a decision by the suspension or debarment official whether to suspend or debar, the contractor is excused from its E-Verify obligations. If the contractor is suspended or debarred, they are not eligible to participate in E-Verify during the period of suspension or debarment. If the suspension or debarment official determines not to suspend or debar the contractor, then the contractor must reenroll and use E-Verify.

Some issues raised by the rule

Federal contractors may need to complete new I-9s

Employers may use a previously completed Form I-9 as the basis for initiating the E-Verify query of an existing employee as long as it meets certain requirements.

- The I-9 complies with the E-Verify documentation requirements
- The employee's work authorization has not expired
- The federal contractor has reviewed the I-9 with the employee to ensure that the employee's stated basis for work authorization has not changed, for example they have not gone from an "undocumented worker is authorized to work until _____" to a permanent resident or permanent resident to a U.S. citizen or national. The contractor does not have to personally review the Form I-9 with each employee. It can send out a memo or e-mail to the individuals asking them to confirm that the attestation box they originally checked when completing the I-9 is still current.

If the I-9 does not comply with current E-Verify requirements or the employee's basis for work authorization has expired or changed, the company should complete a new I-9 with the existing employee.

If the Form I-9 is otherwise valid and up to date but reflects documentation, such as a U.S. passport or green card, that has expired since the original I-9 was completed, the federal contractor should not use the photo-screening tool. This may be changed later by USCIS, but for now the federal contracting agencies and USCIS are saying not to use the photo tool for existing employees with expired documents.

The federal contracting agencies acknowledged that some contractors will be placed in a position where they are required to ask employees to provide an I-9 document that is different from the document originally presented for the I-9. Employers must exercise caution that they do not engage in discrimination during this process. Remember that the employee is permitted to choose the documents to provide, within the limitation of the E-Verify program (such as picture I.D.). The employer may not selectively request or reject documents during the reverification process with current employees.

Employees without picture I.D. due to religious objections may be allowed an accommodation

Many comments regarding the proposed rules raised the issue that individuals may not have a picture identification, yet E-Verify requires that to complete the I-9 the individual provide picture identification. If the original I-9 contains a List B document that did not have a picture, the employer may need to complete a new I-9, as discussed above. One organization had members with religious objections to having their photo taken. The Department of Homeland Security and the contracting agencies creating the final rules suggested that if a federal contractor had employees who did not have a picture I.D. due to religious objections, that an accommodation could be made for the employee and federal contractor in that instance. This is a case by case determination. DHS is working to create processes and procedures in E-Verify to accommodate religious beliefs and disabilities, as required by law.

Employees waiting for a Social Security number can take more than three days to do E-Verify

If an employee is waiting for a Social Security number (such as new visa applicants) the company should notate on the Form I-9 that they are waiting for the Social Security number. The E-Verify query cannot be initiated without a social security number. DHS has stated that notating this on the I-9 satisfies the requirement that the E-Verify query be initiated within three days.

Suggestions and conclusion

The Executive Order and Final Rules have been challenged in a federal lawsuit. One reason for all of the delays is to allow the federal government to respond to the lawsuit or revise the regulations. The law that created the E-Verify program created it as a voluntary program and specifically prohibited the Attorney General from requiring participation, except by certain companies found to have violated the immigration laws and certain federal government agencies. It is not clear whether the government can require federal contractors to use E-Verify as a part of a voluntary contractual agreement with the government.

The company should conduct an I-9 audit, ensure that it has a completed I-9 for every current employee, and ensure its current I-9s are complete and up to date. This will help reduce the administrative burden if the company is required to use E-Verify for existing employees under a federal contract.

The company should also consider implementing training, including I-9 and E-Verify training, as well as anti-discrimination training. The government is aware that increased E-Verify use may lead to increased discrimination and is taking steps to educate employees regarding their rights.

The Company may consider organizing a separate entity that does the government contract work. Only the entity that signed the contract and agreed to the E-Verify provisions is bound by the requirements.

Chapter 13

Helpful steps to comply with E-Verify requirements

General tips

- Make sure to post the required E-Verify posters.
- Apply the process uniformly to all newly hired employees.
- Do not use on existing employees.
- Do not use prior to hiring individual or as a screening tool.
- Do not terminate employment, refuse to provide training, refuse to provide benefits, or otherwise take adverse action based on tentative non-confirmation.
- Make sure the employee signs the tentative non-confirmation notice and make sure to give the employee copies of tentative non-confirmation documents.
- The employer must allow the employee to keep working during the verification process until a final non-confirmation, unless the employment is terminated for a reason other than the verification process.
- Contact E-Verify customer service: 888-464-4218.
- Contact E-Verify technical support: 800-741-5023.

Procedure

Step 1: Timing to complete E-Verify

Complete Form I-9 verification process after the date of hire but within three business days after the employee's first day of employment. Regulations technically require the employee to complete Section 1 on the first day of employment but the employer has three business days to complete the form.

After completing the Form I-9 and within three business days after employee's first day of employment, enter the information from Section 1 and Section 2 of the Form I-9 into E-Verify by selecting "Initial Verification" from the Case Administration page.

Keep in mind that:

- If employee chooses to provide List B document, it must contain a photograph.
- Under I-9 rules, there is no requirement that the company retain copies of the documents presented to complete the I-9 form.
- There is an issue that arises regarding photocopies and E-Verify. The E-Verify MOU states that employers (except employers using an E-Verify Designated Agent) are required to keep photocopies of only Permanent Resident Card or Form I-766 Employment Authorization Document. Federal discrimination laws require employers to treat all new hires in the same manner and may not discriminate or treat new hires differently in the I-9 process based on citizenship.

