



**Recipes to Avoid  
Immigration Issues**  
April 30, 2015

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Moderated by:

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Jennifer is a shareholder in the firm's Litigation Practice and chair of the firm's Food and Beverage Law Practice Group. Jennifer counsels clients on all regulatory matters affecting food and beverage companies, including product development, labeling, marketing and advertising, food recalls and market withdrawals, supply chain analysis, and food safety issues, including the new Food Safety Modernization Act. She also represents food and beverage clients, including start-ups and national and international companies, in litigation at the state and federal levels.

## AGENDA

11:30am CT Registration, Networking and Lunch

11:45am CT Webinar attendees may begin to log on

12:00pm CT Presentation, Q&A



### Asking Questions

Throughout the webinar, type your questions using the "QUESTIONS" section in the webinar panel. We will answer as many questions as possible during our Q & A session at the end of the webinar.

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## Webinar Housekeeping

### Viewing the Slides

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### Asking Questions

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### Information

This webinar provides general information about legal issues. It should not be construed as legal advice or a legal opinion. Attendees should seek legal counsel concerning specific factual situations confronting them.

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Ben chairs Reinhart's Immigration Law Group and is a shareholder in the firm's Labor and Employment and International Practices. He has more than 17 years of broad-based immigration law experience. Ben's experience includes assisting large multinational corporations, small private companies and individual investors successfully navigate the complex U.S. immigration laws in order to meet their business needs through such tasks as: transferring international personnel; hiring foreign-born talent with hard-to-find skill sets to fill professional positions; and establishing new U.S. investment enterprises or branch operations. He regularly works with clients from a variety of different industries, including food & beverage, manufacturing, health care, research, financial services, technology, education, entertainment, professional sports, consumer goods and agriculture.

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## Immigration Reform and Control Act of 1986

- Immigration Reform and Control Act of 1986 ("IRCA") imposes penalties on employers who knowingly hire or continue to employ persons who are not authorized to work in the United States

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## Immigration Reform and Control Act of 1986 (cont.)

- The IRCA requires employers to:
  - Have all employees hired after November 6, 1986 complete Section 1 of Form I-9 ("Employee Information and Verification") no later than the first day of employment (i.e., first day of paid work);
  - Examine original document(s) to establish identity and work eligibility within three business days of the first day of employment; and
  - Complete Section 2 of Form I-9 ("Employer Review and Verification") within three business days of the first day of employment

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## Immigration Reform and Control Act of 1986 (cont.)

- Basic rule for the completion of Section 2:
  - Employee need only present either:
    - One document from List A ("Documents that Establish Both Identity and Employment Authorization")
  - OR
  - One document from List B ("Documents that Establish Identity") AND one document from List C ("Documents that Establish Employment Authorization") from the List of Acceptable Documents approved by the U.S. Citizenship and Immigration Services ("USCIS") and published on the current version of Form I-9

Good resource: <http://www.uscis.gov/I-9Central>

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## Immigration Reform and Control Act of 1986 (cont.)

- The IRCA additionally prohibits immigration-related unfair employment practices, which may take the form of:
  - National origin discrimination with respect to hiring, firing and recruitment or referral for a fee against any work-authorized individual by employers with more than 3 and fewer than 15 employees

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## Immigration Reform and Control Act of 1986 (cont.)

- Document abuse against any work-authorized individual by employers with four or more employees
- Citizenship or immigration status discrimination against protected individuals with respect to hiring, firing and recruitment or referral for a fee by employers with four or more employees
  - Protected: U.S. citizens and nationals, some permanent residents (if they timely applied for naturalization), asylees, refugees and temporary residents

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## Immigration Reform and Control Act of 1986 (cont.)

- Retaliation or threats against, coercion of or intimidation of individuals alleging unfair immigration-related employment practices or cooperating with the investigation or prosecution of such claims

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## Immigration Reform and Control Act of 1986 (cont.)

- Violations of the IRCA can result in penalties upon the employer and possibly against its managers, executives and owners
  - Form violations (missing, mistakes or document abuse)
    - \$110 to \$1,100 per individual
  - Hiring violations (unauthorized, fraud or unfair)
    - \$375 to \$16,000 per individual
  - Pattern or practice of violations (unauthorized)
    - \$3,000 per individual and/or six months' federal prison

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## Overdocumentation

- The IRCA specifically prohibits employers from engaging in what is commonly referred to as "overdocumentation" when completing Section 2 of Form I-9

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## Overdocumentation (cont.)

- Overdocumentation refers to, but is not limited to, situations in which the employer:
  - Requests more documents than required by law to complete the Form I-9 process;
  - Rejects valid documents presented by an employee and instead requests specific documents preferred by the employer; or
  - Requests an employee to present work authorization documents more often than required

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## Overdocumentation (cont.)

