JONES WALKER

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IN THIS ISSUE:

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CROSS YOUR T's AND DOT YOUR I-9 COMPLIANCE

What is an I-9 and why do you have to have this?

The "I-9" is what people use to describe the Employment Eligibility Verification Forms I-9 and is one of the tools used by the government to try to ensure that employers are hiring only those individuals eligible to work in the United States.

The 1986 Immigration Reform and Control Act ("IRCA") was supposed to help control illegal migration by ensuring that unauthorized persons would not be able to get a job in the United States. IRCA's main focus is to prohibit the hiring or continued employment of aliens who employers know, or should know, are not authorized to work in the United States. Thus, IRCA requires all U.S. employers to complete the I-9 for all employees hired after November 6, 1986. Employers do not need to have I-9's completed for independent contractors or for workers provided to them by a staffing company.

When I-9 obligations are triggered.

The I-9 form has three sections: Section 1—Employee Information and Verification; Section 2—Employer Review and Verification; and Section 3—Updating and Reverification. Section 1 must be completed by an employee on his or her date of hire, the first day of paid work. This section identifies the employee's personal information such as name and address and whether the individual is a U.S. citizen, lawful permanent resident, or an alien authorized to work in the U.S. for a specific period.

Section 2 must be filled out within three days from the time the employee begins employment.

Section 3 must be filled out if an employee's employment authorization is temporary and will expire. This section must be filled out on or before the expiration date of the employee's employment eligibility.

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What the employer's obligations are.

First, with respect to Section 1, you must ensure that the employee has completed the entire section. If not, you should not hire him or her. You cannot, however, require employees to produce documents to verify Section 1 information. Also, you cannot require the employee to include his or her social security number in this section unless you participate in the voluntary automated eligibility confirmation pilot program.

With respect to Section 2, the employer must review and record documents that identify the employee's identity and employment eligibility. An employee may choose to provide a document from List A (which establishes both identity and work eligibility) or one document from List B (which establishes identity) AND one from List C (which establishes work eligibility). Employers must reject any documents that are expired, with 2 exceptions: a U.S. passport (List A) and any document from List B. Similarly, employers have a duty to ensure that the only documents presented are original documents. The one exception to this rule is that a certified birth certificate with a state seal is acceptable.

As discussed above, an employee must supply these documents within 3 days after he or she begins employment. The only exception to this rule is if the employee presents a receipt for application for a new document that has been lost, stolen, or damaged. Then, the employee must submit the document within 90 days from the date of hire.

Employers must review and accept documents that reasonably appear to be genuine and relate to the person presenting them. Thus, it is important for your representative to know what to look for and what should raise a red flag, such as a social security number starting with 999.

With respect to Section 3, employers must reverify employment eligibility when an employee's employment authorization, as indicated in Section 1, expires or if the evidence of employment authorization as recorded in Section 2 has expired. To reverify an expired status, the employee may give you any valid document from List A or C of the I-9. The employee does not need to give you an updated version of the expired document.

Finally, once the I-9 is complete, you must keep it for each employee for three years after the date of hire or for one year after employment is terminated, **whichever is later**.

Why comply?

It's the law, and failure to comply carries civil and criminal penalties as well as potential public relations nightmares. Specifically, if you fail to complete or retain I-9's, civil fines range from $110-$1,100 per violation (*i.e.*, for each time an I-9 should have been completed, retained, etc.). Also, if you are found to have knowingly hired or continued to employ unauthorized aliens, you face exposure to: (1) fines ranging from $275 to $2,200 per unauthorized worker for a first offense, from $2,200 to $5,500 for second offenses, and from $3,300 to $11,000 per unauthorized worker for subsequent offenses; (2) criminal penalties in the form of up to six months' imprisonment and/or fines up to $3,000 per each unauthorized alien hired or employed; and (3) denial of federal contracts. These are just the federal penalties. Many states also have, or are considering, their own laws and penalties regarding hiring unauthorized workers.

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Dot all the I's.

When is the last time your company audited its I-9 practices? If the answer is more than a year or two ago, or you can't remember whether or if this was done, now is the time to act. Open up the newspaper and you're likely to see a company cited for failing to comply with I-9 requirements or a subcontractor indicted for aiding illegal immigrants. And, with the Department of Homeland Security turning its eyes to catching employers out of compliance, the odds of getting audited are increasing exponentially. With the help of your counsel, you should review your current practices to make sure:

1. All of your company's individuals involved in the I-9 process are thoroughly trained with respect to I-9 requirements;

2. You have a "tickler" system in place to capture expiration dates of certain work authorization documents, taking into account time for you or the employee to apply for extensions, if necessary, and a system for reverifying the documents;

3. Your contracts with temp agencies or subcontractors contain provisions in which they confirm that they are in compliance with all immigration laws, they agree to provide you with any such documentation upon reasonable notice, and they agree to indemnify you for any damages incurred by their failure to comply with IRCA;

4. The people you are classifying as "independent contractors" are not really "employees" for whom you should be completing I-9's; and

5. You're not forgetting about IRCA's other main goal—to prevent discrimination. IRCA also prohibits employers from discriminating against any person (other than an unauthorized alien) in hiring, firing, recruiting, paying, etc., due to a person's national origin or citizen status. The Form I-9 process can't be used to pre-screen employees for hiring. Additionally, an employer cannot choose which documents an employee uses to satisfy I-9 requirements.

