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Unauthorized Employment of Aliens: Basics of Employer Sanctions

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Summary

The Immigration Reform and Control Act of 1986[1] (IRCA) sought to end unauthorized employment by imposing penalties on employers who knowingly hire or continue to employ aliens not authorized to work in the United States (e.g., illegal aliens and foreign tourists). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996[2] (IIRIRA) amended some of the provisions of IRCA by reducing the number of acceptable documents for completion of the Employment Eligibility Verification form (I-9) purposes, providing employers with the possibility of a good-faith defense against technical paperwork violations and providing some protection for employers who are part of multi-employer associations. This report summarizes the employer sanctions. This report will be updated as events warrant.

Background

Under IRCA, employers in the United States are prohibited from knowingly hiring an alien not authorized to work in the U.S.[3] Three types of conduct are specifically prohibited: (1) hiring, or recruiting or referring for a fee, an alien knowing he or she is unauthorized to work; (2) continuing to employ an alien knowing that he or she has become unauthorized; and (3) hiring any person (citizen or alien) without following the record keeping requirements of the Immigration and Nationality Act of 1952[4] (INA).

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[1] P.L. 99-603, 100 Stat. 3359. IRCA amended the Immigration and Nationality Act (codified as amended at 8 U.S.C. §§ 1101 *et. seq.*).

[2] P.L. 104-208, 110 Stat. 3009 (hereinafter IIRIRA).

[3] 8 U.S.C. § 1324a. For employment purposes, an "unauthorized alien" is one who is not at a particular time either: (a) lawfully admitted for permanent residence or (b) authorized to be so employed by law or by the Attorney General. 8 U.S.C. § 1324a(h)(3). Thus, the term covers, e.g., illegal aliens and certain aliens here temporarily whose status does not permit them to work (i.e., tourists).

[4] P.L. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-*et. seq.*)

IRCA also prohibits discrimination on the basis of citizenship status, sets penalties for document abuse and expands national origin discrimination.[5]

Employment Verification

Section 274(a)(1)(B) of the INA makes it illegal for an employer to hire any person, citizen or alien, without first verifying the person's authorization to work in the United States. Employers (and recruiters and referrers for a fee) must examine documents and attest that they appear to be genuine and relate to the individual. If a document does not reasonably appear on its face to be genuine and to relate to the person presenting it, the employer may not accept it. Under INA § 274B, employers may not specify which document(s) the person must present. The INA and applicable regulations provide for three categories of documents: (1) those that establish both identity and employment eligibility;[6] (2) those that establish identity only;[7] and (3) those that establish work eligibility only.[8] IIRIRA reduced the number of documents acceptable for I-9 purposes from those allowed under IRCA.

An employer can terminate an employee who fails to produce the required document(s), or a receipt for a replacement document(s) (in the case of lost, stolen or destroyed documents), within three business days of the date employment begins. However, these practices must be applied uniformly to all employees. If an employee presents a receipt for a replacement document, he or she must produce the actual document(s) within 90 days of the date employment begins.

An employer is liable under the INA for "knowingly" hiring unauthorized aliens, or for continuing to employ such aliens after learning that they are not authorized to work in the United States. The law defines an "unauthorized alien" as an alien who is not either

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[5] The anti-discrimination provisions of IRCA apply to employers of four or more employees. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* also prohibits national origin citizenship discrimination but applies only to employers of fifteen or more employees. Thus, only employers of three or fewer employees are not subject to anti-discrimination statutes.

[6] Documents establishing both identity and employment eligibility include a U.S. passport; an alien registration receipt card or permanent resident card, Form I-551; a foreign passport with a temporary I-551 stamp; an employment authorization document such as Form I-766, Form I-688, Form I-688A, or Form I-688B; and in the case of a nonimmmigrant alien authorized to work for a specific employer, a foreign passport with the Form I-94 bearing the same name as the passport and indicating an endorsement of the alien's nonimmigrant status, and the name of the approved employer with whom employment is authorized as long as the period of employment has not expired and the proposed employment is not in conflict with any restrictions on the I-94.

[7] Under INA § 274A(b)(1)(D), documents establishing identity include a driver's license or identification document issued by a state, federal or local government containing a photo or other identifying information; or for individuals under age 16 in a state that does not issue an appropriate identification document, documentation of personal identity found by the Attorney General to be reliable.

