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I-9 Compliance Guidelines

The I-9 process is designed to require employers to verify the identity and work eligibility of individuals who present themselves for employment. At the same time, the form is designed to prevent unnecessary or discriminatory inquiry into the employee's nationality. As with many employment issues, it is critical for employers to be familiar with the rules and requirements of the I-9 process in order to avoid expensive litigation and possible fines.

There are generally three instances where I-9 and immigration issues arise in a hiring of foreign professionals:

- ***Recruitment***: What questions can you ask regarding nationality and visa status; what questions can you absolutely ***not*** ask.
- ***Job Offer***: What visa must you obtain. This issue was discussed in the Part 1 of this Handbook.
- ***Hiring Stage***: I-9 process.

Each of these phases has its own rules.

Recruiting Inquiries:

Can:

Ask if an applicant is "currently authorized to work in the United States on a full-time basis for any employer."

- If the applicant answers "yes," you may then ask "will you require now or in the near future employment visa sponsorship (i.e., H-1B visa).
- You ***may not*** ask what their employment eligibility is based on.

- If the applicant answers "no" to your original question whether they are currently authorized to work in the United States on a full-time basis, you may ask what their current immigration status is.
- These questions, if asked, should be asked of everyone, not just "foreign-looking" or "foreign-sounding" candidates.

Cannot:

- Ask if the person is a U.S. citizen.
- Ask how the person obtained citizenship.
- Ask if the person is a permanent resident alien (i.e., green card holder).
- Ask what kind of work authorization the person has.
- Ask to see the green card.
- Ask what the person's visa status is.
- Ask what the person's home country is.
- Ask when their work authorization expires.
- Ask if the applicant has "unlimited work authorization" or work authorization for an "indefinite period of time."

  Under IRCA employers cannot reject "protected individuals" because of time limited employment eligibility, even if the remaining eligibility is short. For example, asylees, refugees, and temporary resident aliens or applicants for temporary residents may have work authorization that is only valid for six to eighteen months from the time that it is obtained. However, all of these people are able to obtain automatic extensions of work authorization and are, protected under IRCA as "intending citizens" of the United States. Thus, the better practice is never even to inquire as to the remaining time left on work authorization, since it is not relevant at the recruiting or interview stage.
- Ask what the person's native language is.
- Ask how the person acquired the ability to read, write or speak in that language.
- Ask if the person intends to become a citizen of the United States.
- Ask if the person intends to remain permanently in the United States.

  Note: Persons who would need an employer to petition to obtain an H-1B visa or a green card are not "protected individuals" under IRCA. Therefore, the employer is free to provide this service or not provide this service. ***However***, the employer should not have a policy that has a disproportionate impact on employees of certain national origins. In other words, you may not apply for green cards only for nationals of certain countries and not nationals of other countries.

I-9 Verification

The following is a list of "dos and don'ts" to be relied upon in the I-9 verification process.

Do:

- Perform I-9 processing at time of hire, not at time of interview. (Note: Some employers have employees fill out the I-9 at the time of interview. This is not, in and of itself, improper as long as all interviewees are required to fill out the I-9. ***However, this practice is not advisable since a rejected applicant could bring a claim alleging that information on the I-9 was used for unlawful purposes).***
- Accept all documents listed on the I-9 form that "reasonably appear to be genuine," and "relate to the individual."
- Set up a tickler system to track cases that must be reverified.
- Reverify the employee's I-9 documents if given a temporary stamp of permanent residence, rather than the actual green card.
- Keep I-9 forms separate from personnel files so that they may be easily reviewed and produced. It also makes it easier to destroy after three years from date of hire or one year from date of termination, whichever is later.
- Keep terminated employees' I-9 forms separate from current employees.

Do Not:

- Specify which documents an employee may present in connection with the I-9 verification.

  Note: Employers may request social security numbers at the time of application as long as ***all*** applicants are required to provide a social security number and that any applicant who cannot provide one be given a reasonable time to do so.
- Refuse to accept specific documents.
- Ask to see a document with an expiration date if the document the applicant presents does not have an expiration date on it.
- Ask for actual I-9 documents rather than receipts for such documents. If an employee presents receipts for the replacement of any of the documents listed on an I-9, that person has 90 days from the date of hire to submit the original documents, and may work in the interim.

