

**EMPLOYER SANCTIONS AND
I-9 COMPLIANCE
INSTRUCTION MANUAL FOR
HUMAN RESOURCE
MANAGERS**

**HOW TO AVOID HIRING
ILLEGAL WORKERS AND
AVOID CIVIL PENALTIES FOR
EMPLOYMENT
DISCRIMINATION AGAINST
FOREIGN BORN WORKERS**

By Larry W. Smith – Attorney at Law

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PREFACE

Hiring foreign born workers can be a mine field of potential liability for the Human Resource staff. This is a more urgent matter than ever since the Department of Homeland Security (DHS) has announced a crack down on Employers and the individuals involved in the hiring process who knowingly hire illegal workers. Since that announcement, hundreds of company management personnel and workers have been arrested by the DHS in workplace enforcement sweeps. Unfortunately for the Human Resources Manager and their staff, that presents an unprecedented dilemma: Turning a blind eye to illegal employment is no longer an option. Failure to comply with the law can now mean going to jail. As of June 14, 2006, new Employer verification rules were also proposed by the DHS and may soon be in effect. Once adopted, these new

rules will add yet another level of complexity and risk to the hiring process. Combine those governmental announcements with the fact that an Employer also is subject to liability for not fairly considering foreign born workers for employment even if the Employer is just attempting to avoid the complex rules regulating their hiring, and complying becomes even more difficult. Then, once hired, the discovery of illegal status; the unwitting acceptance by the Employer of false documents supplied by the employee; and, the unequal application of company policy to all applicants combine to present a dilemma for the Human Resources department. Only by close and consistent adherence to the complex issues regulating this area of the law can the Employer and the Human Resources staff avoid criminal prosecution and civil fines.

This Instruction Manual is intended as a guide for all Employers and their Human Resources Staff located anywhere in the United States. This instruction manual was prepared by experienced immigration attorneys who have assisted thousand of employers through the complex federal laws regulating the hiring of foreign born workers.

I. INTRODUCTION

A. Who We Are and Who This Instruction Manual Is Meant to Help

Who prepared this Instruction Manual?

As a full service immigration law firm, our attorneys have represented thousands of small business owners and their employees over the last 26 years. We have prepared this Instruction Manual to address the real life problems we have found from our experience that the Employers we represent face on a daily basis. Most of the Employers we represent are small business owners and they do not have an attorney on staff or ready access to a Labor Law attorney to advise them.

Do your staff members speak Spanish?

Almost all of the small business Employers we represent in Southern California have Hispanic employees on their workforce, and it is even more

common that those Hispanic employees face some sort of immigration problem. Our support staff is therefore bilingual in English and Spanish so that we can work closely with both the Employer and their employees to resolve those immigration problems. However, this Instruction Manual applies to any Employer regardless of what nationality of foreign born worker the Employer is interviewing for a job opening. We use the term “Interviewing for a job” broadly since federal employment laws apply the moment a job applicant seeks any form of employment. There is simply no way for an Employer to avoid the applicability of federal law regulating employment in today’s diverse economy.

I have been told that I must fire my key employee if they lack work authorization. What can I do to keep them?

While we understand the position of politicians who address the immigration problem faced by Employers by advocating that Employers simply “fire everyone who does not have proper authorization to work,” that is not always an easy solution for many small business owners to accept. That is especially true when the Employers hired the illegal workers when the United States government gave only lip service to enforcing illegal hiring practices. Unfortunately for many businesses, the foreign workers they hired who still do not have proper work authorization are often a key part of the business operation. Now that the Department of Homeland Security has announced a renewed focus on enforcement of the long existing laws prohibiting having illegal workers on staff, many small business owners find themselves in a very difficult situation. In order to come into compliance with the newly enforced employment laws, the small business owner is now faced with the prospect of having to terminate a very key employee who has an immigration problem but who is so key to the small business owner’s operation that the termination of that key employee would cripple the Employer. Yet, the Employer wants a solution to bring their business operation into compliance with the law. We pride ourselves on finding practical solutions to these difficult situations.

B. Practical Guidance to Real World Problems Employers Face

With the Department of Homeland Security's renewed emphasis on workplace enforcement and the recent arrests of management personnel at a number of companies, we are more frequently than ever consulted by Employers who want to find a real world, practical solution to the immigration problems faced by their employees and a correct analysis of the Employer's exposure to liability so that the Employer can take appropriate action to avoid criminal prosecution. We find it very odd that when we read the hundreds of articles written on this topic each year, that those articles never confront the reality that many small business owners actually do have illegal workers performing services and no one tells an Employer what to do with the employees who may be working for the Employer illegally, except to fire them all. If that were the way the real world actually worked, then there would be 11 million unemployed illegal workers tomorrow morning and the U.S. economy would collapse. Obviously, not every employer is following that advice, so other real world solutions must be explored.

What do I do if I have an illegal worker on my payroll?

While we certainly cannot and do not ever advise Employers to ignore the law, we do find that there is a lack of realistic guidance available for Employers on what they can and should do if they suspect that they have an illegal worker on their payroll. Therefore, this Instruction Manual was written to provide guidance to the thousands of small business owners and entrepreneurs who want to comply with the law but who want real world practical assistance on how to go about solving the immigration problems their employees face, not simply a lecture on what the Employer may have done wrong in the past.

We also developed this Instruction Manual to provide the staff of the Human Resources department and the business owner with concise instructions regarding the Employer's responsibility to verify that everyone the Employer hires has the right to work in the United States. That verification process starts with

the completion of Form I-9, Employment Eligibility Verification. We therefore give guidance in this Instruction Manual on how to comply with the federal regulations concerning the hiring of foreign born workers and I-9 compliance. Proper completion of Form I-9 is now an urgent matter since the Department of Homeland Security has recently started arresting Employers who have hired illegal workers. Completing Form I-9 and complying with the rules and regulations regarding what to do when hiring foreign born workers is far more complex than might appear at first blush. However, even though those rules and regulations are complex, most business owners and their Human Resources staff can comply once the conflicting rules are properly explained.

*My business
is not located
in California.
Can you still
help me?*

While our attorneys are all licensed to practice law in California, we represent Employers and immigration clients in immigration matters throughout the United States. That is because immigration law is a federal matter. As licensed attorneys, we are authorized to represent anyone from anywhere in the United States on immigration issues. Through the use of today's technology, e-mail communications and overnight delivery of documents, business owners are no longer limited to using only those professionals who are located in their local area. We therefore invite your inquiry concerning the use of our legal services through our website www.employersanctions.com.

II. What Can an Employer Do Immediately to Find Out if They Are Exposed to Criminal Prosecution and Civil Fines for Past Illegal Hiring Practices?

A. The Department of Homeland Security Has Announced a Crackdown on Employer's Hiring Illegal Workers

Since that announcement, hundreds of management personnel and illegal workers across the United States have been arrested. As of June 14, 2006, new proposed rules were announced by the Department of Homeland Security regarding employment verification and failure to comply will result in civil fines

and criminal prosecution. We assist Employers assess their compliance with the hiring requirements under the current law and the new proposed rules; on I-9 compliance; and, how to avoid civil fines and criminal prosecution in their hiring practices.

B. What Is an Internal I-9 Audit and Why Do I need One Now?

Every Employer must complete Form I-9 for each employee in accordance with complex laws or face criminal prosecution and civil fines. We recommend an Internal I-9 Audit for every Employer. Such an Internal I-9 Audit should be mandatory for a company who has received a letter from the Social Security Administration or the Internal Revenue Service advising the Employer that the social security number supplied by an employee does not match their records. Those letters are commonly referred to as “No-Match” letters. The receipt of “No-Match” letters for more than one employee signals a potentially serious problem for the Employer and the entire staff of the Human Resources Department. The Department of Homeland Security announced on June 14, 2006 that new proposed rules are to be followed regarding the receipt of No-Match letters. Failure to comply with those new rules could result in the loss of “Safe Harbor” protection.

Through an Internal I-9 Audit, we point out to the Employer errors made in the completion and retention of I-9 Forms and how to resolve those problems so as to avoid criminal prosecution and civil penalties.

III. How the Information Is Organized in This Instruction Manual

There are several ways to get to the information you may need in this Instruction Manual. First, this Instruction Manual was written as a book. Therefore, we have supplied a Table of Contents to assist you in finding what you need. You are welcome to print out a hard copy of this Instruction Manual to put in a binder for future reference. However, please be advised that our

Instruction Manual is over 55 pages long. Once printed, you can then read the entire Instruction Manual or keep it for reference. Alternatively, to find what you need on a specific topic, just refer to the Table of Contents and you can click to the appropriate section on our web site and be taken to the appropriate section. Finally, we have provided a list of the most Frequently Asked Questions (FAQ) on our website. To quickly get an answer to any question you may have, simply bring up the FAQ list, go through that list to find the question you need answered right away and just click on that FAQ. That will take you directly to the page in our Instruction Manual setting forth the answer to the specific question you may need answered.

You will also note that our Instruction Manual contains a heavy use of footnotes as references to source material. We debated about where to have the footnotes, or even to include footnotes at all. However, since labor law attorneys as well as in-house counsel for some of our clients need access to the laws and regulations we use, we decided to include a healthy use of endnotes. We have placed all references to our source material at the end of this Instruction Manual for design reasons. That way, if we cite a statute, regulation, or court case you will know where we obtained our information. Also, we have made every attempt to place on our website all of the source material we cite in this Instruction Manual so that you can quickly download the full text of any publication or court case we reference if you like at www.employersanctions.com.

How can I keep up to date on the changes in these laws?

However, regardless of how you use this Instruction Manual, we urge you to visit our website frequently for the most up to date version of this Instruction Manual as well as the latest information on this area of the law. This is an ever changing topic and we update our website daily to reflect the latest regulations and court cases affecting this complex area. On our website you will not only find the latest version of this article, but you will also find Employer Alerts we have posted, recent court cases as well as pending legislation. All of this information is free of charge at www.employersanctions.com.

IV. Hiring Foreign Born Workers

Who should read this Instruction Manual?

This Instruction Manual is intended to provide guidance to an Employer and their Human Resources personnel with regard to what they must do to verify the authorization to work for both the Employer's current employees as well as what must be done to verify the work authorization for new hires. The primary focus of this Instruction Manual is with the federal immigration laws governing the hiring, the continued employment and the termination of foreign born workers. Since we are immigration attorneys, we do not consider ourselves to be what is normally referred to as labor law attorneys. Therefore, our discussion of hiring practices will focus almost exclusively on the federal immigration laws regulating employment and immigration discrimination related issues and the proper completion of Form I-9. We frequently interface with labor law attorneys who are best equipped to handle the more common labor law issues such as wage and hour laws, working conditions, age discrimination issues and the like. Similarly, we are consulted by labor law attorneys when it comes to our expertise in the proper interpretation of federal work authorization documents, obtaining and reviewing work visas and related immigration issues.

Do I need to worry about discrimination when I hire a foreign born worker?

If the only thing that an Employer and their Human Resources staff needed to worry about was verifying an employee's right to work in the United States, their job would be difficult enough. However, the Employer's task is complicated because the Employer's exposure to liability for discrimination in the hiring and termination process involving foreign born workers is as great as is their risk of engaging in unauthorized employment.

Just who is considered a foreign worker?

