**Employer Best Practices for Avoiding Immigration Violations**

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**I. Developing Corporate Best Practices Immigration Policies and Policy Statements**

**A. Companies should consider creating Corporate Immigration Policy Statements. Such statements serve several purposes, including:**

1. Making certain that all employees in all offices are aware of a uniform policy and follow a uniform policy.

2. Eliminating the necessity of developing new policies every time an issue is raised.

3. Being able to advise employees of policies when employees ask questions regarding issues such as sponsorship for permanent residence and payment of attorney's fees.

4. Forcing officials to reflect on issues that may not otherwise be the subject of review.

5. Making certain that all relevant employees are aware of fines and penalties to which the institution may be exposed for failing to follow relevant laws and regulations.

6. Having a self-serving document to illustrate good faith attempts to comply with all relevant immigration laws.

7. Instilling a climate of corporate compliance to avoid having employees violating immigration laws, which actions may be imputed to the company.

**B. Policies should be delineated in the following areas:**

1. Avoiding the hiring of foreign nationals without authorization to work for the employer.

a) The company will only hire foreign nationals with authorization to work for the company.

b) Any employee who has knowledge of a foreign national not having authorization to work in the U.S. must reveal such information to management.

c) Any employee who accepts a document that is known to be a counterfeit document for verifying identity or employment authorization of a prospective hire will be terminated.

2. Termination of foreign national employees who are found to be without authorization to work.

a) Policy regarding termination of foreign national employees who are found to be out of status.

b) Developing a system to track status expiration dates of foreign national employees.

3. I-9 compliance:

a) Time of completion of I-9.

b) Policy with respect to employees who do not have all necessary documents at the time of completion of I-9.

c) Policy regarding acceptable documents.

d) Policy regarding updating of I-9 form.

e) Policy regarding retention of I-9 forms.

f) Policy regarding retaining copies of documents.

g) Policy regarding where I-9 forms are kept.

h) Policy regarding aliens with questionable authorization to be employed.

4. Policy regarding avoiding national origin and citizenship discrimination:

a) Questions that may and may not be asked on employment applications or at interviews.

b) Policy regarding action to taken if the company has suspicion or reason to believe that an employee may not have employment authorization.

5. Policies Regarding Employment of Foreign Nationals in H-1B Status:
a) Wage requirements.

b) Public examination file documentation.

c) Documentation of "actual wage".

d) Dealing with strikes or work stoppages.

e) Termination of H-1B employees.

f) Early departure penalties.

g) Payment of return cost of transportation.

h) Leaves of absence.

i) Changes in hours of pay.

j) Retention of public examination file.

k) Payment of attorney's fees.

l) Payment and non-reimbursement of USCIS worker training fee.

m) Short-term placements and transfers of H-1B employees.

n) Payment of benefits to H-1B employees.

o) Payment of required documentation in the event of a DOL investigation.

p) Choice of prevailing wage source.

q) Policies regarding date of commencement of employment/payment of wages.

r) Policies regarding non-payment of wages during leaves of absence, suspensions, disciplinary actions, etc.

s) Policies regarding use of bonuses to meet required wage obligations.

t) Policies regarding deductions to be taken from salaries.

u) Policy on "volunteering".

v) Policies regarding withdrawal of labor condition application.

w) Policies regarding notification to USCIS and/or formal termination letter.

x) Policies regarding retention of documents.

y) Policies regarding extended severance pay.

z) Policy on use of portability for out of status foreign nationals.

**II. Participation in Voluntary Government Program**

**A. U.S. Immigration and Customs Enforcement ("ICE") has developed two programs in which employers can enroll with the goal of avoiding immigration violations.**

1. Basic Pilot Program, which enables businesses to check the social security numbers that job applicants provide against a national data base of social security and immigration records.

2. ICE "Mutual Agreement between Government and Employers ("IMAGE"). (www.ice.gov/partners/opaimage)

a) Employers must first agree to an I-9 audit by ICE and ensure the accuracy of the wage reporting by verifying the social security numbers of their existing labor forces utilizing the social security number verification system.

b) Employer must then commit to the "Best Hiring Practices" listed at III, below.

c) ICE provides training and education to IMAGE partners on proper hiring procedures, fraudulent documentation detection and anti-discrimination laws.

