

EMPLOYER SANCTIONS

Summary

The Immigration Reform and Control Act of 1986 was created primarily to discourage employers from hiring undocumented aliens. This summary outlines the salient provisions that affect how all employers recruit, consider, and hire not only foreign nationals, but all applicants for employment -- including U. S. citizens.

First, the law imposes record-keeping requirements on employers by which employers verify any new employee's (i) work authorization and (ii) identity. The law further describes the kinds of documents that an employee must produce at the time of hire to prove his or her employment eligibility and identity.

Second, the law imposes civil and criminal penalties on all employers who knowingly hire, recruit or refer for a fee for employment, any alien not authorized to work in the United States.

Third, graduated civil and criminal penalties may be levied against employers who fail to comply with the law's document verification requirements, knowingly hire unauthorized aliens, or engage in pattern or practice violations.

Who Is Covered by the Law

The law covers all entities, large and small, corporate and individual, regardless of the number of employees in the employer's workforce.

Who Enforces the Law

The sanctions provisions and the penalty provisions are enforced by special agents of the U.S. Department of Homeland Security's Immigration and Customs Enforcement (ICE)

arm and by compliance officers of the U.S. Department of Labor's Employment Standards Administration (Wage and Hour Division).

What The Law Makes Unlawful

The law makes it unlawful for an employer to do two things:

- to hire anyone for employment in the United States, without first examining documents that establish the individual's identity and eligibility to work; and
- "to hire, or to recruit or refer for a fee, for employment in the United States," an alien, if the employer **knows** the alien is not authorized to work.

"Knowing" is defined as including not only actual knowledge, but also constructive knowledge -- knowledge that may be fairly inferred through notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care to know about a certain condition. In other words, it's not what you actually know, but what you should have known.

What The Law Requires Employers To Do

All employers must:

- verify certain acceptable documents of all new recruits, candidates, applicants, or employees, regardless of citizenship (this means that even U.S. citizens must produce documents), and
- maintain records of certain documents for specific time periods.

What Documents Are Acceptable

Employers must examine documents that establish that the applicant (i) is eligible to work, and (ii) is presenting his or her true identity. In

some cases, two documents in tandem may be required; in others, one document alone may achieve both purposes. A list of acceptable documents appears on the reverse side of the *Employment Eligibility Verification Form I-9*.

What Employers Must Record

The employer, recruiter or referrer must sign a Form I-9, Employment Eligibility Verification, attesting under penalty of perjury that the required documents have been examined. The employee must also sign the same form, attesting under penalty of perjury that he or she is either a U.S. citizen, a lawfully admitted permanent resident, or an alien authorized to work.

How Long Must Records be Kept

Employers must retain the I-9 form that both they and the applicant, recruit, or employee have signed, for a minimum of three years after the date of hiring or one year after the date the employee is terminated, whichever is later.

Affirmative Defense

Compliance with these verification procedures establishes an affirmative defense against prosecution for violation of the law's employer sanctions provisions.

Copying Verification Documents

The law permits the photocopying of documents presented by applicants for verification purposes, but does not obligate employers to do so.

Penalties

The civil penalties for knowingly hiring or continuing to employ an unauthorized alien are:

- First Offense: \$275-\$2,200 fine per unauthorized alien;
- Second Offense: \$2,200-\$5,500 fine per unauthorized alien;
- Third Offense: \$3,300-\$11,000 fine per

unauthorized alien;

- For offenses which occurred before Sept. 29, 1999, the amounts are 10 percent less.

The criminal penalties for engaging in "a pattern or practice" (regular, repeated or intentional activities) of employment violations can reach up to \$3,000 for each unauthorized alien and up to six months' imprisonment.

The civil penalty for failing to ask any job applicant (including a U.S. citizen) for work authorization and identification documents and for failing to properly complete an I-9 form ranges from \$110 to \$1,100 for each applicant. No criminal penalties apply to these paperwork violations.

INDEPENDENT CONTRACTORS

The employer sanctions provisions and an employer's obligation to complete a Form I-9 are not applicable to independent contractors. Therefore, knowing what qualifies as an independent contractual arrangement and what is considered an employer-employee relationship is important. In formulating its definition of independent contractor, USCIS looks to criteria and factors enumerated in Internal Revenue Service guidelines.

Definition

The guidelines state that "independent contractor" includes individuals and entities¹ who

- carry on independent business,
- contract to do piecemeal work according to their own means or methods, and
- are subject to control only as to results.