This Instruction Manual addresses the issues which arise in the hiring and termination of foreign born workers. By foreign born worker, we do not mean the process of bringing a prospective worker into the United States from a foreign country. That is a visa process, which is a service that we perform, but that process is a completely separate topic. Instead, when we refer to interviewing or

hiring a foreign born worker, we mean the more common process of an Employer hiring someone who is applying for a job at the Employer's location in the United States when the applicants are already in the United States but they are not either United States citizens or Legal Permanent Residents of the United States. An Employer cannot hire any job applicant unless they are authorized to work in the United States. Unfortunately for Employers, making the determination of who is or is not authorized to work in the United States is often difficult and a mistake during the hiring process may expose the Employer and the Human Resources staff to civil penalties and criminal prosecution for hiring or continuing to employ someone who is not authorized to work. On the other hand, the same laws which punish an Employer for hiring an illegal foreign worker also punish the same Employer if the Employer improperly discriminates against foreign born workers by not hiring qualified applicants if they are authorized to work in the United States. We also address in this Instruction Manual the uncomfortable situation many small business Employers find themselves in, especially in Southern California, which is what to do with those key employees who are already on staff but who do not have proper authorization to work in the United States.

What law requires me to verify the right of the people I hire to work in the United States?

It has been the responsibility of all Employers to verify an employee's right to work in the United States since 1986.¹ After the enactment of the Immigration Reform and Control Act of 1986 ("IRCA" hereafter), the Immigration and Naturalization Service ("INS") engaged in substantial workplace enforcement to ensure enforcement of the hiring requirements set forth in IRCA. However, following the attacks of 9/11, the INS (now renamed and part of the Department of Homeland Security (DHS)), directed their attention to guarding our ports of entry, and they reduced their enforcement of workplace violations. However, the Department of Homeland Security recently announced a renewed crackdown on Employers who are not properly verifying the right of employees to work in the United States and who are instead hiring illegal workers. Since that

announcement was made hundreds of company management personnel and illegal workers who did not have proper work authorization have been arrested in numerous businesses throughout the United States. The landscape for those responsible for making hiring decisions has changed dramatically.

I have heard news about the new enforcement provisions in the Sensenbrenner bill. What is that?

As a further result of the growing movement by the federal government to crackdown on illegal employment, the United States House of Representatives recently passed H. R. 4437, known as the Sensenbrenner Bill, which adds even more severe Criminal and Civil penalties than under existing law for Employers who hire illegal workers or who have hired unauthorized workers in the past and who still have those illegal workers on staff.² Under the provisions of the Sensenbrenner Bill, in addition to existing requirements to verify an applicant's right to work in the United States, Employers will also be required to verify the Social Security number of all new employees against a database to be maintained by the DHS.³ Also, under the Sensenbrenner Bill, Employers will be required to re-verify the right to work in the United States for all current employees against that same Social Security database so that current illegal workers can be identified and removed from the workforce.⁴ The obvious goal of the Sensenbrenner bill is to quickly identify those workers who are not authorized to work in the United States so that those employees can be terminated.

What is the likelihood that I will be caught hiring illegal workers?

More important than the proposed legislation, Washington has sent a very strong signal in recent months through the announcement of the Department of Homeland Security that there will be a renewed emphasis in 2006 on workplace enforcement of existing laws concerning the employment of foreign born workers. The Sensenbrenner Bill still needs to be passed by the United States Senate. President Bush has already publicly praised H.R. 4437, and many members of the U.S. Senate have voiced approval of the bill. However, the U.S. Senate wants the provisions of the Sensenbrenner Bill coupled with a Guest Worker Program. You should check our website frequently since we post the latest updates on where the Sensenbrenner Bill stands in the legislative process as

well as the status of related legislation. This Instruction Manual will be updated on our website at www.employersanctions.com should the Sensenbrenner Bill or any other legislation be signed into law by the President.

However, regardless of what new legislation passes, the Department of Homeland Security has left no doubt about its intention to focus on workplace enforcement against Employers in 2006. In a News Release dated April 20, 2006, the Secretary Michael Chertoff and Julie L. Myers, assistant Secretary for United States Immigration and Customs Enforcement (ICE) unveiled a comprehensive enforcement strategy for the Nation's interior.⁵ The Department of Homeland Security and ICE left no doubt with their newly announced crackdown on Employers who hire illegal workers by stating:

“Employers that knowingly and recklessly employ illegal aliens must be punished. ICE has already initiated a strategic shift in the way it approaches such Employers by bringing criminal charges against them and seizing their illegally-derived assets – rather than relying on the old tactic of administrative fines as sanctions.”⁶

Therefore, Employers can expect that existing laws prohibiting the use of illegal workers, which already contain substantial criminal and civil sanctions, will be enforced by the Department of Homeland Security, by state agencies, or by enforcement actions brought by third parties from now on. For example, the governors and legislative bodies of many states have announced plans at the state level to go after those who employ illegal workers.⁷ A number of California politicians have also supported state enforcement of hiring laws by proposing to crack down on Employers in California as the best way to put a stop to illegal immigration.

In fact the states have now taken the lead in passing anti illegal immigration legislation. There is a ground swell of resentment by many people in

What if the new enforcement law doesn't pass? Do I still need to worry?

the United States of the perceived negative impact of illegal immigration and that the best way to combat illegal immigration is to prosecute business owners and their management staff who participate in knowingly hiring illegal workers. The July 10, 2006 issue of USA Today analyzed the action taken by 30 states to deal with the problem of illegal aliens under state law. Over half of the states have now passed laws aimed at stemming illegal immigration, with Employer fines being a big focus of the new states laws.

*What do I
tell an
employee if I
suspect they
may be
working
illegally?*

As a result of expected new state and federal workplace enforcement, Employers and everyone involved in the hiring process are well advised to immediately determine if any of their current key employees have problems with their work authorization documents. If so, then those key employees should be urged to seek immediate legal advice to solve those problems before the Department of Homeland Security or the state enforcement agencies make a call on the Employer. Now that enforcement of unlawful hiring practices is an urgent priority of the Department of Homeland Security (DHS), the likelihood of the DHS pursuing existing criminal prosecution and civil fines against Employers in 2006 is far more likely.

However, in complying with lawful hiring practices, Employers must constantly walk a fine line in their hiring practices by, on the one hand, attempting to verify the right of a person to legally work in the United States and on the other hand, making sure that the Employer does not engage in hiring discrimination regarding foreign born applicants. Step over that fine line in the hiring activity and the Employer may be subject to a lawsuit for discrimination by asking for either too much or for improper documentation when verifying an applicant's right to work in the United States. Therefore, in this Instruction Manual, we have included alerts Employers should be aware of in order to avoid potential liability for discrimination based upon nationality, race or citizenship in the hiring process.

Can I rely upon the government's Handbook for Employers for accurate instructions?

Unfortunately for all Employers who must comply with hiring laws, the laws regulating the employment of foreign born workers are scattered about numerous pieces of legislation, advisory letters and court cases. The laws are also conflicting and many of the government documents that are supposed to provide guidance to Employers are out of date. For example, the document upon which most Employers rely, the "Handbook for Employers" (government document M-274 dated 11/21/91) is 15 years old. We therefore have developed this Instruction Manual as a reference tool for the thousands of Employers we currently represent because there is no single reliable government document containing all of this information in one place. We have taken all of the many conflicting laws and government regulations governing the hiring, the continued employment and the termination of foreign born workers, and we have consolidated all of that information into this Instruction Manual.

We hope that you find this Instruction Manual helpful to your business. We also appreciate your feedback. So, if there is an area of this Instruction Manual where you have a question, a comment or a suggestion, we welcome your input by e-mail to our website at www.employersanctions.com. We do our best to respond to all e-mail communications, so please do not hesitate to contact us.

This Instruction Manual is offered for informational purposes only and is not intended as legal advice. You should consult with an attorney knowledgeable with this complex area of the law before you take any action with regard to your business operation or before you take any action against a current employee or job applicant.

V. **Laws Regulating the Employer’s Responsibility to Determine the Eligibility of Prospective Employees to Work in the United States**

A. **Employers and Employees Who Are Covered**

Is my business required to perform the verification of the right of employees to work?

All Employers are affected by the rules regarding the verification of the right of their employees to work in the United States. Those laws start at the Immigration Reform and Control Act of 1986 (IRCA). IRCA provides the starting point regarding an Employer’s responsibility for verifying the employment authorization of its employees to work in the United States.⁸ IRCA also sets forth the penalties for non-compliance with its verification requirements. However, the enforcement of the antidiscrimination provisions of IRCA apply only to a business with four or more employees.

B. **Employers Defined**

The provisions of IRCA are fairly broad and cover anyone who commences the employment of someone “for wages or other remuneration.” Therefore, anyone placed on payroll clearly falls under the regulations set forth in IRCA. Moreover, as we discuss later in this Instruction Manual, Employers cannot skirt their responsibility or avoid the penalties set forth under IRCA by an attempted misclassification of its employees as independent contractors. Therefore, taking an illegal worker off payroll, or paying cash to someone the Employer knows is not authorized to work in the United States still exposes the Employer to sanctions under IRCA. The term “. . . or other remuneration” is also quite broad and would therefore encompass salaries, wages, commissions or piece work activity.

C. **Acquiring a Company**

Successor Employers who acquire employees when purchasing a business are responsible for the accuracy of the Form I-9’s completed by the prior owners. Therefore, if a business is being sold, the buyer must understand

that they must either re-verify the I-9 Forms for the employees or face liability if they are improperly completed or if employees are working illegally.

D. Employer Exemptions

All prospective employees an Employer desires to hire are covered with the exception of casual hires and independent contractors.

1. Casual Hire

A casual hire is limited to someone who performs sporadic, irregular or intermittent domestic employment.

2. Independent contractor

What if I employ independent contractors?

A true independent contractor is not covered by IRCA. Therefore, an Employer is not required to verify the work authorization of an independent contractor. However, the independent contractor exception to the work authorization verification requirements of IRCA has been widely misunderstood by Employers, so it should come as no surprise that this is where we see many small business owners get into trouble.

I have classified people who work for me as independent contractors, and I pay them cash. Am I okay?

Unfortunately, many Employers erroneously believe that by classifying their new hires, or by converting their current workers whom they discover have immigration problems, to independent contractors (or that by taking them off payroll altogether and paying them cash) that the Employer is somehow safe from the Employer sanctions provided for under IRCA. Sadly, those Employers who so misclassify their workers as independent contractors only subject themselves to even more problems by facing additional penalties from the Internal Revenue Service and the state taxing authorities for failure to properly report and pay payroll taxes and to match Social Security taxes for those workers.

Therefore, Employers must understand that the term “independent contractor” means someone who is truly independent. Someone who shows up from 9 a.m. to 5 p.m. Monday through Friday and who does what someone in the Employer’s operation tells them to do is not independent. If an Employer has such persons working at their facility, the Employer is still subject to the Employer sanctions set forth under IRCA as well as tax penalties for failure to properly report and turn over taxes.

What is a real independent contractor?

True independent contractors have their own tools, determine what is to be done, in what sequence the jobs they have are to be done, and they perform such work for many different people. Therefore, an Employer who simply seeks to classify what is in reality an employee as an independent contractor, without actual facts to support the classification, will not only fail but that Employer faces even more problems. The lesson to be learned is that the problem of an illegal worker must be confronted by the Employer and an attorney should be consulted to find a real solution to the problem.

Finally, a reclassification of illegal workers to the status of independent contractor by the Employer was doomed to failure from the beginning anyway. That is because, under IRCA, even if a person is a true independent contractor, if the Employer knows that the independent contractor has no authorization to work in the United States, the Employer is still liable for the criminal and civil penalties provided for under IRCA since it is not only illegal for anyone to employ an illegal worker under IRCA, it is illegal for anyone to even contract with someone whom the person knows is not allowed to work in the United States.

