

## Avoiding Liability for Hiring Illegal Immigrants

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Hopefully, most employers are aware that no employee can be legally hired without complying with the requirements of the Immigration Reform and Control Act of 1986 (IRCA). This article will discuss the requirements that must be met to avoid liability for hiring illegal immigrant employees. IRCA became effective on November 6, 1986. Its record keeping and sanctions provisions affect every employer regardless of size or number of employees. Not only are employers subject to extensive record keeping requirements but criminal and civil sanctions against employers can and have been imposed for non-compliance. The magnitude of fines — up to \$1,000 per worker for documentation and record keeping violations and ultimately up to \$10,000 per incident for “knowingly” hiring an unauthorized worker — are among the highest of federal penalties.

### The Law in Detail

Initially, IRCA currently has a two-pronged approach to stemming illegal immigration.

1. Significant penalties against employers who “knowingly” hire illegal aliens.

2. Monetary damages and civil requirements for discrimination in hiring and firing by employers (with four or more employees) against any person in a “protected category” (citizens or nationals of the United States, lawful permanent residents,

certain agricultural workers, and persons granted asylum or refugee status).

### Hiring of Aliens

IRCA makes it unlawful to “knowingly” hire, recruit, refer for a fee, or continue to employ any alien not authorized to work in the United States. The act also prohibits an employer’s use of contract or day labor and/or subcontracting arrangements designed to circumvent the law which is viewed as the equivalent of “knowingly” obtaining the services of an unauthorized alien. Similarly, an employer can be charged with “knowledge” on the basis of indirect and/or circumstantial evidence.

IRCA contains a “grandfather” provision that eliminates the need to complete any paperwork for a certain class of employees — that is, there are no I-9 requirements or applicable sanctions with regard to any employee already employed on or before November 6, 1986, and who has remained “continuously” employed. The statutory documentation provisions do not apply to independent contractors or casual domestic labor employed at one’s home on a sporadic, irregular, or intermittent basis.

An employer that in good faith complies with the employment verification requirements discussed below automatically establishes a first-line defense that it did not “knowingly” hire or continue to employ an alien who was not authorized to work. The Immigration and Naturalization Service (INS) then bears the burden of proving otherwise.

### I-9 Attestation Forms

New employees and the employer must complete an “attestation” under penalty of perjury. The employee must attest that he/she is authorized to work

and the employer must attest that it has reviewed the documentation supplied by the employee and that the documents “appear” genuine. An employer does not guarantee that the documents provided are genuine; an employer merely attests that the employee’s documents have been examined and appear to be in order. The Form I-9 must be completely filled out — attaching photocopies of the documents is not acceptable. If an employee refuses to sign, they should not be employed.

The attestation appears on Form I-9. Although the form may change to reflect proposed changes under the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRAIRA), discussed below, the attestation remains a fixed requirement.

### Documentation

IRCA requires that all employers inspect and verify documentation that establishes both the identity and employment authorization of every new employee, regardless of circumstance. It is permissible and, indeed, generally recommended, that employers retain photocopies of these documents both as evidence of its good faith intent in complying with IRCA and in order to assist in completing its own internal periodic internal audits.

There are various forms that may be presented to fulfill I-9 requirements. They are separated into three discrete categories: those that provide identity and work authorization in a single document (List A); those that provide identification only (List B); and those that provide work authorization only (List C). An employer need see only one of the documents from List A or one document each from Lists B and C. An employer must accept any documents offered by the employee as

long as they appear on the list. An employer may not prefer or specify which documents it will accept.

A complete delineation of acceptable documents applicable to each respective list (A, B, C) appears in Table 1.

### **Possible Changes in Required Documentation**

In accordance with the IIRAIRA, certain documents were to be removed from the lists of acceptable documents either by notice from the Attorney General or September 30, 1997 (whichever occurred first): foreign passport, birth certificate, and certificates of naturalization or citizenship.

The September 30 implementation date has been indefinitely postponed. As such, the documents listed above continue to remain acceptable as of the publication date of this edition. The I-9 form itself and its lists of acceptable documents are all under review. Pursuant to proposed rules, the list of acceptable documents will be reduced. Before completing the I-9, it may be best to confirm the status of acceptable documents with an attorney. Importantly, INS is not issuing fines for failure to comply with the reduced document list while the final rules are pending.

### **Verification of Employees**

Employees who will be employed for more than three days must be verified within three working days after hire. Employees hired for three or less days must complete the entire verification process before work on the first working day. In either case, Section 1 of the Form I-9 must be completed on the first day by the employee.

### **Special Receipt Rule**

If an individual, already authorized to work, cannot present a required List C employment document within the required three-day period, he or she must present a receipt demonstrating that he or she has applied for a replacement document within three business days of hire. That person must then present the required document within 90 days of

hire. For example, an employee who shows proper identification but who provides a receipt showing he/she has applied for a new social security card to replace a lost one, may begin work.

Lastly, where an employee's work authorization expires, that person must be re-verified or employment terminated. The re-verification information may be added to the original I-9 (old form) accompanied by the signature of the verifier and date of verification or on the new form by completing the "re-verification" portion identified as Section 3. The reverification process may also be changed under IIRAIRA final rules with the addition of a new, discrete re-verification form, the I-9A.

### **Penalties**

There are three escalating levels of fines for "knowingly" employing an illegal alien.