- Overdocumentation can lead to an unfair employment practice or document abuse charge that could result in a DOJ-OSC lawsuit against the employer
- The potential for a DOJ-OSC enforcement action is enhanced when an employer engages in, or appears to engage in, overdocumentation based on an employee's actual or perceived national origin or citizenship status (E-Verify Users Beware!)

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## Tips to Avoid Overdocumentation

- Never demand that an employee present a particular document or set of documents from the Form I-9's List of Acceptable Documents

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## Tips to Avoid Overdocumentation (cont.)

- Verify that the original documents provided by the employee:
  - Are on the current Form I-9 List of Acceptable Documents
  - Appear genuine and relate to the employee
  - Are unexpired
  - Substantiate the employee's unexpired employment authorization

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## Tips to Avoid Overdocumentation (cont.)

- Never require different or additional documentation from an employee or group of employees than what the Form I-9 regulations require

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## Tips to Avoid Overdocumentation (cont.)

- Do not use a future expiration date of employment authorization in and of itself to determine whether an employee is qualified for a particular job

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## Tips to Avoid Overdocumentation (cont.)

- Be timely when reverifying the work eligibility of employees whose work authorization is subject to expiration
  - But never demand reverification from employees whose employment authorization is not affected by the expiration of the document originally provided by the employee

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## Tips to Avoid Overdocumentation (cont.)

- Legitimate reverification circumstances:
  - Employee's work authorization has expired
  - Form I-9 documentation is missing or incomplete
  - Form I-9 never existed or was destroyed
  - Notice from ICE

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## Tips to Avoid Overdocumentation (cont.)

- List B documents should never be reverified
- U.S. citizens' work authorization should never be reverified if their Form I-9 exists and was properly completed
- Permanent residents' work authorization should never be reverified if their Form I-9 exists and was properly completed (with very limited exceptions)

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## Tips to Avoid Overdocumentation (cont.)

- When reverifying, employees need only present a valid and current List A or List C document of their choice
- Employer may not request specific documents or combination of documents
- Reverification process must be nondiscriminatory and consistent

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## Tips to Avoid Overdocumentation (cont.)

- Visually examine the presented documentation to determine if there are any features that would cause a reasonable person to doubt either the documentation's authenticity or its relation to the individual presenting it, but be reasonable

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## Title VII

- Title VII prohibits employers from discriminating because of a person's race, color, religion, sex or national origin. Title VII does not prohibit discrimination based on citizenship or alienage, except when the discrimination on the basis of citizenship has the purpose or effect of discriminating on the basis of national origin. Title VII applies to any person or entity with 15 or more employees on the payroll each working day for 20 or more weeks during the current or preceding year.

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## Title VII (cont.)

- Title VII covers discriminatory practices relating to the terms and conditions of employment such as compensation, benefits, promotions and training
- Prohibited conduct under Title VII includes both intentional discriminatory treatment as well as unintentional practices that have a discriminatory impact on nationalities
- The language of Title VII does not exclude from protection individuals who are unlawfully present in the U.S. or not authorized by the immigration laws to be employed in the United States

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## Limitations During Hiring

- What may I ask a job applicant about his or her immigration status?
  - The U.S. Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC") has suggested that the following questions would be acceptable to pose to job applicants during the initial screening stage:
    - Are you legally authorized to work in the United States without the need for [us/the Company] to sponsor you? \_\_\_ Yes \_\_\_ No
    - Will you now or in the future require sponsorship for an employment authorizing status or visa (e.g., an H-1B visa)? \_\_\_ Yes \_\_\_ No
  - Employers could also consider similar renditions of this basic inquiry:
    - Will you now or in the future require sponsorship from [us/the Company] in order to maintain or to obtain an employment authorizing status/visa (e.g., H-1B, TN, etc.) or other form of employment authorization (e.g., an Employment Authorization Document a/k/a "EAD card") in order to legally work in the United States? \_\_\_ Yes \_\_\_ No

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## Limitations During Hiring (cont.)

- May I tell potential job applicants that my company will not sponsor prospective employees for work-authorizing immigration benefits?
  - Yes, employers may inform applicants of their policy against sponsoring job applicants for an employment-authorizing visa or status. OSC has suggested the following may be acceptable ways of informing job applicants of the employer's policy against immigration-related sponsorship:
    - Applicants must be presently authorized to work in the United States on a full-time basis.
    - This company does not sponsor individuals for the purpose of obtaining H-1B status (or any other nonimmigrant or immigrant status of visa (specify as applicable)).

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## Limitations During Hiring (cont.)