E. Employees Hired Prior to November 7, 1986

Are the employees who have worked for me for a long time covered?

Fortunately for some Employers and their employees, there is a grand-father clause for all employees hired prior to November 7, 1986. However, there must have been no break in the continuous employment for that employee. In order for the Employer to be grand-fathered in, the employee must have

maintained their employment with no termination and a subsequent return to work.

F. Illegal Hiring Activity Defined Under IRCA

1. Illegally hiring, recruiting or referring for a fee, an alien knowing that he or she is not authorized to work.

What law prohibits me from hiring someone who is not authorized to work in the United States?

The first prohibited activity of an Employer under IRCA is the hiring of any one who is not authorized to work in the United States. That prohibited activity would extend to Human Resource Managers and their staff members who had knowledge of the illegal activity or who later discover it. The prohibition regarding illegal workers also extends to not only hiring, but to recruiting and referring for a fee someone who is not authorized to work in the United States. Therefore, most employment agencies that assume the responsibility of verifying that temporary workers can be employed are also covered by this prohibited activity. However, the provision requires a “knowing” activity, so an Employer needs to have either actual or constructive knowledge of the applicant’s illegal status. As can be seen later in this Instruction Manual, that knowledge can be inferred from the circumstances of the case.

2. Hiring any person, Citizen or alien, without following the record-keeping requirements of the Immigration and Naturalization Act of 1952 and IRCA is against the law.

Do I need to verify even a U.S. citizen's right to work?

At the foundation of IRCA is the fact that above all, it is a paperwork compliance law. Therefore, even if every person ever interviewed or employed by the Employer has the right to work in the United States, the Employer can still face substantial Employer sanctions for failing to complete the paperwork requirements of IRCA. Under IRCA, all Employers are required to complete Form I-9 and examine the work authorization documents specified on Form I-9. Then, the Employer must attest that they have examined the documents supplied

by the employee giving them the right to work in the United States, and that those documents appeared on their face to be genuine and related to that employee. All Employers must maintain the completed Form I-9 for the statutory period of time and present the completed forms for inspection within three days of being requested to do so by an appropriate government agency. Failure to complete, verify, maintain the paperwork as required, or turn over the Form I-9 documents when requested, even if everyone on payroll is authorized to work in the United States, exposes the Employer to the sanctions specified in IRCA.

G. Initial Application Process and Verification Requirements

1. Employers must examine Form I-9 and attest under penalty of perjury to the fact that the documents provided by the employee granting them the right to work in the United States appear genuine and relate to the individual applicant

How can I tell if the documents the employee shows me are genuine?

After the employee has completed Form I-9, the Employer must sign the Form I-9 under penalty of perjury. The Employer cannot simply accept the employee's word that they have valid work authorization documents without examining those documents. Form I-9 contains a notice to the Employer that it is illegal for them to fail to actually examine the appropriate documents establishing the right of the employee to work in the United States. The Employer must further certify that the Employer has not only examined the documents presented by the employee but that those documents appear to be both genuine and that they apply to the person being hired. The employer may, but is not required, to make copies of the documents the employee provided. However, the Employer cannot escape liability by just making copies of the documents provided and neglecting to examine them. The Employer must actually examine the documents and attest to the fact that they did so.

As discussed later, we strongly discourage Employers from making a copy of the documents the employees use to show work authorization. Also while the

Employer is not expected to be an authority on forged documents, reasonable care must be used in examining the documents supplied by the employee. If a government audit ever occurs, a reasonable person standard will be used to determine if the Employer skirted their responsibility in this area and having copies of the actual documents provided by an employee can be used to demonstrate a good faith effort to catch forged documents.

Documents that appear on their face to be forged or fake documents should be questioned by the Employer and failure to do so will subject the Employer to the penalties set forth under IRCA. However, great care must be taken by the Employer to apply the same rules in reviewing questionable documents to all employees so as to avoid charges of discrimination by questioning only the documents of those applicants with accents or who appear to be “foreign looking.” As a result, we urge all Employers to have a written policy regarding when and how to handle questionable documents so that it can be done on a consistent basis.

Examples of clearly forged documents, again applying the reasonable person standard, would consist of documents which appear to be copies of originals, or which use different size and type style in an area where all type should be of the same size and type. This situation should alert the Employer of a literal “cut and paste” modification of someone else’s document for an applicant’s own use. Also, even though the Employer is not expected to be an expert on forged documents, Employers could well be held responsible for knowing what commonly used documents look like. For example, Employers could reasonably be charged with knowing what a driver’s license in their state looks like, since they undoubtedly have one in their own possession. A dramatic departure in the appearance of a commonly used document by an applicant from what the Employer is used to seeing should put a reasonable person on notice of a problem and further inquiry should be made. Since there is an extensive combination of documents that can be provided by an employee to show that

they are authorized to work in the United States, the opportunities for a prospective employee to forge documents are almost limitless. Therefore, the key concern of the Employer in fulfilling their responsibility of determining that the documents are genuine is (i) that the Employer must examine the documents; (ii) that the Employer must believe in good faith that they can truthfully explain to a reasonable person in an audit that they appeared genuine at the time the employee completed Form I-9; and (iii) that the documents applied to the employee presenting them. Since there is a requirement that the documents supplied by the employee must apply to that person, then documents that appear to have someone's name or photograph fraudulently inserted should give rise to a question of genuineness.

Can I accept copies of documents used to prove the right to work?

Finally, the documents supplied for examination must be originals with only one exception. A certified copy of a birth certificate may be used in lieu of an original.⁹ Therefore, the use of what clearly appears to be a photocopy of a required document should be rejected, and may also put the Employer on notice of the possible use of a false document by someone not authorized to work in the United States. Moreover, knowingly accepting a forged document exposes the Employer to document fraud, which is discussed later in this Instruction Manual.

2. Categories of documents employees are allowed to use to prove authorization to work in the United States

What part of Form I-9 does the employee complete?

The employee should be instructed to read Form I-9 and complete Part I. The employee should be asked to comply with the provision that asks them to supply documentation demonstrating that the employee is authorized to work in the United States.

Am I allowed to assist the employee in completing Form I-9?

If the employee needs assistance in completing Form I-9, the Employer or someone on their staff may assist the employee.¹⁰ The Employer may also interpret the instructions for the employee if the employee does not speak English.¹¹ Form I-9 and its instructions are only provided to Employers and

accepted by the United States government in English.¹² In the case where the Employer assisted the employee in completing Form I-9, that fact should be noted in the appropriate area of Form I-9.

What documents can an employee use to prove authorization to work?

Form I-9 specifies what documents are allowed to be supplied by the employee in order for the employee to establish that they have a right to work in the United States. When a prospective employee is told that an offer of employment has been made, the employee should be given Form I-9 which lists the documents the employee can provide to show that they have the right to work in the United States. However, as to those applicants who were only interviewed, but to whom no offer of employment was made, those applicants do not need to complete Form I-9.¹³ The categories of documents from which the employee may choose to produce evidence that they have the right to work in the United States are as follows:

The employee can produce one (1) document from List A¹⁴

List A Those documents that establish both the identity of the person and their right to work in the United States.

or

The employee may produce one (1) document from List B and one document from List C¹⁵

List B Those documents that establish identity;

and: one document from List C

List C Those documents that establish the right to work in the United States.

Can the Employer ask for different documents than the employee submits?

The specific allowed documents within each category the employee is permitted to supply in order to meet the requirements of Form I-9 are set forth on

the next page. However, it must be stressed that the employee selects the documents which the employee in their sole discretion chooses to produce.¹⁶ The Employer is not allowed to specify which documents the Employer wishes to see and cannot ask to see more documents than one document from List A or one from both List B and List C!¹⁷ If the Employer specifies the documents the Employer wants to see or asks for additional documents over what the employee wants to produce, then the Employer is committing document abuse and may be liable for Employer sanctions under IRCA.

LISTS OF ACCEPTABLE DOCUMENTS*

LIST A	OR	LIST B	AND	LIST C
<p>Documents that Establish Identity and Employment Eligibility</p> <ol style="list-style-type: none"> 1. U.S. Passport (unexpired or expired) 2. Certificate of U.S. Citizenship (<i>INS Form N-560 or N-561</i>) 3. Certificate of Naturalization (<i>INS Form N-550 or N-570</i>) 4. Unexpired foreign passport, with <i>I-551 stamp</i> or attached <i>INS Form I-94</i> indicating unexpired employment authorization 5. Permanent Resident Card or Alien Registration Receipt Card with photograph (<i>INS Form I-151 or I-551</i>) 6. Unexpired Temporary Resident Card (<i>INS Form I-688</i>) 7. Unexpired Employment Authorization Card (<i>INS Form I-688A</i>) 8. Unexpired Reentry Permit (<i>INS Form I-327</i>) 9. Unexpired Refugee Travel Document (<i>INS Form I-571</i>) 10. Unexpired Employment Authorization Document issued by the INS which contains a photograph (<i>INS Form I-688B</i>) 		<p>Documents that Establish Identity</p> <ol style="list-style-type: none"> 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. 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. School card with a photograph 4. Voter's registration card 5. U.S. Military card or draft record 6. Military dependent's ID card 7. U.S. Coast Guard Merchant Mariner Card 8. Native American tribal document 9. Driver's license issued by a Canadian government authority <p>For persons under age 18 who are unable to present a document listed above:</p> <ol style="list-style-type: none"> 10. School record or report card 11. Clinic, doctor or hospital record 12. Day-care or nursery school record 		<p>Documents that Establish Employment Eligibility</p> <ol style="list-style-type: none"> 1. U.S. social security card issued by the Social Security Administration (<i>other than a card stating it is not valid for employment</i>) 2. Certification of Birth Abroad issued by the Department of State (<i>Form FS-545 or Form DS-1350</i>) 3. Original or certified copy of a birth certificate issued by a state, county, municipal authority or outlying possession of the United States bearing an official seal 4. Native American tribal document 5. U.S. Citizen ID Card (<i>INS Form I-197</i>) 6. ID Card for use of Resident Citizen in the United States (<i>INS Form I-179</i>) 7. Unexpired employment authorization document issued by the INS (<i>other than those listed under List A</i>)

* Source: *Handbook for Employers*, 56 Fed. Reg. 41767, 41772 (Aug. 23, 1991).

3. Document Abuse –Prohibition against any Employer specifying which documents can be used by the employee and prohibition against Employer requesting additional documents

Why can't I ask to see specific documents to verify a job applicant's right to work in the United States?

An Employer cannot specify which documents the employee can use to comply with Form I-9 and cannot ask for more documents than specified.¹⁸ The Immigration Act of 1990 (IMMACT 90) made the act of an Employer requesting more documents than required a violation of IRCA's antidiscrimination provisions.¹⁹ By doing so the Employer would be in violation of the document abuse provisions of IRCA and subject the Employer to a possible discrimination lawsuit.²⁰ While there are court cases, and language in other statutes, that state that intent on the part of the Employer to discriminate must exist in order for the Employer to be found liable for damages for discrimination, there is simply no reason for the Employer to take that risk. The antidiscrimination provisions of IRCA are quite clear. Therefore, the Employer must accept the documents the employee presents to establish their right to work in the United States so long as they are acceptable documents for the purpose of complying with Form I-9, they appear genuine and they relate to that employee. The Employer simply cannot ask for different or additional documents.

a) Changes to allowed list A, B and C documents

Is there one single government publication I can rely on to tell me what to do?