Step 2: Photo tool

If the employee provided a Permanent Resident Card or Employment Authorization Document, you may be prompted to verify the picture on the card against the picture in the DHS database using the photo tool.

The pictures should be exactly the same. If the picture does not match (allowing for variances in color and gradation given the age of the photo, color settings on computer monitor, etc), select "no" the photos do not match. You will receive a "DHS Tentative Non-Confirmation" – go to Step 8.

If you cannot determine whether the picture is the same, enter "cannot be determined," when asked if the photo matches. You will receive a "DHS Verification in Process." You must inform the employee by printing the Notification to Employee: Verification In Process and giving it to the employee. You must send a copy of the employee's photo to DHS electronically using the E-Verify system or by mail to the address in Step 8(e) and go to Step 6. You may want to retain a copy of the photo until the case has been completely resolved.

Step 3: Computer responses and potential steps

E-Verify will provide one of the following responses:

- "Employment Authorized" – go to Step 4
- "SSA Tentative Non-Confirmation" – go to Step 5
- "DHS Verification in Process" – go to Step 6.

Step 4: Employment authorized

If E-Verify provides "Employment Authorized" response, check the first and last names on the confirmation to ensure that they match employee's name.

If the information is incorrect, request additional verification from the Case Details page. Check the E-Verify system periodically for a response to your request for additional verification.

E-verify should provide a response within three business days.

- If the response is "Employment Authorized" go to Step 4(b)
- If the response is "DHS Tentative Non-Confirmation" go to Step 7
- If the response is "DHS Employment Unauthorized" this acts as a final non-confirmation. Go to Step 10.
- If the name on the confirmation matches the employee's name, "resolve the case" in E-Verify from case details screen. Then print the Case Details page (the confirmation), staple to the Form I-9, and file in I-9 file.

Step 5: SSA tentative non-confirmation

If E-Verify provides "SSA Tentative Non-Confirmation," then print two copies of the "Notice to Employee of Tentative Non-Confirmation" and meet with the employee to provide the notice to the employee and review it with them.

> **Note**
>
> Anywhere that these instructions require the employer to print two copies of a document and have the employer and employee sign both copies, the employer alternatively could print one copy, have the employee and employer both sign the printed copy, photocopy the signed document, staple the original to the I-9, and then give a photocopy of the signed document to the employee. The key is to ensure that the employee receives a signed copy of all the documents and a signed copy is attached to the employee's I-9. If the meeting with the employee is going to occur somewhere that there is no copier available, it is better practice to print two copies so that the employee and employer can both have a signed copy.

- Employer and employee must both sign both copies of the "Notice to Employee of Tentative Non-Confirmation."
- Keep one copy of the signed "Notice to Employee of Tentative Non-Confirmation" with employee's I-9 and give one copy to employee. If the employee is no longer employed at the company or does not show up to meet with the employer and therefore cannot sign the Notice to Employee, indicate this on the notice, sign the employer representative section, and staple to the employee's I-9. Failure to provide an employee with the signed "Notice to Employee of Tentative Non-Confirmation" and right to contest can lead to discrimination charges. Therefore, it is important to have the employee sign the Notice to Employee of Tentative Non-Confirmation or to document the reasons you are unable to do so if you are unable to do so.
- Employee must choose to contest or not contest tentative non-confirmation and sign the Notice.
    - If employee contests, go to Step 5(d)

  - If employee does not contest, this acts as final non-confirmation. Go to Step 10.

- Select "Initiate SSA Referral" from Case Details page. Print two copies of the referral letter, sign and date both copies, and have the employee sign both copies. Provide a copy of the referral letter to the employee and keep a copy with the employee's I-9.

- Ten business days after initiating the referral (or 24 hours after employee returns referral letter stamped by the SSA office or tells you they have resolved the issue with the SSA, whichever is earlier), resubmit the verification through E-Verify. Locate the employee's record in E-Verify, update information as necessary, and click "Initiate SSA Resubmittal."

  - If E-Verify returns "Employment Authorized" go to Step 4(d).

  - If E-Verify returns "SSA Final Non-Confirmation" go to Step 10.

  - If E-Verify returns "DHS Verification in Process," go to Step 6.

  - If E-Verify returns "DHS Tentative Non-Confirmation – (Photo Tool Non-Match)," go to Step 8.

  - If E-Verify returns "Review and Update Employee Data" then review the information originally entered into E-Verify. To correct information, select "Initiate SSA Resubmittal" from the Case Details page, then "Modify SSA Information." Correct information and "Submit SSA Resubmittal."

Step 6: DHS verification in process

If E-Verify provides "DHS Verification in Process," check the E-Verify system periodically for a response from DHS. DHS should provide a response within three business days, but it may take longer.

- If the response is "Employment Authorized" go to Step 4(d)

- If the response is "DHS Tentative Non-Confirmation" go to Step 7

- If the response is "DHS Tentative Non-Confirmation - (Photo Tool Non-Match)," go to Step 8.

Step 7: DHS tentative non-confirmation

If E-Verify provides "DHS Tentative Non-Confirmation," then print two copies of the "Notice to Employee of Tentative Non-Confirmation" and meet with the employee to provide the notice to the employee.

- Employer and employee must both sign both copies of the "Notice to Employee of Tentative Non-Confirmation."

