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# IRCA COMPLIANCE and the TENNESSEE EMPLOYER: Avoiding Immigration Bombshells

by GREGORY SISKIND of Siskind Susser Bland

Immigration has dominated domestic news coverage for the better part of this year and here in Tennessee, immigration took a front and center role in congressional races as well as the Senate and gubernatorial elections. With estimates of the undocumented immigrant population in Tennessee ranging from 150,000 to as many as 600,000 and with Congress set to go back to the drawing board and try to pass immigration legislation in 2007, immigration will continue to make headlines at home and nationally for the foreseeable future.

While immigration can be a highly divisive issue, employers need to focus on complying with the law. Most employers will never file a visa application for a worker. But the mistake many business owners make is assuming that no foreign employees means no need to worry about immigration laws.

This article will focus on the employment verification requirements under the Immigration Reform and Control Act of 1986 ("IRCA"). Those provisions made every employer in the country a deputy of US Immigration and Customs Enforcement. Employers are required under that law to verify the identity and work authorization status of every employee of the business. The mechanism for compliance is the I-9 Employment Verification Form that every worker must complete on the day of hire or earlier. Failure to comply with IRCA's I-9 rules can result in significant fines, loss of access to government contracts and highly negative publicity for a company. But despite the focus on immigration in the news, a large number of companies fail to comply with IRCA's I-9 rules.

## What is an I-9 Form?

The I-9 is a one page form employees complete verifying their identity as well as proving they are allowed to work in the United States. The form itself has three parts. Section 1 includes basic biographical information on the employee and also asks the employee to certify that he or she is a citizen, permanent resident or authorized to work under another status. The second section is completed by an employer who must verify what documents an employee presented to prove their identity and right to work and that the paperwork was completed in a timely manner. The third section is reserved for employers who must periodically update the I-9 Form if the worker is not authorized to permanently work in the US.

## What documentation must an employee present along with an I-9 Form?

Employees must present documentation of identity and work authorization and can present documents from a pre-set list included in the I-9 Form's instructions. Some documents, like a US passport or a permanent residency card, can prove both identity and that one is legal to work. Some documents, like a driver's license, prove identity only and some documents, like a social security card (other than a card stating it is not valid for employment) prove work eligibility. Employers are not allowed to tell employees which documents from the pre-set list they must present. Occasionally, an employee is authorized to work, but they have not been issued a document on the list. In such a case, an immigration lawyer may be able to provide a legal memorandum for an employer documenting the authorization to work, which will normally insulate an employer from liability. In some of these cases, the worker is entitled to 90 days to get the documentation to the employer though there are occasional cases where more time is permitted.

## Who must complete an I-9 Form?

IRCA requires all employers to have all employees hired after 1986 complete I-9 verification paperwork. Workers who are not hired do not need to complete I-9 Forms. Employers who selectively choose who will and will not complete I-9s could face penalties under anti-discrimination rules. Volunteers are not subject to I-9 rules since they receive no "remuneration" for their services. Independent contractors are also not subject to the I-9 rules, but employers should note that if they contract work to companies they know use unauthorized workers, they could be held liable as well under IRCA. Persons transferring within a company are not required to complete an I-9 form, but the easiest practice is usually to complete a new I-9 anyway rather than having to document that the I-9 was done previously. Employees rehired by a company need not complete a new I-9 as long as they resume work within three years of completing the initial form I-9. Also, it is not necessary to complete a new I-9 after

- an employee completes paid or unpaid leave (such as for illness or a vacation),
- a temporary lay-off,
- a strike or labor dispute,
- gaps between seasonal employment



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### When must the I-9 Form be completed?

The I-9 process must start on the day an employee starts work. The employee must complete the first section of the I-9 form and provide the supporting documents noted above within three days of the date of hire. If the documents are not presented by that point, the employee must be removed from the payroll (though it is permissible to suspend the worker rather than terminating the worker all together). While it is possible to require people to complete the I-9 form before the first day of employment, many immigration lawyers caution against this because the form does elicit information about one's national origin and a decision not to hire a worker could trigger a discrimination claim. To the extent an employer chooses to have I-9s completed before the date of hire, they should only be requested after a position has been offered and accepted and there should be a uniform policy applicable to all employees receiving an offer of employment having to complete the I-9 ahead of time.

### Can an I-9 Form be completed electronically?

In October 2004, legislation was enacted that allows for the I-9 to be completed, signed and stored on a computer. In June 2006, regulations were issued implementing the new statute. The new rules sets standards for completing forms electronically and also for the scanning and storage of existing I-9 forms.

### What are the I-9 recordkeeping requirements?

Employers must keep I-9 Forms for all current employees. For terminated employees, the form must be retained for at least

three years from the date of hire or for at least one year after the termination date, whichever comes later.

