

Newsletter

Immigration, "No Match" Letters and Employer Requirements

By David G. Lubben & Richard A. Russo

I. Immigration Reform and Control Act of 1986

A. Overview

This federal law applies to all employers regardless of the size of their workforce and makes it *illegal* to:

1. Hire, recruit, or refer for a fee an alien knowing that the alien is not authorized to work in the United States;
2. Continue to employ an alien knowing that the alien is or has become unauthorized to work in the United States;
3. Hire a person without properly complying with an employment verification system (I-9s);
4. Discriminate in employment on the basis of national origin (for employers with between four and fourteen employees);
5. Discriminate in employment on the basis of U.S. Citizenship or lawful alien status.

B. Actual Knowledge or "Constructive" Knowledge

1. Actual knowledge is knowingly hiring or retaining an illegal alien, while constructive knowledge is knowledge which may be fairly inferred through notice of facts and circumstances which would lead a person exercising reasonable care to know that they had hired/retained an illegal alien.
2. "Constructive" knowledge was originally narrowly construed -- only found where employers ignored notices by INS that certain employees not authorized to work, but is now more broadly interpreted -- presumption of hiring/retaining illegal aliens may arise in several situations.

C. Presumption of Hiring/Retaining Illegal Alien

An employer may be presumed to know that it has hired or retained an unauthorized worker under at least three circumstances:

1. When the employer fails to properly complete an I-9;
2. When the employer obtains information indicating that the employee is not authorized to work in the U.S.; and
3. When the employer acts with reckless disregard in permitting another company or individual to introduce an unauthorized alien into its workforce.

Examples of information that may indicate an employee is not authorized to work in the U.S. include an employee asking the employer to sponsor him for a labor certification or green card, or a Final Nonconfirmation notice from the E-Verify system.

The third grounds, reckless disregard, may arise when an employer enters into a contract with an independent contractor and there are some sort of warning signs that may put an employer on notice that the independent contractor employs illegal aliens.

D. Wal-Mart (independent contractor case)

From 1998 to 2003, the U.S. Department of Justice ("DOJ") conducted an extensive investigation into companies providing cleaning services at more than 1,000 Wal-Mart stores. In October 2003, the U.S. Immigration Customs and Enforcement Agency ("ICE") raided sixty-one Wal-Mart stores, arresting 245 illegal aliens working for the independent contractors. Following the raids, Wal-Mart entered into a settlement with the DOJ including the following terms: \$11 million fine; Wal-Mart agreed to

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establish a means of verifying that its contractors were taking reasonable steps to comply with immigration laws; and to provide training to all store managers on immigration employment laws.

On the other hand, properly completing an I-9 provides a rebuttable presumption the other way -- that the employer did not knowingly hire an unauthorized worker. The presumption can be defeated if the documents presented do not appear genuine on their face, or if the employer colludes with the employee to falsify the documents. The good faith defense also does not apply to employers who fail to make corrections within 10 days after receiving notice of a deficiency.

II. Revised I-9 Forms

A. Overview

Employers are required by law to verify an individual's identity and eligibility to work in the U.S., through the Form I-9 document verification process.

I-9s must be completed for each employee within three days of starting work. They are not filed with the U.S. Department of Homeland Security ("DHS"), but must be retained and available for three years from the date of hire, or one year after the last day of work, whichever is later.

There are several instances where employers are not required to complete an I-9:

1. Employees hired before November 7, 1986, who are continuing in their employment and have reasonable expectation of employment at all times.
2. Employees hired for domestic work in private homes on a sporadic, irregular and intermittent basis.
3. Independent contractors.
4. Employees provided to employer-employee leasing or temporary agencies.

The forms (and photocopies of presented documents supporting the forms) can be stored in paper format, microfiche, microfilm, or electronically. If employers choose to keep their I-9s electronically, they must maintain:

- An indexing system to permit searches by any of the data elements;
- Security systems to prevent unauthorized access, or alteration, of the forms;

If the signatures on the forms are electronic, then the employer must use appropriate technology to authenticate the signature, such as electronic signature pads, PINs, biometrics, or "click and accept" prompting systems.

B. Revisions

On November 7, 2007 DHS released a revised form of I-9. The revised form removes (and therefore prevents employers from relying on) five documents for proof of both identity and employment eligibility:

1. Certificate of U.S. Citizenship
2. Certification of Naturalization
3. Alien Registration Receipt Card
4. Unexpired Reentry Permit
5. Unexpired Refugee Travel Document

DHS removed these documents because they are particularly susceptible to counterfeiting and identity fraud.

There was also another document added to the List of Acceptable Documents on List A: an Unexpired Employment Authorization Document with photograph.