It should also be noted that new, but as yet unimplemented, laws exist specifying new documents which are acceptable for Form I-9 purposes and deleting other documents from the list of acceptable documents. Unfortunately, the Handbook for Employers (M-274 rev. 11/21/91) has not been updated to reflect those changes. The U.S. government has advised Employers that they will not be punished if they rely upon the contents of the Handbook for Employers instead of implementing the provisions of the new laws.²¹ While an Employer has been advised that they will not get into trouble for continuing to accept

documents specified in the old Handbook for Employers, we advise Employers to check with their legal counsel on how to handle the acceptance of documents no longer deemed acceptable.

b) New acceptable documents not listed in the Handbook for Employers

While the U.S. government is working out how to update the Handbook for Employers, what does the Employer do if an employee wants to use a document not listed in the Handbook for Employers, but that document has been deemed as acceptable by the United States government in legislation? We can only urge Employers to work closely with their attorney to develop a coherent company policy on which documents are and are not acceptable.

c) Check for updates on acceptable documents

We constantly update our website to reflect the latest changes affecting this area of the law. Therefore, we urge all Employers to frequently check our website at www.employersanctions.com for changes in the law in this complex area. We also track new court cases and legislation in this area and we offer a free e-mail alert to all Employers who request one. Our information is free to all Employers whether we represent them or not. To review the most recent version of this Instruction Manual, as well as any aspect of the latest laws and reports of Employer sanctions, or to register for your e-mail alert, check our website at www.employersanctions.com and follow the instructions.

d) Prohibition against requesting additional documents

If an Employer cannot specify which documents they want the employee to supply to show work authorization, can an employer ask for more documents than the employee supplied? The answer is no. This is a particularly troubling area for many Employers to accept. After all, the Employer's thinking goes, if the documents set forth on Form I-9 are acceptable to demonstrate the employee's

authorization to work in the United States, asking for as many documents as possible in order to show that authorization must be better. Additionally, from the Employer's perspective, if a mitigating factor to be considered when levying a penalty against an Employer is the Employer's good faith attempt to comply with the law, then why not cover all of the bases and ask for enough documents to be absolutely certain that the Employer is hiring only employees who have a right to work in the United States? That sounds entirely rational and very logical. Therefore, since we are dealing with the United States government, it should come as no surprise that not only is that not the case; but by doing so, the Employer is subject to an entirely new set of fines and penalties for document abuse.

4. Antidiscrimination Provisions – It is illegal to discriminate against a “Protected Individual”²²

What anti-discrimination provisions do I need to be concerned about?

An Employer should be just as concerned with the antidiscrimination aspects of their hiring practices under IRCA and its related statutes as they are with verifying lawful employment. The complexity of complying with this area of the law comes from the government's balancing act of, on the one hand, trying to enforce its lawful employment laws, and, on the other hand, the government's competing goal of guarding against discriminatory hiring practices. This is truly an area where the Employer seems “damned if you do, and damned if you don't.”

Who is a “protected individual” I need to worry about discriminating against?

The complexity regarding prohibited discrimination combines an understanding of who a “protected individual” is, with an understanding of what antidiscriminatory provisions of IRCA relate to those “protected individuals.” Unfortunately, it is not always an easy task to determine if a prospective applicant or an existing employee falls under the category of “protected individual.” That is because the employee (i) may fall in or out of the status of “protected individual” due to the passage of time; (ii) the occurrence of certain events; (iii) their taking or not taking of certain action as required by law; (iv) the

change in certain immigration laws which affect their legal status; (v) the decision of the President or Congress to grant or revoke certain rights they may have; (vi) decisions in new court cases, and a myriad of other complex factors. Given these complex array of factors, no concrete set of rules can be presented here as to whether a prospective or current employee falls into the status of a “protected individual” at the time an Employer wants to either hire or terminate that individual’s employment. We can present the definition of a “protected individual” as defined by the statutes as we do below. However, the status of each applicant or employee must be evaluated on a case by case basis at the time of their hiring or termination. Therefore, the Employer should consult with an immigration attorney with up to the minute information on who “protected individuals” are at that moment, so that those decisions can be made on a case by case basis.

A “protected individual” by statute is defined as:

“An individual who is a U.S. citizen or national or an alien lawfully admitted for permanent residence, a temporary resident under § 210(a) or § 245A(a)(i), a refugee under § 207, or an asylee under § 208.”²³

I don't even know who a protected individual is. Can I still be punished?

Employers must also be aware that ignorance of who a “protected individual” is and how they should be treated is no defense. It is the Employer’s responsibility to know who a “protected individual” is, and the Employer’s unwitting discrimination against a protected individual is no defense to a discrimination enforcement action.²⁴ Therefore, an Employer can be charged with discrimination as a result of its own failure to exercise reasonable care in gaining the knowledge of who a “protected individual” is and how they should be treated.²⁵ The burden is on Employers to either educate themselves in this area of the law or seek proper legal advice from an attorney. However, it is not discrimination to “prefer” an equally qualified U.S. citizen over a non-U.S. citizen if indeed they are both equally qualified for the job.²⁶ Further, under some

circumstances, an Employer can hire only U.S. citizens so as to comply with a governmental contract or if a governmental entity mandates such hiring.²⁷

5. Prohibition against requiring the employee to indemnify their right to work in the United States

Can I ask someone I want to hire to indemnify me that they have a right to work in the United States?

Given the complexity of complying with the provisions of IRCA, it would be great for the Employer if an Employer could just ask a prospective employee to insure the Employer of their authorization to work in the United States. Unfortunately, that cannot be done. The Employer cannot ask an employee to post a bond, insure or otherwise guarantee their authorization to work.²⁸ The responsibility to do the verification that the employee is authorized to work in the United States falls solely upon the Employer. The Employer's responsibility would also seem to extend to the cost of verifying an employee's right to work. For example, a logical question would be, if the Employer is required to talk to their attorney to examine the documents the employee provides to show proper work authorization, can the Employer make the employee pay for that cost. The answer is no. However, if the employee needed their own legal assistance to renew a document they have chosen to use to show that they have authorization to work in the United States, such as a work permit renewal, that cost would probably fall upon the employee. Before an Employer attempts to make an employee pay for anything, the Employer should consult with an attorney.

6. Special problems concerning a Request of an Employer for a Social Security Card

Can I ask to see a Social Security card?

An area where we see a great deal of confusion on the part of Employers arises when an Employer requests that a person starting work produce a Social Security Card or at least provide a Social Security Number. There is great confusion among Employers concerning the timing of that request, the purpose of the request and what can and cannot be done with the information obtained as a result of the request.

Doesn't a job applicant need a Social Security number before I can hire them?

Most Employers are surprised to discover that a person does not need a Social Security Card or Social Security Number in order to be “hired.”²⁹ We define “hired” as the time when an Employer has determined that they want to offer an applicant a job. Once the job offer has been extended, that person has been “hired” so they need to complete Form I-9. On Form I-9, a Social Security Card is just one of the many documents an employee who has just been “hired” may elect in their sole discretion to use in order to show that they are authorized to work in the United States and thus eligible to be “hired.” Therefore, an Employer can not ask for a Social Security Card to show that the employee is entitled to be “hired” if the employee elects to not produce one.³⁰

When can I ask for a Social Security number?

After Form I-9 has been completed and the employee has filled out Part 1, and after the Employer has examined the documents supplied by the employee and they all appear to be satisfactory, then the employee can “start work.” However, while not required on Form I-9 to be “hired” so that the employee can become employed, once the employee does actually “start work,” the employee is then required, but only for the purpose of tax reporting, to produce a Social Security Card, or a receipt for an application for a Social Security Card.³¹

Therefore, what documents are needed to be “hired” (i.e., to fill out a Form I-9 and supply acceptable documents) and what documents are required to “start work” (i.e., to be placed on payroll) are two completely different concepts. The Employer’s own policy manual and communications to new employees should clearly state that the reason for requesting the Social Security Card if the employee did not use one to be “hired,” is for tax reporting purposes only since the applicant has “started work” and not for the purpose of “hiring” the employee.

Don't I have to give the IRS the SSN for taxes?

However, the Employer’s problems are not over. The next dilemma for the Employer is this, if an Employer cannot request to see a new employee’s Social Security Card for the purpose of complying with Form I-9 “hiring” requirements, but then is required to request the Social Security Card for the

purpose of complying with tax requirements, then what does the Employer do if the Social Security documents used for tax purposes appear fraudulent? If the Social Security Card appears suspicious or fraudulent when presented for tax compliance purposes, is the Employer put on constructive notice of the existence of a potential illegal worker? The dilemma confronting the Employer is this: “I cannot request to see a Social Security Card for the purpose of determining if the applicant has work authorization so I can “hire” them, and if I request to see a Social Security Card for the purpose of “hiring” that person, I can face penalties for document abuse. However, what do I do if I receive a questionable Social Security Card the employee wants to use for tax purposes when they “start work”?” The Employer faces an almost irreconcilable dilemma. There are no clear answers in this area and all we can recommend is that the Employer seek legal advice from an attorney on a case by case basis before taking any action regarding any prospective employee who produces a questionable social security card for tax purposes.

The next problem has to do with the Employer’s potential exposure to penalties from the IRS for the improper use of Social Security numbers for tax reporting purposes. Every Employer is required to file numerous federal tax returns reporting wages and must issue its employees a W-2 each year.³² Therefore, if the Employer is reluctant to question the Social Security documents provided to it by its employees, if those Social Security documents are later determined to not be valid, then the Employer faces the potential liability of being fined by the Internal Revenue Service for using invalid Social Security Numbers on its tax reporting documents.³³ Again, there is no clear answer to this dilemma and legal counsel should be consulted prior to taking action if an Employer is notified by the Internal Revenue Service of a potential reporting discrepancy.

7. Uniform application of company hiring procedures to avoid discrimination lawsuits.

Can I ask someone who looks foreign for more information to protect myself?

If the Employer finds the need to question whether certain documents supplied by an applicant to show proper work authorization are genuine or not, great care must be used by the Employer to apply consistent rules and to apply the same rules to everyone hired.³⁴ The Employer cannot simply question documents from those the Employer has decided to hire who have foreign accents or appear to be immigrants.³⁵

Additionally, if the Employer questions only the documents for low level positions and applies a completely different standard when interviewing for higher paying or skilled positions, charges of discrimination may well apply. Whatever rules the Employer adopts, they must be evenly applied to all applicants and employees. Therefore, we advise all Employers to provide their Human Resources personnel with written instructions as to how to apply the rules regarding the production of acceptable documents and to monitor every application of those rules.

8. Time frames involved for verification of right to work

a) Verification time limit – 3 business days

How much time do I have to complete Form I-9?

Form I-9 must be completed by both the Employer and the employee within three (3) business days of the time the employee is hired.³⁶ However, if the period of employment is less than three days, then Form I-9 must be completed at the time of employment.³⁷

- b) What to do when documents are missing, lost or stolen – employee has 90 days from production of receipt for replacement

What do I do if an employee tells me they have lost the document they want to use?

In the event that an applicant is unable to produce a document that they wish to use to show that they are authorized to work in the United States, they may provide the Employer within the allowed three (3) business-day period a receipt for a replacement of the document.³⁸ Then the applicant must be allowed ninety (90) days in order to provide the original document.³⁹ During that ninety (90) day period, the employee is allowed to work.⁴⁰

9. Storing Form I-9 and copying employee verification documents

Once Form I-9 has been completed, the next question is, what do you do with them? Also, what should a company do with the documents the employee elected to use to show that they have a right to work in the United States? Finally, what should a company do with all of the Forms I-9 which have expired? The answers to these questions have important ramifications.