- Keep one copy of the signed "Notice to Employee of Tentative Non-Confirmation" with employee's I-9 and give one copy to employee. If the employee is no longer employed at the company or does not show up to meet with the employer and therefore cannot sign the Notice to Employee, indicate this on the notice, sign the employer representative section, and staple to the employee's I-9. Failure to provide an employee with the signed "Notice to Employee of Tentative Non-Confirmation" and right to contest can lead to discrimination charges. Therefore, it is important to have the employee sign the Notice to Employee of Tentative Non-Confirmation or to document the reasons you are unable to do so if you are unable to do so.

- Employee must choose to contest or not contest tentative non-confirmation and sign the Notice.

    - If employee contests, go to Step 7(d)

    - If employee does not contest, this acts as Final Non-Confirmation. Go to Step 10.

- Select "Initiate DHS Referral" from the Case Details screen, then print two copies of the DHS Referral Notice, sign both copies, have the employee sign both copies, and give one signed copy to the employee. Keep one signed copy of the referral notice with the employee's I-9.

- Ten business days after the referral notice (or 24 hours after employee contacts DHS, whichever is earlier), E-Verify should provide a response (it is possible that it could take more than 10 ten days).

    - If E-Verify returns "Employment Authorized" go to Step 4(d)

    - If the response is "DHS Employment Unauthorized" this is a Final Non-Confirmation. Go to Step 10.

    - If the response is "DHS No Show" this acts as a Final Non-Confirmation. Go to Step 10.

Step 8: DHS tentative non-confirmation (photo tool non-match)

If E-Verify provides "DHS Tentative Non-Confirmation – (Photo Tool Non-Match)," then print two copies of the "Notice to Employee of Tentative Non-Confirmation" and meet with the employee to provide the notice to the employee.

- Employer and employee must both sign both copies of the "Notice to Employee of Tentative Non-Confirmation."

- Keep one copy of the signed "Notice to Employee of Tentative Non-Confirmation" with employee's I-9 and give one copy to employee. If the employee is no longer employed at the company or does not show up to meet with the employer and therefore cannot sign the Notice to Employee, indicate this on

the notice, sign the employer representative section, and staple to the employee's I-9. Failure to provide an employee with the signed "Notice to Employee of Tentative Non-Confirmation" and right to contest can lead to discrimination charges. Therefore, it is important to have the employee sign the Notice to Employee of Tentative Non-Confirmation or to document the reasons you are unable to do so if you are unable to do so.

- Employee must choose to contest or not contest tentative non-confirmation and sign the Notice.
    - If employee contests, go to Step 8(d)
    - If employee does not contest, this acts as Final Non-Confirmation. Go to Step 10.
- Select "Initiate DHS Referral" from the Case Details screen, then print **three copies of the DHS Referral Notice**, **sign all copies, have the employee sign all copies, and give a copy to the employee**. Keep a copy of the referral notice with the employee's I-9, and send one copy with the employees documentation to USCIS.
- The company must send a photocopy of the documentation (either a Permanent Resident Card or Employment Authorization Card) that the employee provided to the company for verification to the USCIS along with a copy of the signed DHS Referral Notice.
    - The company may send the documents electronically by choosing "Submit Electronic Copy" from the E-Verify system. The documents must be in .gif format
    - The company can mail a copy of the document along with a copy of the referral letter to:

      U.S. Citizenship and Immigration Services
      Verification Division
      Attn: Status Verification Unit
      490 L'Enfant Plaza East SW, Suite 8001
      Washington, DC 20024
- After ten business days (or 24 hours after employee contacts DHS, whichever is earlier), E-Verify should provide a response (it is possible that it could take more than 10 business days).
    - If E-Verify returns "Employment Authorized" go to Step 4(b)
    - If the response is "DHS Employment Unauthorized" this is a Final Non-Confirmation. Go to Step 10
    - If the response is "DHS No Show" this acts as a final non-confirmation. Go to Step 10.

Step 9: Case in continuance

If E-Verify provides "Case in Continuance" check the E-Verify system periodically for a response from DHS.

- if the response is "Employment Authorized" go to Step (4)(b)
- if the response is "DHS Employment Unauthorized" this is a Final Non-Confirmation. Go to Step 10.
- if the response is "DHS Tentative Non-Confirmation" go to Step 7.

Step 10: Final non-confirmation

Once you receive a notice that acts as a Final Non-Confirmation, which includes "SSA Final Non-Confirmation," "DHS Employment Unauthorized," "DHS No-Show," or employee does not contest a tentative non-confirmation:

- terminate the employment of the individual who was the subject of the final nonconfirmation. Complete a personnel status form identifying that the employee was unable to complete a valid I-9 and E-Verify process
- if the company chooses not to terminate the employment, it must report in E-Verify during the case resolution, "Employee Not Terminated" and it will be presumed that the company is knowingly employing an unauthorized worker if the individual turns out to be unauthorized.
- resolve the Case on the Case Details Screen by selecting "Resolve Case" and selecting "Resolved Unauthorized/Terminated"
- print the Case Details Page and attach to the Form I-9.

Other considerations

This document is a summary for informational purposes and should not be relied upon as legal advice. Refer to the E-Verify User Manual, the Memorandum of Understanding, and updates released by the USCIS at:

- www.uscis.gov for more information.

The USCIS is making changes to the E-Verify system and the User Manual on a regular basis in response to feedback it receives from government studies and from registered users. Keep apprised of changes and complete refresher training when system changes are announced.