The revised I-9 also informs employees that providing their Social Security number is voluntary, pursuant to Section 7 of the Privacy Act. Employees must still provide their Social Security number if the employer participates in E-Verify.

The new form is available at various sites on the Internet. Employers must use the new form for all employees hired after November 7, 2007. DHS however will not seek penalties against employers using the old form during a transition period. The end of the transition period will be publicly announced by DHS in the Federal Register. After the end of the transition period, an employer using the older form will be subject to administrative penalties for failure to complete an I-9.

Because of the importance of I-9s as the principal defense against claims of knowingly hiring or employing illegal aliens, employers

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should conduct internal audits of their I-9 records at regular intervals to ensure completeness and review for errors.

III. E-Verify/Basic Pilot

The Basic Pilot program, recently renamed E-Verify, is an internet-based system for electronic verification of new hires authorization to work in the United States. It is basically an add-on to the I-9 verification. It uses Social Security Administration ("SSA") and DHS databases. Under federal law, participation is voluntary, but is mandatory in a few states.

To participate, employers must register at: <https://www.vis-dhs.com/employer> registration. Also, an employer wishing to participate must sign a memorandum of understanding agreeing to the following:

1. That it will not initiate a request until after the employee has been hired and the Form I-9 completed;
2. That it will verify all new employees through the program;
3. That it will post notices about the program and anti-discrimination provisions;
4. That it will not take any adverse action against the employee while the SSA or ICE is processing a verification request (unless the employer receives affirmative information that the employee is unauthorized);
5. That it will provide access to its employment records to SSA and DHS; and
6. That it will use the information generated solely to confirm identity and work authorization and not for any other reason.

Employers may terminate their participation at any time. Employers are not permitted to pre-screen applicants on the system, nor can they submit verification requests for employees hired before registration on the system.

The E-Verification process begins after an individual is hired and the I-9 is completed. The employer must initiate the query no later than the end of three (3) business days after the new hire's start date. To submit a verification request,

an employer transfers information from the I-9 into E-Verify. This includes the employee's name, date of birth, Social Security number, citizenship status, hire date, type of documents presented by employee during the I-9 process and the expiration dates for documents. If the system confirms eligibility, the employer either records a verification number on the I-9 or prints out the verification screen and attaches it to the I-9. The confirmation serves as a presumption that the employer has not knowingly hired an illegal alien.

If the system does not verify eligibility, a Tentative Nonconfirmation result is sent to the employer. The employer then notifies the employee of the result. If the employee does not contest the result, then it becomes a Final Nonconfirmation. To contest the result, the employee must visit a SSA or ICE field office within eight work days to resolve any discrepancy in the records. The SSA or ICE will then respond to the employer, either with a confirmation or with a Final Nonconfirmation.

If the result is a Final Nonconfirmation, the employer may then terminate the employee's employment without any liability. If the employer decides not to terminate employment, it must notify DHS through the system. Failure to notify DHS subjects the employer to an administrative fine. Failure to terminate the employee's employment creates a presumption of constructive knowledge of employing an illegal alien.

PROS: Demonstrates good faith attempt at immigration compliance, and provides affirmative government confirmation or nonconfirmation of employees.

CONS: Administrative expense, forces employer to terminate employment despite possible errors in system, uncertainty as to employee's status during verification process.

1. Illinois statute bars employers from participating

In August 2007, Illinois amended Section 12(a) of the Illinois Right to Privacy in the Workplace Act to prohibit employers from enrolling in the E-Verify program until the Social Security Administration is able to make a determination on ninety-nine percent (99%) of the Tentative

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Nonconfirmation notices issued to employers within three days. The purpose of the amendment was to “protect employees from unfair treatment under the federal government’s flawed program.” The State law also requires employee training in the use of E-Verify, posting notices to employees, and the establishment of procedures to safeguard the confidentiality of information disclosed in the system.

The State law was set to go into effect on January 1, 2008, but in September 2007, the DHS filed a lawsuit against the State in federal court in Springfield arguing that the law was preempted by federal immigration law. The State agreed to stay enforcement of the new law until at least April of 2008.

In January of 2008, a bill was introduced in the Illinois Senate (S.B. 1878) to change the amendment so that the prohibition only applies to State employees. The other parts of the amendment (training, notices and confidentiality) would remain in effect.

IV. “IMAGE” (ICE Mutual Agreement Between Government and Employers)

Is a program created by ICE and designed to encourage law-abiding employers to follow certain compliance guidelines and ultimately police themselves, in order to free up time and resources so that ICE can focus on entities more likely to violate the law.