- a) Where to store Form I-9

Do not keep Form I-9 with an employee's regular personnel file. There are many important reasons to keep the completed Form I-9 separate from the regularly maintained personnel file for employees.

Among the various reasons to keep Form I-9 separate from the regular personnel file is so that the Employer can maintain the confidentiality of the employee's personnel file. Although designated federal agencies have a right to demand to see the Forms I-9 for the company's employees, that does not translate to a right of those designated federal agencies to see the employee's entire personnel file. The employee's personnel file may well contain confidential information which may be prohibited from disclosure by state and federal law to a

third party without a court order. By way of a few examples only, the employee file may contain confidential medical records used to support arrangements under the Americans with Disabilities Act. There may be confidential disclosures of information concerning separation agreements, or dissolution and restraining orders in a family law matter. There may be notices from state and federal taxing authorities regarding unpaid taxes or other such claims. Since there is a good likelihood that some form of state or federal law prohibits the Employer from disclosing the above referenced information, then the Employer could be creating an entirely new set of liabilities for the unauthorized disclosure of the confidential information of the employee's file to a third party such as the DHS. Therefore, we urge Employers to set up a completely separate set of files to be used solely for the purpose of maintaining Forms I-9 for all employees.

Another reason for maintaining a separate file for Form I-9 is that once an authorized federal agency has requested to see all Forms I-9, the Employer only has three (3) days to comply. If the Forms I-9 are embedded in the employee's regular personnel file, there is no time for the Employer to extract the Form I-9 from the personnel files and present them to the appropriate federal agency.

It is further recommended that only the form I-9 for current employees be maintained. The Forms I-9 for terminated employees should be purged and scheduled for destruction as set forth below.

b) To copy or not to copy employee supporting documents

An Employer is allowed, but not required, to make photocopies of the documents the employee elects to show that they are authorized to work in the United States. Therefore, since the Employer is allowed to make photocopies, should they be made?

(i) Advantages of photocopying employee supporting documents

For Employers who are completely confident in their ability to interpret the documents supplied by employees to prove their authorization to work in the United States, making photocopies of the actual documents provided by the employee could show, if an audit ever occurred, that the Employer acted in good faith. After all, if the originals of the documents provided by the employee were valid, then the photocopies will also appear valid. Therefore, in a subsequent audit, the Employer could simply lay out on a table for inspection all Forms I-9 for its employees along with the photocopied documents the employees provided. The Employer could then show the person conducting the audit the documents the employees used and say, “You see, the documents I was presented are on the appropriate list of A, B, or C documents; they appeared to be genuine originals; they apply to the person presenting them; and I saw nothing that would have put a reasonable person on notice of any irregularities requiring further inquiry.” If the federal agent examining those documents concurs, then everyone is happy. In that case, photocopying the documents properly supported the Employer’s position that they complied with federal hiring requirements. However, this example makes a lot of assumptions that often do not exist in real life. There are many dangers posed by the photocopying of supporting documents used with Form I-9 and the disadvantages of making photocopies are set forth below.

(ii) Disadvantages of photocopying employee supporting documents

There is a different school of thought by legal practitioners which says that it is not a good idea for an Employer to make photocopies of the documents the employee uses to show that they are authorized to work in the United States. That theory, to which we subscribe, states that the Employer should not do what

they are not mandated to do, I.E. make photocopies, when in fact those very photocopies can be used against the Employer.

Assume again that the Employer is the subject of an audit by the DHS. Assume again that photocopies of supporting documents were attached to the Form I-9 completed by all employees. If all current employees are audited, the Forms I-9 those employees prepared could number into the hundreds and could have been prepared many years ago. There may have been changes in the Human Resources staff and the old Human Resources staff may not have been as well trained or informed as is the current staff. Unfortunately, if a federal agent examines hundreds of Forms I-9 and hundreds of supporting documents supplied years earlier, there is a great mathematical chance that they will spot errors. Some of the supporting documents may have been expired when presented, but no one caught it; some may be in the wrong categories of documents, some of the supporting documents for an employee may be attached to the Form I-9 and others may not have been attached due to clerical errors or a photocopy machine malfunction. As all Employers know, clerical tasks are subject to error, so why invite an examination by a federal agent. If simple clerical errors have occurred, they may look suspicious and cause further inquiry, burdening the Employer with additional work and expense.

(iii) Recommendation regarding the photocopying of employee supporting documents

While we realize other law firms may express a different view, we do not advise Employers to photocopy the supporting documents an employee uses to demonstrate that they have a right to work in the United States. Making those photocopies is not mandatory, so why should the Employer incur the additional photocopying expense and additional storage requirements? It is a clerical task prone to errors, which errors only raise suspicions in an audit. While we do have

some Employers who still insist upon making photocopies of supporting documents, we do not recommend it.

c) What to do with Forms I-9 for terminated employees

Upon termination of an employee, we recommend that the Employer remove that employee's Form I-9 from the active employee files and calendar it for destruction at the appropriate time. There is no reason to leave old documents for someone to audit. Once the federally mandated time to retain Form I-9 has expired, we recommend that expired Forms I-9 be purged and shredded.

Federal law only requires document retention for a specific period of time. Destroying expired Forms I-9 when allowed by law does not suggest that the Employer has anything to hide. Therefore, there is no valid reason for an Employer to maintain expired Forms I-9, which may be many years old, so that they can be included in a federal audit.

In conclusion, destroy expired Forms I-9 each time an Internal Form I-9 audit is performed.

VI. Potential Damages the Employer Faces for Continuing to Employ its Existing Unauthorized Workers

A. It is illegal to Continue to Employ an Alien Knowing that He or She Has Become Unauthorized to Work in the United States.

Can I get into trouble if someone I have already hired is working illegally?

Continuing the employment of a worker whom the Employer knows is not authorized to work in the United States is illegal and subjects the Employer to Employer sanctions under IRCA.⁴¹ However, the Employer must have knowledge of the fact that the employee does not have work authorization.⁴² The knowledge of illegal employment can be either constructive knowledge or actual knowledge, and can be gained in several ways. However, regardless of the way

the knowledge of illegal employment was gained by the Employer, the continued employment of that person is illegal.⁴³ This area of compliance with IRCA is the most problematic for many small business Employers. The problem which causes the most difficulty for the small business Employer arises when the employee in question has become a key worker for a small company and that key employee has acquired specialized knowledge during their time of employment.

What exactly is a key employee?

We do not need to define who a key employee is. Every small business owner knows exactly who they are. The key employee is the one who has been with the small business owner for a long period of time, often through good and bad times. They are the one employee the small business owner relies on the most, the one who can run a particular machine or perform some unique service better than anyone else. Indeed, if the small business Employer discovers that an existing employee is not authorized to work in the United States, but that employee is not key to the business operation, but simply sweeps out the back room or performs some other menial task and is easily replaced, the Employer has no problem and is justified under current law to terminate the employee and no harm results.⁴⁴ Therefore, the problem only presents difficulty to the Employer when the termination of that key employee will hurt the business operation of the Employer.

B. Gaining Actual Knowledge of Illegal Employment Because an Existing Employee's Work Authorization Expires

What do I do if the work authorization of one of my employees expires?

The first way an Employer may find itself faced with a problem concerning the continued employment of an illegal worker arises if the employee in question had a valid work permit at the time of hire, but the work authorization expires on a specific date in the future. That fact was obviously known to the Employer at the time of hire if the work authorization document was used to gain employment, so the Employer is charged with knowing the expiration date.

If an applicant's authorization to work in the United States expires in the future, can I just decide not to hire them?

In fact, the Employer cannot even use the fact that a prospective employee has a work permit that expires on a future date as a reason to not hire that applicant.⁴⁵ Refusal to hire an applicant because they have only a brief period of time when they are authorized to work in the United States, no matter how brief that period of time may be, violates the antidiscrimination provisions of IRCA. However, if the employee continues to work for the Employer after the work authorization expires, then the Employer is violating the continuing employment provisions of IRCA and is subject to Employer sanctions. Therefore, in cases where Employers know that a key employee has a work permit that will expire on some future date, the Employer needs a mechanism to record the expiration date of the work authorization document and must track that date so that new work authorization documents can be obtained in time. Failure to take these steps will subject the Employer to Employer sanctions under existing law. Where Employers do not have such a follow-up mechanism and the old work authorization expires, the Employer is guilty of “continuing to employ” an illegal worker.

Can someone track the expiration of work authorization documents for me?

Our law firm offers the tracking and notification service of expiring documents for any of the Employers we represent who request that we do the tracking. Our immigration attorneys review the current work authorization documents for employees, we establish and maintain expiration dates and set up a realistic renewal procedure so that there are no gaps in authorization to work. We also provide e-mail alerts to both the Employer and to the employee so that important renewal dates are not missed. We have found from experience that employees underestimate the length of time needed to renew or extend their work authorization documents. The USCIS (Formerly INS) works very slowly, so the renewal process should start at the earliest possible time. By missing critical deadlines, Employers place themselves at an unnecessary risk of employing an illegal worker and the employee is placed at risk of violating the immigration laws by working illegally. By working in the United States illegally, the employee also

risks losing very valuable legal rights such as the right to become eligible to adjust their status, and they may also become subject to being deported.

I will just check the Handbook for Employers to determine when work permits expire. Is that advised?

This is one area where we feel that the government Handbook for Employers is misleading and following the instructions in the Handbook for Employers could get an Employer into trouble. The Handbook for Employers addresses certain grants of time to extend the right of an employee to work in the United States.⁴⁶ However, those provisions are outdated.⁴⁷ Therefore, an Employer should check with an immigration attorney with regard to what may appear to be expired work authorization documents so that the attorney can properly determine if the employee's work authorization has actually expired or if they have an automatic extension of their right to work in the United States. If that determination is not properly made, then the Employer may wrongly terminate an employee who is actually authorized to work even though their work permit appears to have expired on its face, exposing the Employer to possible liability due to document abuse, discrimination or wrongful termination.

C. Follow up Requirements for H-1B Employees

Each employee hired under H-1B status must be monitored on a regular basis to make sure that the terms and conditions of the H-1B status are properly maintained. Failure to properly monitor and comply with the terms of H-1B status could cause the employee to go out of status causing them to work without proper authorization, and subjecting them to deportation. Continuing to employ someone who has lost their H-1B status could cause the employer to be employing an illegal worker, subjecting the employer to sanctions. The following general monitoring steps should be taken in order to monitor the H-1B status of your employees. Since these guidelines are only general in nature, you are urged to work closely with a knowledgeable immigration attorney in order to make sure that both your company and the employee are in compliance.

Total admission in H-1B status is normally for a maximum of 6 years, including extensions. However, each visa is only valid for a period of up to 3 years because the underlying Labor Condition Application approval is only valid for up to 3 years at a time. Therefore, after an initial admission in H-1B status, your employee will require that an extension of status be filed before the expiration date of the first visa. You will need to insure that such an extension is filed before the current visa expires or the employee will fall out of status and be working without authorization. Moreover, if the extension of status application is filed late, your employee may not be eligible for an extension of status inside the United States and could even face unlawful presence penalties which may prevent that employee from obtaining future H-1B status. Proper monitoring of the expiration dates are therefore crucial.

