OUR PRACTICE

I-9 Procedures and Penalties

Whether or not you hire or intend to hire aliens, I-9 compliance is required of all employers. It is vitally important that an employer establish a process to comply with all I-9 requirements. For all those hired after November 5, 1986, the employer must review the employee's documents and complete Form I-9 verifying the employee's identity and authorization to work in the U.S. This page provides a brief explanation of employment verification.

- **USCIS Handbook for Employers**
- **Workers for Whom I-9 Must Be Completed**
- **Procedures for I-9 Completion**
- **Invalid Social Security Cards**
- **Extra Tools for Compliance**
- **Successor Employers**
- **Penalties**
- **How We Can Help**

USCIS Handbook for Employers

The *USCIS Handbook for Employers*, which was revised most recently in 2009, is the main tool the U.S. Department of Homeland Security (DHS) uses for educating employers on I-9 compliance. The book summarizes basic I-9 procedures and describes the common immigration related documents that may be presented to the employer. Over the last few years the Handbook has become increasingly informative, but of course more complex.

We warn the employer, however, that the Handbook for Employers is not foolproof. The new Handbook contains clearer explanations of employers' obligations and updated examples of acceptable documents. Unfortunately, the Handbook fails to show all the different variations of the shown document types that can be valid, fails to explain sufficiently that other versions might be valid, fails to depict several types of acceptable documents at all, and depicts some types of documents incorrectly. Thus, employers continue to lack clear governmental guidance in their role as involuntary document reviewers.

The Department of Homeland Security occasionally issues public notices in the Federal Register requiring employers to accept certain types of other documents, sometimes for a temporary period. The most common instance of this involves Temporary Protected Status. DHS frequently has automatically extended the validity of employment authorization documents (Form I-766) for TPS registrants beyond the validity on the face of the card by Federal Register publication. The currently effective extensions are usually listed on the web page of USCIS or the Office of Special Counsel.

Workers for Whom I-9 Must be Completed

With few exceptions, I-9 compliance is required of every U.S. employer who hires employees after November 6, 1986, even if the employee is only hired for one day. The exceptions are as follows:

- Employees working outside the United States (even if the employer is an entity based in the U.S.);
- Those employees defined as "Casual" employees "who provide domestic service in a private home that is sporadic, irregular, or intermittent;"
- Alien crewmen;
- "Grandfathered" employees hired before Nov. 6, 1986;
- Independent contractors and their employees (but note: knowing use of unauthorized workers by contract still carries liability).
- True volunteers who will never expect any remuneration.
- Workers legitimately on a foreign payroll who perform B-1 services.

Procedures

Timing for Completion of Form I-9 and Retention of Documents Employers are strictly required to complete the first section of Form I-9 (where the employee swears to be authorized) "at the time of hire." Time of hire can be considered by the employer to precede the first day of actual work, as long as the employer and worker have agreed on the employment. The rest of the form must be completed, and identity and work authorization documents reviewed, within 3 business days of hire. During that three days, the employee must be allowed instead to present a receipt for an application to replace a lost, stolen or damaged document that would qualify. We recommend that employers present applicants with a carefully worded notice about the I-9 procedures they will have to comply with after they are hired. Employers must retain completed I-9's for the later of either: (1) three years after hire, or (2) one year after the employee's termination.

It is no longer optional for the employer to accept, for 90 days, a worker's receipt for an application to replace a valid document– such a receipt must be accepted. But this procedure is inapplicable to renewal of an I-766 work card (as opposed to replacement of a lost card for the period it was already valid). Under a special arrangement for refugees, an I-94 card with "I-551 stamp" on it counts as a receipt for I-551 for a year, and an I-94 card with photo and refugee admission stamp counts as a receipt for I-766 for 90 days.

Acceptability of Documents

An employee must truthfully attest on Form I-9 to be a U.S. citizen, national, permanent resident (green card holder) or otherwise work authorized. Either the employer or employee or both could face severe immigration-related or even criminal sanctions for making false statements or using, possessing or accepting false documents (including someone else's documents). When assessing the documents, the employer must use a "best effort and good faith" in determining if on their face the documents "reasonably appear to be genuine and relate to the employee."

Many of the documents in the lists are unfamiliar to employers, and good counterfeits abound, which presents a "catch 22" for employers. If the employer accepts a document that turns out to be false, immigration officials or a court could later decide the employer should have known it and could impose sanctions. But if the employer errs on the side of refusing a document that turns out to have been valid, the employer could face potential discrimination suits and/or penalties for "requiring more or different documents" than are required by Form I-9 regulations.

The courts have been reluctant to hold employers to a standard of being document experts, and most employers have tended to err on the side of accepting documents not known to be false. A big practical risk of this practice particularly for employers with lots of unskilled workers who may be foreign born– has been the prospect of a government raid that clears out the employer's work force in an instant. This creates a serious business problem. DHS has announced some hesitancy to do large workplace raids, but it has shown

increasing determination to conduct costly audits of I-9 forms and payroll records in order to fine employers for noncompliance.

More recently, however, criminal charges by the government and even racketeering lawsuits by competitors have been sustained against significant U.S. employers, and the stakes appear higher to find a way to make sure unauthorized workers are not hired, especially *en masse*. Even the use of contractors whose employees are unauthorized can lead to serious liability. This underscores the importance of devising a careful I-9 compliance strategy with counsel familiar with immigration and employment laws.