  Note: A notice that an application for work authorization has been ***filed*** with CIS, but has not yet been adjudicated, is not a "receipt" for this purpose. Rather, it applies to the replacement of an existing document that has been lost, stolen or damaged.
- Ask F-1 students who are still performing practical training while in school to verify that they are enrolled full time. This would be considered document abuse under IRCA.
- Fire an employee at the time of reverification if their work authorization had expired without first giving that person a chance to show that he or she is still eligible to continue working. Generally, an employee will have three days to present I-9 documents. This

policy must be consistently applied to all employees to prevent the possibility of national origin discrimination.

In summary, recruiters should obtain as little information as possible about citizenship status, employment authorization or national origin before actually hiring the applicant. Once the applicant has been hired, the person responsible for performing I-9 verification should strictly follow the instructions on the I-9 form and allow the employee to select whatever documents within each column s/he chooses to present and not inquire any further about documents which "reasonably appear to be genuine on their face."

I-9 Compliance

Changes in I-9 Procedures

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRA-IRA), passed October 1, 1996, made several changes in the areas of I-9 compliance:

- § reduced the list of acceptable documents for I-9 purposes to evidence identity and work eligibility.
- § reduced penalties for employers who commit "technical" I-9 paperwork violations.
- § required that employers must have discriminatory intent to be liable for "document abuse" violations.
- § created new civil and criminal penalties to deter document fraud.
- § increased number of investigators to enforce I-9 compliance.
- § created a new pilot program to telephonically verify, based on government data bases, the work authorization of employees prior to hiring.
- § barred government contracts to employers who knowingly hire or continue to employ illegal aliens.

CIS has only issued interim regulations implementing these changes. No final regulations have been released. This section will review each of these changes in detail.

Acceptable I-9 Documents

First, the list of acceptable documents an employee can present for I-9 purposes to evidence identity and/or work eligibility has been reduced by the 1996 legislation in hopes of simplifying an employer's compliance with these requirements. However, this change applies only with respect to hirings occurring on or after September 30, 1997. ***Although these revisions are currently in effect, enforcement has been postponed pending issuance of final regulations and the release of a new I-9 form, with the reduced list of documents. No action will be taken against employers for relying on documents listed in the current version of the form.***

With regard to List A Documents, which evidence both employment eligibility ***and*** identity, the new law ***removes***:

- § The Certificate of US Citizenship (CIS form N-560 or N-561);
- § The Certificate of Naturalization (CIS form N-550 or N-570);

- § Reentry Permit; and
- § Refugee Travel Document.

As a result of all of these changes, the revised List A documents are:

- § US Passport, expired or unexpired;
- § Alien registration receipt card (green card) - CIS form I-551;
- § Employment Authorization Cards; and
- § Unexpired foreign passport with I-551 stamp or attached I-94 Arrival-Departure Record.

List B Documents (documents which establish identity only), are now limited to drivers license or state issued ID card. School ID cards, voter registration cards, U.S. military cards, draft records, military dependent ID cards, U.S. coast guard merchant marine cards and U.S. citizen ID cards (CIS form I-197 or I-179) are no longer acceptable.

Lastly, the 1996 law ***removes*** the following List C Documents, which evidence employment eligibility only:

- § Certificates of birth issued by local government authorities in the United States
- § Unexpired employment authorization document issued by CIS.

As revised, List C Documents establishing employment eligibility are limited to:

- § Social security number card with no employment restriction; and
- § Form I-94 Arrival/Departure Record.

Recognizing that some people may have difficulty presenting something from this reduced list, CIS reiterated its "receipt rule," identifying three instances when receipts are acceptable in lieu of a required document. The employee must present:

- § ***Application for replacement of lost or stolen documents***. Please note that an application for initial work authorization or extension of existing but expired work authorization is not an application for "replacement" document.
- § ***I-94 Card that CIS has marked with a "Temporary I-551" stamp*** is a receipt for Form I-551 until the expiration of the stamp or if no expiration, within one year from date of admission. Then it would need to be reverified.
- § ***I-94 Card indicating refugee status***. If individual presents a I-94 card with a refugee or asylee admission stamp, then they have 90 days to present either a Form I-688 or I-766 EAD (List A) or a social security card containing no employment restrictions (List C) and some other List B document. However, both asylees and refugees are authorized to work "incident to status" and are NOT required to present a work authorization card to be eligible to work.