**B. Both Programs are voluntary. In choosing whether to participate, employers should consider:**

1. IMAGE covers all members of a company's workforce and does a more extensive scrub of records to determine if a worker is in the country illegally or is using fraudulent documents.

2. Becoming an IMAGE partner provides confidence that the employer has a legal workforce and therefore should not suffer a loss of workers in the event of an ICE investigation or raid.

3. Neither program will necessarily detect imposters using stolen or borrowed identities.

4. ICE does not guarantee it will first communicate with cooperative employers about alleged problems rather than opening covert investigations to build criminal cases or otherwise raid the workforce.

**III. U.S. Immigration and Customs Enforcement ("ICE") List of "Best Hiring Practices" (www.ice.gov/partners/opaimage)**

A. Develop a protocol for dealing with Social Security Administration "no-match" letters.

B. Develop policies to ensure that the company's I-9 process is not discriminatory.

C. Semi-annual I-9 audits by an external firm or a trained employee not otherwise involved in the I-9 process.

D. Use the Basic Pilot Program for all hiring.

E. Permit the I-9 and Basic Pilot program process to be conducted only by individuals who have received training, and include a secondary review as part of each employee's verification to minimize the potential for a single individual to subvert the process.

F. Establish an internal training program, with annual updates, on how to manage completion of form I-9 and how to detect fraudulent use of documents in the I-9 process.

G. Establish a protocol for assessing the adherence to the "Best Practices" guidelines by the company's contractors and subcontractors.

H. Establish a self-reporting procedure for reporting to ICE any violations or discovered deficiencies.

I. Establish a tip line for employees to report activity relating to the employment of unauthorized aliens and a protocol for responding to employee tips.

**IV. Avoiding Violations Relating to H-1B Employees**

**A. Violations that DOL looks for**

1. Proof that employer hired "cheap foreign labor".

2. Proof that employer fired U.S. workers who were more highly paid.

3. Proof that employer understated H-1Bs' qualifications in order to underpay them.

4. Proof that employer did not post appropriate notice.

5. Proof that employer benched H-1Bs without paying.

6. Proof that employer did not pay the promised wage or deducted hidden employer business expenses from the employee's wage.

**B. Avoiding Labor Condition Act ("LCA") Liabilities.**

1. LCA training.

2. LCA audits.

3. Keeping all necessary documentation in the public examination file.

**C. Changes in Employment Relationship**

1. Delay in commencement of employment:

a) Foreign nationals brought from outside of the U.S. on H-1B visas must be put on the payroll on the earlier of the date that they present themselves for employment or 30 days after arrival in the U.S. 20 C.F.R. 655.731(c)(6)(ii).

b) If the foreign national is in the U.S. and the change of status has been applied for, the employment relationship may not commence until the effective date of the change of status. From that date, the employment must commence on the earlier of the date that the employee presents herself as ready for employment or 60 days after the effective date of the change of status to H-1B. 20 C.F.R. 655.731 (c)(6)(ii)

c) Delay in obtaining a social security number should not delay commencement of the H-1B's employment.

d) Delay in getting a visa does not require any action since rules regarding H-1B compliance only apply during periods that the foreign national is in the U.S.

2. Change in hours of employment:

a) Changes in hours and schedules do not require any action on the part of the employer unless hours fall below full time.

b) In that event, a separate part time labor condition application and H-1B petition would be required.

3. Change in job duties.

a) An insignificant change in job duties does not trigger a requirement of any immigration filing.

b) A material change in job duties does require a new H-1B petition.

4. Change of wage.

a) Reduction of the H-1B's wage to an amount less than the higher of prevailing wage and actual wage is a violation.

b) Across the board wage reduction to all employees does not create a violation unless the foreign national's wage is reduced below the higher of actual or prevailing wage.

5. Change of location of employment:

a) Change of location of employment in the same "area of intended employment" (roughly defined as normal commuting distance) only requires a notice posting at the new location.

b) Change of location to an area outside of the area of intended employment for more than 30 days in a year requires a new LCA and H-1B petition. 20 C.F.R. 655.735(c).

c) The 30 day period is increased to 60 days if the H-1B continues to maintain an office at her permanent work site, spends a substantial amount of time at the permanent work site and the H-1B's residence or place of abode is located in the area of the permanent work site. 20 C.F.R. 655.735(c).