Please note that there is a potential issue with copying only the permanent resident card or Form I-766 and not copying any other supporting documents used to complete the I-9. Federal law prohibits employers from selectively copying documents employees present to complete the form I-9. Federal law and regulations state that the employer is not required to keep copies, but to selectively copy only the documents of individuals of certain national origins or citizenship status could violate the nondiscrimination provisions of the Immigration and Naturalization Act. We are awaiting an opinion from the Office of Special Counsel for Immigration Related Unfair

Employment Practices regarding photocopies. In the meantime, we have had E-Verify representatives from the E-Verify Help Desk state that companies can make copies of the permanent resident card or I-766 to use the Photo Tool and then shred the copies after completing the Photo Tool step. If the employee is challenging a tentative nonconfirmation based on a photo no-match, you may want to keep the copy of the photo until the tentative non-confirmation is resolved and then shred the copies.

Chapter 14

Immigration visas

The United States Citizenship and Immigration Services (USCIS) under the Department of Homeland Security (DHS) oversees the visa and permanent immigration process.

In the employment context, there are two ways in which an employer can obtain the services of a foreign national employee. The first avenue is to pursue a non-immigrant visa. These various work visas provide temporary work eligibility for employees. Employees working under these visas are generally required to work for a particular employer for a specific amount of time. This is generally the fastest option to pursue, although companies run into various requirement and cap limit road blocks along the way.

The other avenue is to sponsor a foreign national employee in obtaining legal permanent residency in the United States. This is commonly known as the "green card." This process results in an individual being able to permanently reside and work in the U.S. Also, once the person gains permanent residency, he or she is free to work for whatever employer the individual chooses. Obtaining a green card through the labor certification process is extremely backlogged, so it can often take years for this process to come to a completion. Thus, many employers begin the immigration process by bringing foreign national employees to the U.S. via a non-immigrant visa and then begin work on the permanently residency process, and eventually, the employee can apply for adjustment of status.

Below is a summary of various employment-related visa options and the more intricate and lengthy permanent residency route.

Temporary visa classifications authorizing employment

U.S. employers may sponsor foreign employees for certain temporary visa categories that authorize employment in this country. Some of these categories include:

H-1B – Specialty Occupation (Professional)

The H-1B visa is for professionals who will work in a "specialty occupation" on a temporary basis for no more than six years. A specialty occupation is one that requires at least a baccalaureate degree in a specific area of specialty relevant to the position. In addition, the employee must have attained that level of education (or foreign equivalent) in the specialty. H-1B visas are employer-and job-specific.

The H-1B petition process involves certification of a Labor Condition Application (LCA) by the DOL and approval of an H-1B visa petition filed with the Department of Homeland Security's US Citizenship and Immigration Services (USCIS). Once the employer's H-1B petition is approved by USCIS, the individual worker can obtain an H-1B visa stamp by appointment at the U.S. consulate or embassy in his or her native country. If the individual is already in the U.S., a change of status to H-1B is possible, and if the individual is already in H-1B status, he or she can begin working for a new H-1B employer as soon as the employer's petition is filed without having to wait for an approval.

The LCA verification process requires you to certify:

- that the H-1B individual will be paid the higher of the prevailing or actual wage for that occupation in your area
- that you will offer the individual the same terms and conditions of employment that you offer to U.S. workers
- that you will not employ the individual in a strike or lockout
- that you will notify other similarly situated employees (or their agent) of your intent to employ an H-1B individual in the relevant position.

You must document your compliance with the LCA verifications by retaining relevant documents and by making available a "public inspection" file upon request.

H-1B status is initially granted for no more than three years. Extensions are available, but the employee is subject to a maximum cumulative period of six years of H-1B status. H-1B extensions beyond the six-year limit are possible if the individual is the beneficiary of an employment-based permanent residence process that has been pending for more than one year, or is the beneficiary of an improved immigrant petition and is unable to adjust status to permanent residence because of per-country limits.

Dependents of H-1B individuals are eligible for H-4 status, which allows them to stay in the U.S. with the H-1B individual. H-4 dependents are not authorized to work.

Treaty NAFTA – Canadian and Mexican professionals

Under the North American Free Trade Agreement (NAFTA), citizens of Canada and Mexico who are qualified professionals can work in the U.S. using the Treaty NAFTA, or TN, classification. This visa category is available for designated professional occupations set forth in an appendix to NAFTA. The list of professions includes many occupations that would also qualify for H-1B status, such as engineers, accountants, and professors.

One advantage of TN status is that the application procedure is very simple. An applicant can apply at the border by presenting:

- proof of Canadian or Mexican citizenship
- proof of membership in a listed occupation

- an offer of employment in that occupation from a U.S. employer

  and

- fifty dollars.

TN applications filed by citizens of Canada are adjudicated on-the-spot at the port of entry (airport or land border crossing). Mexican citizens must apply for TN status at a U.S. Consulate abroad. If approved, the individual is given a multiple-entry TN status that is valid for one year.

Although TN status can theoretically be renewed indefinitely in one-year increments by filing a petition or by reapplying at the border, in practice the status may be limited to five or six years of renewals because the treaty states that TN status cannot be granted to an individual who intends to reside in the U.S. permanently. Dependents of TN individuals can get TD (Treaty Dependent) status but cannot use that status to work in this country.

L-1A and L-1B – Intracompany transfers of managers/executives or specialized knowledge personnel

The L-1A and L-1B visas are designed to facilitate the temporary transfer of managerial, executive, and specialized knowledge personnel from overseas entities to related U.S. entities. L-1A status is for managers and executives, and L-1B status is for persons with specialized knowledge of company methods, products, procedures, operations, etc. To qualify for L-1 status, the employee must have worked for the company abroad in a managerial, executive, or specialized knowledge position for at least one full year during the three years prior to the transfer to a managerial, executive, or specialized knowledge position with the related U.S. entity. First line supervisors are not eligible for L-1A status as managers unless the persons they supervise are professionals.

