

How to Avoid an ICE Meltdown: Immigration Enforcement and Compliance

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Recent Developments

- Increased Enforcement
- SSA Mismatch
- Federal Legislation
- State Legislation
- Federal Contractor E-Verify Rule



Increasing Enforcement

- Bush Administration
 - April 19, 2006 IFCO raid
 - May 9, 2006 Fischer Homes
 - Swift Meat Co. raids
 - DHS Safe Harbor Rule
 - Agriprocessors raid
 - Federal Contractor rule



Increasing Enforcement

- Obama Administration
 - Fewer Raids
 - More I-9 Inspections
 - 652 Notices of Inspection Sent on July 1, 2009
 - George's Processing Settles for \$450k
 - Shipley Do-Nut Fined \$250k and forfeits \$1.33 MM



DHS Changes Enforcement

- IFCO Systems raid brought dramatic change in enforcement
 - Criminal Sanctions
 - Increased appropriations
 - New personnel
 - Lots more raids
 - Inter-agency cooperation



DHS Changes Enforcement

- "When employers get those kinds of numbers, or when there are other numbers that are provided that clearly do not match the names in Social Security records, that has to be a tipoff that there's a potential illegal or undocumented worker who's being employed."
- As a result, employers that receive information suggesting an SSN mismatch are now on constructive notice that they may be employing illegal aliens



Liability for Contractors



- ICE raided Fischer Homes and arrested 4 superintendents and 76 workers at 3 different job sites
- Workers arrested worked for contractors and subcontractors
- Superintendents charged with harboring and concealing illegal aliens



Targeted Industries



- Agriculture
- Construction
- Food Processing
- Hospitality
- Textiles
- Others in national infrastructure



SSA Mismatch Rule

- Obama Administration recently announced that it will abandon the mismatch safe-harbor rule and rescind it.
- DHS may still consider mismatch information to be constructive notice of a problem employee, so safest course is to follow the safe harbor procedure.
- Employer has 30 days to review and correct its records.
- Employee must correct problem within 90 days of employer's receipt of mismatch letter.



Comprehensive Immigration Reform



- We have seen failure of an enforcement-only bill in 2005, a CIR proposal in 2006, and two efforts in the Senate in 2007.
- The Obama Administration appears to be committed to action and is certainly promoting the dialogue. Sen. Charles Schumer (D. NY) is currently working on draft CIR legislation.
- It is not clear if Congress will get to it this year.



Federal Contractor Rule

- President Bush signed amendment to Executive Order 12989 on June 6, 2008
- Requires federal government to contract only with entities taking steps to avoid employment of illegal workers
- DHS designated E-Verify as "the" appropriate step for contractors to take
- Federal Acquisition Council issues proposed rule on June 12, 2008



Federal Contractor Rule

- Final rule published by Department of Defense, General Services Administration, and NASA on November 14, 2008
- Rule applies to contracts entered into, extended, or amended on or after September 8, 2009 with performance terms lasting more than 120 days
- Rule requires federal contracting officer to insist upon inclusion of contract language requiring contractor to enroll in, and use, E-Verify for all new hires Company-wide AND for existing employees working in direct support of the federal contract



States Requiring Use of E-Verify

- Requirement limited to new hires
- Required for all employers:
 - Arizona
 - Mississippi
 - South Carolina
- Required for state contractors:
 - Colorado
 - Georgia
 - Minnesota
 - Missouri
 - Nebraska
 - Oklahoma
 - Rhode Island
 - Utah



IRCA Basics: Prohibited Acts



- Knowingly hire an alien who is not authorized to work
- Hire any individual without verifying identity and work authorization
- Continue the employment of a person if the employer knows or should know the person is not authorized to work



IRCA Basics: Prohibited Acts



- Require an employee to present any specific document or combination of documents for I-9 purposes
- Require an employee to present more or different documents than are minimally required for the employment verification process
- Refuse to accept documents tendered by an employee that reasonably appear to be genuine on their face



IRCA Basics: Penalties

- Fine per unauthorized alien for Illegal Employment Violations
 - \$375 to \$3,200 First Violation
 - \$3,200 to \$6,500 Second Violation
 - \$4,300 to \$16,000 Third & Other Violations
- Criminal Sanctions Likely After First Violation



IRCA Basics: Penalties

- I-9 paperwork violations result in penalty of \$110 to \$1,100 for each individual
- Document abuse discrimination violations result in a fine of \$110 to \$1,100



More Penalties

- 10 years and/or \$250,000 fine for harboring, smuggling, concealing, or transporting illegal aliens for financial gain
- Criminal sanctions for conspiracy to harbor, smuggle, conceal, or transport



Section 1

- Employee should complete Section 1 before work commences
- Section 1 asks name, address, date of birth, Social Security number, and status
- Employee must attest to accuracy of Section 1 information under penalty of perjury
- Employee must sign and date
- Use Preparer/Translator certification, if necessary
 - Employer can complete Section 1



Section 2

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).