If an extension of status is obtained past the initial 3 year term, and your employee remains in valid H-1B status or L status, be aware that your employee will be subject to a 6 year maximum limit of H-B status. But, if your employee has spent any time in H-1B status before accepting employment with your company, that employee may reach the 6 year maximum earlier than you may anticipate. There are some limited exceptions to that rule. For example, if your employee has spent at least one year outside the United States before entering in new H-1B status, your employee will start a new 6 year term. Also, it may be possible to obtain extensions past the 6 year maximum. For example, your employee may obtain extensions in 1 year increments if they are the beneficiary of a pending labor certification application or employment petition and such application has been pending for at least 365 days since the date of filing that application. Since these exceptions can be tricky, you are urged to check with an immigration attorney to make sure that you are in compliance.

If you employ an individual who is working in H-1B status, be sure to calendar the expiration dates of each visa and take steps to preserve their status well in advance of the expiration dates. That may be as simple as filing a timely

application for extension of status or filing a labor certification or employment petition well in advance of their 6 year limit.

In addition to monitoring the expiration of the employment authorization term, employers have many other requirements to follow to insure compliance with H-1B visa regulations.

In order to obtain an H-1B visa, an employer must first file a Labor Condition Application (LCA) with the Department of Labor (DOL). The LCA requirement attaches some responsibility to the employer to protect workers. An LCA application requires the employer to attest that it is offering the required wage for the position. The employer must attest that it will provide working conditions that will not adversely affect other workers similarly employed. Examples of working conditions include hours worked, shifts worked, and vacation time provided. The employer must also attest that there is no strike or lock out in the occupational classification at the place of employment.

The employer must provide notice of the LCA and job offer to the bargaining representative before filing the LCA. If no bargaining representative exists, the employer must provide posted notice of the LCA filing to other employees.

A complete copy of the LCA must be made available for public inspection within 1 day of filing the LCA. Therefore the employer must create and maintain what is referred to as a Public Access File at either the employer's principle place of business or the jobsite. The Public Access File must contain the LCA and all supporting documentation including, a copy of the complete and signed LCA, documentation providing the wage rate, documentation explaining the system used to set the actual wage for the position, a copy of the documentation used to establish the Prevailing Wage, a copy of the notice to the bargaining representative or copy of the posted notice to employees, and a summary of benefits offered to workers in the same occupational class.

Additionally, the employer must provide the H-1B employee with a copy of the LCA on or before the state date of employment.

All H-1B and LCA records must be retained by the employer for 1 year beyond the LCA period or if a complaint is filed, until such complaint is determined. Payroll records must also be retained for at least 3 years after the last date of employment. The employer must be careful to keep confidential personnel records separate from the H-1B Public Access file.

The employer must begin paying the H-1B worker within 30 days of entry to the United States or within 60 days of obtaining H-1B status inside the United States through a change of status.

If an H-1B employee has their employment temporarily suspended, for example, due to a lack of work, the employer must continue to pay the salary of the H-1B worker. Failure to keep the worker employed and on payroll may result in the worker falling out of legal status affecting both employment authorization and overall immigration status.

If the employer dismisses the H-1B worker, the employer must pay the reasonable costs of transportation home as provided by the private contract between the parties, which is normally part of the H-1B visa application package.

Failure to comply with H-1B regulations may result in the employer being assessed substantial monetary fines and being subject to future restrictions when filing immigration applications for employees.

It is important that employers regularly review their internal employee records and H-1B Public Access Files to insure compliance in the event of a government audit. It is preferable for an employer to discover defects in records keeping through an internal self audit than to have defects discovered by governmental auditors. Self audits should be performed by the company with the assistance of an objective outside party. Many employers naively believe that

they are in compliance with H-1B requirements when the H-1B employee is being paid the wage offered on the LCA. However, a complete H-1B and LCA self audit necessitates many other inquiries, including an examination of whether the wages paid to the H-1B worker are equal to workers in the same occupational class or the Prevailing Wage for the position. The self audit should also consider whether the Prevailing Wage documentation in the file is valid. A complete self audit will also include inquiries into what duties the H-1B worker is performing, where the H-1B worker is located, whether the worker has been continuously employed and the conditions of employment, as well as a review of the payroll records for each worker.

In addition to identifying issues of non-compliance, a self audit should also provide corrective remedies to bring the employer into compliance.

D. Should I Talk to One of My Key Employees About Their Immigration or Work Status?

Should I talk to one of my key employees about their immigration or work status?

We highly recommend that even if casual discussions regarding an existing key employee's legal status or authorization to work are to take place, that those discussions be conducted by an immigration attorney without the involvement of the Employer's staff. It is our opinion that discussions with key employees regarding their continued authorization to work be conducted by an attorney and not the Human Resources department in order to protect the attorney client privilege with the employee and the Employer; to remove the Employer from discussions imparting actual or constructive knowledge of illegal employment; to eliminate the risk of the Employer asking for documentation that may be deemed discriminatory; and to prevent the Employer from having to make a determination of the validity of complex visa and other immigration laws which the Employer is simply not equipped to make. In these sensitive areas, it is best for an immigration attorney to make that inquiry and to keep the Employer

and the Human Resources Department out of any involvement in order to minimize their exposure to liability.

Moreover, an immigration attorney may find that proper work authorization documents can be quickly gained under a number of different programs. As we mention throughout this Instruction Manual, many immigration law firms such as ours offer free initial consultations for both Employers and employees on immigration matters. Given that fact, there is simply no reason for an Employer to not send a key employee to consult with an attorney if they are at all concerned about the authorization of one of their key employees to work in the United States.

E. Social Security Administration or Internal Revenue Service Letters to Employers — No-Match Letters

I received a letter from the Social Security Administration concerning an employee's number. What do I do?

The Employer may have received a letter from the Social Security Administration or the Internal Revenue Service stating that the Social Security number provided by an employee did not match their records. These letters are commonly referred to as Social Security “Mismatch” letters or “No-Match” letters. These inquiries from the Social Security Administration and the IRS should not be ignored! They do require a response.⁴⁸ However, again, that investigation is a very sensitive area, and we highly recommend that neither the Employer nor anyone on the Employer’s Human Resources staff make an investigation of the employee as to why the Social Security Administration or the IRS No-Match letters were received. An attorney should respond to the No-Match Letters on behalf of the Employer. The investigation as to why the No-Match Letter was received and the response to that letter are best left to an immigration attorney to evaluate the situation and so as to insulate the Employer from discrimination lawsuits as much as possible. This is particularly true of the new Department of Homeland Security proposed rules announced on June 14, 2006.⁴⁹ Under the

new proposed rules, specific procedures must be followed in order for those Employer's to receive "Safe Harbor" protection.

If I receive a letter from the Social Security Administration about one of my employees, haven't I been told that they are an illegal worker?

In the past Employers erroneously believed that since they had received a letter from the Social Security Administration or the IRS that that meant that the Employer had either actual or constructive notice that the person in question was not authorized to work in the United States. That was not the case and no such constructive or actual notice of illegal employment was imparted by the mere receipt of a Social Security No-Match Letter and nothing more.⁵⁰ In fact, the Social Security No-Match Letter was not to be used as the sole basis for terminating an employee. The Social Security No-Match Letter contains the following language:

"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."⁵¹

However, even though the receipt of a No-Match Letter previously did not convey constructive knowledge that an employee was working illegally, it should now raise a red flag to the Employer and follow up by an attorney is highly recommended in order for the Employer to preserve the "Safe Harbor" protection under the new proposed rules announced on June 14, 2006 by the Department of Homeland Security (the "New No-Match Rules" hereafter).⁵² In fact, even though the new No Match Rules are not final, we recommend following those rules since the Department of Homeland Security has sent its signal to

Employers indicating how they feel the Employer should handle the No-Match letters. Therefore, Social Security No-Match Letters can no longer be ignored as they often were in the past and they should be responded to by an attorney. We strongly advise any Employer who receives a Social Security No-Match Letter to consult with an attorney immediately to determine the proper course of action to follow and how to best respond. The law in this area is still under review and The Department of Homeland Security announcement June 14, 2006 of their new regulations regarding the obligations of Employers who receive a No-Match has not yet become law. The New No-Match Rules describe what an Employer must do as a follow-up when such letters are received in order to receive “Safe Harbor” protection. The New No-Match Rules further provide that the Employer will be judged by the “totality of the circumstances” in its hiring practices. We urge our readers to immediately consult an attorney if they have received a Social Security or Internal Revenue Service communication that the social security number of one of their employees does not match the government records. This is no time for Employers or Human Resources staff to test the way the Department of Homeland Security is going to view the Employer’s conduct in handling No-Match letters without assistance of competent legal counsel.

F. Sponsoring an Employee for Labor Certification Does Not Impart Either Constructive Knowledge or Actual Knowledge that an Employee Is Working Illegally

How can I help one of my key employees become a legal resident?

Any Employer can sponsor an employee to become a Legal Permanent Resident (LPR) of the United States through the Labor Certification process. As a law firm, we have represented, and are currently representing, several thousand Employers who sponsor their employees to become Legal Permanent Residents of the United States through the Labor Certification process. In order to sponsor an employee to become a Legal Permanent Resident of the United States, the Employer needs to make an offer of employment to the employee and comply with the current Labor Certification process. The Labor Certification

process is a valuable tool for an Employer to use to resolve an immigration and work authorization problem for one of their employees. Employers and employees often do not use this valuable tool because they do not understand how the process works. Moreover, Employers often incorrectly believe that the job the employee performs may not qualify. Employers are often surprised to find out that what may be considered by the Employer as low level jobs qualify for the Labor Certification process. An employee does not need a college education or perform an extremely highly complex job to qualify. For example, our firm has been successful with cooks, mechanics, machine operators and similar positions. Any Employer who wants more information about assisting one of their key employees is invited to contact us or visit our website at www.employersanctions.com or call us at (213) 365-7060 for a free consultation to find out how that process works.

If I am helping someone with a Labor Certification, doesn't that give me notice that they are working illegally?

A major misconception we find of most Employers is that they erroneously believe that if they are currently sponsoring, or are asked in the future to sponsor an employee for the Labor Certification process, that the Employer has then been put on notice that the employee is not authorized to work in the United States. Without more, that is just not the case.⁵³ The reason that an Employer is not put on either constructive or actual notice that they are employing an illegal worker when simply being asked to help an employee with a Labor Certification case is that there are numerous valid reasons someone may ask an Employer to sponsor them for the Labor Certification process even when the employee is currently authorized to work.

By way of only a few examples, the employee in question may be in the United States under political asylum, as a refugee, or under Temporary Protected Status. Under all of those provisions, the employee is normally able to acquire work authorization documents while their cases are pending with the USCIS. Therefore, they may well have a right to work in the United States and can be hired by the Employer. However, since the ultimate outcome of the relief they

are seeking may be uncertain, or may end at some future date, it is reasonable for them to ask their Employer to sponsor them for a Labor Certification process which would give them “permanent” as opposed to only the “temporary” permission they have to remain and work in the United States. Seeking permanent permission to remain in the United States is a very legitimate reason to seek help from an Employer, and with nothing more, does not signal to the Employer that the employee is engaged in illegal employment.