Participating employers will be required to: (1) undergo audits of their employment eligibility practices by ICE; (2) use the E-Verify system; and (3) follow certain best practices (e.g., establish in-house review and audit process for I-9 & E-Verify program compliance, establish self-reporting systems, submit an annual report to ICE, etc.). In return, employers would be granted the “IMAGE Certified” mark of agency approval from ICE.

V. New regulation and Revised Form of “No-Match” Letters from SSA

When an employer files W-2 payroll forms to SSA, the agency compares the names and SSNs on the form to agency records. If the name does not match the SSN in SSA’s records, then the withheld wages are placed into an earnings

suspense file while SSA tries to resolve the discrepancy. By 2007, \$420 billion had been deposited into the earnings suspense file based on discrepancies found for between six and seven million workers.

Since 1994, SSA has sent out “no-match” letters to employers with more than ten employees with mismatched information and for whom mismatched employees represent more than one half of one percent (.5%) of all the W-2s filed by the employer.

Up until last year, DHS has taken the position that an SSA no-match letter does not constitute constructive knowledge of employment of an illegal alien. The no-match letters stated on their face that they did not imply that the worker was an illegal alien and warned employer’s not to fire employees based solely on the letter. In fact, employers had no legal obligation to respond to the no-match letter at all. Most employers went no further than to notify the employee of the discrepancy.

In August 2007, DHS revised its regulations to state for the first time that receipt of a no-match letter could lead to a presumption of constructive knowledge of employing an illegal alien. In order to avoid such a presumption, the employer must take the following steps:

1. Check the employer’s own records for errors within 30 days;
2. If the employer’s records are accurate, notify the employee of the discrepancy and give the employee ninety (90) days to resolve it directly with SSA (ICE will not consider the matter resolved until the employer verifies with the SSA that the Social Security number matches the employee’s name and is valid for work. One can obtain such information from the SSA via the internet or telephone); and
3. If the employee cannot resolve the discrepancy, the employee must fill out a new I-9 using a different Social Security number and is then required to produce identifying documentation with photographs.

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If after following this procedure an employer is unable to confirm an employee's work authorization, the employer must terminate the employee or risk civil and criminal liability.

ICE has acknowledged that other procedures may be deemed a reasonable response to an SSA or DHS notification, but that an employer that followed procedures other than those described in the rule, would risk a finding that its response to an SSA notification was not reasonable under the circumstances -- the presumption of constructive knowledge would remain.

In conjunction with the new regulation, SSA prepared a new form of no-match letters, one that instructed the employer on its new obligations, and also informed employers that if they terminated an employee after going through this procedure (if the employee is unable to provide a legitimate new SSN) then the employer will not be liable for national origin discrimination under the IRCA.

The new regulation was challenged in litigation and in October 2007, a federal court in San Francisco held it invalid -- on the grounds that DHS has flip-flopped on the legal effect of no-match letters without a reasoned analysis and without following regulatory procedures.

Based on this preliminary injunction, SSA has announced that it will not send out any new no-match letters until at least March 2008. DHS has appealed the District Court ruling to the Federal Court of Appeals.

V. ICE Steps Up Workplace Raids

In 2006, the number of employers and employees arrested in immigration raids quadrupled from previous years' levels. In 2007, DHS shifted its enforcement focus from civil fines toward criminal charges such as harboring aliens, smuggling aliens, and money laundering. Prior to this new enforcement initiative, the DHS typically limited its enforcement measures to audits of an employer's I-9 compliance and paperwork fines.

In December 2006, DHS conducted a coordinated raid of six Swift & Company meat processing plants in six different states. Over 1,200 employees were arrested. Swift lost 40

percent of its workforce and suspended operations at all six plants, resulting in \$20 million dollars in lost production.

In 2001, Swift was charged by the Department of Justice with excessively scrutinizing documents of individuals who looked or sounded "foreign" (document abuse and discrimination). The Company entered into a \$200,000 settlement with DOJ to resolve the charges.

Swift has used E-Verify/Basic Pilot since 1997.

If you are unlucky enough to be the subject of an ICE raid, contact legal counsel, do not consent to any search or sign any document, cooperate in providing access to I-9s, but do not otherwise volunteer information or cooperation, keep notes on records reviewed and otherwise monitor the agents' activities within the facility.

VI. RICO Lawsuits Between Competitors (or Against Unions) Over Employment of Illegal Aliens

In 1996, the definition of "racketeering activity" under RICO (the Racketeered Influenced and Corrupt Organizations Act) was expanded to include, among numerous other things, "knowingly hiring at least ten illegal immigrants within a twelve month period." If a RICO violation is proven, the plaintiff is entitled to treble damages, plus attorneys fees.

For further information, please contact:

David G. Lubben
309.673.1681
dglubben@dcamplaw.com

Richard A. Russo
309.673.1681
rarusso@dcamplaw.com

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