

DHS's refocused worksite enforcement strategy targets employers

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Confirming that employment is one of the “root causes” of illegal immigration, the Department of Homeland Security (DHS) has announced a refocused worksite enforcement strategy prioritizing criminal and civil actions against employers that knowingly hire undocumented workers over actions against the illegal workers themselves.

Enforcing immigration through criminal prosecution of employers. As outlined in an April 30, 2009, DHS [fact sheet](#), the strategy reflects a Department-wide focus that targets, through criminal prosecution, employers who cultivate illegal workforces. This signals a shift away from the Bush Administration's worksite enforcement policy, which focused on large-scale raids designed to arrest and deport undocumented workers. There were more than 6,000 arrests related to worksite enforcement in 2008, but only 135 employers were arrested.

While Immigration and Customs Enforcement (ICE), DHS's largest enforcement arm, will focus its resources on the criminal prosecution of employers that knowingly hire undocumented workers, it will continue to arrest and process for removal any undocumented workers who are found in the process.

ICE will also use all available civil and administrative tools, including fines and debarment, to deter illegal employment. In addition to evidence indicating criminal conduct such as trafficking, smuggling, harboring, visa fraud, identification document fraud or money laundering, ICE will look for evidence of worker mistreatment. Before conducting a worksite enforcement operation and arresting workers at the site of employment, ICE will obtain indictments, criminal arrest or search warrants, or a commitment from the US Attorney's office to prosecute the employer. In addition, existing humanitarian guidelines governing ICE's behavior in raids affecting 150 or more employees will now apply to worksite enforcement operations impacting 25 or more undocumented workers.

How should employers respond? DHS's refocused worksite enforcement strategy serves as a helpful reminder for employers to review their Form I-9 compliance obligations. ICE will be looking for undocumented workers who have secured jobs by presenting false documents for the employment verification process. Form I-9 non-compliance can result in fines of varying amounts, forfeiture of company assets and criminal prosecution. And now, more than ever, ICE will hold employers, including individual executives, managers and HR professionals, accountable for knowingly hiring undocumented workers.

Is your company using the correct Form I-9? Under the Immigration Reform and Control Act of 1986 (IRCA), all employers are required to verify the identity and employment authorization of each individual they hire for U.S. employment, regardless of that individual's citizenship. Employers and employees must complete the Form I-9, retain it for a statutorily established period of time (three years after the employee's date of hire or one year after the date that employment is discharged) and make it available for inspection to certain government officials. Form I-9s can be retained in paper, microfilm, microfiche or electronically.

The documents designated as acceptable for the Form I-9 are divided among three lists:

- List A—documents that establish both identity and employment authorization;
- List B—documents that establish only identity; and
- List C—documents that establish only employment authorization.

Employee completes Section 1. The employee completes Section 1, Employee Information and Verification, at the time of hire. DHS suggests that Section 1 be completed on or before the first day of employment, regardless of his or her immigration status. Section 1 includes basic information about the employee, such as the employee's name, address, birth date and Social Security number. It also asks the new employee to attest to his or her status: US citizen, lawful permanent resident or an alien authorized to work until a specified date. It is the employer's responsibility to ensure that every new employee properly completes Section 1 by his or her first day of work.

Employer completes Section 2. After physically examining the documents presented by the employee, the employer completes Section 2, Employer Review and Verification, and Section 3, Updating and Reverification (if applicable). Section 2 of the Form I-9 must be completed and signed by the employer within three business days of hire, whether the employer employs thousands of employees or only one. If the employment relationship will last less than three days, then the employer must verify the documents on the hire date. In Section 2, the employer attests that it has reviewed documentary evidence of the new employee's **identity** and employment **eligibility**.

Employer completes Section 3. Employers should complete Section 3 of the Form I-9 when updating and/or reverifying the employment authorization of an employee whose previous valid

authorization has expired. Employers must reverify the employment authorization of their employees on or before the work authorization expiration date recorded in Section 1.