The U.S. employer must file a petition for L-1 status with the regional USCIS Service Center with jurisdiction over the location where the individual will work. Canadian transferees may submit the petition at the U.S.-Canada border for immediate adjudication. Once the employer's petition is approved, the individual may obtain an L-1 visa stamp from the U.S. embassy or consulate abroad, or if already in the U.S., may commence the L-1 employment.

L-1 status is initially granted for three years, and extensions are available for two-year periods. L-1A managers/executives are entitled to up to seven years of L-1 employment in the U.S., and L-1B specialized knowledge personnel are eligible for a maximum of five years of authorized stay. Dependents of L-1 transferees obtain L-2 status. Unlike most temporary visa categories which do not allow dependents to work, L-2 spouses may obtain employment authorization.

Some multi-national companies may qualify for "blanket" L-1 status. Typically, this is available for entities that transfer more than 10 people per year, have annual sales in excess of $25 million, or have over 1000 U.S. employees. Blanket L-1 status allows the U.S. entity to bypass the USCIS petition process in individual cases. Instead, the U.S.

entity sends a special form to the transferee, who then applies for L-1 status directly at the U.S. consulate or embassy.

E-1 and E-2 – Treaty trader/investor

Based upon a bilateral investment treaty or a treaty of friendship, navigation, and commerce between the United States and a foreign country, an individual may come to the United States to open and operate a foreign-owned business, or be employed in a foreign-owned business that already exists here. Entities engaged in substantial trade between the U.S. and the treaty country will be able to transfer managers, executives, and key personnel using the E-1 (Treaty Trader) visa status. Entities making a substantial investment in the U.S. may transfer managers, executives, and key personnel using the E-2 (Treaty Investor) visa status.

The foreign entity must be a "citizen" or "native" of the treaty country. This means that at least a majority of the ownership of the foreign entity must be held by citizens of the treaty country. The person seeking E visa status must also be a citizen of the treaty country. There is no prior employment requirement, however.

E-1 individuals must be engaged in activities supporting a substantial volume of international trade in goods or services. E-2 individuals must be directing or developing an active and substantial investment of irrevocably committed funds devoted to production of goods or services. Substantial means more than enough to secure the success of the enterprise and more than enough to support the E individual and family members.

Most E individuals apply for E visa status directly at the U.S. embassy or consulate in the treaty country, but it is possible to change to E status from within the U.S. Individuals admitted in E status are granted two years of authorized stay so long as their E visa stamp is valid at the time of entry. Typically, E visas are valid for five years, but this may vary depending upon the terms of the treaty. In most cases, the E visa can be renewed for additional periods provided that the underlying trade or investment remains viable.

Dependents of E visa individuals acquire the same status as the principal individual (E-1 or E-2 status). E-2 spouses may obtain employment authorization.

H-2A and H-2B – Agricultural and other seasonal and temporary workers

The H-2A visa is for seasonal agricultural workers, and the H-2B visa is for non-agricultural temporary or seasonal workers. H-2 status is only available for jobs that are truly temporary in nature, so the status is almost always limited to one year. The employer must test the market for available U.S. workers and obtain a certification from DOL that none are available to fill the temporary position(s). The test of the market must offer prevailing wages and working conditions.

There is a quota or limit on the number of H-2B visas that can be issued each fiscal year. Often, the quota is exhausted well before the end of the fiscal year.

H-2A employers may be required to hire U.S. workers who apply for work anytime up to halfway through the certification period, even if that involves discharging the individual worker. Also, H-2A employers may need to pay special wages, offer housing, and in some cases may have to pay transportation costs for the individual to come to the work site and return home.

Each H-2 period of authorized stay will be one year or less. After using three consecutive H-2 periods, the individual must remain outside the U.S. for at least six months before becoming eligible to use H-2 status again.

H-3 – Trainees

A U.S. employer may sponsor an individual for H-3 status to provide the individual training that is unavailable in the individual's native country. The individual is not supposed to engage in productive training other than as necessary to provide effective training. H-3 individuals cannot displace U.S. workers. The petitioning employer must supply extensive documentation of an appropriate training curriculum with the petition. The documentation must specifically discuss the amount of on-the-job vs. classroom training, address why the training is not available in the trainee's native country, and explain how the training experience will enhance the individual's career prospects abroad. H-3 status is limited to the duration of the training program, which cannot exceed two years.

F-1 – Academic students

F-l visas are for students engaged in degree programs at U.S. academic institutions. There are several types of employment authorization available to F-l foreign students, including on-campus employment, off-campus employment due to severe economic hardship, international organization internships, curricular practical training, and optional practical training before and after completion of studies.

An F-l student engaged in a full course of study may engage in part-time on-campus employment such as working in a cafeteria or bookstore so long as this employment does not displace a U.S. worker. This type of on-campus employment does not require advance permission from USCIS.

An F-l student may apply for employment authorization to work off-campus due to economic necessity or for an internship with an international organization. Economic necessity work permits are normally not granted except upon proof of a substantial and unforeseen change in the student's finances.

F-1 students may also engage in practical training employment related to their degree program. While enrolled, F-1 students may use Curricular Practical Training (CPT). This may take the form of an internship, co-op, work-study program or some other activity that is an integral part of the degree program, and CPT can be commenced upon an endorsement by the school's foreign student advisor. A student who uses more than 12 months of CPT becomes ineligible for post-graduate Optional Practical Training (OPT).