"Good Faith" Compliance Attempts

Second, the 1996 legislation adds a "good faith" defense for employers who have committed merely technical or procedural errors in completing the I-9 form. Under the change in the law, an employer cannot be fined for merely technical or procedural errors in completing the form, unless the CIS or the Department of Labor has first explained the error to the employer and given the employer 10 business days to correct the error. Only if the error has not been corrected will CIS or DOL be eligible to fine

the employer. Please note that this revision to the law only applies to persons hired and I-9 forms completed after September 30, 1996. Technical and procedural violations on I-9 forms completed prior to September 30, 1996, but still required to be retained under the law, would not receive the benefit of the 10-day cure rule.

It is critical for employers to distinguish between "technical or procedural errors" versus "substantive" errors. Examples of "technical or procedural" errors that could be corrected within a 10-day cure period are:

- The employee failing to date Section 1 of the application;
- The employee failing to complete maiden name, address or birth date in Section 1;
- The employer failing to date Section 2; and
- The employer failing to complete the date of hire in the middle attestation of Section 2.

Substantive violations that are not curable are:

- Failure of employee to complete Section 1 attesting to citizenship or immigration status.
- Failure of employee to sign Section 1.
- Failure of employer to review and document either a List A or a List B and List C document in Section 2.
- Failure of employer to sign Section 2.

Requirement of "Discriminatory Intent"

A third revision made by the 1996 law amends the anti-discrimination statute. Now, for an employer to be liable for "document abuse" (asking for more or different documents than required for work authorization), the employee must show that the employer ***intended*** to discriminate based on national origin or citizenship status. This "intent" requirement only applies to employer requests for documents on or after September 30, 1996. The goal of this revision is to ensure that employers not be fined for document abuse violations if the employer's actions were motivated by a good faith effort to comply with IRCA's verification requirements.

Document Fraud

Fourth, despite the seemingly pro-employer revisions, you can now be found civilly liable for document fraud if you prepare, file or assist another person in preparing or filing an application for benefits with knowledge or in reckless disregard of the fact that such application or document was falsely made. This law would cover signing an I-9 form when you know that the documents presented are false or insufficient, or you know that the person is not authorized to work in the U.S. In fact, the law created a criminal penalty of up to 5 years in jail, on top of the civil penalty, if you fail to disclose your role as preparer of a false document. For example, if you as an employer, complete an I-9 for someone who does not speak English (or not very well), but fail to disclose your role as preparer by signing the certification, then you could be criminally liable if the I-9 is considered "falsely made."

Increased Enforcement

Fifth, the law also made it a priority to focus on work site enforcement initiatives and justified increasing the number of agents and support staff who investigated I-9 compliance exclusively from 317 to 701. Although most of the increased enforcement will focus on industries traditionally associated with illegal employment, including food processing, construction and agricultural production, this is still a substantial increase in the pressure by CIS on employers to establish proper I-9 procedures.

Government Contractors

Finally, the last major change in this area is that President Clinton issued an executive order which places additional penalties on government contractors who violate IRCA's prohibitions against the knowing employment or continued employment of unauthorized aliens. Such employers will be barred from procuring government contracts for one year. Note that this bar does not apply to paperwork violations, only to hiring violations. Under the order, the knowing employment of even one unauthorized alien in a pool of several thousand employees would still be sufficient to trigger the bar.

CONCLUSION

This Handbook is published by the Immigration Practice Group ("IPG") of McCandlish Holton PC. The IPG of McCandlish Holton PC regularly advises U.S. and foreign companies and U.S. universities on all aspects of hiring and transferring international personnel. Immigration Specialists in the IPG are Mark B. Rhoads, Helen L. Konrad, and Jennifer Minear.

All of the technical details, regulations and procedures regarding immigration cannot be explained in this brief Handbook. The highlights discussed above outline strategies and identify issues regarding the employment of foreign personnel. Current U.S. visa rules, labor and immigration laws, and bilateral trade and investment treaties offer many opportunities to transfer essential foreign personnel to U.S. operations.

This handbook should not be considered legal advice. Immigration is a complex area of law, and particular issues should be addressed with experienced immigration counsel.

For further information on our Immigration Practice Group or the materials contained within this Handbook, please contact:

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