



An IMA InfoServ Article

Immigration Reform and Control Act

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InfoServ Title: Employer Guidelines for Complying with the Immigration Reform and Control Act

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Guidelines for Complying with the Immigration Reform and Control Act

Highlights of the Act

- **Amnesty Provisions**

The Immigration Reform and Control Act ("IRCA" or the "Act") conferred legalized resident status to illegal aliens who have lived continuously in the United States since January 1, 1982.

- **Prohibitions and Penalties**

The Act prohibits the employment of illegal aliens and imposes criminal and civil penalties (fines between \$250 and \$10,000, and six months imprisonment) against persons who knowingly hire unauthorized aliens. IRCA does not apply to current employees hired, recruited or referred, or employees continued in employment, prior to November 7, 1986.



- **Record Keeping and Verification Procedures**

Employers are required to verify that an individual is legally eligible for employment, and to attest, on a form to be provided by the Attorney General, in writing, that identity and eligibility for employment were verified.

Summary of the Act

- **Acts Prohibited**

The Act prohibits persons or other entities from:

Knowingly hiring, recruiting or referring for an employment fee, individuals who are unauthorized aliens as defined by the Act.

NOTE: If an employer obtains the employment of aliens through a subcontract, contract or exchange, knowing that the aliens so obtained are unauthorized aliens, it will be treated as a "violation" by the employer.

Knowingly employing an individual who is, or has become, an unauthorized alien.

Failing to comply with requirements of the Employment Verification System described in the Act.

Requiring individuals to post bond or otherwise indemnify the employer for potential liability under the Act.

Engaging in any unfair immigration-related employment practices as defined by the Act.

- **Definitions**

Employers – IRCA applies to any individual or entity that hires, recruits or refers for an employment fee,^[1] regardless of size, and includes corporations whether for profit, or not-for-profit, partnerships and sole proprietorships.

Employees – Individuals who provide services or labor for wages or other remuneration are considered employees. "Casual domestic" employees who provide domestic service in a private home on a "sporadic, irregular, or intermittent" basis, and independent contractors as defined by the Act, are not considered employees.

Unauthorized Aliens – An unauthorized alien is defined as an alien who is not lawfully admitted for permanent residence, or not authorized to be employed under the Act or by the Attorney General.

- **Employer Obligations**

Documentation – As part of the employment process, employers must examine specific documents that verify both an individual's identity and eligibility for employment.



Documents examined must be originals or certified copies, not merely photocopies. In some instances, one document will establish both employment authorization and identity and the examination of that single document will therefore be sufficient under the Act. These documents include a United States passport; a Certificate of United States citizenship (INS Form N-560 or N-561); a Certificate of Naturalization, (INS Form N-550 or N-570); an unexpired foreign passport which authorizes current employment in the United States; an alien registration receipt card or a resident alien card (INS Form I-151 or I-551) which contains a photograph of the bearer. (All alien registration cards do not authorize employment and therefore these cards must be individually scrutinized by the employer.); a temporary resident card (INS Form I-688); or an employment authorization card. (INS Form I-688A). If no document listed above is available to authorize employment and verify identity, an employer must examine one document establishing identity and one document establishing authorization to move.

Documents which are acceptable to authorize employment include a social security card valid for employment purposes; a certificate of birth in the United States or a certificate which establishes United States nationality at birth; an unexpired re-entry permit (INS Form I-627); an unexpired Refugee Travel document (INS Form I-571); a certificate of birth issued by the Department of State (Form FS-545); a certificate of Birth Abroad issued by the Department of State (Form DS-1350); an original or certified copy of a state, county or municipally-issued birth certificate; an employment authorization document issued by INS; a native American tribal document; or a United States Citizen Identification Card or resident citizen identification card (INS Form I-197 or I-179).

Documents acceptable to establish identity^[2] include a driver's license or similar state identification card which contains a photograph or other personal identifying information; a school identification card with a photograph; a voter's registration card; a U.S. military card or draft record; an identification card issued by a federal, state or local governmental agency; a military dependent's identification card; a native American tribal document; a United States Coast Guard Merchant Mariner Card; or a driver's license issued by the Canadian government.

State Employment Agency Documentation. If an individual is referred to the employer by a state employment agency and that agency provides documentation to the employer which certifies that the agency has verified the employment authorization and identity of the individual, the employer may rely on the state agency's documentation and need not examine the documents listed above.

Verification System. IRCA requires employers to examine specific documentation which, establish the identity and authorization to work of all individuals hired, recruited or referred and to attest in writing that they have done so. Individuals hired, recruited or referred must provide the documentation required and also attest in writing that they are either a citizen or national of the United States, an alien lawfully admitted to permanent residence, or an alien authorized to work under the Act. The Form I-9 must be completed for each employee, and it must be retained by the employer for specific periods and made available for inspection by government officials upon three days advance notice. In cases of hire, the I-9 must be kept for three years after the date of hire or one year after termination of employment, whichever is later. In cases of recruitment and referral, the recruiter or referrer must keep the records for three years after the date of hire, if the referred individual is hired as a result of such recruitment or referral.