While a Form I-9 update refers to simple name and address changes or for rehires (if the employee's items in lists A, B or C have not changed or expired), a reverification occurs when an employee, upon accepting employment, indicated that their employment eligibility is temporary. In this situation, employers must reverify the employment eligibility of such employees on or before their expiration date recorded in Section 1. When reverifying, employers **CANNOT** specify which documents they will accept from an employee. Employers should direct the employee to the "Lists of Acceptable Documents" on the Form I-9. The employee must present a document that shows either an extension of his or her initial employment authorization or new employment authorization. Employees can present any combination of acceptable documents—they need not present a new version of the same document that was first presented but subsequently expired. If the employee cannot provide proof of current employment authorization, the employer cannot continue to employ that person.

Form I-9 revisions. After delaying implementation once already, DHS announced that employers must begin using the revised [Form I-9 Employment Eligibility Verification](#) (Rev. 02/02/09), starting April 3. This is the result of a [rule](#) issued by DHS streamlining the employment eligibility verification process and revising the Form I-9. In addition, DHS revised its [Handbook for Employers, Instructions for Completing the Form I-9](#) (M-274), which has been modified to reflect the changes made to the Form I-9.¹

Expired documents no longer accepted. The revised Form I-9, among other things, continues DHS's trend of narrowing the list of acceptable documents to show both identity and work authorization. Most significantly, however, expired documents will no longer be accepted for Form I-9 verification purposes, meaning that all documents must be valid at the time they are submitted. Only unexpired documents or documents without an expiration date (*i.e.*, Social Security cards) will be accepted.

This is not a trivial change since, previously, employers could accept many expired documents, like US passports and driver's licenses. In making this change, DHS explained that it wanted to ensure that documents presented for use in the Form I-9 process were valid and reliably established both identity and employment authorization status. Expired documents may not demonstrate a valid status and are prone to tampering and fraudulent use.

In addition, certain documents have been removed and/or added to the Form's List of Approved Documents:

- **Documents that were removed:**

- Form I-688, Temporary Resident Card
- Forms I-688A and I-688B, outdated Employment Authorization Cards

USCIS no longer issues these cards and all that were in circulation have expired.

- **Documents that were added to List A as evidence of identity and employment authorization:**

- a temporary I-551 printed notation on a machine-readable immigrant visa in addition to the foreign passport with a temporary I-551 stamp
- valid passports for citizens of the Federated States of Micronesia and the Republic of the Marshall Islands, along with Form I-94 or Form I-94A, indicating nonimmigrant admission under the Compact of Free Association Between the United States and Micronesia or the Marshall Islands.

Other technical changes. For the first time, the Form I-9 also requires new employees to distinguish between a representation of US citizenship or non-citizen nationality. In particular, employees can attest to being either a citizen or noncitizen national of the United States. Noncitizen nationals are persons born in American Samoa, certain former citizens of the former Trust Territory of the Pacific Islands and certain children of noncitizen nationals born abroad.

Although prior regulations refer to temporary I-551 “stamps,” the State Department for several years has been affixing machine-readable immigrant visas (MRIVs) that contain a pre-printed temporary I-551 notation in the foreign passports of aliens immigrating to the United States. USCIS consequently updated the regulations to reflect this alternate temporary I-551 document with the pre-printed temporary I-551 notation on MRIVs.

Additionally, under both the preexisting Compacts with Micronesia and the Marshall Islands, and the Compacts as amended, most citizens of Micronesia and the Marshall Islands are eligible for admission to the United States as nonimmigrants. Such citizens of Micronesia and the Marshall Islands have the privilege of residing and working in the United States. Amendments to the Compacts include provisions that eliminated the need for citizens of Micronesia and the Marshall Islands to obtain an Employment Authorization Document (Form I-766). By adding to List A Micronesia and the Marshall Islands passports, with a valid Form I-94 or I-94A, citizens of Micronesia and the Marshall Islands will be able to use their passports in the I-9 process without the need to obtain a separate Employment Authorization Document.

Military identification card for Armed Forces employers. Since the release of the rule revising the Form I-9, DHS published a [rule](#) stating that a military identification card issued by the US Armed Forces (*i.e.*, the US Army, Navy, Air Force, Marine Corps, or Coast Guard) is

acceptable as a List A document (evidencing both identity and employment eligibility) if the employer is the Armed Forces and the Form I-9 is completed for the purposes of military enlistment. Aside from the Armed Forces, no other employer may accept the military identification card as a List A document. However, the military identification card still remains acceptable as a List B document (evidencing identity) for all employers.

