

To Do Or Not To Do I-9s... There is No Question

By David H. Nachman

There is an old saying that nothing is guaranteed except death and taxes. Well, add one more to that list... the hiring and firing of employees. As long as the employer-employee relationship is in existence, human resource and managerial professionals will be faced with the daunting task of winding their way through the labyrinth of labor and employment rules and regulations.

One facet of the hiring and the firing process is regulated by the Immigration Reform and Control Act of 1986. The U.S. immigration laws have been, and continue to be, shaped by a variety of economic and political factors. Such factors often direct the focus of legislative initiatives that ultimately translate into a set of regulations directly impacting upon U.S. employment policies and procedures. Such policies and procedures, as they are established, and as they evolve, are likely to be administered by human resource and/or other like personnel within an organization.

Oftentimes such regulations can have a dramatic effect on an organization's policies and procedures. Such was the effect upon the passage of the Immigration Reform and Control Act of 1986 (also commonly referred to and referred to herein as "IRCA"). IRCA's verification requirements affected every employer and every employee in the U.S. who had either commenced employment or changed his/her job since the enactment of the law and brought them within the INS' reach.

When President Reagan signed IRCA [Pub. L. No. 99-603, 100 Stat. 3359] into law on November 6, 1986, a historic mark was made in the philosophy in the U.S. Immigration Law. IRCA did two things. First, the law made the "knowing" [which knowledge can be either "actual" or "constructive"] employment of unauthorized aliens unlawful. Second, IRCA introduced a formal record system for all employers, which requires an employment eligibility verification on INS Form I-9, for every employee hired after November 6, 1986.

The purpose of IRCA was to deny job opportunities to the foreign nationals in the United States who were not authorized to work [S. Rep. No. 132 99th Cong., 1st Sess. (1985)]. IRCA supporters argued that the U.S. would regain control over its borders only when unauthorized workers were denied access to jobs. IRCA's introduction of the INS Form I-9 provided a method by which employers could determine which individuals are authorized to accept work.

However every action has an equal and opposite reaction. Civil liberties groups and ethnic organizations were quick to point out that IRCA may be used as a pretext for turning down job applicants or firing employees because they look or sound foreign [H.R. Rep. No.

1000 99th Cong., 2d Sess. 87; H.R. Rep. No. 682, pt.1, 99th Cong., 2d Sess 68 (1986)]. To counteract this potential discrimination, IRCA established a mechanism that prevents unfair labor practices based upon nationality or citizenship.

Although the INS has stated that its public position has changed from that of enforcement to that of education. The INS also conducts more than 60,000 I-9 inspections a year on organizations of all sizes and in all sectors of the economy.

Generally, these audits are random, but INS investigators follow leads from both public and private sources. Not surprisingly, the Department of Labor (DOL) is likely to be a favorite INS resource for information for audits.

The DOL conducts routine inspections for compliance with wage and hour laws. Oftentimes, part of that audit will include a review of the Form I-9s. While the DOL will not cite an employer for an IRCA violation, they may notify INS. The DOL may also provide the INS with information about a potentially non-work-authorized individual upon receipt of an alien labor certification. This application process is often the first step for obtaining permanent residence for a foreign worker.

IRCA directs a multi-tiered directive/analysis for the employer with regard to the hiring and firing of all employees. No matter whether the candidate is a U.S. citizen or a foreign national, every employer in the U.S. must complete and maintain an I-9 Form for each and every employee within the specified retention period.

Section 274A of the Immigration and Nationality Act ("INA") provides the statutory guidance for the employer verification and the sanctions portion of IRCA. Section 274A(a) provides that it is unlawful for an employer to hire an "alien" (read "non-citizen") knowing that he or she is not authorized to work. For the employer, to hire an individual who is not work authorized is a "knowing" or "substantive" violation of the law. In addition, it is unlawful to hire anyone without complying with certain "employment verification procedures."

Section 274A(b) directs every employer to undertake a process to verify that each and every employee who is hired after November 6, 1986, be authorized to work in the United States. Once again, it is critical for every employer to know that the employment verification obligation applies to both citizen and non-citizen job applicants alike.

To temper the potentially harsh effects on employees and prospective employees, a delicate balance was struck between the obligation of an employer to verify the employment eligibility of the employee and the obligation of the employer to avoid discrimination against employees on the basis of either citizenship or nationality. As a result, Section 274B of INA was implemented. It provides that employers which have three or more employees cannot engage in discrimination based upon nationality or citizenship status in hiring or terminating employees.