6. Change of Employer:

a) The new employer must file a new H-1B petition.

b) If the change of employer is the result of a corporate re-organization, merger, acquisition, or the like, no new H-1B petition is required assuming the new employer assumes all the liabilities of the previous employer and the new employer updates the public examination file with various information required by DOL regulations.

7. Discipline or Suspension:

a) The DOL position is that the employer who removes an employee from payroll for work-related reasons (other than because of a condition related to the employee as in H below) is in violation of DOL's regulations and subject to sanctions, including a back pay award.

b) The DOL position would require the employer to terminate the H-1B petition if at any point the employer decides not to pay the required salary.

8. Leave of Absence:

a) DOL policy depends on whether the leave is employer or employee-requested.

(1) If the leave is employee-requested, such as maternity, there are no requirements placed upon the employer.

(2) If the leave is employer-generated, the employer would be required to pay full salary during the leave period.
b) CIS policy is not dependent upon whether the leave is employer- or employee-initiated.
(1) With CIS, the issue is whether there is an expectation of continuing employment at the conclusion of the leave of absence. If so, the employee is in valid status
9. Resignation or Termination.
a) It is advisable – although not required – to notify DOL to terminate the labor condition application since the employer's liability under the LCA continues for a period of one year after the earlier of the end date of the LCA or the termination of the LCA.

b) CIS regulations state that an employer "shall" notify CIS when the H-1B employment relationship ends. 8 C.F.R. 214.2(h)(11)(i)(A).

c) Upon termination prior to the expiration date of H-1B status, the employer is required to pay the employee's return costs of transportation to her home country.

**V. Avoiding National Origin and Citizenship Discrimination Claims**

**A. Title VII's Prohibition on National Origin Discrimination**

Regardless of a job applicant's ancestry, he or she is entitled to the same employment opportunities as anyone else. Under Title VII of the Civil Rights Act of 1964 ("Title VII"), which covers employers with fifteen (15) or more employees and which is enforced by the Equal Employment Opportunity Commission ("EEOC"), it is unlawful to discriminate against any employee or applicant because of the individual's national origin. No one can be denied equal employment opportunity because of birthplace, ancestry, culture, or linguistic characteristics common to a specific ethnic group. Furthermore, equal employment opportunity cannot be denied because of marriage or association with persons of a national origin group; membership or association with specific ethnic promotion groups; attendance or participation in schools, churches, temples or mosques generally associated with a national origin group; or a surname associated with a national origin group.

Examples of violations covered under Title VII include:
• ***Employment Decisions:*** Title VII prohibits any employment decision, including recruitment, hiring, and firing or layoffs, based on national origin.

• ***Harassment:*** Title VII prohibits offensive conduct, such as ethnic slurs, that creates a hostile work environment based on national origin. Employers are required to take appropriate steps to prevent and correct unlawful harassment. Likewise, employees are responsible for reporting harassment at an early stage to prevent its escalation.

• ***Language***
o Accent Discrimination: An employer may not base a decision on an employee's foreign accent unless the accent materially interferes with job performance.

o English fluency: A fluency requirement is only permissible if required for the effective performance of the position for which it is imposed.

o English-only rules: English-only rules must be adopted for nondiscriminatory reasons. An English-only rule may be used if it is needed to promote the safe or efficient operation of the employer's business. If an employer believes the English-only rule is critical for business purposes, employees have to be told when they must speak English and the consequences for violating the rule. The EEOC will consider any negative employment decision based on breaking the English-only rule as evidence of discrimination if the employer did not tell employees of the rule.

Employers who commit national origin discrimination in violation of Title VII may be liable for compensatory damages, including lost wages and emotional distress, punitive damages and attorneys' fees and costs.

**B. IRCA's Ban on National Origin and Citizenship Discrimination**

The Immigration Reform and Control Act ("IRCA"), which is enforced by the U.S. Department of Justice, prohibits discrimination based on national origin or citizenship. Employers who impose citizenship requirements or give

preference to U.S. citizens in hiring or employment opportunities may violate IRCA, unless there are legal or contractual requirements for particular jobs. (Employers also may violate Title VII if a requirement or preference has the purpose or effect of discriminating against individuals of a particular national origin.) IRCA's anti-discrimination provisions apply to smaller employers than those covered by Title VII – they apply to all employers with at least 4 employees.

