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ATTORNEYS AT LAW

I – 9 History and Practice Advisory

HISTORY OF PASSAGE OF 1986 IMMIGRATION REFORM AND CONTROL ACT (IRCA)

- For the first time, employers were required to verify under penalty of perjury that new hires (after 11/6/86) were authorized to work in the U.S.
- Penalties were assessed for paperwork violations, knowing hire or retention of illegal workers, and for pattern or practice violations.
- The initial law was harsh even on technical, non-willful violations, but has been softened, both in the law itself and as applied in practice.
- To balance a fear that employers would avoid sanctions by simply not interviewing or hiring foreign looking or sounding people, IRCA contains anti-discrimination provisions, specifically preventing employers from specifying the documents to be presented and from retaliating against whistle-blowers.

“IRCA seemed to penalize employers more than it aimed to curb illegal immigrants.”

- In 1996, Congress finally lessened the procedural burdens by introducing the “good faith” compliance defense, allowing employers to correct technical and procedural violations and giving the employer 10 days to correct any violations. Also, even in cases where employers improperly requested certain documents, a claimant has to prove “intent to discriminate” to sustain a charge.
- Use the year 2000 version of the I-9 and its list of acceptable documents. The only change is that the following documents are no longer acceptable: Certificate of United States citizenship, a certificate of Naturalization, a Reentry Permit, a Refugee Travel Document, or a Form I 151.

Current Enforcement Regime

- Investigations, Notices of Intent to Fine and Final Notices are way down.

- DHS resources are not going to employer sanctions.
- Total fines are 10% of what they were 10 years ago.
- Maximum fine penalties were raised to \$1,100 and \$2,200 for paperwork violations and illegal hire/retention, respectively.

Basic Requirements

- I-9 for each employee - exceptions for independent contractors (IRS test)
- Section 1 must be completed at the time of hire or prior thereto; if they require help to complete, then preparer or translator must complete certification; this section puts the employee at risk because they are representing that they can work in the U.S.
- Within three days of hire, you must review the documents presented for identity and employment authorization eligibility, and complete Section 2.
 - List A - any one of these documents in original (no copies) or
 - List B & List C - one original from each (restricted social security card generally unacceptable)
 - Record document name, identification number and expiration date (if any) in Section 2.
 - If document is lost, stolen or damaged, a receipt to replace it must be provided within three days of employment - 90 days to produce original replacement document and I-9 must be notated with new original. This does not apply if the document to be replaced would be insufficient, e.g., receipt to replace restricted social security card or EAD application.

Reverification

- If Box 3 in Section 1 is checked, then you must reverify continuing eligibility to work on or before the expiration date. Do it in red and if employee fails to provide timely documentation the employee must be terminated.

Transfer

- I-9 travels with the employee if they move from unit to unit within a company. If they transfer to a new company (not a successor-in-interest) then new I-9 must be completed.

Retention and Inspection

- I-9's must be retained for three years after hire or one year after termination, whichever is later.

- Three days' notice is required when warrant is issued. Original I-9's must be made available on location.
- Where a recruiter has been designated by an employer to fill out I-9, then photocopy is allowed; it's better to have a local lawyer act as agent for the recruiter or employer (in a situation involving a one-person, distant operation).

Electronic Storage

- October 30, 2004 law allows employer to fill out and store I-9 forms electronically. If preferred, employer can continue to use original signatures and store paper I-9's.

Copying Documentation from Categories A, B & C (TO COPY OR NOT TO COPY – THAT IS THE QUESTION!)

- If copies are made, documentation must be retained with I-9's - apply uniformly (same rule if you have a no copy policy.)
- Even if you keep documentation, you must still complete Section 2.
- If you copy, do both sides of documents
- Passports: just copy pages with name, photo, country of issue, date of birth and expiry date.

Rehires

- If rehired within three years of initial hire, they may use the same I-9 but update Section 3. If List C document has expired they must update and reverify.

Third Party Hires

“An employer may not rely upon a contract between the individual and their contractor, if the employer is aware that the individual is not authorized to work in the U.S.”

Penalties (for violations occurring after 9/29/99)

- Paperwork: \$110 - \$1,100
- Knowing Hire: \$275 - \$2,200 (2nd or 3rd violation, fine goes up to \$5K and \$11K per alien, respectively).
- Pattern or Practice: \$3,300-\$11K per alien +/- = six months jail (there is only one offense if part of a single proceeding)
- Amount of fine dependent on size and net worth of employer and good faith.

1996 Act/Bono Amendment

- 10 days to correct technical or procedural flaws
- Good faith compliance - e.g., training programs, written materials, in house audits and pilot project participation (use of government assistance - call CIS employer number to verify work eligibility; pilot program has been extended to all 50 states & D.C. and web-based access is not offered to participating employers.)

Exception: 1) Failure to correct within 10 days or 2) pattern or practice violation

- What items can be corrected within the 10 day cure period? (a) Not name of employee in Section 1 or correction of box attesting to whether employee is a citizen, LPR, etc. (b) failure to review and verify documents in Section 2 or failure to enter document title, etc. unless a copy of document has been retained.
- DHS can still forgive violation when it is impossible to correct or if ameliorating circumstances exist.

Non-Intent to Discriminate/Burden of Proof

- More difficult for claimants now - must prove discriminatory intent if more or different documents requested of an individual; must prove that this was done only to discriminate; if there was any other reason, then absolute defense.

Key Indicators for Employers to Avoid

- Different procedures applied to only one ethnic group or only to authorized aliens and not to U.S. citizens.
- Discharge based on foreign appearance or accent.
- U.S. citizen only practices.
- All aliens must produce green cards.

PRACTICE RECOMMENDATIONS

1. Centralize Authority
 - a) Limit the number of persons who will complete and administer I-9's (use trained HR person).
2. Centralize Storage
 - a) Store alphabetically and separate between current and former employees.
 - b) With larger company, divide I-9's by geographic location, year of hire and year of termination.
 - c) Keep in one location (you have three days to get them out to another location if subpoena issued).
 - d) Do not keep I-9 in employee's personnel file.

3. Green card production delays and need to extend I-551 stamps - be careful with these situations (err on the side of allowing or continuing employment).
4. H1B or L-1 Extension Applications filed prior to expiration are acceptable work eligibility proofs; normally the filing of an EAD (I-765) application is not sufficient proof.
5. Pre-Employment Inquiries
 - a) “Are you legally authorized to work in the U.S.?”
 - b) “Will you now or in the future require sponsorship for employment visa status (e.g. H1B visa status)?”
 - c) Do not ask applicant to specify their citizenship status, e.g., - Do not ask: Are you one of the following - USC, LPR, Temporary Resident, Asylee or Refugee?
6. Refugees and asylees are automatically entitled to work and do not require independent work authorization.
7. Internal Audits
 - a) Annually
 - b) Sampling for large companies
 - c) F/U on particular problems/mistakes

SOURCES OF AUTHORITY

- DHS Employer Handbook
- Immigration Employment Compliance Handbook (West Publishing)
- AILA publications
- INA (8 CFR § 274; 28 CFR § 44 and § 68)
- Executive Order 12989 (2/13/96)
- IIRAIRA (§ 411 - Bono Amendment)
- Opinion Letters of Special Counsel (e.g. on campus recruitment policy; employment application queries)