1. For a first violation of "knowingly" employing an illegal alien, a civil fine of at least \$250 and up to \$2,000 for each unauthorized alien will be levied.

2. For a second violation, fines increase to a minimum of \$2,000 and up to \$5,000 for each unauthorized alien.

3. For any subsequent violation, fines increase to a minimum of \$3,000 and up to \$10,000 for each unauthorized alien.

IRCA also provides for criminal sanctions. Thus, an employer found guilty of engaging in a "pattern or practice" (regular, repeated, and intentional) of "knowingly" hiring illegal aliens is subject to a criminal penalty of up to \$3,000 for each unauthorized alien employed and/or six months in prison.

Additionally, civil penalties ranging from \$100 to \$1,000 may be assessed against employers who fail to follow IRCA's document verification and record keeping requirements for each employee for whom the I-9 was not properly completed, retained, or made available for inspection, regardless of the employee's legal status.

### **Record Keeping Requirements**

The completed, signed I-9 forms must be retained for three years after

the date of hire or one year after termination of employment, whichever is later. For rehire purposes, an employer may use an employee's same I-9 form for a period of time up to three years after the date of initial hire as long as that individual "remains authorized to work." The same rule applies to the rehiring of a former employee within one year of termination.

In order to avoid claims of discrimination and other adverse legal ramifications, documents should be retained in separate files and not be retained as part of a personnel file.

### **Discrimination/Document Abuse**

Discrimination by employers in order to avoid sanctions is prohibited.

An example of prohibited discrimination is refusing to hire anyone who appears to be foreign.

Civil penalties (monetary and otherwise) for violation of IRCA's discrimination provisions, which apply to employers of three or more workers, include:

- For a first violation of the discrimination provisions, a civil fine of at least \$250 and up to \$2,000 for each discriminatee;

- For a second violation, fines increase to a minimum of \$2,000 and up to \$5,000 for each discriminatee;

- For any subsequent violation, fines increase to a minimum of \$3,000 and up to \$10,000 for each discriminatee;

- An unlawful request for more or different documents in violation of the document abuse provisions of IRCA may result in an additional civil penalty between \$100 and \$1,000 for each discriminatee;

- Orders to hire or reinstate;

- Posting of notices in the workplace stating that the employer will not engage in specified violations of IRCA in the future;

- Expunging files of any pertinent adverse or derogatory notations, memos, evaluations, etc.;

- Back pay and additional paperwork requirements.

To enforce the discrimination and document abuse provisions, IRCA created the Office of Special Counsel

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within the Department of Justice to receive, process, and investigate discrimination complaints of “unfair immigration-related employment practices.”

Although IRCA attempts to avoid duplicative efforts with respect to discrimination charges filed under Title VII of the Civil Rights Act of 1964, aliens who seek to raise claims of employment discrimination based on national origin generally remain able to file charges with state and federal Title VII agencies. ❖

**Table 1. Lists of Acceptable Documents**

Items on the following lists marked with an asterisk (\*) have been removed from the list of acceptable documents under the proposed rules.

- OR -

One document each from Lists B and C

**List A**

Identity and employment authorization in a single document

- U.S. passport (expired or unexpired)
- Certificate of Naturalization (INS Form N-555 or N-570)\*
- Certificate of United States Citizenship (INS Form N-560 or N-561)\*
- Unexpired foreign passport that contains either an unexpired employment authorization and signifies admission for permanent residence or an INS Form I-94 along with the unexpired employment authorization
- Permanent Resident/Alien Registration Receipt card or Resident Alien card with photograph (INS Form I-551)
- Unexpired Temporary Resident card (INS Form I-688)
- Unexpired Employment Authorization card (INS Form I-688A)
- Unexpired Employment Authorization document (INS Form I-688B)
- Unexpired Refugee Travel document (INS Form I-571)\*
- Unexpired Re-entry Permit (INS Form I-327)\*

**List B**

Identity only

- State or U.S. possession-issued (or Canadian) driver’s license with photograph or information including, at least, name, sex, date of birth, height, weight, eye color, and address
  - Federal\*, state, or local\* I.D. card containing photograph or information including, at least, name, sex, date of birth, height, weight, eye color, and address
  - Voter registration card\*
  - Military dependent’s I.D. card\*
  - U.S. Coast Guard Merchant Mariner card\*
  - U.S. military card or draft record\*
  - Native American tribal document
  - School I.D. card with photograph\*
  - Documents for persons under 18 years of age who are unable to produce any of the above documents\*:
    - School record or report card\*
    - Day care or nursery school record\*
    - Clinic, doctor, or hospital records\*
- (If either a minor – a person under age 18 – or a handicapped person who is placed in a job by a non-profit organization or as a part of a rehabilitation program cannot present a List A or List B document, a parent, legal guardian, or representative of the non-profit organization (in the latter case) can prepare the I-9.)

**List C**

Employment authorization only

- Social Security card (unless specified as “not valid for employment” or “valid for employment with work authorization only”)
- Birth certificate issued by any state (or legal subdivision thereof) or U.S. possession – original or certified copy\*
- Birth certificate issued by the State Department for a birth abroad (Forms FS-545 or DS-1350)\*
- Any INS employment authorization document (other than those on List A)\*
- U.S. citizen or Resident Alien I.D. card (INS Forms I-197 or I-179)
- Native American tribal document
- Form I-94 authorizing work with the employee

- AND -