

KENTUCKY BAR ASSOCIATION 2011 CONVENTION



PURSUING JUSTICE
IN THE 21ST CENTURY

IMMIGRATION: WHAT EVERY EMPLOYER NEEDS TO KNOW

CLE Credit: 1.0
Friday, June 17, 2011
8:30 a.m. - 9:30 a.m.
Elkhorn Meeting Rooms A-D
Lexington Convention Center
Lexington, Kentucky



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**Printed by: Kanet Pol & Bridges
7107 Shona Drive
Cincinnati, Ohio 45237**

Kentucky Bar Association

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THE PRESENTER



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IMMIGRATION LAW -- WHAT EVERY EMPLOYER NEEDS TO KNOW

Frances E. Catron

I. IMMIGRATION REFORM AND CONTROL ACT OF 1986 (IRCA)

- A. Twenty-five year old statute created a comprehensive scheme prohibiting the employment of illegal aliens and established an extensive employment verification system; employers have significant responsibilities, subject to both **civil** and **criminal** penalties for non-compliance.
- B. The U.S. Supreme Court says:

“Under IRCA, it is impossible for an undocumented alien to obtain employment in the United States without one or both of the parties to the employment agreement contravening the explicit congressional policies.” Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 148 (2002).

II. IRCA ESTABLISHED EXTENSIVE EMPLOYMENT VERIFICATION SYSTEM

- A. What or who is considered an “employer” under IRCA?
 - 1. Definition of “employer” is not in the statute, but in the implementing regulation -- 8 C.F.R. §27 *et seq.*
 - 2. An “employer” is a person or entity who engages the services of an employee for wages or remuneration. 8 C.F.R. §27a.1(g).
 - 3. An “employer” can be both the corporation or other business entity as well as the individuals who conducted the hiring.
 - 4. Individual management and supervisory personnel may be liable if they exercise control over the hiring and/or firing process.
- B. Who is considered an “employee” under IRCA? The definition of employee is a bit trickier than the definition of employer.
 - 1. An “employee” is a person who provides services or labor for compensation, whether in wages or another form. 8 C.F.R. §27a.1(f).

2. Two categories of personnel are not considered “employees”:
 - a. Casual domestic employment in a private home.
 - b. Independent contractors.
 - i. They carry on an independent business;
 - ii. Contract to do work according to their own methods; and
 - iii. Are subject to control only in regard to results.

MUST MEET ALL THREE CRITERIA.

NOTE: Other provisions of federal criminal law make it illegal to be complicit with those attempting to circumvent IRCA by setting up independent contractors to hire illegal aliens. This is an area fraught with difficulties.

- C. Federal law requires employers to verify employees' eligibility to work -- the Form I-9 process.
 1. All employers are required to complete and retain a form I-9 for every employee hired after November 6, 1986.
 2. Form I-9 is a one page form containing two sections.
 3. **Section 1** requires **employee** to complete, and sign.
 - a. Section 1 may be completed by employee at any time between acceptance of job offer and conclusion of the first day of work.
 - b. Section 1 requires employee to provide first and last name, middle initial and maiden name if applicable, current address, date of birth, Social Security number, and to attest to his or her citizenship or immigration status by checking a box on the form.
 - c. If a translator is used to assist the employee then the translator must also sign under penalties of perjury.

4. **Section 2** requires **employer** to verify employee's documents and sign.
 - a. Employers must review **original** unexpired documents from employees that show identity and authorization to work in the United States.
 - b. Three lists of acceptable documents, lists A, B, and C, specified in the regulations.
 - i. List A documents show **both** identity and employment authorization by presentation of the single document. Examples -- U.S. Passport, Permanent Resident Card, Alien Registration Receipt Card (green card), foreign passport with appropriate stamp/form (I-551, I-94, I-94A).
 - ii. List B documents show **identity only**. Examples -- state or Canadian issued driver's license, U.S. Military I.D. bearing photograph.
 - iii. List C documents show **employment authorization only**. Examples -- U.S. Birth certificate issued by U.S. State or U.S. State Department, U.S. Social Security card unless it states on its face that it does not authorize employment, Native American tribal documents.
 - iv. Employers must examine one document from List A *or two* documents, one from List B and one from List C.
 - v. Employers must accept any documents from Lists A, B, and C that reasonably appear to be genuine and to belong to the employee and may not demand that a particular type of document be presented.
 - c. Information from the documents must be recorded by the employer in Section 2 of the Form I-9.
 - d. Employers may but are not required to keep copies of the original documents presented by the employee. The original documents must be returned to the employee. If the employer chooses to make copies of

the documents, the employer must do so for ALL employees, not just the employees who appear to be foreign born or present DHS issued documents such as green cards.

5. Both sections are signed under **penalties of perjury**.
 6. Section 2 must be completed and signed by the employer within three business days of the date employment begins.
 7. The Form I-9 must be retained by the employer for the duration of the employment and for three years after the date of hire, or one year after the date employment is terminated, whichever date is longer.
 8. The Federal Statutes specifically require employers to permit inspection of their retained I-9s and any retained copies of employee documents by the Department of Homeland Security (DHS which includes ICE), the Office of Special Counsel U.S. Department of Justice (OSC which investigates complaints of unlawful discrimination) and the Department of Labor (DOL which investigates unfair labor practices).
- D. Information from employer records concerning employees is submitted to IRS and to SSA through the submission of tax information.