In 1991, legislation called "The Immigration Act of 1990," commonly referred to as IMMACT '90, added Section 274C that provides that it is illegal to forge, counterfeit, or alter documents required to prove identity and employment eligibility. In 1996, IRCA gave employers a breather by requiring that employees filing complaints pursuant to the discrimination provisions of the INA demonstrate that the employer committed the act with an "intent" to discriminate.

If the penalties for violations of sexual harassment laws and wage and hour laws are not enough, a violation of the employer sanctions provisions of IRCA may result in both civil and criminal penalties. A simple paperwork violation may result in monetary fines from \$100 to \$1000 per violation, and it may be possible to have several paperwork violations on a single Form I-9. The fines can mount up quickly. Fines may be imposed where the employer fails to complete sections of the I-9, neglects to confirm that each employee has completed the form, and/or fails to maintain a proper retention and retrieval system for the Form I-9s.

Should the INS determine that an employer has engaged in a "pattern or practice" of knowing violations, the INS is authorized to fine an employer up to \$3,000 for each unauthorized employee and impose a prison sentence of up to six months.

Some examples where the INS has determined that there was employer liability include:

- Inadvertently permitting an employee to continue work beyond the expiration date on the INS issued employment authorization document (EAD);
- Accepting employment eligibility documents for the Form I-9 that do not appear legitimate, even when the employer did not want to question the documents for fear of facing discrimination claims;
- Not having actual knowledge of workers who are not employment authorized since INS regulations since 1991 have defined "knowledge" to include "constructive knowledge." [Constructive knowledge is knowledge which may fairly be inferred through the notice of certain facts and circumstances which would lead a person through the exercise of reasonable care, to know about a certain condition];
- Holding incomplete Form I-9s;
- Having information indicating that the alien did not have work authorization such as from an Application for Alien Labor Certification;
- Acting with "reckless and wanton disregard" of the regulations by permitting the introduction by a third party of an individual into the workplace who is not work authorized.

It is clear that INS holds employers accountable even in cases where the employer commits inadvertent errors. The burden of proof is on the government to show that an employer is guilty of failing to comply with the regulations. Monetary penalties range from \$250 to \$2,000

per alien violation for a first offense, \$2,000 to \$5,000 per alien for a second offense and \$3,000 to \$10,000 per alien for each subsequent offense.

While the Form I-9 is not required to be filed with the INS, or with any other U.S. government agency, section 274A does require employers to retain all I-9s for at least three years after the date of hire, or for one year from the date that an individual is terminated, whichever is later. The regulations currently provide that original I-9s or I-9s on microfiche must be retained. The regulations are inflexible and do not yet permit storage on CD or other type of medium. However, the recent passage of the electronic signature law is likely to have an impact in the I-9 area.

Under IRCA, the INS must provide three days notice of its intent to perform an I-9 audit. The notice need not be in writing. In some cases, an inspector will show up with no warning and request an I-9 inspection.

It is a good idea to ask for a three-day notice, at that time, to take stock of your I-9s and make any necessary technical corrections to mitigate possible penalties or fines. *Under no circumstances should a Form I-9 be destroyed or a new I-9 be backdated.*

During an audit, the INS inspector will ask to see original I-9s. If the I-9s are on microfiche, you must provide a location and microfiche viewer for the inspector. Remember that the inspector's audit is limited to the I-9s only. After the inspection, the INS will contact the employer if there are any discrepancies between the INS records and employee documentation. A common situation is where a green card supporting an I-9 appears to belong to someone other than the employee. An employer should ask that employee for clarification of his/her status and be ready to terminate the employee should they be unable to provide a valid response.

Individuals who were unable to produce List A, B, and C documents required under the law, purchased or borrowed documents from friends in an attempt to circumvent the I-9 procedures.

In an attempt to thwart such practices, in the Immigration Act of 1990, Congress responded by adding section 274C to the law. Section 274C makes it unlawful to:

- Forge, counterfeit, alter or falsely make any document, or use or accept any such document for immigration purposes;
- Use a lawfully issued document of someone else for immigration purposes;
- Accept, receive or provide a lawful document issued to someone else for employment verification purposes.

Violators of such document fraud provisions of the INA may be subject to both criminal and civil penalties. An employer may be subject to a cease and desist order and to fines ranging from \$250 to \$2,000 for each document accepted by first time violators and between \$2,000 and \$5,000 for each document accepted by repeat violators. INS regulations define "document" very broadly so that almost any instrument may be considered as such.

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