

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

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

- Appoint an IRCA compliance officer and establish an IRCA compliance policy.
- Conduct 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.
- Establish 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.
- Establish 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 their uniformity in terms of when the employment verification is commenced? Are employees all treated the same when there is a social security mismatch letter?
- Establish a re-verification tickler system to ensure I-9s are checked in a timely manner.
- Centralize the I-9 Form recordkeeping process.
- Establish a process for human resource professionals to check quickly with counsel when there are any problems in the verification process.
- Establish a backup system to ensure timely compliance with I-9 rules when a human resource professional is out of the office.
- Segregate Forms I-9 from personnel records
- Consider using an electronic I-9 product in order to automate the collection of information, speed up the production of information in the case of a government audit and also ensure timely re-verification of I-9 forms

### **9.2 What are the best ways to avoid immigration-related employment discrimination?**

The DOJ's Office of Special Counsel suggests the following ten steps be taken to avoid liability under IRCA's anti-discrimination rules:

- Treat all people the same when announcing a job, taking applications, interviewing, offering a job, verifying eligibility to work, and in hiring and firing.
- Accept documentation presented by an employee if it establishes identity and employment eligibility; is included in the list of acceptable documents; and reasonably appears to be genuine and to relate to the person.
- Accept documents that appear to be genuine. You are not expected to be a document expert, and establishing the authenticity of a document is not your responsibility.
- Avoid "citizen-only" or "permanent resident-only" hiring policies unless required by law, regulation or government contract. In most cases, it is illegal to require job applicants to be U.S. citizens or have a particular immigration status.
- Give out the same job information over the telephone to all callers, and use the same application form for all applicants.

- Base all decisions about firing on job performance and/or behavior, not on the appearance, accent, name, or citizenship status of your employees.
- Complete the I-9 Form and keep it on file for at least 3 years from the date of employment or for 1 year after the employee leaves the job, whichever is later. This means that you must keep I-9s on file for all current employees. You must also make the forms available to government inspectors upon request.
- On the I-9 Form, verify that you have seen documents establishing identity and work authorization for all employees hired after November 6, 1986, including U.S. citizens.
- Remember that many work authorization documents (I-9 Form lists A and C) must be renewed. On the expiration date, you must re-verify employment authorization and record the new evidence of continued work authorization on the I-9 Form. You must accept any valid document your employee chooses to present, whether or not it is the same document provided initially. Individuals may present an unrestricted Social Security card to establish continuing employment eligibility.
  - Permanent resident cards should not be re-verified
  - Identity documents should not be re-verified
- Be aware that U.S. citizenship, or nationality, belongs not only to persons born in the United States but also to all individuals born to a U.S. citizen, and those born in Puerto Rico, Guam, the Virgin Islands, the Commonwealth of Northern Mariana Islands, American Samoa, and Swains Island. Citizenship is granted to legal immigrants after they complete the naturalization process.

### **9.3 Should a company have an Immigration and Reform and Control Act compliance officer?**

Yes. Employers should ensure that an official at the company is thoroughly trained in IRCA's employer sanctions and anti-discrimination rules and is able to supervise all persons charged with handling Forms I-9. The officer should be responsible for the following additional functions:

- ensuring that Form I-9 records are properly retained
- ensuring that a reliable system is in place to re-verify Forms I-9
- act in concert with employees, managers, subcontractors, customers, recruiters, and others to ensure that the company's IRCA compliance policy is followed
- work with outside counsel to ensure that regular Forms I-9 preventative audits are conducted
- work with outside counsel to conduct regular training programs for human resource professionals and others at a company charged with hiring employees
- consult with counsel to properly respond to Social Security Mismatch letters
- work with outside counsel to establish an action plan should the company be the subject of an audit or investigation by DHS, DOL, or OSC
- ensure that contractors supplying labor are properly screened to ensure IRCA compliance
- oversee the company's IRCA compliance policy to ensure it is readily available and periodically updated by counsel

### **9.4 Should a company have an Immigration and Reform and Control Act compliance policy?**

Yes. Employers should establish a standard IRCA compliance policy that is included with the company's other personnel policies and materials. The IRCA compliance policy should

- Name the company's IRCA compliance officer,
- Advise on complying with IRCA's employer sanctions and anti-discrimination rules.
- Contain rules for working with outside contractors,
- Set training requirements for those completing the Forms I-9,
- Have a zero tolerance policy for the employment of individuals who cannot comply with IRCA's employment verification rules,
- Establish the timing and procedures for regular internal Form I-9 audits,
- Contain rules on who has access to Form I-9 records,
- List procedures for using E-Verify,
- Set protocols for interacting with government officials in connection with IRCA compliance, and
- Outline re-verification procedures.

### **9.5 Should companies have special Form I-9 policies for dealing with outside contractors?**

Over the last few years, ICE has increasingly targeted companies that use contractors employing unauthorized employees. IRCA specifically states that a person or entity who uses a contract to obtain the labor of an alien knowing that the alien is unauthorized to work shall be considered to have hired the alien for employment in the United States.

This was the basis of the government's targeting of Wal-Mart in 2005. Sixty Wal-Mart stores were raided by ICE and 245 unauthorized employees were discovered working as night janitors and cleaners. The employees were actually the employees of a contracting firm and the government argued that Wal-Mart was responsible for the contractors' actions. The retail giant eventually paid an \$11 million fine to resolve the dispute.