III. NEW SAFE HARBOR PROVISIONS FOR EMPLOYERS

- A. The Social Security Administration (SSA) and the DHS issue letters to employers notifying the employer of discrepancies in documents submitted by employees. These letters are referred to as “no-match” letters (SSA) or “notice of suspect document” letters (DHS).
- B. SSA sends “no-match” letters to employers when employee name and Social Security numbers submitted on W-2 forms do not match the SSA records.
- C. Federal laws commonly require “knowing” action or inaction from an employer before assessing penalties or criminal liability. Concept of “knowingly” in both statutory and case law includes both actual and constructive knowledge. No turning of a blind eye permitted.

- D. “No-match” letters in some circumstances can be evidence an employer possessed knowledge of the employment of persons not authorized to work in the U.S.
- E. New regulation gives examples of what the DHS will consider as a reasonable response by an employer after receipt of a “no-match” or “notice of suspect document” letter to fend off use of the letters as evidence of the employer's knowledge of the employment of unauthorized workers, most usually illegal aliens.
- F. New regulation requires action by employer to claim the safe harbor.
 - 1. Employer must verify accuracy of its own records, *i.e.* transmission error, within thirty days of receipt of “no-match” letter.
 - 2. If no error, then employer must go to employees and ask them to verify the information provided. If employee verifies the information, then employer should notify employee of the receipt of the “no-match” letter and ask the employee to contact the SSA or DHS and resolve the discrepancy. This must be done and reported back to the employer within ninety days of first receipt of the “no-match” letter by the employer.
 - 3. Employer then notifies SSA (or DHS) of the corrected record(s).
 - 4. If the employee takes no action or refuses to resolve the discrepancy and report the corrected name/number back to the employer, the employer must use a modified Form I-9 process to re-verify employment authorization with affected employee to take advantage of the safe harbor.
 - 5. The modified Form I-9 process requires the completion of a new Form I-9 by the employee using documents establishing both identity and authorization to work in the United States but which do not contain the number or name referenced in the “no-match” letter. Modified Form I-9 process must be completed within ninety-three days of first receipt of the “no-match” letter.

IV. RAMIFICATIONS OF VIOLATING IRCA

- A. Employers who violate IRCA are subject to civil penalties, cease and desist orders, and/or criminal prosecution.
- B. Three primary types of criminal violations encountered by employers.
 - 1. Knowingly hiring aliens unauthorized to work -- 8 U.S.C. §1324A(a)(1)(A) makes it unlawful to hire, recruit, or refer for a fee, an alien knowing the alien is not authorized to work in the United States.
 - 2. Hiring without verification of eligibility to work -- 8 U.S.C. §1324A(a)(1)(B)(i) makes it unlawful to hire without complying with the verification requirements of IRCA.
 - 3. Continuing to employ after learning an alien is or has become unauthorized to work -- 8 U.S.C. §1324A(a)(2) makes it unlawful to continue the employment of an alien after obtaining knowledge the alien is or has become unauthorized to work in the United States.

V. CRIMINAL STATUTES OTHER THAN IRCA ALSO APPLY TO EMPLOYERS -- EXAMPLES

- A. **18 U.S.C. §1546(a)** – possession, use acceptance or receipt of any immigrant visa, alien registration receipt card, or other document prescribed by statute for evidence of authorized employment knowing the document is forged, altered, counterfeited or procured by means of any false claim or statement.

Ten-year offense.

- B. **18 U.S.C. §1546(b) (false documents)** – Whoever for purposes of satisfying a requirement of the INA uses:
 - 1. An identification document knowing or having reason to know that the document was not issued lawfully for the use of the possessor, or
 - 2. An identification document knowing or having reason to know that the document is false, or a false attestation, is guilty of a . . .

Five-year offense.

- C. **8 U.S.C. §1324 (harboring)** -- Harboring illegal aliens through employment, housing, transportation or through the provision of other specified resources-some examples:

1. Bringing illegal aliens to the U.S.
2. Transporting illegal aliens within the U.S.
3. Harboring illegal aliens within the U.S.

Ten-year offense if purpose of financial gain; otherwise, five years.

- D. Other Criminal Statutes

1. Aiding and abetting or conspiracy with others committing prohibited acts.
2. Money laundering.
3. Fraudulent use, possession of Social Security numbers, cards.

VI. ADDITIONAL RESOURCES

- A. www.ice.gov -- Immigration and Customs Enforcement. Click on link for "IMAGE" program.
- B. www.uscis.gov -- U.S. Citizenship and Immigration Services. Click on link "for employers." There you will find the M-279, Handbook for Employers and I-9 forms.
- C. USCIS Office of Business Liaison
1. The primary function of the Office of Business Liaison (OBL) is to educate the United States public on immigration-related employment, investment, and school issues.
 2. The OBL provides information on the employment eligibility verification process, as well as the opportunities available to employers to hire and/or "sponsor" foreign workers in accordance with U. S. Government regulations administered by a variety of federal agencies.

3. Office of Business Liaison address:

111 Massachusetts Avenue, NW, 6th Floor
Washington, DC 20539
Toll-free line: 1-800-357-2099 (press "4", then "1")
TDD: 1-800-767-183
Fax: 1-202-272-1865

D. Local ICE Offices in Kentucky: Ft. Mitchell, London, Louisville

1. Northern Kentucky.

207 Grandview Drive, Suite 20
Ft. Mitchell, KY 41017
(859) 578-4606

2. London.

301 Wendall Way
London, KY 40741
(606) 862-6041

3. Louisville.

601 West Broadway, Room 601
Louisville, KY 40202
(502) 582-6526

