STAYING OUT OF HARM'S WAY: IMMIGRATION PITFALLS THAT EMPLOYMENT LAWYERS AND THEIR CLIENTS SHOULD AVOID: Part 2 of 3

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I-9 Verification, Record-Keeping and Anti-Discrimination Measures

In order to avoid liability for failing to comply with the duty of Form I-9 verification, the employee and employer must correctly complete the Form I-9 on a timely basis. The employee must complete Section 1 of the I-9 on or before the first day of hire and attest to his or her basis for employment in the United States as a citizen, lawful permanent resident or foreign national with temporary work permission. Within the first three days of hire, the employer must inspect original documents of identity and work permission proffered by the worker, confirm that they relate to the new hire, and complete Section 2 by verifying that the foreign national is authorized to work in the United States.

While performing this task, the employer may not engage in prohibited discrimination ("document abuse") by requesting too many documents or requesting particular documents. These seemingly contradictory and confusing legal mandates originated with the Immigration Reform and Control Act of 1986 ("IRCA") and have been amended since original enactment.[2] These laws require employers to verify that all employees, regardless of their nationality, hired on or after November 6, 1986, are authorized to accept employment in the United States, and that – in the case of a foreign national with a temporary work permit – work authorization continues throughout the foreign national's employment.[3]

Several I-9 concerns can be addressed and resolved through the development of a corporate compliance policy on employment eligibility verification. A number of issues

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[2] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, §§ 411- 413; Pub. L. No. 104-208.
[3] For information on I-9 verification procedures, see the BCIS Office of Business Liason web site, http://www.bcis.gov/graphics/services/employerinfo/oblhome.htm also, Angelo A. Paparelli and Catherine L. Haight, "If It Can Happen To Mickey Mouse, It Can Happen To You: Avoiding Hidden Perils of Immigration Law When Hiring U.S. Citizens and Foreign Workers," published in ABA Section of International Law and Practice, New Rules and Institutions, New Markets and Challenges, April, 1994 Annual Spring Meeting.

need to be addressed in an I-9 compliance review.[4] The company, with counsel's guidance, should ask a number of questions, including:

- Are qualified management representatives assigned to monitor and supervise I-9 verification procedures?
- What are the safeguards for assuring that I-9s are completed by the new employee on the first day of hire and by the company within three days after the worker begins employment?
- What measures are in place to confirm that document abuse and other forms of prohibited discrimination do not occur?
- Has the employer adopted a policy (and applied it consistently) either to copy all documents of identity and employment eligibility provided by new hires (and retain such copies for the required retention period) or to decline to copy such documents?
- Has the employer developed an adequate file management system (separate from personnel records) for proper maintenance of the verification documents, and the docketing of deadlines for reverifying the continued employment eligibility of workers with time-limited permission to work?
- Has the employer developed an employee training system to assure that assigned employees understand the compliance policy so that a consistent, correct application of I-9 verification procedures occurs?

Forethought in this area of law may well save the employer substantial costs by placing the company in a better position to defend itself against an I-9 investigation by the BCIS, the DOL or the Office of Federal Contracts Compliance Programs.[5] Moreover, under a presidential Executive Order, federal contractors face additional potential liability for knowingly hiring unauthorized foreign nationals. This order subjects federal contractors to a one-year government contract bar if the contractor has been found to

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[4] To review a checklist for the prevention, response and defense against BCIS employer sanction investigations, see Ann L. Lamdin, Michael D. Patrick, Richard A. Gump Jr. and Angelo A. Paparelli, "When Uncle Sam Knocks: Representing Employers Who Face or Fear Government Investigations," Immigration & Nationality Handbook, (AILA 1997).

[5] An employer's failure to position itself to defend against a potential I-9 investigation can prove costly, because if the government finds fault, the sanctions can add up. Failure to complete or maintain the Form I-9 properly and required documents subjects an employer to a fine from $100 to $1,000 for each violation. INA § 274a(e)(5), 8 U.S.C. section 1324a(e)(5). If the government determines that the employer hired or continued to employ a worker after November 6, 1986 while knowing that the worker was unauthorized to work, the possible penalty range is:

$250 to $2,000 for the first offense (for each worker);
$2,000 to $5,000 for the second offense (for each worker); and
$3,000 to $10,000 for the third offense (for each worker).

INA § 274a(e)(4)(A), 8 U.S.C. § 1324a(e)(4)(A). If BCIS determines that the employer committed a pattern or practice of violating Form I-9 laws, criminal sanctions of six months in jail and a $3,000 fine may be imposed. INA § 274a(f)(1), 8 U.S.C. § 1324a(f)(1).

have employed alien workers with knowledge that the employees lack the right to work in the United States.[6]

Employment lawyers should also be aware of a recent development involving the interplay of the I-9 verification obligation and the employer's duty to comply with tax and payroll withholding obligations. Recently, the Social Security Administration ("SSA") has taken to mailing to employers so-called "mismatch" letters. These letters inform employers that the agency is unable to post earnings reported on a W-2 tax form on behalf of an employee because of a discrepancy in the reported Social Security Number ("SSN") and the worker's name. Under a new policy, the SSA has increased dramatically its issuance of letters informing employers of discrepancies in data reported to the SSA.[7]

Employment lawyers must be careful about the way they advise a business client on what to do after it has received a mismatch letter. A mismatch letter may lead an employer to ask the worker to explain the discrepancy. The employee's response may cause the employer to learn about the unauthorized employment of the worker or merely about some other innocent change in circumstances.[8] Employers should be cautioned against moving forward too quickly in investigating employees who are the subject of a mismatch letter, without first receiving immigration advice on the proper course to pursue. As discussed above, an employer may face sanctions for knowingly employing workers who have no work authorization, but the employer also must follow anti-discrimination rules that limit the information that may be requested of an employee. The employer, as noted, can also be liable if it violates other immigration or employment laws prohibiting unlawful discrimination.

The Importance of Confirming that Foreign Workers Maintain Lawful Immigration Status

The events of September 11, 2001 have changed, perhaps forever, the way of business and of life in America. The terror attack has heightened security at airports, altered the way we travel, created adverse affects on the economy, especially in the tourism industry, caused the loss of jobs, and threatened the federal surplus by requiring taxpayers to absorb the cost of fighting a multi-front war on terrorism. Foreign nationals are particularly affected by the U.S. government's reactions to the events of September 11. Indeed, foreign nationals can expect to face additional scrutiny of their status in the

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[6] Executive Order 12989 (February 13, 1996).

[7] In the past, the SSA issued mismatch letters to employers whose annual wage reports showed discrepancies in the names or SSNs of employees and SSA records for at least 10% of an employer's employees. Beginning with the SSA's processing of 2002 W-2 reports, the SSA will issue mismatch letters to all employers whose W-2 data shows at least one discrepancy in the SSA data. See J. Ira Burkemper, "The 'Mismatch Letter' Is in the Mail: The Social Security Administration Ramps Up Its Warnings to Employers," ILW (2002).

[8] An employee's use of a false Social Security Card is only one of many reasons why an employer's records and the SSA's records do not match. For example, a person may neglect to inform the employer or the SSA of a name change following marriage.

United States as part of the government's effort to enforce immigration laws and protect national security. Some of these issues are of particular concern to employment lawyers.