



Increased Immigration Enforcement Increases Risk for Employers

By M. Edward Taylor

Intense national debate continues regarding possible changes to our immigration laws, and proposed reform legislation is presently stalled in Congress. Nonetheless, the politicized climate has brought increasing pressure on the agencies responsible for enforcing the present laws to crack down on employers of illegal aliens. Press reports indicate that enhanced enforcement action is focused particularly on the construction and hospitality industries, but health care and retail have also been mentioned as targets, and all employers remain subject to penalties for violations of the Immigration Reform and Control Act (“IRCA”). This Employment Note is to remind employers of their obligations under the existing law and of the significant penalties that can result from violations.

IRCA imposes an affirmative obligation on employers of all sizes to verify that U.S. employees are eligible to work in the U.S., mandates record keeping requirements, and separately prohibits the knowing employment or continued employment of an unauthorized alien. IRCA also prohibits discrimination on the basis of national origin and citizenship – the latter of which is a protected class not recognized by Title VII.

Employment verification is conducted through completing Form I-9 within three days of an employee commencing employment, or at the commencement of employment if the job is to last less than three days. Employers are required to have completed I-9’s for all employees hired after November 6, 1986. The employee is to complete Section 1 of the form and provide the employer with documentation establishing identity and authorization to be employed in the U.S. A U.S. passport establishes both identity and employment authorization. An employee can also provide separate documents to establish identity and employment authorization, typically a driver’s license and social security card; Form I-9 identifies other acceptable documents. The employer must examine the documents and, in Section 2 of the form, verify under oath that the documents appear to be genuine and relate to the individual. Employers may, but are not required to, copy the documents. Employers should be aware that requiring documentation in addition to that deemed sufficient on the I-9 is illegal.

Form I-9 must be retained by an employer for the longer of three years or one year after termination of an individual’s employment. An employer is entitled to three days’ notice before an inspection of its I-9’s by the Special Counsel For Immigration-Related Unfair Employment Practices, Immigration and Customs Enforcement, or the Department of Labor. Given the relatively short notice period, employers are well advised to maintain I-9’s in a separate file rather than in each employee’s personnel file. Failure to properly maintain or produce the I-9’s subjects an employer to liability, and can be evidence of knowingly employing unauthorized aliens.

The penalties for violating IRCA can be significant. First, there can be criminal liability. For an individual responsible for a pattern or practice of violations of the

verification requirement or the employment prohibition, there is a fine of up to \$3,000 and six months in prison for the entire pattern and practice.

For failure to comply with employment verification procedures, which can occur even if the employee is not an unauthorized alien, the fine is \$110 - \$1,100 for each individual. The size of the penalty for this violation takes into consideration the size of the employer; good faith; seriousness of the violation; whether the individual was an unauthorized alien; and any history of previous violations.

For knowingly employing an unauthorized alien the penalties are based on the number of offenses; the rules provide that multiple violations in the course of one proceeding or determination count as a single offense. However, each offense includes penalties for each unauthorized alien:

- First offense: \$275 - \$2,200 for each unauthorized alien.
- Second offense: \$2,200 - \$5,500 for each unauthorized alien.
- Subsequent offenses: \$3,000 - \$11,000 for each unauthorized alien.

As noted above, IRCA also prohibits discrimination on the basis of national origin and citizenship. The citizenship provision precludes an employer from favoring a U.S. citizen over an alien who is authorized for employment, and vice versa. The national origin prohibition, like Title VII, prohibits discrimination based on an individual's country of origin (which includes favoring foreign-born employees over Americans, subject to certain treaty exceptions). The Act also prohibits intimidation and retaliation against a person for the purpose of interfering with the rights granted by the Act. The Office of Special Counsel investigates charges and can prosecute alleged violations through an administrative procedure.

Although IRCA has been in effect for nearly twenty years, the law has received relatively little attention since it was originally implemented. Given the current political climate and the resulting increase in enforcement actions, prudent employers will review their policies and practices to ensure they are in compliance with IRCA. If there are concerns about compliance generally, or about individual employment situations, our attorneys are available to assist.