Invalid Social Security Numbers

The employer is often faced with the problem of being alerted by the Social Security Administration (SSA) that a particular employee's Social Security Number (SSN) fails to match Social Security Administration records. After learning such information, the employer who continues or subsequently uses the invalid number for I-9 completion may risk being subject to the penalties listed below for document fraud. After making sure the number was transcribed correctly in the first place, the employer should require the employee resolve the mismatch by providing a valid number. Many reasons can cause such a mismatch other that fraud, and the employer should give the employee time to correct the error with the Social Security Administration. Regulations were issued outlining the procedures employers should take in the event that they receive a SSA no-match letter in order to avoid a governmental conclusion that the mismatch letter or other DHS notification constitutes "constructive knowledge" that the affected workers may be unauthorized. Those regulations were enjoined by a court and then abandoned by DHS, but they still should be considered carefully. An employer should be wary of accepting an SSN with other than 9 digits or an SSN with a clearly bogus number, such as those having an area of 000, in the 800 or 900 series, or with a 00 group or 0000 serial number.

Extra Tools for Compliance

USCIS provides employers the option to enter a "Memorandum of Understanding" to use the "E-Verify" system by which the employer enters a "query" for each new hire and thereby performs a data matching process against the social Security "Numident" database of accounts and, if the worker has not verified against SSA's data as a citizen, against DHS databases of work-authorized aliens. Existing employees may be separately queried against the SSA data by use of SSA's Social Security Number Verification System. Employers who wish to obtain a governmental seal of compliance may participate in the ICE "IMAGE" program. Whether and how to participate in these programs should be discussed carefully with legal counsel. Increasingly, federal and state government entities and even private entities are requiring their vendors to use E-Verify for any workers providing services. A few states purport to require every employer to use E-Verify. Employers with a federal government contract or subcontract explicitly requiring use of E-Verify must query E-Verify even for existing employees, while other employers choosing to use E-Verify are only allowed to use E-Verify for workers hired since the facility registered with E-Verify.

Successor Employers

An employer who purchases a going concern and continues to employ any of the previous employer's workforce assumes the responsibility (and liability) of "any and all Forms I-9 completed by the previous employer." In addition to exposing the unwitting employer to the risks of penalties for paperwork violation, corporate acquisitions can also invalidate the status of currently employed aliens. It is prudent to consult with an immigration attorney whenever such changes in corporate structure occur in order to assure I-9 and other regulatory compliance and the continued employment of valuable employees.

Penalties

Penalties for knowingly hiring or continuing to employ or, in some cases, recruiting or referring an alien unauthorized to work in the U.S. include the following fines:

- first offense, $375-$3,200 per unauthorized alien;
- second offense, $3,200-$6,500 per unauthorized alien;
- third offense, $4,300-$16,000 per unauthorized alien.

Employers found engaging in a "pattern of practice" may face the steep fines (up to $3,000 for each unauthorized alien, even on the first offense) and even imprisonment.

In addition, "paperwork" violations, where an employer fails to complete or maintain I-9 Forms for all employees hired after November 5, 1986, carry fines ranging from $110-$1,100 per employee regardless of whether the employee was unauthorized or not.

The government can and has charged employers and their managers with crimes relating to hiring unauthorized workers, and these crimes often carry penalties including 5 years or more in federal prison and substantial fines. Unlawful "harboring" can range from assisting a known illegal alien to enter the U.S. to encouraging someone to reside in the U.S. with "reckless disregard" for the person's illegality. Other federal crimes include: transporting, housing, and/or knowingly hiring 10 or more aliens with the actual knowledge that the aliens were brought illegally to the United States; making, providing, using or accepting false documents; and using false social security numbers. Click here for a summary of the crimes most commonly used against employers in immigration related indictments.

How We Can Help

Baker Donelson's Immigration Group regularly counsels employers on I-9 compliance. We perform private audits of I-9 documents, prepare compliance programs, and train managers and workers in implementing those programs. We evaluate particular questionable documents and situations. We help employers decide whether and how to create or store I-9 forms electronically, to use Social Security Administration's Number Verification System, or to participate in the Department of Homeland Security's E-Verify program. We help federal contractors design and implement E-Verify programs in compliance with Executive Order 13465 as implemented in Federal Acquisition Regulations.

We defend sanctions actions by ICE for "paperwork" and "knowingly hire" violations of I-9 rules. We work with our strong Litigation Department to bring and defend claims against competitors based on employment of unauthorized aliens. We advise and defend claims against competitors based on employment of unauthorized aliens. We advise and defend employers and managers in the increasingly common criminal investigations and proceedings relating to employment of aliens.

We coordinate our Team's services closely with our firm's well-respected Labor and Employment Law Group and with our firm's White Collar Crime Group. We provide advice and coordinate with U.S. and foreign preparers concerning U.S. taxation of international companies doing business in the U.S., and concerning the U.S. taxation of international workers placed in the U.S. and abroad.

Important Links

- Form I-9
- E-Verify
- DHS Handbook for Employers, with Form I-9
- ICE IMAGE Program
- Office of Special Counsel in Department of Justice

Downloads

- ICE Worksite Enforcement Memo – ICE internal strategy and field instruction for enforcement against employers May 2009

- DACA: USCIS Guidance for Employers – I-9 and E-Verify for DACA beneficiaries
- ICE I-9 Fines Overview and Sample Forms 2009 – ICE internal guidance on I-9 enforcement with schedule of fines and factors, with sample forms