The Form I-9 is available in English and Spanish. However, only employers in Puerto Rico may have employees complete the Spanish version for their records. Employers in the 50 states and other US territories may use the Spanish version as a translation guide for Spanish-speaking employees, but must complete the English version and keep it in their records. Employees may also use or ask for a translator/preparer to assist them in completing the form.

More information on the Form I-9 is available on USCIS's website at: <http://www.uscis.gov>. Paper copies of the Form I-9 can be ordered by calling USCIS at 1-800-870-3676.

Tips for using the revised Form I-9. Charles M. Miller, of the Miller Law Offices², provides the following timely tips for using the revised Form I-9:

- DO remember to complete Section 1 of the Form I-9 on the first day of employment; other than short-term employees (three days or less), employees have 72 hours to produce the Lists A or B and C documents, unless the employee produces a receipt for a replacement document. (**Note:** If an employee is unable to present the required document or documents within three business days of the date employment begins, he or she must produce an acceptable receipt in lieu of the acceptable document. This is called the “receipt” rule.³
- DO remember that the receipt rule is only for the receipt for the replacement of lost, stolen or destroyed authorization documents, not for renewals that have been filed but have not been issued.
- DO remember that all employees, except for short-term employees, may take advantage of the receipt rule.
- DO remember that after April 3, 2009, **ONLY UNEXPIRED DOCUMENTS FOUND ON THE NEW LISTS A, or B and C MAY BE VERIFIED OR REVERIFIED.**
- I-551 Permanent Resident Cards have an expiration date, but even though the card may be expired, it IS STILL CONSIDERED UNEXPIRED for the purposes of Form I-9 verification, by regulation.
- DO be aware that there are new tables of temporary employment authorization documents found on pages 8-9 of the M-274 that may be accepted IN ADDITION to the docu-

ments found on Lists A, B and C.

- DO NOT request specific documents; to do otherwise may violate the document abuse discrimination law.
- ONLY employers enrolled in E-Verify must require a social security number and a List B photo ID.
- DO remember to use the new Lists A and C for the reverification of the employment authorization documents of existing employees whose document(s) have expired.
- DO reverify on Section 3 of Form I-9; if you run out of room you may write the employee's name in section 1 and complete Section 2 of a currently valid Form I-9. You can also use Section 3 of a new Form I-9. Remember to attach the new Form to the previously filled-out I-9.
- DO NOT reverify an expired US passport or passport card, an Alien Registration Receipt Card/Permanent Resident Card (Form I-551), or a List B document that has expired.

Miller is one of three authors of a forthcoming Aspen Publishers title scheduled for release in August 2009. *Immigration Law in the Workplace* is the first and last book your company will turn to for immigration employment questions. *Immigration Law in the Workplace's* comprehensive, authoritative yet easy-to-read topical approach to current worksite enforcement and compliance issues is the most current on the market. For more information, call 1-866-745-9911 or visit <http://www.aspenpublishers.com>.

Form I-9 internal audits. Employers need to create and implement a Form I-9 compliance policy to minimize the likelihood of increased I-9 audits and worksite enforcement operations from the federal government. A key focus of any such policy is developing and implementing an I-9 self-audit program. David C. Whitlock, of Littler Mendelson⁴, recommends the following when conducting an internal audit:

- Generate a list of employees hired since November 6, 1986. It will be easier later if the list matches the order in which your I-9 forms are filed. The list should show last name, first name, date of hire, date of termination, and some distinguishing fact, *e.g.*, SSN or DOB, in case two employees have the same name.
 - Ideally, individuals with more than one hire date will appear on the list once for each date of hire, and each prior hire would also show a termination date, so you can determine which forms you don't need to keep.
- Calculate the retention dates for persons on the list by comparing date of hire, date of ter-

mination, and date of your self-audit. The easiest way to do this is to write down the date that is one calendar year prior to the audit date. That becomes the target termination date. Then subtract two years to get the target hire date. (Forms can be discarded for persons hired before the target hire date whose employment ended before the target termination date.) Highlight or cross off the names of the employees on the list whose I-9 forms need no longer be retained.