¹ "Entity" refers to any legal entity, including, but not limited to, a corporation, partnership, joint venture, governmental body, agency, proprietorship or association.

Factors Considered

Factors considered in determining whether an individual or entity is an independent contractor (regardless of what the entity calls itself) include (but are not limited to):

1. whether the individual is required to follow instructions;
2. the amount of training of the individual related to that particular job;
3. the amount of integration of the individual into the employer's business;
4. whether services are rendered personally;
5. whether the employer hires, fires and pays assistants;
6. the existence of a continuing relationship;
7. the establishment of set amount of work hours;
8. whether the individual must devote substantially full time to the job;
9. whether the individual works on the employer's premises;
10. whether the individual works according to a sequence set by the employer;
11. whether the individual must submit regular or written reports to the employer;
12. whether the individual is paid by time rather than by project;
13. whether the individual is reimbursed for expenses;
14. whether the individual furnishes the necessary tools and materials;
15. whether the individual has invested in the facilities for performing the services;
16. whether the individual can realize a profit or a loss;
17. whether the individual works for more than one firm at a time;
18. whether the individual makes his/her services available to the general public;
19. whether the employer has the right to discharge the individual; and
20. whether the individual has the right to terminate the relationship.

Thus, an employer who contracts with a recruiter or "headhunter" to recruit employees for its business, but who requires the recruiter to work on the employer's premises, who supplies the recruiter with an office, who has the recruiter working exclusively or almost exclusively for the employer, and who requires the recruiter to maintain essentially the same work hours as its other employees, probably has an I-9 verification obligation. The independent contractor in this situation is almost indistinguishable from an employee.

Use of Labor Through Contract

Entities that engage the labor or services of an independent contractor are not responsible for verifying the employment eligibility of the independent contractor's employees. So, if an employer has a contract with a building maintenance company to clean the employer's premises, the employer has no I-9 obligation regarding the employees of the cleaning company with which the employer has a contract.

However, an employer may not use a contract or subcontract to circumvent the employment eligibility verification requirements that would otherwise pertain to employees. The regulations forbid an entity from knowingly using a contract, subcontract, or exchange entered into, renegotiated, or extended after the date of the law's enactment (November 6, 1986), to obtain the services of an unauthorized alien.

So, using the same example above, if the employer knows, or should have known, that the building maintenance company employs undocumented workers to clean the employer's premises, then the employer may well be found to have used a contract to circumvent the employment eligibility verification requirements that would otherwise pertain to employees.

ANTI-DISCRIMINATION

IRCA attempts to prevent discrimination against aliens in the employment process by making it illegal for employers to engage in certain behavior.

Certain Actions as Discriminatory

IRCA, and the federal regulations implementing IRCA, lists documents that employers must accept as evidence of a person's identity and work eligibility. It is an unlawful immigration-related employment practice for an employer to request *additional* or *different* documents than those required under IRCA, or to refuse to honor any documents tendered that on their face reasonably appear to be genuine. For instance, an employer who insists on seeing a resident alien's "green card" commits a discriminatory act in the hiring process.

Anti-Retaliation Protections

It is unlawful for an employer to intimidate, threaten, coerce or retaliate against any individual for the purpose of interfering with any right or privilege provided by IRCA. The law extends this protection to an individual who intends to file or has filed a charge or complaint, or has testified, assisted or participated in any manner in an unfair, immigration-related employment practice investigation.

Civil Penalties

Persons or entities that violate the anti-discrimination provisions may be penalized as follows:

- *First Violation.* Pay a civil penalty of between \$275 and \$2,200 for each individual discriminated against;
- *Second Violation.* Pay a civil penalty of between \$2,200 and \$5,500 for each individual discriminated against; and
- *Third and Subsequent Violations.* Pay a civil penalty of between \$3,300 and \$11,000 for each individual discriminated against.

Persons or entities that violate the I-9 paperwork provisions may be fined between \$110 and \$1,100 for each individual discriminated against.

Other Relief Orders

In addition, any person or entity found to have committed an unfair, immigration-related employment practice may also be ordered to:

- Post notices informing employees of their rights and the employer's obligations;
- Educate all personnel involved in hiring and complying with IRCA about the law;
- Remove a false performance review or warning from an employee's personnel file; and
- Lift any restrictions on an employee's assignments, work shifts, or movements.

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