Under IRCA, when hiring, discharging, or recruiting or referring for a fee, employers with four or more employees may not:
• Discriminate because of national origin against U.S. citizens, U.S. nationals, and authorized aliens. (Employers of 15 or more employees should note that the ban on national origin discrimination against any individual under Title VII of the Civil Rights Act of 1964 continues to apply.)

• Discriminate because of citizenship status against U.S. citizens, U.S. nationals, and the following classes of aliens with work authorization: permanent residents, temporary residents (that is, individuals who have gone through the legalization program), refugees, and asylees.
Additionally, IRCA requires employers to verify the identity and employment eligibility of its employees: employers and workers newly hired since 1986 must complete the Form (I-9). Employers who are inconsistent in their I-9 policies and procedures may face discrimination claims under IRCA. (Please refer to the section on Form I-9 below.) Employers must accept any document listed in the INS Handbook for Employers, and may not arbitrarily specify an INS document, or require additional documents. Employers may not refuse to hire a qualified worker whose employment authorization expires at a later date. IRCA imposes back pay and severe penalties on employers who commit immigration-related employment discrimination. An employer who requests more or different documents than are required or refuses to honor documents that on their face reasonably appear to be genuine can face fines of up to $1,000 per person. Other types of discrimination carry fines of up to $2,000 per person for the first offense, $5,000 for the second offense, and $10,000 for the third or more offenses. In addition to fines, employers can be ordered to pay lost wages for applicants not hired or employees discharged in violation of discrimination provisions. Employers can be ordered to hire applicants or reinstate discharged employees if discrimination is found.

**C. How to Avoid Discrimination on the Basis of National Origin**
Employers are prohibited from discriminating against persons on the basis of their national origin. “National origin” refers to the country where a person was born or where his or her ancestors came from. Employers cannot treat qualified persons differently because they have the physical, cultural, or linguistic characteristics of a national group.
**Common examples and alternatives:**

**1.** ***Asking only persons of a particular national origin for documents.*** Employer asks all job applicants believed to be Mexican to provide proof of permanent residency. Because of their national origin, perceived Mexican applicants are treated differently. This also may be discrimination on the basis of citizenship.

A better approach: Employer asks all applicants (regardless of place or birth of ancestry) to whom a job offer is made to provide any documents indicated on the A list or B and C lists of acceptable documents accompanying the I-9 Form.

***2. Requiring unnecessary language proficiency.*** Employer requires all employees to speak English fluently on the job, regardless of whether competent performance of the job requires such skills. Persons with accents or limited English ability are not hired for field production and harvest jobs, even though English fluency is not essential to performing them.

A better approach: Employer establishes English language skill requirement for employees whose duties include frequent communication with the public but not for jobs where it is not essential.
**D. How to Avoid Discrimination on the Basis of Citizenship**
Employers are prohibited from discriminating against persons in hiring, discharging, and recruiting and referring for a fee because of their citizenship status. Permanent and temporary residents, refugees, asylees, and U.S. citizens are protected. Employers must use uniform and fair I-9 Form completion procedures when hiring individuals. It is easy to avoid immigration-related employment discrimination and still comply fully with IRCA. Just follow the simple guidelines illustrated here.
**Common examples and alternatives:**

***1. Prematurely requesting documents.*** Employer asks to see a job applicant's documents before making a decision that the person is qualified and extending a job offer. Person does not get job and believes that citizenship status discrimination, revealed through the examination of the documents, is the reason.

A better approach: After determining the applicant is qualified for the job, employer makes a job offer conditioned upon the applicant's providing adequate documentation of work authorization and identity.

***2. Requesting more or different documents.*** Employer asks for a particular kind of document, such as a "green card," a document with an Alien Number, or another INS document, in addition to those offered by applicant.

A better approach: Employer allows applicant to provide any documents indicated on the A list or the B and C lists of acceptable documents accompanying the I-9 Form.

***3. Asking only certain persons for documents.*** Employer requests work authorization documents only from persons with accents or foreign-sounding names or appearances.

A better approach: Employer asks all successful applicants to whom a job offer is made for documents.

***4. Hiring only citizens or non-citizens.*** Employer hires only citizens for jobs, although the employer is not required to do so pursuant to law or government contract; or employer prefers and hires non-citizens rather than citizens for certain types of work.

A better approach: Employer hires qualified persons with proper documentation, regardless of citizenship status.