[8] Under INA § 274A(b)(1)(c), acceptable documents in this category include a social security card or other documentation found acceptable by the Attorney General that evidences employment authorization.

a lawful permanent resident or an alien authorized for employment by the INS.[9] The term "knowledge" is construed broadly and includes not only actual knowledge but also "constructive" knowledge (which may fairly be "inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition.")[10]

Good-Faith Exception

Under INA § 274A(a)(3), a person or entity that establishes that it has complied in good faith with the requirements of the employment verification obligations has an affirmative defense to a charge that it has violated the provisions.[11] IIRIRA also allows an employer a good faith defense when the employer is found to have made technical or procedural errors in preparing or completing Form I-9.[12] IIRIRA requires that if the employer made a good faith attempt to comply, the government must explain the problem to the employer and allow the employer at least 10 business days to correct it.[13] If the employer fails to correct the error, sanctions may be imposed. Section 274A(b)(6) does not provide the employer with a good faith defense if it has engaged in a pattern or practice of violations of this law.[14]

Sanctions

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (ICE) is authorized to conduct investigations to determine whether employers have violated the prohibitions against knowingly employing unauthorized aliens and failing to properly complete, present or retain Employment Eligibility Verification forms (Form I-9) for newly hired individuals. Any person or entity may file a signed complaint alleging a violation of INA § 274(A) with the ICE office having jurisdiction over the business or

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[9] 8 U.S.C. § 274A(h)(3).

[10] For example, in *Mester Manufacturing Co. v. INS*, 879 F.2d 561 (9th Cir. 1989), an employer was orally notified by the then INS that he had accepted fraudulent documentation from several employees in completion of their I-9's. The employer argued that mere oral representations, even when made by the INS, should not impute knowledge to the employer. The Ninth Circuit rejected this argument and held that once the employer was made aware of the problems with the employee's documentation, the knowledge requirement was satisfied, regardless of how this knowledge was obtained. *See*, 8 CFR § 274a.1(l)(1)(listing situations of constructive knowledge).

[11] *See*, *U.S. v. Tuttle's Design Build, Inc.*, 2 OCA-HO 270 (8/30/91)(stating that a good faith defense may be raised if the employer shows that (1) an examination of the employee's documents was conducted, in order to establish the individual's identity and employment eligibility; and (2) that the pertinent I-9 form concerning that individual was properly completed). The employer may not argue good faith compliance with the verification requirements if the documents presented are clearly counterfeit, forged, or do not relate to the employee.

[12] Examples of technical errors include (1) a missing date or address on the form or (2) the employee did not make an attestation.

[13] INA § 274A(b)(6).

[14] A pattern or practice violation refers to regular, repeated, and intentional activities. 8 CFR § 274a.1(k).

residence of the alleged violator. The complaint must contain specific information as to both the complainant and the potential violator and detailed factual allegations including the date, time and place of the alleged violations or conduct alleged to constitute a violation of the act. ICE may conduct an investigation for violations on its own initiative or as a result of having received a complaint. If ICE determines after an investigation that there has been a violation, ICE may issue and serve a Notice of Intent to Fine[15] or a Warning Notice.[16]

Employers who fail to properly complete, retain,[17] and/or present Forms I-9 for inspection as required by law may be subject to a civil penalty for violations ranging from $110 - $1,100 per employee whose Form I-9 is not properly completed, retained, and/or presented.[18] Factors considered in setting the fine level are the size of the business, the employer's good faith, the severity of the violation, and the employer's history.[19] Also, the Attorney General can bring a district court action seeking equitable relief (i.e., permanent injunction, etc.).

For a violation of INA § 274A(a)(1)(A) or (a)(2), an employer can face: (1) $275 - $2200 fine for each unauthorized individual;[20] (2) $2,200 - $5,500 for each employee if the employer has previously been in violation;[21] (3) $3,300-$11,000 for each individual if the employer was subject to more than one cease and desist order.[22]

Under INA § 274A(f), employers convicted of having engaged in a pattern or practice of knowingly hiring unauthorized aliens or continuing to employ aliens knowing that they are or have become unauthorized to work in the United States, after November

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[15] In cases where a notice is issued, employers may request a hearing within 30 days of service of the NIF. Employers may contest the notice before an Administrative Law Judge of the Office of the Chief Administrative Hearing Officer (OCAHO), Executive Office for Immigration Review, U.S. Department of Justice. Hearing requests must be in writing and filed with the ICE office designated in the notice. If a hearing is not requested within the 30-day period, ICE will issue a Final Order to cease and desist and to pay a civil money penalty. Once a Final Order is issued, the penalty is unappealable. If a hearing is requested, ICE will file a complaint with OCAHO to begin the administrative hearing process which may end in settlement, dismissal, or a Final Order for civil money penalties.

[16] The Notice must contain a statement of the basis for violations and the statutory provisions alleged to have been violated.