Employers are also, as noted above, sometimes held to be the actual employer of unauthorized employees as opposed to the contractor that ostensibly employs them. The lesson is that employers may very well need to focus on IRCA compliance by its contractors.

Given the risks associated with using contract labor, many companies are beginning to demand that their contractors adhere to IRCA and provide documentation of their compliance. Consult with your attorney regarding developing appropriate protective measures.

### **9.6 How do mergers, acquisitions and other major changes affect Form 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. An employer who continues to employ some or all of a previous employer's workforce in cases involving a corporate reorganization, merger, or sale of stock or assets may accept the I-9s previously prepared by the predecessor company. However, the Forms I-9 should be checked in the due diligence process to ensure that the acquired forms are in compliance, as any errors or omissions on the adopted forms become the responsibility of the acquiring employer. Employers should consider adding Forms I-9 to a merger checklist and have all employees of the combined company complete new 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 immigration problems. For an in depth discussion of the immigration consequences of mergers and acquisitions, see chapter 13.

### **9.7 Can an employer who does not wish to assume an acquired company's liability for Form I-9 violations re-verify the entire work force?**

Yes. In such a case, the succeeding employer may have all employees complete new Forms I-9. The benefit of this is that employers will have the opportunity to correct past problems and ensure compliance. Also, if any employees requiring a visa transfer as a result of the merger or acquisition, the employer will have an additional chance to discover the issue.

### **9.8 ICE Best Hiring Practices**

- (✓) Use the Basic Pilot Employment Verification Program for all hiring.
- (✓) Establish an internal training program, with annual updates, on how to manage completion of Form I-9 (Employee Eligibility Verification Form), how to detect fraudulent use of documents in the I-9 process, and how to use the Basic Pilot Employment Verification Program.
- (✓) Permit the I-9 and Basic Pilot Program process to be conducted only by individuals who have received this training—and include a secondary review as part of each employee's verification to minimize the potential for a single individual to subvert the process.
- (✓) Arrange for annual I-9 audits by an external auditing firm or a trained employee not otherwise involved in the I-9 and electronic verification process.
- (✓) Establish a self-reporting procedure for reporting to ICE any violations or discovered deficiencies.
- (✓) Establish a protocol for responding to no-match letters received from the Social Security Administration.
- (✓) Establish a Tip Line for employees to report activity relating to the employment of unauthorized aliens, and a protocol for responding to employee tips.
- (✓) Establish and maintain safeguards against use of the verification process for unlawful discrimination.
- (✓) Establish a protocol for assessing the adherence to the "best practices" guidelines by the company's contractors/subcontractors.
- (✓) Submit an annual report to ICE to track results and assess the effect of participation in the IMAGE program.

Source: [www.ice.gov/partners/opaimage/](http://www.ice.gov/partners/opaimage/).

## 9.9 Sample Contract Language for Contractors

CONTRACTOR represents and warrants that all necessary visa or work authorization petitions have been timely and properly filed on behalf of any employees requiring a visa stamp, I-94 status document, EAD, or any other immigration document necessary for such employees to legally work in the US. CONTRACTOR has complied in all respects with the provisions of the Immigration Reform and Control Act of 1986 including properly completing, retaining and re-verifying Forms I-9. CONTRACTOR has complied in all respect with any state or local laws relating to employers that knowingly or intentionally hire unauthorized immigrants. There are no claims, lawsuits, actions, arbitrations, administrative or other proceedings, governmental investigations or inquiries pending or threatened against the CONTRACTOR relating to the CONTRACTOR'S compliance with local, state or federal immigration laws and regulations.

There have been no letters received from the Social Security Administration (SSA) regarding the failure of CONTRACTOR'S employees SSNs to match their name in the SSA database. There have been no letters or other correspondence received from the Department of Homeland Security or other agencies regarding the employment authorization of any employees of CONTRACTOR. If the CONTRACTOR operates in a state or has contracts with a state of Federal agency that requires or provides a safe harbor if an employer participates in the Department of Homeland Security's e-Verify electronic employment verification system, the CONTRACTOR has been participating in e-Verify for the entire period such participation has been required or available as a safe harbor or as long as the company has been operating in such state or contracting with such agency.

CONTRACTOR agrees to conduct a self-audit on an [annual] basis of it's personnel records to ensure compliance with IRCA's I-9 requirements. CONTRACTOR agrees to certify [annually] to ABC Corporation that it is in compliance with all immigration laws and requirements and is not being investigated by any government agency with respect to compliance with immigration law. CONTRACTOR agrees to provide ABC Corporation with copies of Forms I-9 for all employees working at ABC Corporation. CONTRACTOR shall only provide employees to ABC Corporation that have consented in writing to the disclosure of their Form I-9 to ABC Corporation. CONTRACTOR shall provide ABC Corporation with a copy of its IRCA compliance policy and procedures.

CONTRACTOR agrees to indemnify and hold harmless ABC Corporation from any liability for CONTRACTOR's failure to comply with any U.S. immigration law or regulation.

[NOTE: language should be included reciting that the relationship is an independent contractor relationship and listing factors showing this is the case.