There are many even more complex examples as to why an Employer is not put on either constructive or actual notice of the existence of an illegal worker when being asked to help in a Labor Certification process. However, the important point is that as complex as the immigration laws are, it would be almost impossible for an Employer to know the many valid reasons an employee who has authorization to work in the United States would seek sponsorship for a Labor Certification case. Therefore, without more, currently sponsoring or being asked in the future to sponsor an employee in a Labor Certification case does not confer either constructive or actual knowledge of illegal employment.⁵⁴

However, the mistake we see Employers make all too often is to panic. The Employer takes the innocent fact that an employee is seeking assistance with a Labor Certification case, and the Employer seeks additional information from the employee directly as to why they want assistance rather than turning those inquiries over to an immigration attorney. By thinking that the Employer is “doing the right thing” by requesting additional information, such as the specific reason why the employee is seeking Labor Certification assistance, or by asking point blank the current legal status of the employee, the Employer risks a possible discrimination law suit and risks moving from lack of knowledge of the existence of an illegal worker to actual knowledge. Thus, the Employer’s mistaken belief that they should gather up more information about the employee they are trying to help with a Labor Certification process may expose the Employer to unnecessary liability for document abuse, unequal application of

company rules and at risk of making the wrong decision as to whether to retain or terminate the employee. Again, such inquiries should be made by an attorney on the Employer's behalf so that the appropriate action can be taken.

G. What Should the Employer Do if They Have Gained Constructive or Actual Knowledge of the Existence of an Illegal Worker?

What should I do if I discover that a key employee is working for me illegally?

As discussed above, it is not only illegal to hire unauthorized workers, but it is also illegal to continue with the employment of anyone that the Employer discovers is not authorized to work in the United States.⁵⁵ This area of the law presents a particular problem for an Employer who discovers that an employee who is key to the business operation is not authorized to work for the Employer. Such a discovery presents a dilemma for the Employer, and especially for the small business owner, who is then forced to choose between terminating a key employee or breaking the law.

However, of the decisions that the Employer needs to make, we often find that the Employer makes the wrong one, which is to ignore the problem and "bury their head in the sand." Frequently, the Employer erroneously believes that by taking that key employee off payroll and paying them as an independent contractor, that they have solved the problem. Unfortunately, that variation of ignoring the problem only places the Employer in even more hot water and does nothing to solve the underlying problem. While it is uncomfortable for an Employer to deal with the fact that they do indeed have a key worker who is not authorized to work on their payroll, it is even worse to ignore the problem. The problem cannot be ignored, and the Employer should consult with an immigration attorney immediately to try to find a solution to the key employee's immigration problem rather than ignoring it. Since every employee's facts are going to vary, they must be evaluated by an immigration attorney to see what can be done for

the employee on a case by case basis. Doing nothing will not make the problem go away.

1. When I started my business I hired someone who is not authorized to work. What do I do now?

One of the most common ways, particularly in smaller companies, that actual knowledge of illegal employment is gained is that the employee simply disclosed at the time of hire that the employee was not authorized to work. The Employer, perhaps not aware of the serious legal problems they could face later on, simply hired the employee anyway. That often occurs in smaller companies that may have been in desperate need at the time of hire for an employee with the unique skills of that employee in a tight labor market. However, as the Employer's business grows and becomes successful, the Employer has more at risk for non-compliance with federal hiring laws. Once the Employer becomes concerned about their exposure to possible Employer sanctions, their past decision comes back to haunt them.

The problem for the Employer by that time is that the employee in question has become key to the Employer's successful business operation. After all, if that were not the case and the employee was easily replaced, the Employer could simply terminate the employee with no legal consequences.⁵⁶ In the situation where the Employer has actual knowledge that one of their key employees does not have current work authorization, the Employer should immediately consult an immigration attorney.

By seeking advice of an immigration attorney, it may well be that the key employee can quickly renew or acquire proper work authorization documents. We find that employees often do not have proper work authorization documents when they are actually entitled to them for a variety of reasons. Often, it is because they did not know their legal rights. Frequently, they were afraid to contact the immigration authorities out of fear. They may not have applied for the

work authorization documents to which they were entitled due to misinformation in their community, or for cultural reasons. An immigration attorney can quickly determine if any avenues exist by which the employee can get work authorization immediately, or in the future, under a number of programs that often are available to the employee. Again, there is really no reason for an employee to not seek legal advice since many law firms, such as ours, offer a free initial consultation concerning their immigration rights.

2. What to do if the Employer only has a suspicion that a key employee is not authorized to work in the United States

What do I do if I only have a suspicion that one of my key employees is working illegally?

If an Employer has a key employee on their payroll whom the Employer only suspects is not authorized to work in the United States, we urge the Employer to have the employee consult immediately with an immigration attorney. We strongly advise against the Employer taking any action against an employee only suspected of illegal employment without consulting an immigration attorney out of concern with the Employer's exposure to a potential claim of discrimination or unlawful discharge.

VII. How Complaints Against Employers Arise and the Liabilities for Violating the Law

Who can file a complaint against me if I hire someone illegally?

An Employer is not subject to sanctions or other fines until there is an investigation or complaint. Although workplace violations are now a priority and initiated by the Department of Homeland Security or USCIS or ICE, the Employer needs to be equally concerned about an investigation being initiated due to complaints filed by the Employer's disgruntled current employees, disgruntled former employees, competitors, one of the anti-immigration groups and other third parties.

Do I need to worry about someone turning me in?

A. Why Employers are investigated – One word, “Tips”

Employers who hope that the U.S. government is too busy to detect their illegal hiring or discrimination practices are surprised to discover that most audits of an Employer’s improper hiring practices are the result of a “tip.”⁵⁷ That “tip” often comes from disgruntled current or former employees. A current or former employee may be unhappy with the Employer’s hiring practices; they may resent being terminated or passed over for a promotion; or, they may be working with or under someone they do not feel is working legally in the United States.

Additionally, a competitor may contact the government with a list of names the competitor feels are working illegally. Employers are also well advised to be concerned with one of the growing number of anti-immigration groups such as the Minuteman Project who has threatened to go after Employers.⁵⁸ In fact, a number of anti-illegal immigrant organizations have started all out campaigns to go after Employers who have illegal workers. The effort of these groups is to expose the Employer so that action can be taken against the Employer. That action may be in the form of sending “shame” letters to the Employer and includes litigation against those Employers for their illegal hiring practices. Many such organizations have websites where they expose the names of Employers who have illegal workers employed. Employers are advised to check those websites to see if they are listed and to seek legal advice if their name appears. Although there are hundreds of such sites to check, the most prominent are www.illegalemployers.org, www.wehirealiens.com, www.fairus.org, and www.alipac.us. Therefore, any company which has illegal workers has to worry about groups who are well organized and determined to expose their illegal hiring practices.

A new twist on suing Employers who hire illegal aliens was reported in the Los Angeles Times on August 23, 2006, on the front page of the Business Section.⁵⁹ A company which provides legal temporary workers is suing a

company it normally supplied workers to contending that they are using illegal workers instead of the legal workers supplied by the plaintiff. What is surprising about the lawsuit is that it has been brought under the California Unfair Competition status. We suspect that we will see hundreds if not thousands of such lawsuits in the future. The theory of such lawsuits is simple. If a company pays the market rate for legal workers and a competitor pays lower wages for illegal workers, then they have an unfair advantage over the company paying for legal workers and an unfair competition lawsuit can follow. Every Employer has a competitor. Therefore, an Employer employing illegal workers needs to worry about unfair competition lawsuits brought by their competitors. Almost all states have an unfair competition law or other statutory redress mechanisms. Therefore, Employers should anticipate an avalanche of such lawsuits in the future.

Finally, a number of states have announced plans to go after Employers who are employing illegal workers as a way to stop illegal immigration.⁶⁰ Therefore, Employers should not take comfort in alleged reports that the United States government is too busy to crack down on illegal hiring practices, since most investigations are actually initiated by “tips” or enforcement actions from third parties.

B. Suits by Current Employees - RICO Actions

Can my current employees or competitors sue me if I hire illegal workers?

Another new and dangerous developing area for Employers are lawsuits brought under the Racketeer Influenced and Corrupt Organizations Act (“RICO”). A number of Employers have been sued under the RICO statutes. In some cases, employees working in the United States legally have used the RICO statutes to sue their own Employers who use illegal workers. Recently, the executives of Zirkle Fruit Co. settled a RICO lawsuit for \$1.3 million.⁶¹ That RICO case was brought against the executives of Zirkle as a class action lawsuit by the employees of Zirkle who were working legally and alleged that by using some

illegal workers, that the executives of Zirkle were depressing the wages of those employees who were authorized to work in the United States.⁶² Disgruntled legal employees may be able to obtain substantial compensation from their own employers by suing the Employer for hiring illegal workers. This presents a grave problem for the Employer because the lawsuit may come from within from people who are working for the Employer and who know who is working for the Employer illegally.

C. Possible Action by State Governments

Many Border States such as California and Arizona have had longstanding disputes with the federal government over reimbursement to the states for the cost of illegal immigration. The governor of Arizona recently declared a state of emergency so as to use state resources at the border to control crime and stop illegal immigration. Governor Napolitano also announced an intention to go after Employers who hire illegal workers in Arizona. Many politicians in California and other states that are fed up with inaction by the federal government in controlling illegal immigration have threatened the same action. Therefore, during 2006, Employers should be prepared to have governmental agencies from their states and local municipalities initiating actions against businesses using illegal workers.

D. Government's Right to Review Form I-9 in an investigation

*Am I
required to
show the
Forms I-9 I
prepare?*

If there is an investigation into alleged illegal hiring practices, the normal procedure is for ICE to arrive at the Employer's office unannounced. It is common for ICE to have specific employee's names as well as a list of particular documents they are seeking. ICE does not need a search warrant for the Form I-9's they want to see. Under IRCA, the Employer must produce all Form I-9's requested by ICE, USCIS, DHS or the Department of Labor. That is a big reason we advise Employers to conduct I-9 Audits now before such an event occurs. The Employer is given only three (3) days to produce the Form I-9 documents. It

is common practice for ICE to request that the Employer sign a waiver and simply produce the documents “on the spot” to “save everyone time.” We strongly advise Employers to never waive this time period and to never voluntarily produce any documents until they have had an opportunity to talk to an attorney. Even if the Employer feels very strongly that they have done nothing wrong, the Employer has too much at stake and generally will be no match when confronted by an agent from the Department of Homeland Security who is already armed with substantial information obtained to launch the investigation. Any Employer confronted with such a situation is well advised to immediately contact an attorney in order to best protect their legal rights.

E. Prohibition Against Retaliation

Additionally, we advise our Employers to not terminate, investigate or retaliate against any employee who is the subject of an investigation or who the Employer suspects may have initiated the investigation. Taking such steps exposes the Employer to the possibility of even more liability for discrimination and retaliatory practices.⁶³ Instead, the Employer should take a deep breath, call an attorney, and wait for legal advice before doing anything.

F. ICE Raids

Am I subject to a raid if I hire illegal workers?

It cannot go without mention that there may be one more tragic event that occurs if the United States government feels that an Employer is willfully hiring illegal workers. The ultimate insult to the Employer of course would be a raid on their premises by armed federal agents. Since we have been contacted by Employers, as well as employees, both during and after this “doomsday” event has occurred, we can tell you from our first hand experience that it is a traumatic event for those involved.

However, it is still not the end of the world. Again, competent legal counsel should be contacted to calmly evaluate the situation. The raid may have

been the result of an overzealous federal agent, or the result of a jurist granting an overly broad armed raid when one was not truly justified under the circumstances. However, regardless of the reason for the raid, do not interfere and do not allow your employees to interfere. Instead, use your time to contact an attorney for advice.