***5. Rejecting persons whose work authorization expires in the future.*** Employer refuses to hire person because employment eligibility document indicates that it expires at some future date.

A better approach: Employer hires person with the understanding that the person will provide evidence of continuing employment authorization before expiration date on the document. Employer accepts any approved document before expiration of previous document.

***6. Inaccurately concluding that documents are false.*** To avoid employer sanctions, employer routinely calls government agencies to determine whether documents offered by applicants are legitimate. Employer relies upon information to incorrectly decide that applicant does not have work authorization and refuses to hire him or her.

A better approach: Employer reviews all documents to see if they reasonably appear to be genuine and does not routinely investigate authenticity of documents unless they clearly appear on their face to be false.

**VI. Form I-9**

The Immigration Reform and Control Act ("IRCA"), requires employers to verify the identity and employment eligibility of workers newly hired since 1986, which includes completion of Form I-9. Employers must keep each I-9 on file for at least three years, or one year after employment ends, whichever is longer. Form I-9 is a one page form employees complete to verify their identity and prove that they are allowed to work in the United States. The form itself has three parts. Section 1 includes basic biographical information on the employee and also asks the employee to certify that he or she is a citizen, permanent resident or authorized to work under another status. The second section is completed by an employer who must verify what documents an employee presented to prove their identity and right to work and that the paperwork was completed in a timely manner. The third section is reserved for employers who must periodically update the I-9 Form if the worker is not authorized to permanently work in the US.

**A. What documentation must an employee present along with an I-9 Form?**
In order to prove identity and eligibility for employment in the United States, the Act requires employees to allow examination of one of the following documents:

**Documents that Establish Both Identity and Employment Eligibility:** "List A"
1. United States Passport (expired or unexpired)
2. Certificate of US Citizenship (INS Form N-560 or N-561

3. Certificate of Naturalization (INS Form N-550 or N-570)
4. Unexpired foreign passport, with I-551 stamp or attached INS Form I-94 indicating unexpired employment authorization
5. Permanent Resident Card or Alien Registration Receipt Card with photograph (INS Form I-151 or I-551)
6. Unexpired Temporary Resident Card (INS Form I-668)
7. Unexpired Employment Authorization Card (INS Form I-688A)
8. Unexpired Reentry Permit (INS Form I-327)
9. Unexpired Refugee Travel Document (INS Form I-571)
10. Unexpired Employment Authorization Document issued by the INS which contains a photo (INS Form I-688B)

If an individual does not have one of the documents listed above, the Act requires that the individual provide two documents: one from “List B” and one from “List C” (below) for examination and verification of identity and employment eligibility:

**Documents that Establish Identity:** "List B"
1. Driver’s license or I.D. card issued by a state or outlying possession of the United States provided it contains a photograph or information such as, name sex, date of birth, height, eye color, and address
2. ID Card issued by federal, state or local government agencies or entities provided it contains a photograph or information such as name, gender, date of birth, height, eye color, and address
3. School Identification card with a photograph
4. Voter's registration card
5. U.S. Military card or draft record
6. Military dependent’s identification card
7. US Coast Guard Merchant Mariner card
8. Native American tribal documents
9. Driver's license issued by a Canadian government authority

**For persons under age 18 who are unable to present a document listed above:**
10. School record or report card
11. Clinic, doctor, or hospital record
12. Day-care or nursery school record

**Documents that Establish Employment Eligibility:** "List C"
1. US social security card issued by the Social Security Administration (other than a card stating it is not valid for employment)
2. Certification of Birth Abroad issued by the Department of State (Form FS-545 or Form DS-1350)
3. Original or certified copy of a birth certificate issued by a state, county, municipal authority or outlying possession of the United States bearing an official seal
4. Native American tribal document
5. US Citizen ID Card (INS Form I-197)
6. ID Card for use of Resident Citizen in the United (INS Form I-179)
7. Unexpired employment authorization document issued by the INS (other than those listed under List A)

**B. Who Must Complete an I-9 Form?**

IRCA requires all employers to have all employees hired after 1986 complete I-9 verification paperwork. Employers who selectively choose who will and will not complete I-9s could face penalties under antidiscrimination rules. Workers who are not hired do not need to complete I-9 Forms. Volunteers are not subject to I-9 rules since they receive no “remuneration” for their services. Independent contractors are also not subject to the I-9 rules, but employers should note that if they contract work to companies they know use unauthorized workers, they could be held liable as well under IRCA. Employees rehired by a company need not complete a new I-9 so long as they resume work within three years of completing the initial form I-9.