OPT permits up to 12 months of on-the-job practical training upon completion of an academic degree program. F-1 students must apply for a work permit in order to use OPT and cannot commence employment until the permit is issued.

Dependents of F-1 individuals are granted F-2 status and cannot work.

J-1 – Exchange visitors

Individuals participating in a designated exchange visitor program may engage in specific types of employment as part of their program activities. There are many types of J-1 exchange visitor programs, including those for students, practical trainees, teachers, professors, research assistants, specialists, camp counselors, au pairs, and distinguished visitors. J-1 practical trainees are authorized up to 18 months of on-the-job training; other categories have different time limits.

Some exchange visitors are subject to a two-year home country residence requirement which must be satisfied before the individual is eligible for H, L, or permanent resident status. This obligation attaches f the individual's exchange visit is funded by the individual's government or the U.S. government, if the individual's skills are in short supply in his or her country, or if the individual is coming to the U.S. to obtain graduate medical education. If the individual is subject to the two-year residence requirement, so too are all of the individual's dependents. It is sometimes possible to obtain a waiver of this requirement, but the waiver process is cumbersome and time-consuming.

O – Extraordinary ability individuals

The O category is for highly talented or acclaimed individuals who are scientists, educators, artists, athletes, entertainers, or business people. To qualify for O visa status, the individual must demonstrate sustained national or international acclaim. The U.S. employer must show that the individual will fill a position that requires a person of extraordinary ability. The petitioning employer must also submit a peer review evaluation confirming the individual's international renown and the need for such a person. O status can be requested for an initial period of three years. Extensions of O status are available in one year increments, with no limitations on total length of stay in O status.

P – Performing artists, athletes and entertainers

P visa status is for performing artists, athletes, and entertainers. Individuals seeking this category must demonstrate substantial achievement in their field. This status also requires a peer review evaluation confirming the individual's international renown:

- P-1 status is for principal individuals
- P-2 status is for essential supporting personnel
- P-3 status is for coaches and trainers
- P-4 status is for dependents.

Generally, P visa status will be granted for the duration of the engagement or season.

Permanent residence

There are two major avenues to permanent residence:

1. family-based sponsorship

   and

2. employment-based sponsorship.

Each type of sponsorship has several categories and different procedures.

Individuals who marry U.S. citizens may be sponsored immediately for permanent residence and are not subject to per-country quotas. If the sponsor's petition is approved within two years of the date of marriage, the individual will be granted conditional permanent resident status. In that case, the couple must file a joint petition to remove conditions on residence two years after the date the individual is granted conditional permanent residence. This requirement is intended to deter marriage fraud.

Almost all other family-based petitions are subject to category and per-country quotas, and because of the high level of demand, it may take many years before a visa is available. There are family-based categories for unmarried sons and daughters of U.S. citizens, spouses and children of permanent residents, married sons and daughters of U.S. citizens, and brothers and sisters of U.S. citizens.

Employment-based permanent residence also has several categories. Each has different requirements. For some categories, the employer must obtain "labor certification," such as a certification from DOL that there are no U.S. workers qualified and available to fill the position for which the individual is sponsored.

- **Employment-based Category 1**
  Employment-based Category 1 is for Priority Workers, which includes Nobel laureates, college/university teachers/researchers, and intracompany transferee managers/executives. A labor certification is not required for this category.

- **Employment-based Category 2**
  Employment-based Category 2 is for individuals with advanced degrees and individuals with exceptional ability in the arts, sciences, education, athletics, or business. A labor certification is usually required for this category unless the individual's employment will directly serve important U.S. interests.

- **Employment-based Category 3**
  Employment-based Category 3 is the most common of the employment-based categories, as it is used by professionals without advanced degrees, skilled workers in jobs requiring at least two years of training or education, and unskilled workers. A labor certification is always required for this category.

- **Employment-based Categories 4 and 5**
  Employment-based Category 4 is for Religious Workers, but is little-used now because of a history of abuse. Similarly, employment-based Category 5, which is for investors committing over $1 million to the U.S. economy, is also little-used because of a history of visa fraud.

Once a labor certification is obtained, the employer files an immigrant petition with USCIS. The individual and dependent family members may concurrently file for adjustment of status if immigrant visas are immediately available, which will depend on the individual's nationality, the employment-based classification used, and the demand. If an immigrant visa is not currently available to the individual, he or she must wait to file an adjustment of status application until such numbers are available. If the individual has worked without authorization or failed to maintain lawful status for more than 180 days, the individual cannot adjust status in the United States, and must complete the permanent residence procedure through consular processing at the U.S. embassy or consulate in his or her home country.

Cautions

These are the basic visas that are regularly obtained in the United States, however this list is not exhaustive. It is important to regularly consult the USCIS website (www.uscis.gov) and utilize immigration tracking software.

Further, assisting individuals and employers with obtaining visas and permanent resident cards can often be a grey area in terms of legal issues. Because some aspects of this process could be viewed as the unauthorized practice of law, it is important to seek legal counsel as appropriate. Also, many visa and immigration businesses utilize the skills of paralegals to assist with the process, complete intake with the prospective clients, follow through to obtain the appropriate documents, and watch over the process.