Again, there are many defenses available to an Employer that competent legal counsel can raise at a hearing or in a court of law. Neither you nor your employees should ever consider resisting a raid on your business by agents from the Department of Homeland Security. If there is a dispute as to which documents should have been taken in such a raid, those issues can be raised by an attorney in a court of law.

VIII. Fines and Penalties

What kind of fines and penalties can I face?

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (ICE), the Department of Labor and the Office of Special Counsel are authorized to conduct investigations to determine whether Employers have violated the prohibitions against knowingly employing unauthorized workers and failing to properly complete, present or retain the Employment Eligibility Verification form (Form I-9) for newly hired individuals.⁶⁴

If ICE believes that violations have occurred, ICE may issue a Warning Notice, a Technical or Procedural Failures Letter notifying the employer of technical or procedural failures in need of correction, or a Notice of Intent to Fine (NIF).⁶⁵ In cases where a NIF is issued, Employers may request a hearing within 30 days of service of the NIF to contest the NIF before an Administrative Law Judge of the Office of the Chief Administrative Hearing Officer (OCAHO), Executive Office for Immigration Review, U.S. Department of Justice.⁶⁶ Hearing requests must be in writing and filed with the ICE office designated in the NIF.⁶⁷ If a hearing is not requested within the 30-day period, ICE will issue a Final Order to cease and desist and to pay a civil money penalty.⁶⁸ Once a Final Order is

issued, the penalty is unappealable. If a hearing is requested, ICE will file a complaint with OCAHO to begin the administrative hearing process which may end in settlement, dismissal, or a Final Order for civil money penalties.⁶⁹

A. Notice of Intent to Fine

If a workplace violation is discovered, the governmental agency making the discovery will typically provide the Employer with a Notice of Intent to Fine. That Notice will contain the specific workplace violation uncovered, the fine which the government intends to levy, and the statutory authority for the fine. The Employer has 10 days to oppose the fine and to challenge the findings.

B. Requirements that Form I-9 be properly completed, retained and/or presented upon demand.

Do I need to retain Form I-9 for my employees?

The Employer is required to sign the I-9 form under penalty of perjury and maintain the form for the longer of three (3) years after an employee's hire or one (1) year after termination.⁷⁰ Failure to do so exposes the Employer to a paperwork violation.⁷¹ This fine can be assessed even if after an audit it is discovered that every single employee was authorized to work and there were no workplace violations.⁷²

Do I still need to complete and maintain Form I-9 if everyone is working for me legally?

Therefore, properly maintaining and being able to produce the Form I-9 when asked by the appropriate government agency is a completely separate responsibility from the prohibition against hiring illegal workers.

Employers who fail to properly complete, retain, and/or present Forms I-9 for inspection as required by law may be subject to a civil penalty for violations occurring on or after September 29, 1999 from \$110 - \$1,100 per employee whose Form I-9 is not properly completed, retained, and/or presented.⁷³ For violations occurring before September 29, 1999, civil penalties range from \$100 to \$1,000. In determining the amount of the civil penalty, the following factors are considered: size of the business of the employer being charged; the good faith of

the employer; the seriousness of the violation; whether or not the individual was an unauthorized alien; and the history of previous violations of the employer.⁷⁴

C. Range of Fines

What kind of fines can I face for non-compliance with the law?

An employer found to have knowingly hired, recruited or referred for a fee, or continued to employ, an unauthorized alien for employment in the United States shall be subject to an order to cease and desist from the unlawful behavior and to pay a civil fine.⁷⁵ An employer can be fined \$250 - \$2,000 per unauthorized alien with respect to whom the first offense occurred before September 29, 1999, and not less than \$275 and not exceeding \$2,200, for each unauthorized alien with respect to whom the offense occurred on or after September 29, 1999.⁷⁶ An employer can be fined from \$2,000 - \$5,000 per unauthorized alien for a second offense that occurred before September 29, 1999, and between \$2,200 - \$5,500 if occurred on or after September 29, 1999.⁷⁷ An employer can be fined from \$3,000 - \$10,000 per unauthorized alien for each third or subsequent offense that occurred before September 29, 1999, and between \$3,300 - \$11,000 if occurred on or after September 29, 1999.⁷⁸ These penalties are not limited to employees for whom Employers complete and retain I-9 files, but also cover Employers' use of contract personnel known to them to be unauthorized to work in the United States.⁷⁹ If an employer can demonstrate compliance with Form I-9 requirements, a good faith defense with respect to a charge of knowingly hiring an unauthorized alien will have been established unless the government can prove otherwise.⁸⁰ Moreover, under the new proposed procedures announced by the Department of Homeland Security on June 14, 2006, a "Safe Harbor" has been defined for those Employers who follow the procedures for handling social security No-Match letter. Any Employer who can demonstrate that they have made a good faith attempt to follow the rules announced on June 14, 2006 will have a defense to criminal prosecution and civil fines.

IX. Fraudulent Documents Used by Employees to Gain Employment and the Employer's Exposure to Liability

What do I do if an employee used a fraudulent document to gain employment?

A troubling area for Employers lies in the area of the exposure of the Employer to civil and criminal penalties for the acceptance of fraudulent documents.⁸¹ This liability usually has nothing to do with the Employer's knowingly accepting fraudulent documents, but rather from innocently accepting their employees' false documents at the time of hire. Particularly at risk are those Employers who discover too late that one of their key employees has used a false document to gain employment. This most commonly arises when a key employee has used someone else's Social Security Number, a false driver's license, or a forged document such as a fake birth certificate when they originally gained employment. Then, much later the Employer finds out that the employee used the fraudulent documents to obtain their employment. Again, this discovery causes no problem for the Employer if the involved employee is not key to the business organization. In such a case, the Employer could simply follow their own consistently applied non-discriminatory and non-retaliatory practices, and simply terminate the non-key employee with no concern of criminal or civil repercussions. This of course assumes that this same procedure was followed as to all employees. If that is not the case, the Employer may be exposed to a discrimination lawsuit based upon an unequal application of its own procedures.

The liability to which many Employers are exposed is contained in the language describing who can be punished for document fraud. Under INA Section 274C, it is unlawful for "any person or entity" to "use, attempt to use, possess, obtain, accept, or receive, or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this Act or obtain a benefit under this Act"⁸² (Emphasis Added)

*What if I
just work for
the company?
Can I still be
sued if they
hired
someone
illegally?*

First, the use of the term “any person” extends to Employers and anyone acting on their behalf, which would include Human Resources personnel or any other persons engaged in the hiring and firing process.⁸³

Second, the law is worded very broadly to include the act of “accepting” or “receiving.” Thus, if a key employee has engaged in document fraud through the use of false documents at the time of hire, the Employer may also be subject to prosecution for “accepting” and “receiving” those fraudulent documents. These are very serious matters, and the Employer should immediately contact an immigration attorney to determine their potential exposure to liability if they believe that they have received or accepted false documents in the hiring process.

Caution should be exercised by all Employers regarding the actions they take against those employees whom they think have used a false document to gain employment. All facts and documents in question should be turned over to an attorney for evaluation. There may be explanations for the use of those documents by the employee and they must be examined on a non-discriminatory basis to determine if they are truly fraudulent. The worst thing the Employer can do is to terminate the employee without consulting legal counsel.

X. Defenses to Penalties - Good Faith, Substantial Compliance, Statute of Limitations and Safe Harbor

*Do I have
any kind of
defense to
penalties if I
tried to
comply with
the law?*

Fortunately, there are defenses for an Employer who can demonstrate that they have made a good faith effort to comply with the law or that the Employer has substantially complied with the employment verification procedure.⁸⁴ The Department of Homeland Security has provided a new “Safe Harbor” provision in proposed rules announced on June 14, 2006. These are all separate defenses and can be used as affirmative defenses to both criminal prosecution and civil penalties.

A. Good Faith Compliance

If an Employer is to take advantage of the defenses available under this provision, they must be able to demonstrate that they have made every effort to comply with the law.⁸⁵ Particularly, if the violations are minor clerical errors and innocent mistakes, then the Employer will not be subject to penalties.⁸⁶

Importantly, if the USCIS or ICE finds what it believes to be non-compliance, they must give the Employer ten (10) days to comply before any penalties can be assessed.⁸⁷

B. Substantial Compliance

Similar to the Good Faith defense, the Substantial Compliance defense is available for paperwork defects.⁸⁸

C. Statute of Limitations

There is a five (5) year statute of limitations for the sanctions provisions of IRCA. Therefore, if the I-9 Forms were prepared more than five (5) years before an action is initiated, the Employer is protected by the statute of limitations defense.

D. Employment Verification Program Available

There are several databases available by which an Employer can verify Social Security Numbers. However, the Employer should have clearly established written procedures on how it is to use the information obtained in a non-discriminatory basis or the Employer could face charges of discrimination.

There is a Basic Pilot Program available from the government which allows an Employer to verify an employee's authorization to work.⁸⁹ However, there are significant areas of concern to consider before an Employer uses such a program. While the use of such programs may appear attractive on its face,

Are there any types of help the government provides to do the employment verification?

their use also places the Employer at risk. Therefore, if an Employer wishes to explore the use of such programs, the Employer should check with their attorney so that the legal ramifications and the Employer's exposure to liability can be fully explained.

E. New "Safe Harbor" Protection

Under the new proposed rules announced by the Department of Homeland Security (DHS) on June 14, 2006, a "Safe Harbor" provision will be created for Employers who follow the DHS rules on handling Social Security No-Match letters. Under those rules, the Employer must within 63 days of receipt of a No-Match letter resolve the problem or terminate the employee. These new rules have not been finalized and are subject to change. Therefore, please check our web site www.employersanctions.com for updates on the rule changes.

XI. Conclusion

Hiring foreign born workers can be a mine field of potential liability for the Employer and the Human Resource staff. From the start of the interview process, the employer is subject to liability for not fairly considering foreign born workers even if the Employer is just attempting to avoid the complex rules regulating their hiring. Once hired, the discovery of illegal status, the unwitting use of false documents and equal application of company policy continue to present dilemmas for the Employer. Only by close and consistent adherence to the complex laws regulating this area of the law can the Employer and the Human Resources staff avoid criminal and civil liability.

EMPLOYER SANCTIONS INSTRUCTION MANUAL

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Sixth Edition, 2006

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Library of Congress Cataloging –in-Publication Data

Smith, Larry W.

*Employer Sanctions for Hiring Illegal Workers – How to Stay Out of Trouble: Guidelines for
Employers and Human Resources Personnel on the Hiring and the Continued
Employment of Foreign born workers/Larry W. Smith*

p. cm – (Legal survival guides)

Includes index

ISBN _____

1. Emigration and immigration Law –United States – popular works I

Title II. Series

Printed and bound in the United States of America

¹ P.L. 99-603, 100 Stat. 3359. IRCA amended the Immigration and Nationality Act (codified as amended at 8 U.S.C. §§ 1101 *et seq.*).

² *Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005* (H.R. 4437/Title II S. 202).

³ *Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005* (H.R. 4437/Title II S. 701-703).

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⁶ Mike Sunnucks, "Governor toughens immigration stance, backs employer sanctions," *The Business Journal Phoenix*, (January 9, 2006) www.phoenix.bizjournals.com

⁷ Mike Sunnucks, "Governor toughens immigration stance, backs employer sanctions," *The Business Journal Phoenix*, (January 9, 2006) www.phoenix.bizjournals.com

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⁹ Handbook for Employers, 56 Fed. Reg. 41767, 41772 (Aug. 23, 1991).

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⁷² NOT DONE

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