- Pull forms for highlighted names from the I-9 file. Do not throw them away until someone else has confirmed that you need no longer retain the form by confirming that the two retention tests (three years from date of hire and one year from date of termination) have been met. In addition, you may find information on a form that need not be kept which may be useful in completing a form which was completed later (perhaps because of re-hire) for the same person.
- Begin checking I-9 forms, working in the same order as the names on the list. As each form is reviewed, put a check mark on the list next to the appropriate name. Set aside forms for whom there is no name on the list as you go through it, as these are probably forms for people whose names changed.
- Use some version of “stick-on” notes to show problems with the forms. Be aware that forms may have multiple problems.
- Begin correcting forms that have been reviewed. If you have retained photocopies of documents, many form deficiencies may be cured. In addition, information from employee personnel files may be helpful.
 - If anything is added to Section 1 of the form, remember to complete the Preparer/Translator portion of the form. If using the new form, use the audit date as the date to insert in the Preparer/Translator portion of the form, since it is better to have a “late completion” problem than missing information on the form. If information is added to the form, try to use the same color ink. Do not use “White Out” to cover up incorrect information or for any other purpose; instead simply cross out the incorrect information. If you are adding information to Section 2 of the form, it is optional to include the words “Self-Audit” and the date of the audit.
- If necessary, ask employees to sign or date Section 1 of the form or present correct documents.
- As forms are corrected, cross out deficiencies on the “stick-on” notes. When all items are crossed out, remove the “stick-on” note. When the form is correct, re-file it. If you need to know more about your overall compliance level, annotate or highlight the employee list to show forms which have been corrected. This may help identify recurring problems

for purposes of future staff training.

- There may be some forms which simply cannot be cured. For example, you may have terminated employees from whom you accepted invalid documents, but the form cannot yet be discarded. Annotate the list to show a “major” problem, remove the “stick-on” note, and re-file the form.
 - Note that you may wish to create a “tickler” file or some other system for reminding you to discard defective forms when you no longer need them.
- When you have reviewed all forms and corrected all deficiencies, review the annotated list to see what forms you are missing. See if any of the forms you set aside for lack of a name on the list should be filed under a different name. Consider checking the personnel file to see if a name change has occurred. Any current employees for whom no form can be found should be called in immediately to complete a form.
- If a significant number of forms are missing or defective for terminated employees, consider keeping separate I-9 files for current and terminated employees. This may be helpful during the process of discarding forms periodically, and there is less likelihood that ICE will ask to see forms for terminated employees if the forms for current employees are in good shape.
- Add up the number of missing forms and major problems to calculate your exposure.
- Discard forms that you are certain you need not keep.
- Plan your next I-9 internal audit.

In a May 2009, Immigration Law Alert, Law firm [Nixon Peabody](#) recommends the following additional requirements for a Form I-9 compliance policy:

- **Training for all personnel involved** in worker hiring to ensure a consistent level of knowledge of employer obligations;
- **Monitoring of contractor and subcontractor compliance** where a risk for imputed liability exists;
- **Systematic analysis of customer and vendor relationships** to assess contractual employment obligations and potential for imputed liability;
- **Careful tracking of employees with temporary work status** and timely renewal, where

appropriate, of work authorization;

- **Assessment of “no-match” letters** received from the Social Security Administration and appropriate response to same; and
- **A strategy for handling an ICE investigation** should one materialize, including procedures for contacting legal counsel, dealing with federal agents, information dissemination, and employee concerns.

What are the penalties for noncompliance? Remember, employers are responsible for properly completing, retaining and/or making available for inspection Form I-9s as required by law. Absolutely every employee who is hired for employment in the US, regardless of citizenship or national origin, must complete Form I-9. Employers may face civil money penalties in an amount of not less than \$110 and not more than \$1,100 per violation on each Form I-9.

