

What Employers Should Know to Better Protect Themselves from Claims of Illegally Recruiting, Hiring or Retaining Unauthorized Workers

The Immigration Reform and Control Act of 1986 (IRCA) imposes penalties on employers that knowingly hire or continue to employ persons who are not authorized to work in the United States. IRCA also requires employers to maintain documentation of their employees' authorization to work in the United States and penalizes employers that fail to heed this requirement. Specifically, IRCA requires employers to have all employees hired after November 6, 1986 complete Section 1 of Form I-9 no later than the first day of employment (*i.e.*, first day of paid work); to examine original documents to establish identity and work eligibility within three business days of the first day of employment; and to complete Section 2 of the form within three business days of the first day of employment. Because of a fear that IRCA's pushing of the responsibility to police America's workforce onto employers would cause some employers to unfairly refuse to hire individuals who may look or sound "foreign," IRCA additionally prohibits immigration-related unfair employment practices, which may take the form of national origin discrimination or citizenship status discrimination against protected individuals.

Balancing both the obligation to verify employment authorization and the prohibition against immigration-related unfair employment practices is complex and requires sufficient preplanning and training, as oftentimes the objectives of these requirements seem to conflict. Having a written IRCA/I-9 compliance policy and manual in place is therefore an important organizational tool to have, as it will provide an internal roadmap that will reduce staff frustration by providing clear and consistent guidance in addressing IRCA's challenging requirements. The results of recent enforcement actions have also shown that the government expects employers to have such a document in place as it memorializes an organization's commitment to IRCA's requirements and assists in reducing organizational violations of IRCA's requirements.

In addition to implementing a comprehensive IRCA/I-9 compliance policy, there are numerous other proactive measures that employers may take to put themselves in the best possible light in the event of an IRCA/I-9 compliance audit by Immigration and Customs Enforcement (ICE). Practices and tools for your organization to consider to better insulate itself against both discrimination

POSTED:

Mar 6, 2011

RELATED PRACTICES:

[Corporate Law](#)

<https://www.reinhartlaw.com/practices/corporate-law>

[Labor and Employment](#)

<https://www.reinhartlaw.com/practices/labor-and-employment>

RELATED SERVICES:

[International](#)

<https://www.reinhartlaw.com/services/international>

RELATED PEOPLE:

[Benjamin T. Kurten](#)

<https://www.reinhartlaw.com/people/benjamin-kurten>

claims by employees and governmental enforcement actions under the rules and regulations of IRCA include the following:

- Establish an organization-wide policy requiring the hiring and retention of only authorized workers.
- Establish formal "best practices" policies and guidelines regarding:
 - The recruitment, hiring and retention of only authorized workers;
 - The completion, retention, administration, updating and self-audit of Form I-9s;
 - Responding to Social Security Administration (SSA) "no-match" letters and other similar correspondence from other federal or state agencies indicating there is a discrepancy between the agency's information and the information provided by either employees or the organization;
 - Facilitating and responding to "tips" from employees on unauthorized workers; - Termination of employees determined to be unauthorized;
 - Preventing discrimination in the workplace based on perceived immigration status, national origin, ethnicity, etc.; and
 - Assessing company-wide adherence to the best practice guidelines.
- Establish a training program for managers, recruiters, human resources administrators, etc., regarding their legal obligations to prevent the knowing recruitment, hiring and continued employment of unauthorized workers, while also ensuring compliance with pertinent antidiscrimination laws.
- Establish an internal Form I-9 completion and retention training program, with annual updates, on how to manage the completion of Form I-9, how to detect fraudulent use of documents in the Form I-9 process, and how to maintain and update completed Form I-9s.
- Permit the Form I-9 process to be conducted only by individuals who have received the training described above.
- Provide for a secondary review as part of each employee's Form I-9 employment eligibility verification process to minimize the potential for a single individual to subvert the process.

- Use the Social Security Number Verification Service (SSNVS) and establish other procedures to ensure that the names and Social Security numbers of current employees are correctly recorded.
- Arrange for annual Form I-9 audits by an external entity or a trained employee not otherwise involved in the day-to-day Form I-9 compliance activities of the company (so as to avoid self-interest in not reporting detected problems, etc.).
- Establish a procedure for reporting to ICE individuals who have provided known or believed fraudulent documents during the Form I-9 process.
- Establish a "tickler" system for completed Form I-9s to ensure that Form I-9s relying on employment authorizing documents having expiration dates are timely updated to show the continued authorized status of the workers and to help with reminding workers of the need to provide updated documentation evidencing their continuing authorization to work in the United States.
- Require written assurances and indemnification agreements from subcontractors, independent contractors and other outside service providers stating that they recruit, hire and retain only authorized workers and that properly completed Form I-9s exist for each employee of the third party providing services to your organization. Note that it is illegal to make employees post a bond or agree to indemnify the employer against liability arising from knowing employment of unauthorized workers or violation of the I-9 requirements.

In addition to the foregoing, employers may want to consider enrolling and actively participating in ICE's "IMAGE" program or U.S. Citizenship and Immigration Services' (USCIS) "E-Verify" program.

IMAGE

ICE certifies employers who follow the IMAGE program's requirements as "IMAGE Certified." This designation may be considered a mitigating factor in the determination of any civil penalty amount should a penalty be levied by ICE as the result of an I-9 audit. In order to participate in IMAGE, employers must allow ICE to conduct an audit of the employer's existing Form I-9s, the employer must enroll in E-Verify, and the company must comply with ICE's "best practices" guidelines, which include many of the suggestions noted above. In addition, program participants must annually report to ICE the number of employees removed or



denied employment as a result of program participation, as well as the discovery or allegation of criminal misconduct in the employment eligibility verification process (e.g., document fraud, etc.). In connection with the IMAGE program, ICE will review participants' hiring and employment practices and policies and recommend ways to correct compliance issues. ICE represents that it will work collaboratively with employers whenever it discovers minor and isolated I-9 compliance errors and keep related information confidential to the extent permitted by law and regulation. However, ICE does not promise that it will not otherwise seek to prosecute employers for Form I-9 or other related IRCA violations that it considers to be beyond minor or isolated.

E-Verify

The E-Verify program provides employers with internet-based access to SSA and USCIS databases to help determine the work eligibility of employees. The E-Verify program may only be used to verify work eligibility for employees hired after enrollment unless the employer is a qualified federal contractor. E-Verify must not be used to prescreen employees. Instead, E-Verify screening should take place only after an employee has been hired and a Form I-9 for the employee has been completed, but no later than three business days after the employee's first day of employment. E-Verify participants must still comply with all applicable I-9 rules for Form I-9 completion, administration and retention. Participation in the E-Verify program is free to any employer and nonfederal contractor employers may voluntarily terminate participation at any time.

Deciding whether to participate in the IMAGE or E-Verify programs requires careful evaluation of various factors, including the risks and costs involved. Similarly, each organization will present its own particular circumstances due to industry, location, workforce, etc., which will require the above-listed best practices and tools to be customized to best suit and support their efforts to comply with the challenging requirements of IRCA.

Reinhart's [Immigration Law Group](#) would be pleased to assist your organization to develop and implement policies and practices for IRCA/I-9 compliance that will both meet your legal obligations and disrupt your business operations as little as possible."

These materials provide general information which does not constitute legal or tax advice and should not be relied upon as such. Particular facts or future developments in the law may affect the topic(s) addressed within these materials. Always consult with a lawyer about your particular



circumstances before acting on any information presented in these materials because it may not be applicable to you or your situation. Providing these materials to you does not create an attorney/client relationship. You should not provide confidential information to us until Reinhart agrees to represent you.