

Kramer Rayson LLP

Employment Law Conference

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Immigration Update

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Sponsoring Foreign Nationals for Employment

- Create a policy/procedure.
- Determine the best type of visa.
- Adhere to the conditions.
- Avoid discrimination.

Immigration Reform

- We're next!?
- Agreement that there's a problem.
- Disagreement on the solution.
- Shift in focus to employers.

I-9 COMPLIANCE – THE NEW FOCUS

WHAT IS THE NEW FOCUS?

Previously – employee arrest, detention, removal.

- Highly publicized employer raids.
- Large employers with thousands of workers.

THE NEW FOCUS (cont'd)

Now – employer audits, investigation and civil/criminal penalties.

- New ICE initiative (shifting focus)
- Over 600 audits in July 2009.
- More audits in 1 day than in previous year.

CONFLICTING STATUTES

Statutes

- Immigration and Naturalization Act (INA)
- Immigration Reform and Control Act (IRCA)
- Title VII of the Civil Rights Act of 1964 (Title VII)
- Immigration Act of 1990 (1990 Act)

Violations

- Hiring unauthorized workers.
- Discrimination (national origin, citizenship/immigration status.)
- Retaliatory discharge.
- Document fraud.

POTENTIAL PENALTIES

- Civil \$\$\$\$
- Criminal
- Weigh the risk

APPLICATION & PRE-EMPLOYMENT INQUIRIES

- Know what you can and cannot ask
- No policy of USCAs only
- Can prefer USCAs
- No national origin inquiries

REVISED I-9 FORM

Two forms currently accepted:

- February 2, 2009
- August 7, 2009
- Both expire on August 31, 2012

Changes to the form:

- Documents added: US Passport Card, Temporary I-551 stamp, Passport from FSM or RMI with I-94 card.
- Documents removed: Form I-688 Temporary Resident Card, Forms I-688A and I-688B Employment Authorization Card.
- Requires unexpired driver's license and passport.

I-9 FORM COMPLETION – **EMPLOYER RESPONSIBILITY**

- Completion for I-9 Form for all new hires.
- Proper I-9 Form completion (by employee and employer).
- Proper storing and retention of I-9 documentation.
- Updating I-9 documents.
- Protecting employee privacy.

I-9 FORM COMPLETION DAY 1

The Employee must complete and sign Section 1 on day one of employment.

- Must swear he or she is authorized to work in the US.
- Do not request additional documentation
- Providing a SSN is voluntary (unless enrolled in E-Verify).

I-9 FORM COMPLETION DAY 3

(Basic Rules)

- Complete within 3 days of start date.
- Employee selects which documents to present.
- Do not request different or additional documents.
- Review original documents.
- No overzealous scrutiny required – you are not a document expert.

DOCUMENT EXPIRATION

Several types of employment authorization documents, particularly for foreign nationals, have future expiration dates – you must track these.

- This doesn't mean the person won't be granted an extension of their authorization.
- Shouldn't be considered in determining whether the person is qualified for the position (again, avoiding possible discrimination claim).

DOCUMENT RE-VERIFICATION

- May need to re-verify the person's employment authorization upon expiration – Section 3 of Form I-9.
- NOTE – List B documents, such as a driver's license, should not be re-verified when they expire.
- Must re-verify no later than the expiration date.
- Must re-verify when re-hiring an employee.
- Note all changes.

RECORD RETENTION

Keep photocopies for **all** or **none**.

- Avoids claim of national origin discrimination.
- Exception for E-Verify participants.

Retention Period

- 3 years after date of hire, or
- 1 year after date of termination (whichever is later).

Store I-9 documents separate from personnel records.

AUDITS

Inspection (by DHS, OSC or DOL)

- 3 day notice to inspect I-9 documentation.
- Must make available at location requested.

Increased audit activity beginning July 2009.

- Train your HR employees.
- Self audit!

TERMINATING AN EMPLOYEE

Pre-employment – decline to hire.

- USC is required by law or contract.
- Applicant states no US work authorization

Post-Employment Termination

- Failure to provide I-9 documentation.
- False statements on I-9 form.

DISCRIMINATION CLAIMS

The employer should avoid:

- Using work authorization expiration as a basis for judging qualification.
- Requiring different or additional documents than required by I-9 form.
- Rejecting a document that reasonably appears to be genuine.
- Keeping documents for some employees but not others.
- Discarding I-9 documents prematurely.
- Treating non-USCs differently.
- Requesting employment verification documents prior to hire.
- Limiting jobs to USCs (unless required by law or contract).
- Instituting a blanket policy preferring USCs over non-USCs.

WORDS TO LIVE BY

- CONSISTENCY
- TRAINING
- STRICT ADHERENCE
- SELF-AUDITS