## Rochester Daily Record

### Every Lawyer' Survival Guide to U.S. Immigration Law in 2007

***It's not just for immigration lawyers any more***

*This is the second installment in a multi-part series on how the reach of U.S. immigration law impacts other legal areas, creating both opportunities and pitfalls. Part one (March 5) focused on the jeopardy of employers who violate laws intended to prevent unauthorized employment of alien workers.*

*Today's installment outlines how to comply with the rules.*

# How to cope in the world of new employer sanctions

By Stephen M. Brent, Daily Record Columnist
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Compliance with hiring and employee retention obligations in immigration law, even in today''s enforcement oriented environment, is usually manageable if the employer learns the rules and tries in good faith to follow them.

Sanctions against employers for hiring unauthorized workers first came into being as part of the Immigration Reform and Control Act of 1986 (IRCA).

Recently, however, enforcement has become much more rigorous.

The basic law is codified at §§ 274(A) of the Immigration and Nationality Act (INA), making it unlawful for any entity ""to hire or recruit or refer for a fee for employment in the United States an alien knowing that the alien is an unauthorized alien.""

An overview of the rules is set out in the Department of Homeland Security''s 2003 Employer Information Bulletin 102, ""The I-9 Process in a Nutshell,"" available at the U.S. Citizenship and Immigration Services (USCIS) Web site, www.uscis.gov/files/article/EIB102.pdf.

Briefly, an employer is required to examine certain specified documentation to verify a person''s employment eligibility, and to record the results of that examination on an I-9 form.

An employer is required to attest under penalty of perjury that it has examined the employee''s documentation and verified his or her eligibility to work in the United States. The employee must also verify the I-9, and the rules require him or her to sign it no later than the first day of hire. In most cases, employees are given three business days to present the necessary documentation.

Employment verification

Thankfully, employers are not required to verify whether their workers are, in fact, legally authorized, although they can, as discussed later. Rather, the obligation merely requires that they examined a worker''s authorizing documentation and in good faith determined the documents satisfied the prescribed requirements.

The rules are specific about what documents are acceptable, and they are listed on the back of the I-9 form. An employer can use only those specified documents to establish both the worker''s identity and employment eligibility. Certain documents that establish both identity and employment eligibility are set out in Part A. Others establishing identity only are in Part B; and employment eligibility only are in Part C. The worker must produce either one acceptable document from Part A, or one each from Parts B and C.

What happens when someone simply cannot produce documentation for reasons beyond his or her control (i.e. house burned down with all documentation, the dog ate it, or purse was stolen)? The regulations contain a couple of outs, the main one being a receipt for an application to replace a lost, stolen or damaged document. Such documentation is acceptable if the replacement document is presented to the employer within 90 days of hire or, in the case of re-verification, the date the prior authorization expires, 8 CFR §§ 247a.2(b)(1)(vi).

The act creates a good faith defense against paperwork violation, at INA §§ 274(A)(a)(3). This section provides an affirmative defense for the employer that establishes it has complied in good faith with all employment verification obligations. In addition, at §§ 274(A)(b)(6), the act contains a good faith defense against technical or procedural errors in completing the I-9 form.

The regulations also require re-verification no later than the date when an individual''s employment authorization expires. The re-verification requirement does not apply to employees who are U.S. citizens or lawful permanent residents with green cards.

I-9 form retention requirements

Employers, under INA §§ 274(A)(b)(3), must retain I-9 forms until three years after the date of the employee''s hire, or one year after the date of the termination, whichever is later. Originally, employers were required to maintain the forms either as paper originals or as microfilm or microfiche.

Since 2005, the law has permitted electronic storage of I-9 forms.

Social Security numbers and cards

Many, perhaps most, of the high profile cases in which employers have gotten in trouble involve phony Social Security cards. The problems seem to arise most often when employers ignore indications that a person''s Social Security number doesn''t match Social Security Administration (SSA) records for that person; or the employer too readily permits a person to substitute a new number for a questioned one.

One document that establishes employment eligibility —— List C on the I-9 form —— is a U.S. Social Security card other than one facially invalid for employment. Forged Social Security cards are, predictably, ubiquitous among illegal aliens.

When employers report a number the SSA determines to be inconsistent with its records, the employer is informed through a so-called no-match letter. The SSA usually sends no-match letters to employers with at least 10 no-match employees.

With respect to the employer''s obligations in IRCA, what should be done when such a letter is received? If the employer used a Social Security card with a no-match number to establish

employment eligibility on the I-9 form, the employer is confronted with an obvious problem: The employee cannot be precipitously dismissed because the immigration service concedes that a no-match letter alone does not put the employer on notice that an employee is unauthorized for work. The SSA could be wrong, or the mistake could be the employer''s.

Clearly, the employer must take reasonable steps to resolve the problem, however. A reasonable first step is to direct the employee to take up the matter directly with the SSA and report back with documentation.

Alternatives become more complicated after this, however, as the employer seeks to comply with its obligations under the employment eligibility rules without discriminating against the employee on the basis of alienage. Such matters must be handled delicately, on a case-by-case basis. If a matter does get to this stage, it is advisable to involve an attorney. Under no circumstances should an employer ignore a no-match letter.

Pilot Automated Employment Verification Program

One option for employers seeking to verify the eligibility of new hires is participation in a new USCIS verification program. The Basic Pilot Program is an Internet-based system, offered free to employers, that provides a link to the SSA database and immigration records.

Participating employers must complete the required I-9 forms, but then can transmit the information electronically to the government, where it is checked against the SSA databases and, sometimes, against USCIS records.

For more information on the program, visit www.vis-dhs.com/EmployerRegistration.