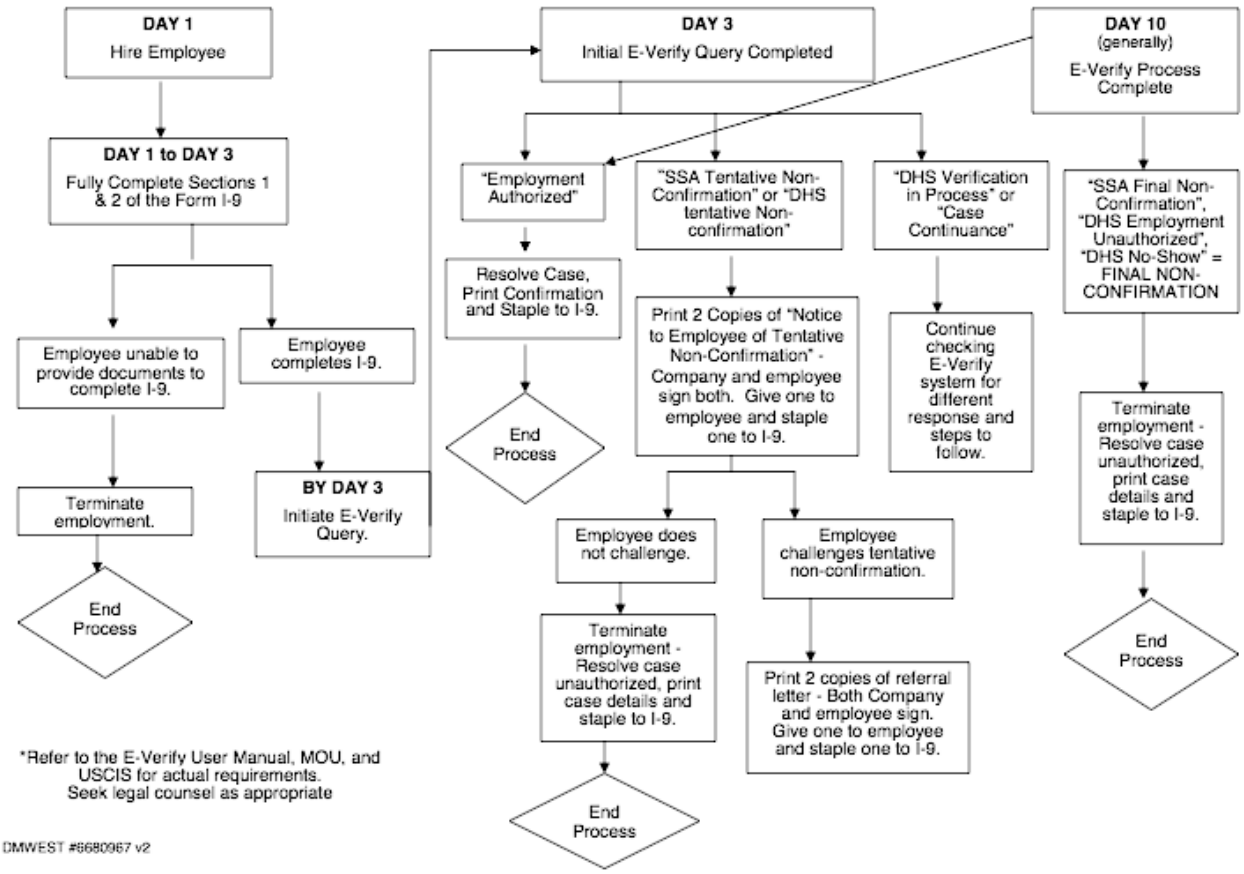
Conclusion

Employers should make an effort to understand the different types of visas available to foreign nationals and know the categories that authorize employment in the United States. Employers should familiarize themselves with which categories can obtain driver's licenses and Social Security numbers, in order to better understand how the Form I-9 can be completed using different types of documents. Finally, employers should work with immigration counsel to diary and track expiration and extension dates for visa workers, since the slightest period of time out of status, or becoming "unlawful", could impose a detrimental impact on a worker's future in the United States.

BALLARD SPAHR

HELPFUL STEPS TO COMPLY WITH REQUIREMENTS OF I-9 AND E-VERIFY PROGRAMS

(602) 798-5475
pacej@ballardspahr.com



*Refer to the E-Verify User Manual, MOU, and USCIS for actual requirements.
Seek legal counsel as appropriate

DMWEST #6680967 v2

Appendix A

Sample memorandum

Memorandum for hiring policy

The company is committed to obeying the law. The company will only hire legal workers. It will not knowingly hire an undocumented or unauthorized worker. Additionally, it will not discriminate because of someone's race, color, or national origin. It will not discriminate because of a person's name, the language a person speaks, or because a person speaks with an accent.

Supervisors and managers are responsible for helping the company obey the law and need to comply with the following:

- Never say that there are undocumented workers or "illegal aliens" working at the company. If you know for sure that an individual is not authorized to work in the United States you must report this information immediately to the President, General Manager, or Controller. The company will then investigate your report in the same way it investigates all personnel and employment decisions and take the proper action.
- Never assume that someone is not authorized to work in the United States merely because the person has a Spanish surname or does not speak English. DO NOT make off-hand or casual comments regarding whether someone is an undocumented worker or "illegal alien." Such remarks can be construed as national origin discrimination.
- Do not give rides to people you know are not legally working in the United States.
- Do not provide housing or lodging for people you know are not legally working in the United States.
- Do not help get documents or identification for people who are not authorized to work or assist them in getting hired.
- Do not contact people in other countries to "place orders" for workers.
- Do treat everyone respectfully and professionally.
- Do use respectful words. When speaking of someone that is not authorized to work in the United States, use the terms "unauthorized worker" or "undocumented worker." Do not use the terms mojado, wetback, illegal, or illegal alien.