Retaining copies of the supporting documents is voluntary, however. Employers can retain copies of documents and attach them to the completed I-9 Form. Immigration lawyers disagree over whether employers should or should not retain copies of supporting documents. Certainly maintaining documentation could provide a good faith defense for an employer in showing that it had reason to believe a worker was authorized even if the paperwork was not properly completed. IRCA compliance officers may also be suspicious of employers that don't keep copies of documents. Of course, keeping documents also leaves a paper trail. Whatever a company decides, however, it is important that the policy be consistently applied. Keep all the documents or keep none of them.

### What are the I-9 re-verification requirements?

If an employee is not a US citizen or lawful permanent resident, they are likely working based on a status with a defined end date. For these employees, the employer must note the expiration of their documents on the I-9 Form and then must pull their I-9 Form before the expiration date and re-verify that the worker's status has been extended. Employers need to establish a reliable tickler systems to prompt re-verification. Aside from complying with the re-verification rule, this system will also ensure that an employer that needs to extend a work visa for an employee will not forget to take care of this critical task (something that is, unfortunately, neglected by many employers and can result in an

employee falling out of legal status). Green cards and passports with expiration dates do not need to be re-verified.

### How do mergers, acquisitions and other major changes affect I-9 requirements?

While a closing may be a cause for celebration at a company, it can also be the cause of a nightmare for a company since it can instantly render all completed I-9s for an acquired company invalid. If the acquiring company does not assume all of the assets and liabilities, then the I-9s will likely not transfer. In a merger case where the acquiring entity is a successor in interest, new I-9s will not be needed. However, I-9s should be checked in the due diligence process to ensure that the acquired I-9s are in good shape. Employers should consider adding I-9s to a merger checklist and have all employees of the combined company complete I-9 forms on the day of closing or beforehand. In any case, an immigration lawyer should be consulted in any merger, acquisition or divestiture to ensure that the transaction does not result in new immigration problems.

### What are the IRCA anti-discrimination and document abuse rules?

While employers need to be diligent about complying with IRCA's employment verification rules, they should not be so overzealous that they end up penalizing qualified workers. IRCA also has anti-discrimination rules that can result in an employer facing stiff sanctions. Employers of more than three employees are covered by the IRCA anti-discrimination rules (as opposed to the 15 or more employees required by Title VII of the Civil Rights Act). IRCA protects most US citizens, permanent residents, temporary residents or asylee/refugee from discrimination on the basis of national origin or citizenship status if the person is authorized to work. Aliens illegally in the US are not protected.

Under IRCA, employers may not refuse to hire someone because of their national origin or citizenship status and they may not discharge workers on those grounds either. The employer is also barred from requesting specific documents in completing an I-9 Form and cannot refuse to accept documents that appear genuine on their face. But note that an employer must be shown to have had the intent to discriminate.

Employers can separately be sanctioned based on legislation passed in 1990 if they request more or different documents than required by the I-9 rules. Employers originally were held strictly liable for violations under this category, but in 1996 legislation was passed requiring a showing that employers intended to discriminate.

### What penalties does an employer face for I-9 violations?

Employers can face stiff penalties for IRCA violations that include substantial fines and debarment from government contracts. Penalties can be imposed for hiring unauthorized workers as well as simply for committing paperwork violations even if all workers are authorized to work. Fines for hiring unauthorized workers will amount to anywhere from \$250 to \$5,500 per

worker depending on the prior history of violation. Employers can also be barred from competing for government contracts for a year if they knowingly hire or continue to employ unauthorized aliens. Paperwork violations can also result in significant fines. Each mistake or missing item on a form can result in a \$100 penalty up to \$1000 for each form. A missing form would automatically be assessed at \$1000. An employer, for example, that had 100 employees and did not complete I-9 Forms might face a \$100,000 fine. IRCA investigators have considerable discretion in assessing fines and will look at factors like the size of the company, the seriousness of the violations, whether the employer was trying to comply in good faith and the pattern of past violations.

Employers should also be cautioned that knowingly accepting fraudulent documents from employees is a different kind of violation that can be criminally prosecuted under other immigration laws.

### What are the best ways to prevent being prosecuted for I-9 violations?

Employers can minimize the chances for being found to have violated IRCA's employment verification rules by undertaking several steps:

1. Conducting a preventative internal audit of the I-9 files to see if there is a pattern of violations requiring remediation. Such an audit should be conducted by, or under the close supervision of, an immigration lawyer familiar with IRCA.
2. Establishing a regular training program for human resource professionals regarding I-9 compliance rules. The training should be conducted by an attorney familiar with IRCA rules.
3. Establishing uniform company policies regarding I-9s. Should copies of documents be retained or not? What kinds of questions can be asked about national origin and citizenship status before the date of hire? Is there uniformity in terms of when the employment verification is commenced?
4. Establishing a re-verification tickler system to ensure I-9s are checked in a timely manner.
5. Centralizing the I-9 Form recordkeeping process.
6. Establish a process for human resource professionals to check quickly with counsel when there are any problems in the verification process.
7. Establish a backup system to ensure timely compliance with I-9 rules when a human resource professional is out of the office. ♦



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