No new verification form need be completed by recruiters or referrers if they have completed verification for an individual within three years of the referral. Similarly, employers need not complete a new Form I-9 if an individual is rehired within three years of the date upon which the original attestation form was completed.

Copies. The law permits employers to make copies of work authorization and identity documents submitted by individuals hired and to retain those copies for purposes of verifying compliance with the law.

Assessing Authenticity of Documents. The Act does not require employers to become experts in assessing the authenticity of documents provided. An employer is deemed to have complied with the documentation requirement if the documents provided "reasonably appear" to be genuine. In that event, the employer need not solicit the production of any other document. Documents submitted and examined, however, must be originals or certified copies, and photocopies should not be considered "authentic."

Time for Compliance. INS regulations provide that the examination of documents and completion of the Form I-9 must occur within three business days of the actual commencement of employment. Employers who employ individuals for less than three days, however, must examine the documentation and complete attestation prior to the end of the first working day. In the event an individual is unable to produce the required documents, but provides the employer with a receipt indicating he or she has applied for the necessary documentation within three business days of hire, verification need not be completed until twenty-one days after hire.

Enforcement. Investigations of employer compliance with the recordkeeping requirements of the Act will be conducted by the Immigration and Naturalization (the "INS") field staff. Immigration compliance also is monitored by employees of the Department of Labor, Wage & Hour Division and Office of Federal Contract Compliance Programs investigators, who incorporate immigration reviews as part of their regular compliance reviews and may request verification documents as part of wage hour and affirmative action audits.

● Penalties

The Act empowers the Attorney General to investigate complaints, hold hearings and impose civil and criminal penalties.

Penalties for Illegal Employment, Recruitment and Referral. Graduated penalties for illegal employment, recruitment or referral on an initial or continuing basis include a fine of \$250 to \$2,000 for each unauthorized alien employed, recruited or referred for the first offense; a fine of \$2,000 to \$5,000 for the second offense; and a fine of \$3,000 to \$10,000 for each unauthorized alien employed, recruited or referred for the third and subsequent offenses.

Penalties for Failure to Comply with the Employment Verification System. Employers that fail to comply with the verification requirements as provided may be fined from \$100 to \$1,000 for each individual hired for whom verification was not obtained. In assessing the amount of the fine, consideration will be given to the size of the employer, good faith efforts at compliance, the seriousness of the violation, whether the individual for whom documentation was not completed was an unauthorized alien and the history of previous violations by the employer.



Pattern or Practice Violations. A fine of up to \$3,000 per unauthorized alien and imprisonment for up to six months, or both, may be assessed in cases of illegal hiring, recruitment, or referral, where the violation amounts to a "pattern or practice," which is defined as "regular, repeated, and intentional activities," but does not include "isolated, sporadic, or accidental acts."

Penalties for Bond Violations. In addition to prohibiting the hire and employment of unauthorized aliens and requiring documentation of eligibility for employment, IRCA also prohibits employers from requiring individuals to post a bond or security, or provide a financial guarantee or indemnity against potential liability arising under the law. Employers violating this prohibition are subject to a fine of \$1,000 per violation, as well as an order to return any amounts received as a result of this violation.

Rights of Appeal. Employers charged with violation of the Act must be notified in advance and may request a hearing before an administrative law judge, whose decision is appealable to the courts. Further, good faith compliance with the Employment Verification System constitutes an affirmative defense to a charge of violation of that portion of the law.

- **Unfair Immigration-Related Employment Practices**

IRCA creates a new category of employment discrimination as well as a new enforcement agency to accept charges, investigate and enforce compliance.

Acts Prohibited. The Act prohibits employment discrimination on the basis of national origin against individuals who are not unauthorized aliens.

Coverage. Individuals protected under this provision of the Act include citizens and nationals of the United States, intending citizens and aliens who have permanent resident status, temporary resident status, refugee status or have been granted asylum, and evidence an intention to become a citizen of the United States through completion of a declaration of intention to become a citizen.

Exclusions. Aliens who fail to apply for naturalization within the time prescribed and aliens who are not naturalized within two years of the date of application for naturalization, are excluded from the protections of this section of the Act.

Exceptions. The prohibited immigration-related employment practices do not apply to employers of three or fewer employees; if the discrimination alleged is covered by Title VII of the Civil Rights Act and a charge has been filed with the EEOC (a charge may be filed with either the EEOC under Title VII or the Department of Justice under this law, but not with both agencies, unless the charge is dismissed by one or the other agency because of lack of jurisdiction); if the "discrimination" is the result of compliance with local, state or federal citizenship requirements; or if the Employer has acted pursuant to the limited citizen preference provisions of the Act (these provisions permit an Employer to legally prefer a citizen or national of the United States over an authorized alien only if the citizen or national is at least equally qualified for the job).