[17] For I-9 must be retained by an employer for the later of three years after the date of hire or one year after the individual's employment is terminated. 8 CFR § 274a.2(b)(2).

[18] 8 CFR § 274a.10(b)(2). Pursuant to the Debt Collection Improvement Act of 1996 (P.L. No. 104-134), an adjustment of civil monetary penalties occurs at least once every four years. As such, increases to civil monetary penalties regarding employer sanctions became effective on September 29, 1999.

[19] 8 CFR § 274a.10(b).

[20] 8 CFR § 274a.10(b)(1)(A).

[21] 8 CFR § 274a.10(b)(1)(B).

[22] 8 CFR § 274a.10(b)(1)(C).

6, 1986, (e.g. expiration of work authorization), may be fined up to $3,000 per unauthorized employee and/or face up to six months of imprisonment.

Unfair Employment Practice

It is an unfair immigration-related employment practice for an employer to discriminate against protected individuals with respect to hiring, recruitment (referral) for a fee, or discharging from employment because of that person's national origin or citizenship status.[23] The term "protected individual" is defined as an individual who is a U.S. citizen or national or an alien lawfully admitted for permanent residence, a temporary resident under § 210(a) or § 245A(a)(i), a refugee under § 207, or an asylee under § 208.[24] However, it is not an illegal employment practice, to prefer an American citizen over an alien if both are equally qualified.[25]

Other circumstances allow for legitimate discrimination, such as hiring only U.S. citizens in order to comply with a government contract, or where an agency or department of the federal, state or municipal government so mandates.[26] For example, many public school districts require hiring only U.S. citizens as teachers.

It is also a discriminatory practice to retaliate against an employee who intends to file or has filed a charge or who testified or participated in an investigation or proceeding under this section, or to interfere with an individual's rights under this section.[27]

Document Fraud - INA § 274C

Persons who knowingly use fraudulent identification documents — either identity documents that were issued to persons other than themselves or false attestations for the purpose of satisfying the employment eligibility verification requirements — may be fined and/or imprisoned up to five years.[28] It is unlawful for any person or entity knowingly to engage in any of the following activities:

- Forge, counterfeit, alter, or falsely make any document for the purpose of satisfying a requirement of the INA or to obtain a benefit under the INA;

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[23] INA § 274B(a).

[24] INA § 274B(a)(3). The term does not cover an alien who fails to apply for naturalization within six months of the date the alien is first eligible to apply or within six months after the date of the enactment of this section or an alien who applied timely but has not been naturalized as a citizen within two years after the date of application unless the alien can establish that he or she is actively pursing naturalization.

[25] INA § 274B(a)(4).

[26] INA § 274B(a)(2).

[27] INA § 274B(a)(5).

[28] 8 U.S.C. § 1324c(e).

- Use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered or falsely made document for the purpose of satisfying an INA requirement or to obtain a benefit under the INA;
- Prepare, file, or assist in preparing or filing an application for benefits or any document required under the act with knowledge or reckless disregard of the fact that such applications or document was falsely made.[29]

This provision applies to "any person or entity." As such, it would include attorneys or anyone else who prepares and/or files applications with ICE. Civil penalties for such actions include fines of: (1) $275 - $2,200 for each document used, accepted or created and each instance of use, acceptance or creation[30] and (2) $2,200 - $5,500 for each document that is the subject of a violation where the person or entity was previously subject to a cease and desist order.[31] Where an entity is composed of physically separate subdivisions responsible for hiring, each such subdivision is considered a separate entity.[32]

In addition, criminal penalties may apply. For example, anyone who fails to disclose or who conceals or covers-up the fact that he or she prepared for a fee an application which was falsely made shall be fined, imprisoned for up to five years or both.[33] Moreover, anyone convicted of failure to disclose the preparation of an application for immigration benefits, who knowingly or willfully prepares or assists in preparing an application for benefits under the INA, whether or not for a fee, shall be fined, imprisoned up to fifteen years or both, and prohibited from preparing or assisting in preparing any other such application.[34]

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[29] INA § 274C(a)(5). "Falsely make" is defined as preparing or providing an application or document "with knowledge or reckless disregard of the fact that the application or document contains a false, fictitious, or fraudulent statement or material representation, or has no basis in law or fact, or otherwise fails to state a fact which is material to the purpose for which it was submitted." INA § 274C(f).

[30] 8 CFR § 270.3(ii)(A).

[31] 8 CFR § 270.3(ii)(B).

[32] 8 CFR § 270.3(ii)(C).

[33] INA § 274C(e)(1).

[34] INA § 274C(e)(2).