More serious charges. An employer’s failure to complete or retain I-9 forms may also lead to more serious charges of knowingly hiring undocumented workers resulting in significant civil and criminal penalties. The potential fines against employers who knowingly hire or continue to hire illegal workers range from a civil fine of \$375 to \$3,200 per worker for the first offense, \$3,200 to \$6,500 per worker for the second offense, and \$4,300 to \$16,000 per worker for every additional offense. Employers convicted of having engaged in a pattern-or-practice of knowingly hiring undocumented workers or continuing to employ workers knowing that they are or have become unauthorized to work in the United States may be fined up to \$3,000 per unauthorized employee and/or face up to six months of imprisonment.

Document fraud. In addition, document fraud means knowingly engaging in any of the following activities:

- (1) accepting a forged or counterfeit document for verification purposes;
- (2) altering or falsely making any document for the purpose of satisfying IRCA’s verification requirements; and
- (3) fraudulently preparing, filing or assisting in preparing or filing a Form I-9.

Remember, document fraud applies to “**any person or entity**,” so employers, supervisors, managers and attorneys can be charged with violating IRCA’s document fraud provisions. Civil penalties for such document fraud include fines of: \$375-\$3,200 for each document used, accepted or created and each instance of use, acceptance or creation; and \$3,200-\$6,500 for each document that is the subject of a violation where the person or entity was previously subject to a cease-and-desist order.

While the Obama Administration appears to be focusing on an “enforcement-first,” employer sanctions immigration approach, do not be surprised if comprehensive immigration reform is

once again on the horizon. The Administration invited members of Congress to the White House on June 25 to discuss comprehensive immigration reform. While health care reform will likely take first priority, recent statements from the Obama Administration and Congressional leadership indicate that immigration reform is still a major legislative priority. What does this mean for employers? Any part of an Obama Administration [immigration policy](#) will focus on “removing incentives to enter the country illegally by preventing employers from hiring undocumented workers,” so employers should be mindful of their Form I-9 compliance obligations and be sure to follow them in order to avoid the potential for serious civil or criminal penalties.

¹ For the first time, the handbook also provides an explanation of the federal government's E-Verify program. E-Verify, administered by US Citizenship and Immigration Services, in partnership with the Social Security Administration, is a voluntary, web-based program that allows employers to verify that their employees are authorized to work in the United States.

² Miller helped to establish immigration law as a field of specialization in California, serving on the State Bar's first Advisory Commission as a member and chairman. A former Immigration and Naturalization Service attorney, he has served on the American Immigration Lawyers Association's (AILA) Board of Directors, as the Southern California Chapter Chair, and as a member of the California State Bar's Board of Legal Specialization. He was also a recipient of the AILA's Jack Wasserman Memorial Award for excellence in immigration litigation.

³ There are three types of acceptable receipts. (1) A receipt for a replacement document when the document has been lost, stolen or damaged. The receipt is valid for 90 days, after which the individual must present the replacement document to complete Form I-9. (2) A Form I-94 or Form I-94A containing a temporary I-551 stamp and a photograph of the individual, which is considered a receipt for the Permanent Resident Card (Form I-551). The individual must present Form I-551 by the expiration date of the temporary I-551 stamp; or within one year from the date of issuance of Form I-94 or I-94A if the I-551 stamp does not contain an expiration date. (3) A Form I-94 or I-94A containing an unexpired refugee admission stamp. This is considered a receipt for either an Employment Authorization Document (Form I-766) or a combination of an unrestricted Social Security card and List B document. The employee must present acceptable documentation to complete Form I-9 within 90 days after the date of hire or, in the case of reverification, the date employment authorization expires. The "receipt" rule does not apply to individuals who present receipts for new documents following the expiration of their previously held document.

⁴ David Whitlock is a shareholder of the national labor and employment firm Littler Mendelson, based in the firm's Atlanta, Georgia, office. Since 1986, his practice has focused on immigration and nationality law, with an emphasis on global immigration and employee verification. His practice includes extensive visa work, handling both temporary and permanent visa cases, as well as advice regarding compliance with the I-9, discrimination and document abuse provisions of IRCA and litigation arising under that statute. Whitlock is a frequent lecturer and presenter on immigration topics and he also advises employers regarding best practices in employment-related topics.