- Do remind supervisors not to talk casually about whether workers are unauthorized. You should never talk about whether someone is an undocumented worker or "illegal alien" unless you really know that they are unauthorized.

Violations of this policy can lead to discipline up to and including termination.

Memorandum regarding immigration and I-9 compliance

Thank you for your interest. We are pleased to have the opportunity to provide you information about the company and its hiring practices. The company has established and enforces an immigration compliance policy. We are committed to employing only those individuals who are authorized to work in the United States. The company will not knowingly hire or continue to employ an unauthorized worker. At the same time, in compliance with federal and state law, the company does not unlawfully discriminate on the basis of citizenship or national origin.

In compliance with the Immigration Reform and Control Act of 1986 (IRCA), each new employee, as a condition of employment, must complete the Employment Eligibility Verification Form (Form I-9) and present documentation establishing identity and employment eligibility. The Federal Government currently provides a list of documents that employees may choose from to show the company at the time that company completes Section 2 of the Form I-9. Under IRCA, an employer is prohibited from asking for more or different documents than the employee provides when completing Section 2 of the Form I-9, and the company is also prohibited from refusing to accept the documents presented as long as the documents presented on their face reasonably appear to be genuine.

In addition to implementing and enforcing our immigration compliance policy, we train our employees on I-9 and immigration compliance. We also conduct anti-harassment and anti-discrimination training for our employees. We go a step beyond what is required by IRCA (while staying within the limits of the anti-discrimination provisions of IRCA) and require our newly hired employees to complete an IRS Form W-9 on which the employee affirms that the Social Security number that the employee provided is correct.

If you have specific information regarding a company employee, please provide it to the company in writing so that the company can investigate and take appropriate action. The company cannot act on vague reports based on appearance, ethnicity, or language skills because to do so could be discriminatory. In order to conduct an investigation and take appropriate action without violating anti-discrimination laws, the company needs the complaint or concern in writing.

Please provide your concerns or any information that you have to the company in writing. Include the name of the employee, the employee's worksite, and any information you have that makes you believe that the employee is not authorized to work in the United States. Please also include your name, address, and phone number. Thank you for your cooperation.

Memorandum regarding Social Security Administration no match letters

This memo addresses the internal policies and procedures a company could use when the company receives a no-match letter from the SSA. This is one option that a company could choose to implement. There is no safe harbor or procedures guaranteed to protect companies against liability.

Dear Employee:

The company has been informed by the Social Security Administration or Department of Economic Security that your Social Security number on file with the company may be in error. Please verify the Social Security number on file in the Payroll Department to ensure that your Social Security earnings are properly allocated by the Social Security Administration or benefits properly provided by the Department of Economic Security. Please let the Payroll Department know whether the Social Security number you have been using at the company is correct. An employee may be subject to a $50 penalty imposed by the Internal Revenue Service under 26 U.S.C. § 6723 if the employee fails to furnish the correct Social Security number to the employer.

Please take appropriate steps with the Social Security Administration or Department of Economic Security to correct any previous mistakes or misallocations regarding Social Security earnings. You can contact the Social Security Administration by visiting a local Social Security Administration office, visiting its website at www.ssa.gov, or calling 1-800-772-1213. It is your responsibility to correct any previous mistakes.

In addition, we need all employees to complete a W-9 and W-4 Form. The attached W-9 Form requires that you list your Social Security number and sign the document verifying that you are using the correct Social Security number. The W-4 Form is an employee's withholding allowance certificate that determines how much federal withholding taxes will be deducted from an employee's paycheck. These documents will be placed in your personnel file. Please complete the attached W-9 and W-4 Form and submit it to Payroll by your next payday. If you do not provide the enclosed forms, the company is required to withhold taxes from your wages as if you were single and have 0 exemptions.Thank you for your cooperation.

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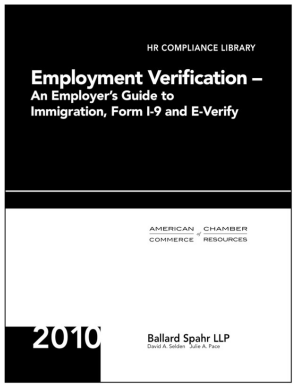
Employment Verification – An Employer's Guide to Immigration, Form I-9, and E-Verify

Ballard Spahr LLP



The Immigration Reform and Control Act of 1986 (IRCA) imposes harsh penalties on employers for hiring aliens without proper work authorization and for failing to verify employment authorization for all employees. Enforcement of these immigration laws has never been greater and this appears to be part of the trend to increase worksite enforcement. But with our informative, plain-English guide, you'll have all the information you need to stay in compliance and out of trouble, saving you money and headaches.

CHAPTERS INCLUDE:

1. Immigration Reform and Control Act
2. Anti-discrimination under IRCA
3. No-match letter, Form I-9, and compliance
4. The Social Security Number Verification Service
5. How to respond to visits and calls concerning immigration
6. I-9 Form
7. Tips to complete the I-9 form
8. Expiration dates and I-9's
9. US Immigration and Customs Enforcement
10. Trends in criminal enforcement of immigration sanctions and I-9 audits
11. E-Verify
12. E-Verify regulations for federal contractors and subcontractors
13. Helpful steps to comply with requirements of E-Verify program
14. Immigration visas

ABOUT THE AUTHORS:

Employment Verification – An Employer's Guide was written by attorneys David A. Selden and Julie A. Pace of Ballard Spahr L.L.P., one of the largest law firms in the country, with over 550 lawyers in twelve offices, representing companies, individuals, and other entities in virtually every state and around the world.

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