NO MATCH IS *NO PROBLEM* IF YOU KNOW WHAT TO DO

What it is and is not.

Many employers who receive a "no match" or "mismatch" letter from the Social Security Administration ("SSA") question what it means and how to respond. A "no match" letter simply means that an employee's name or social security number on a W-2 does not match the SSA records. An employee's mere appearance on a "no match" letter does not mean the employee is not authorized to work in the United States. Indeed, there could be many reasons for the "no match" that have nothing to do with an employee's work status, such as a name change, marriage, etc.

What to do.

You must respond or risk facing: (1) up to a $50 penalty by the IRS for each mismatch (the SSA is required by law to provide the IRS with information on no match W-2 forms); (2) a determination by the Department of Homeland Security ("DHS") that you may have constructive knowledge that you have hired, or are continuing to employ, an unauthorized alien; and/or (3) an increased likelihood of an audit.

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DHS recently proposed regulations regarding recommended procedures for employers to follow in response to no match letters. The proposed regulations do not impose mandatory obligations but, rather, will give you a safe harbor defense. The period for comments on the proposed regulations ends in mid-August, and the regulations may change. The regulations, however, do give some guidance on the general steps you should already be taking. The proposed regulations state that if you receive a no match letter from either SSA or DHS, you should:

1. First, check your own personnel and payroll records to see whether the discrepancy was due to a clerical error on your part. If that is the case, you need to make the correction, notify SSA of the correction, verify that SSA made the change and that the new information matches their records, and make a record of the manner, date, and time of such verification. Note, SSA already gives employers a toll-free number to verify social security numbers: 1-800-772-6270. The proposed regulations state that an employer should conduct this check within 14 days of receipt of the no match notice, but again, until the regulations become final, you should be completing this step within a reasonable time of receipt.

2. If there is no clerical error on your part, then ask the employee whether the information you have in your records is correct. If the employee claims the information is correct, you should direct the employee to the nearest SSA office and ask him or her to resolve the discrepancy with the SSA. As a practical matter, it is a good idea to document your meeting with the employee, what you tell him or her, and that the employee has agreed to follow up with the SSA.

3. If the no match is not resolved, the proposed regulations state that you should reverify the employee's work eligibility and identity. The proposed regulations state that you should do this within 60 days of receipt of the no match and then give the employee 3 more days to bring in documents. Although the proposed regulations use the term "reverify," they contemplate having the employee complete a new I-9 and fill out sections 1 and 2 as if the employee were a new hire. For section 2, however, the employee cannot use the document that is the subject of the no match. The employer would then have to keep the new I-9 and the old I-9 for the same period and in the same manner as if the employee had just been hired. Again, until final regulations are issued, these time frames are useful merely to guide you in terms of what may be considered "reasonable."

When can you or should you terminate someone due to a no match?

Remember, you cannot fire someone just because his or her name appears on this no match letter. Employers are tempted to terminate employees in two circumstances: (1) the employee returns to them with different identity and/or work eligibility documentation; or (2) the employee cannot produce other documentation.

With respect to the first scenario, the proposed regulations anticipate that it IS permissible to accept a new I-9 form with a facially valid new identification and work authorization and to continue the employee's employment. If you fire an employee for breach of honesty-related policies, you cannot rely on the fact that a failure to terminate would have exposed

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you to a risk of immigration enforcement action. If your employees are represented by a union or are in a state with liberal protections for undocumented workers, proceed cautiously and seek advice of counsel in imposing discipline. As with other circumstances giving rise to termination, you need to ensure that you are treating employees consistently.

If the employee fails to give you new identity and work authorization documents, the proposed regulations state that you will have to choose between taking action to terminate the employee and facing the risk that DHS finds that you have constructive knowledge that you're employing an unauthorized alien. Again, the final regulations may say otherwise or may give some guidance on what to do in this circumstance. In the meantime, proceed with caution before terminating. For example, you may want to consider an unpaid suspension until the employee can produce sufficient documentation. Remember, you are not disciplining employees because their names appear on a no match but because, potentially, of their failure to resolve the no match. The key, however, is to get all the facts, make credibility calls, and ensure your discipline reflects a consistent, nondiscriminatory practice.

LABOR & EMPLOYMENT INTERNET RESOURCES

HRhero.com Louisiana Employment Law Letter

IN THE SPOTLIGHT—UPCOMING SPEECHES/PRESENTATIONS BY JONES WALKER LABOR & EMPLOYMENT ATTORNEYS

- Council on Education in Management
  FMLA Update 2006
  H. Mark Adams
  Rebecca G. Gottsegen
  September 14-15, 2006, Baton Rouge, Louisiana

- National Business Institute—Immigration and Employment: Legal Aspects of Hiring Foreign Nationals
  Situational Changes that Impact Corporate Obligations
  Laurie M. Chess
  September 15, 2006, Hyatt Regency, Miami, Florida

- HRhero.com—11th Annual Advanced Employment Issues Symposium
  Disaster Management
  H. Mark Adams—Speaker
  Workplace Sabotage: Employers Have Rights, Too.
  Jennifer L. Anderson—Speaker
  November 8-10, 2006, Caesars Palace, Las Vegas, Nevada

- Loyola University School of Law—Annual Labor & Employment Law Conference
  The Application of the National Labor Relations Act in Non-Union Workplaces
  Sidney F. Lewis, V—Speaker
  November 9-10, 2006, Pan American Life Center, New Orleans, Louisiana

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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