It is not necessary to complete a new I-9 after:
• an employee completes paid or unpaid leave (such as for illness or a vacation),
• a temporary lay-off,
• a strike or labor dispute,
• gaps between seasons for seasonal employees.

**C. When must the I-9 Form be completed?**

The I-9 process must start on the day an employee starts work. The employee must complete the first section of the I-9 form and must provide the supporting documents noted above within three days of the date of hire. If the documents are not presented within those three days, the employee must be removed from the payroll (though it is permissible to suspend the worker rather than terminating the worker all together). While it is possible to require people to complete the I-9 form before the first day of employment, it is not recommended because the form does elicit information about one's national origin and a decision not to hire a worker could trigger a discrimination claim. To the extent an employer chooses to have I-9s completed before the date of hire, they should only be requested after a position has been offered and accepted and there should be a uniform policy applicable to all employees receiving an offer of employment having to complete the I-9 ahead of time.

**D. What are the I-9 recordkeeping requirements?**

Employers must keep I-9 Forms for all current employees. For terminated employees, the form must be retained for at least three years from the date of hire or for at least one year after the termination date, whichever comes later.

Retaining copies of the supporting documents is voluntary, however. Employers can retain copies of documents and attach them to the completed I-9 Form, although there is disagreement over whether employers should or should not retain copies of supporting documents. Certainly maintaining documentation could provide a good faith defense for an employer in showing that it had reason to believe a worker was authorized even if the paperwork was not properly completed. IRCA compliance officers may also be suspicious of employers that do not keep copies of documents. Of course, keeping documents also leaves a paper trail. Whatever a company decides, however, it is important that the policy be consistently applied. Keep all the documents or keep none of them. Generally, it is advisable to keep I-9 Forms separate from personnel files.

**E. Electronic Verification and Storage of I-9 Forms**

In October 2004, legislation was enacted that allows for the I-9 to be completed, signed and stored on a computer. On June 15, 2006, U.S. Immigration and Customs Enforcement ("ICE") published an interim rule governing electronic storage of Form I-9. According to ICE, employers may interpret the law to mean that they may continue to complete Forms I-9 on paper but choose to store the forms electronically. Alternatively, employers may choose to both complete and retain the Form I-9 wholly electronically.

ICE identifies the following advantages for employers who use of electronic Forms I-9:
• Potential cost savings by storing Forms I-9 electronically rather than using conventional filing and storage of paper copies or transferring the forms to microfilm or microfiche.

• Electronic forms will allow employers to better ensure that each Form I-9 is properly completed and retained. Some employers may find that electronic completion and storage renders the process less prone to error.

• Electronically retained Forms I-9 are more easily searchable, which is important for re-verification, quality assurance and inspection purposes. This will be especially helpful and cost-effective for large employers that have job sites across the country or that have high employee turnover rates.

The electronic storage requirements are fairly burdensome, requiring employers to establish a security program to limit access to their I-9 system, maintain a record showing who has accessed the system (i.e., an "audit trail"), and numerous other technical requirements. Among other requirements, electronic retention systems must be secure and must be searchable by any data field in the I-9. Electronic signatures can be accomplished using various technologies including electronic signature pads, Personal Identification Numbers (PIN), biometrics, and 'click to accept' dialog boxes. Electronic signatures must be logically associated with an electronically completed I-9, and must include a method for the signatory to acknowledge that he or she has read the employee and employer attestations on the form.

Employers considering electronic storage of I-9s will want to consider the costs and time-commitment required to establish and maintain an electronic I-9 storage system, including the security procedures required by the interim rule.

**F. What penalties does an employer face for I-9 violations?**

Employers can face stiff penalties for IRCA violations that include substantial fines and debarment from government contracts. Penalties can be imposed for hiring unauthorized workers as well as simply for committing paperwork violations even if all workers are authorized to work. Fines for hiring unauthorized workers will amount to anywhere from $250 to $5,500 per worker depending on the prior history of violation. Employers can also be barred from competing for government contracts for a year if they knowingly hire or continue to employ unauthorized aliens. Paperwork violations can also result in significant fines. Each mistake or missing item on a form can result in a $100 penalty up to $1000 for each form. A missing form would automatically be assessed at $1000. An employer, for example, that had 100 employees and did not complete I-9 Forms might face a $100,000 fine. IRCA investigators have considerable discretion in assessing fines and will look at factors like the size of the company, the seriousness of the violations, whether the employer was trying to comply in good faith and the pattern of past violations.