Enforcement. Charges of unfair immigration-related employment practices are handled by a special counsel appointed by the President, who is responsible for receiving and



investigating charges filed within 180 days of the alleged discrimination and issuing and prosecuting complaints before specially appointed administrative law judges. The judges have the authority to conduct hearings, access and examine evidence of the employer, and issue subpoenas and final orders. Final orders are appealable to the courts.

Remedies and Penalties. The administrative law judge is empowered to order employers in violation to hire the discriminatee with back pay (limited to a maximum of two years prior to date of filing); pay a penalty of up to \$1,000 for each individual discriminated against; pay a penalty of up to \$2,000 for each individual discriminated against if previously subject to penalty; and pay reasonable attorney's fees if the employer is the losing party and its argument "is without reasonable foundation in law and fact" (attorney's fees may also be assessed against an individual whose argument is not founded in the law if the employer prevails).

Compliance Guidelines for Employers.

The following suggestions and guidelines should be of assistance to employers in meeting their obligations under the Act.

- **More Senior Employees Not Affected**

Employer sanctions apply only to persons hired on or after November 7, 1986, and employers do not face penalties for continuing to employ individuals who may be unauthorized aliens if they were hired prior to that date.

The regulations specifically provide that "continuing employment" status for purposes of this provision is not lost if employment is interrupted by temporary, employer-approved leaves for things such as study, childcare, pregnancy or illness. Nor is it lost if the employee temporarily ceases employment because of a strike or layoff after which re-employment may be reasonably anticipated, or if the employee is reinstated after a disciplinary suspension by an arbitrator, court or administrative body or by settlement. Pre-enactment status is lost, however, if the employee quits, is terminated or is deported.

- **Employment Procedures, Forms and Records**

Penalties may be imposed under the Act for failure to comply with the paperwork requirements of the verification system, regardless of whether the individual hired is an unauthorized alien. To avoid these potential procedural violations, employers should take the following steps:

Notification to Recruitment Sources. INS regulation's provide that recruiters or referrers for a fee are required to verify only those individuals referred to an employer who are actually hired. They are required to do so within three business days of hire, but they may delegate verification responsibilities to the hiring employer (though this does not exempt them from liability under the Act). Many employment agencies and other recruiting sources request their employer-clients to complete the Form I-9. Because employers are required to conduct verification in any event, this does not pose an undue burden. Employers should send written notification to all employment agencies, recruitment firms, temporary agencies, from whom candidates are regularly sought, however, advising those sources that all



candidates referred by them will be expected to provide documentation verifying their eligibility for employment. Additionally, any contractual agreements entered into with such agencies should provide that no fees will be owed in the event the individual referred cannot be legally employed.

Notification to Applicants. Employers may wish to revise their application forms to include a statement, which highlights the obligation of the applicant to provide written verification of identity and eligibility for employment in accordance with the Act. This information may also be conveyed on a separate form distributed to the applicant.

Instructions to Persons with Hiring Authority. Employers may consider developing and issuing written instructions to each person who exercises hiring authority advising those persons that written verification of an applicant's eligibility for employment as defined by the Act is a mandatory condition of employment. The Act is very clear that the employee and the employer each must complete the designated portion of the I-9 or it will not be considered acceptable. It is critical, therefore, that all forms be completed and on a timely basis.

Personnel Files. Copies of all verification documents examined, along with copies of the completed and signed attestation forms, should routinely be included in each individual's personnel file for ready access in the event that an inquiry concerning employment eligibility is raised.

Employing Temporary Residents. The Act prohibits the continuing employment of individuals who are, or become, unauthorized aliens if those individuals were hired after the effective date of the Act. Employers who hire temporary residents, amnesty applicants with temporary authorizations or individuals expressing an intent to apply for amnesty should therefore periodically monitor the status of those individuals to verify their continuing eligibility for employment after the dates upon which temporary status or authorization expires, and update the Form I-9 accordingly.

Citizenship Requirement. IRCA prohibits discrimination on the basis of alienage when the individual involved is an authorized alien. Thus, the statute creates a new category of prohibited discrimination which exceeds the national origin discrimination prohibitions of Title VII of the 1964 Civil Rights Act.^[3] Accordingly, employers may not restrict employment to United States citizens (subject only to the limited "citizen's preference" exception noted earlier) under the Act.

If you have any questions about IRCA or would like assistance in developing appropriate compliance strategies or dealing with compliance audits, please feel free to contact Sherrie Travis at Wildman, Harrold, Allen & Dixon, 225 W. Wacker Drive, Suite 2200, Chicago, IL 60606, (312) 201-2198 (telephone), (312) 201-2555 (facsimile), travis@wildmanharrold.com, www.wildmanharrold.com.

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