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

CERTIFY (ATTEST) I swear, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-named document(s) appear to be genuine and to be true and correct copies of the original document(s) presented by the employee to my employer or to me, and that to the best of my knowledge the employee is eligible to work in the United States. (State employment authorization code for the employee below, if applicable.)

| | | |
|---|--------------|-----------------------|
| Signature of Employer or Authorized Representative | (Print Name) | TIC |
| Business or Organization Name and Address (City, State, Zip Code) | | Date (month/day/year) |



Section 2

- We recommend employer complete Section 2 immediately after employee completes Section 1
- Employer completes Section 2 by examining the documents presented by the employee and recording the document numbers and expiration dates in the appropriate columns in Section 2
- Employer must examine original document -- not a photocopy



Practical Hints

- Accept any document specified in List A, List B, or List C, provided that it appears to be genuine and to relate to the employee
- Make sure documents are on List A, List B, or List C
- Do not ask employee to complete Form I-9 prior to offer of employment



Practical Hints

- Do not consider work authorization expiration date in making hiring decision
- Do not ask for DHS/CIS document confirming expiration date of work authorization
- Instructions suggest document filing receipts provide 90-day grace period --- CIS position is that this does not apply to work permit renewals
- Be certain that first day of work is inserted in Section 2 certification
- Record ALL of the necessary information – especially expiration date, issuing authority, type of document



Photocopy Rule



- Copying of documents presented by the employee permitted but not required
- Mere copying of documents does not constitute compliance and will result in penalties if form is not also properly completed
- Photocopies can be used to correct problems identified during a periodic self-audit or in advance of a government audit



Rehired Employees

- A new I-9 form need not be completed for persons re-hired within three years of completing a prior I-9 form
- Instead, the employer can update the prior I-9 form by confirming that the employment eligibility document originally presented remains valid
- If still valid, the employer merely records the re-hire date in Section 3 of the form



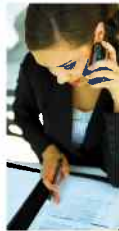
Reverification

- If the employee's work authorization document expires, you must reverify the employee's right to work prior to the expiration of the current work authorization document
- Only reverify on the basis of the document presented; ignore any expiration date in Section 1
- Failure to make a timely reverification is almost always construed as knowingly continuing the employment of an alien who lacks authorization to work



Reverification

- Reverification is accomplished by examining a new work authorization document and completing Section 3 of the form
- The new document type, number, and expiration date, if any, should be recorded in Section 3 and the employer should sign and date Section 3 of the form
- Reverification is not necessary for identity documents, U.S. passports, or Permanent Resident cards



Retention of I-9 Forms



- I-9 forms must be retained for three years from the date work commences and for one year from the date employment terminates
- If you do not meet both tests, do not throw out the form
- This means an employer must have a form for every single current employee hired after November 6, 1986



Retention of I-9 Forms

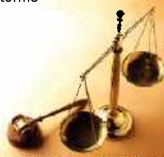


- Keep I-9 forms in files separate from employees' personnel files, so that ICE does not obtain access to information in personnel files in the event of an audit
- We recommend you keep current employee forms separate from terminated employee forms
- Keeping I-9 forms separate makes it easier to pull them quickly in the event of an audit and easier to correct



“So, what do we do??”

- Audit your I-9 forms. Enforcement today will almost certainly begin with an I-9 audit by ICE.
- Use SSA online verification. www.ssa.gov/employer/ssnvs.htm
- DO NOT sign up for E-Verify or IMAGE programs until mandatory.
- Review and process mismatch letters. Follow the terms of the DHS safe harbor rule.
- Create paper buffer with contractors.
- Urge Congress to enact CIR.



Correcting Forms

- Cannot fix late completions, untimely verifications, or status information for terminated employees
- If information is missing, get it and add it to the form – "late" is better than "missing" or "wrong"
- NEVER use correction fluid or blacken out information!
 - Instead, line through the erroneous information in a non-destructive manner.
- Write the new information in the adjacent margin
 - Optional to initial and date the change.
 - Write "self-audit" next to change



IRCA Documents

- List A Documents prove both identity and employment eligibility:
 - US Passport (expired or unexpired)
 - Unexpired foreign passport with I-551 stamp
 - Permanent Resident card (I-551)
 - Temporary Resident card (I-688)
 - Employment Authorization card (I-766)



IRCA Documents

- List B Documents prove only identity:
 - Driver's license or state ID card with photo or basic data
 - ID card issued by government agency with photo or basic data
 - School ID card
 - Voter Registration card
 - US military card or draft record
 - Military dependent's ID card
 - US Coast Guard Merchant Mariner card
 - Native American tribal document
 - Canadian driver's license
 - School record or report card
 - Clinic, doctor, or hospital record
 - Day-care or nursery school record



IRCA Documents

- List C Documents prove only employability:
 - US Social Security card issued by SSA unless restricted
 - Certification of Birth Abroad issued by State Department
 - Original or certified copy of official birth certificate
 - Native American tribal document
 - US Citizen ID Card (I-197)
 - ID Card for use of Resident Citizen in the US (I-179)
 - Unexpired employment authorization issued by DHS other than those in List A



THANK YOU

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