- May I ask an applicant how long their work authorization is valid, and may I then refuse to hire a job applicant whose employment authorization has a future expiration date?
  - Generally, no. Extreme caution must be used. An employer that inquires about the impending expiration of a job applicant's employment authorization status or document, or actually rejects an applicant or his or her proof of current authorization to work in the United States based on the future expiration of that individual's employment authorization, may violate the antidiscrimination provisions of IRCA, depending on the specific facts of that case.

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## Limitations During Hiring (cont.)

- May I terminate an employee for not disclosing that their ability to work in the United States is unrestricted?
  - Generally, no. Employers may enforce a policy requiring truthfulness on the job application for all of its employees, as long as the employer applies the policy consistently to all employees without regard to citizenship or national origin. However, employers may violate the antidiscrimination provisions of IRCA by refusing to hire or by firing an individual based on the fact that the employment authorization the individual presented for Form I-9 purposes has a future expiration date.

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## Limitations During Hiring (cont.)

- May I require all job applicants to be able to read, write and speak English?
  - Yes, but in limited circumstances and to limited degrees. Employers may not be deemed to have violated Title VII by requiring employees to be able to read, write and speak English if such skills can be considered a bona fide occupational qualification reasonably necessary to the normal operation of that particular business. To require employees to have certain English skills, there must be objectively verifiable job skills or aptitudes that are specifically related to a particular employee's position—the level of English proficiency required for potential hires should be commensurate with the level necessary to effectively perform the job for which the person applied.

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## Limitations During Hiring (cont.)

- May I require all job applicants to have a Social Security number?
  - Yes, but caution must be used in how you apply the policy. Employers may reject an applicant who does not have, will not obtain or cannot obtain a valid Social Security number for wage and withholding purposes, provided the policy is neutrally applied to all applicants. Unless the employer is enrolled in the E-Verify program, job applicants do not need to provide a Social Security number on the Form I-9. Even if the employer is enrolled in E-Verify, it is recommended that employers delay the E-Verification process for an applicant until the individual is able to provide a Social Security number and that the individual be allowed to work provided that they have completed a Form I-9 within the timing requirements for Form I-9 completion.

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## Limitations During Hiring (cont.)

- To the extent that an employer is requesting an employee's Social Security number (and not the actual card) for purposes other than to verify employment eligibility through the Form I-9 process, the E-Verify process or other means, the employer is unlikely to implicate the antidiscrimination provisions of IRCA. However, in order to avoid the appearance of discrimination under IRCA, OSC recommends that employers clearly communicate the basis for their request for the applicant's Social Security number (e.g., W-2 completion) and to the extent possible, separate such requests from the employment eligibility (e.g., I-9) process. Employers who make such requests must do so consistently irrespective of citizenship status or national origin of applicants and employees, and should develop a process for individuals that have not yet received Social Security numbers. As cautioned by the Internal Revenue Service, there is no federal law that prohibits either the employment of, or payment of wages to, a person solely because the person lacks a Social Security number.

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## Limitations During Hiring (cont.)

- May I implement a policy of hiring only U.S. citizens?
  - Only in limited circumstances may employers restrict their hiring to only U.S. citizens. Employers have been allowed to limit hiring to U.S. citizens only where it is necessary to comply with a federal, state or local law, regulations, executive order or government contract, or where the U.S. Attorney General determines that it is essential to U.S. interests for an employer to implement such a policy in order to do business with a federal, state or local government or agency thereof.

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## Limitations During Hiring (cont.)

- May I choose to hire a U.S. citizen over hiring another protected individual?
  - Where a U.S. citizen and an IRCA-protected foreign national are equally qualified, an employer does not violate IRCA by hiring the U.S. citizen. However, the employer must truly compare the credentials of the two individuals and cannot simply presume that the U.S. citizen is more qualified.
  - IRCA does not require an employer to hire a U.S. employee over an equally qualified non-U.S. worker who is authorized for employment in the U.S.

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## Limitations During Hiring (cont.)

- May I terminate an employee who originally provided false information regarding their ability to work lawfully in the United States if this misrepresentation is discovered after the employee actual authorization to work in the United States?
  - The Form I-9 rules do not require that you terminate the employee if the employee is now able to properly complete the Form I-9 process using their new documents, identity, etc.
  - There is a risk of a citizenship or nationality discrimination charge, or an overdocumentation charge if you terminate the employee.
  - However, if you have an honesty in hiring or employment policy, and have consistency applied this policy regardless of the type of dishonesty, position, national origin, etc. of employees, then employers could choose to terminate an employee in the situation described above .

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## Questions?



### Asking Questions

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## THANK YOU!

Thank you for attending our presentation.

If you have questions, please contact your Reinhart attorney, Ben or Jennifer.



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