

# Avoid use of illegal aliens: Compliance with federal law

Twenty two years ago, as part of a national effort to stem the flow of illegal immigration into the United States, Congress enacted the Immigration Reform and Control Act of 1986.

Through IRCA, Congress sought to diminish the lure of American jobs for foreign workers by penalizing employers who knowingly hired "unauthorized aliens" — that is, non-U.S. citizens who are not authorized to accept employment in the United States.

To ensure compliance with this employment ban, IRCA established new employment verification and record-keeping rules that apply to the employment of all persons, including U.S. citizens. This sweeping legislation made it unlawful for employers to hire any individual without complying with IRCA's requirements for verification of work eligibility and record keeping.

All employees hired on or after Nov. 6, 1986, must provide documentation of both their identity and authorization to work in the United States. This verification process is conducted through the completion of the Department of Homeland Security Form I-9, Employment Eligibility Verification form.

The I-9 verification procedure provides a record for government investigators and also affords employers a good faith defense against potential charges.

Generally, employers must meet two related obligations with regard to IRCA's I-9 employment eligibility verification requirements: (1) an employer must not knowingly hire, or continue to employ, any person not authorized to work in the United States; and (2) an employer must verify the identity and employment eligibility of every new employee, whether the person is a U.S. citizen or foreign national, hired on or after November 6, 1986.

However, even if an employer completes the employment eligibility verification procedure properly, it still can be subject to severe penalties if it otherwise has knowledge of the unauthorized status of any of its employees.

On Feb. 12, DHS announced that more than 52,000 employers have voluntarily signed up to participate in E-Verify, a free Web-based system that allows participating employers to electronically verify the employment eligibility of newly hired employees. Launched in 2004, E-Verify has gained about 1,000 new employers each week since October, 2007.

The employer sanctions provisions of IRCA aim to eliminate the major incentive for illegal immigration to the United States: the ready availability of employment. Those provisions, however, contain two exemptions. The first is a "grandfather" clause which exempts the continuing employment of unauthorized aliens hired on or before Nov. 6, 1986, the date of the law's enactment. The second exempts "independent contractors," provided the service provider falls within the strict definition of independent contractor.

Section 1 of the I-9 form must be completed by the employee on the first day the employee begins work (usually, on the day of hire). The employee must attest on the I-9 form, "under penalty of perjury," that he is not an unauthorized alien, and that the



GUEST  
COLUMN

Irina  
Batrakova

and relate to him. The employee may choose from among several acceptable documents to submit to the employer to verify his or her identity and authority to work. Hence, an employer may not insist on a specific type of document.

The employer must complete Section 2 of the I-9 form within three business days of hiring an employee and also attest under penalty of perjury that it has examined certain original documentation

presented by the employee, that such documentation "appears on its face to be genuine" and relates to the named individual, and that to the best of the employer's knowledge the employee is authorized to work in the United States. These forms must be maintained in the employer's files for at least three years, and at all times during the individual's employment until at least one year after any termination of employment.

In those instances where the employee's entitlement to work is limited in duration, such as when his green card or employment authorization document expires, the employer must update and re-verify the employee's continued right to work in the United States. Section 3 of the I-9 form is used for updating and re-verification.

Without such documentation, continued employment of the worker may expose the employer to potential fines for paperwork violations, or worse, liability for knowingly employing an alien not authorized to work.

Fines for failure to comply with the employment verification system, such as paperwork violations, range from \$100 to \$1,100 per employee. Fines for employment of unauthorized aliens range between \$250 and \$11,000 per unauthorized alien. The amount of the fee escalates depending on whether there are repeated violations. If there is found to be a pattern or practice of violations, employers may be sentenced to up to six months of imprisonment.

Recent administrative enforcement efforts have both increased and broadened in scope. DHS has received much higher levels of funding for employment verification enforcement, and it has far more personnel devoted to employer sanctions than in recent years.

As administrative enforcement has increased, addressing complex compliance issues such as contractor and employer relationships, and Social Security no-match letters, has become increasingly difficult. DHS has worked with other law enforcement agencies to pursue criminal sanctions against employers in this area much more aggressively than in the past.

To minimize potential fines, any missing or incomplete I-9 forms should be properly completed and the date of any changes or additions should be properly noted. While late completion will not insulate the employer from liability for paperwork violations, it is a mitigating factor and can often reduce the scope and size of any fine that may be imposed.

Employers who have not instituted a compliance program, should conduct an "immigration audit" every two to three years and ensure that all personnel records be reviewed to determine which employees require the completion or update of an I-9 form, and which are "grandfathered."

IRINA S. BATRAKOVA is a lawyer with Samuels Yoelin Kantor Seymour & Spinrad LLP. Her practice emphasizes immigration law, estate planning and business law. She can be reached at 503-225-2966 and at

E. RESOLUTION.

red  
act  
son.

claims

HLAWOFFICE.COM  
503.226.7045

ALDRICH  
LAW OFFICE, P.C.

ry Less.

keeps you  
ults-oriented  
eve

SON & WYATT®  
LAW

business.