Employers should also be cautioned that knowingly accepting fraudulent documents from employees is a different kind of violation that can be criminally prosecuted under other immigration laws.

**G. What are the best ways to prevent being prosecuted for I-9 violations?**

Employers can minimize the chances for being found to have violated IRCA's employment verification rules by undertaking several steps:

• Conducting a preventative internal audit of the I-9 files to see if there is a pattern of violations requiring remediation. Such an audit should be conducted by, or under the close supervision of, an attorney familiar with IRCA.

• Establishing a regular training program for human resource professionals regarding I-9 compliance rules. The training should be conducted by an attorney familiar with IRCA rules.

• Establishing uniform company policies regarding I-9s. Should copies of documents be retained or not? What kinds of questions can be asked about national origin and citizenship status before the date of hire? Is their uniformity in terms of when the employment verification is commenced?

• Establishing a re-verification tickler system to ensure I-9s are checked in a timely manner.

• Centralizing the I-9 Form recordkeeping process.

• Establishing a process for human resource professionals to check quickly with counsel when there are any problems in the verification process.

• Establishing a backup system to ensure timely compliance with I-9 rules when a human resource professional is out of the office.

**VII. Social Security Mismatch Letters**

A "mismatch letter" is a letter from the Social Security Administration advising an employer that a particular Social Security Number of an employee fails to match Social Security Administration records for that employee. This can be a sign of document fraud by an employee; however, it is most often a simple clerical or other error.

**A. What does a mismatch letter say?**

A mismatch letter typically advises an employer to do the following:

1. Determine whether the employer made an error in reporting the Social Security Numbers to the government.

2. Ask employees to check their latest Forms W-2 against the employees' Social Security cards and inform the employer of any name or number differences.

3. Remind the employees to report to the Social Security Administration any name changes due to marriage, divorce or other reasons.

4. Send those employees whose names and numbers do not match SSA records to the nearest SSA office to resolve the problem.

**B. What should I do if I receive a mismatch letter?**

If you receive a mismatch letter, do not panic. The error is likely a clerical error. Rather, you may want to consider doing the following upon receipt of a mismatch letter:

1. Compare your employment records to the Forms W-2 submitted to the SSA.

2. If your employment records do not match, submit corrections to the SSA using Forms W-2c.

3. If your employment records do match, ask your employee to check his/her Social Security card and to inform you of any name or SSN difference between your records and his/her card. If your employment records are incorrect, correct your records. Remind all employees to report to the Social Security Administration any name changes due to marriage, divorce, or other reasons.

4. If the employment records match the information on the employee's Social Security card, have the employee contact any Social Security office to resolve the issue and inform you of any changes after the discrepancy has been resolved. Give the employee a reasonable time frame within which to inform you regarding the resolution of such discrepancy, and follow up with the employee to make sure your records are corrected.

5. HOWEVER, IF THE EMPLOYEE ADMITS TO UNAUTHORIZED EMPLOYMENT STATUS, TERMINATE HIS OR HER EMPLOYMENT IMMEDIATELY! If you fail to do so, you may be a participant in document fraud (not to mention that you would then be knowingly continuing to employ an unauthorized worker)!

**C. Can I discharge an employee based solely on a mismatch letter?**

No, you cannot discharge an employee based solely on a mismatch letter. Receipt of the letter is not a basis, in and of itself, for an employer to take any adverse action against an employee, such as laying off, suspending, firing, or discriminating against an employee who appears on the list. An employer that uses the information in a mismatch letter to justify taking any adverse action against an employee may violate federal law and could be subject to legal consequences.

However, if the employee either admits to using a fraudulent social security number, or, after having been given an opportunity for wage reporting purposes to explain and reconcile a reported discrepancy with SSA records the employee fails to do so satisfactorily, then the employer may wish to reverify the employee's work eligibility. If the employee cannot produce satisfactory documentation for I-9 purposes, the employer may terminate the employee.

**D. ICE's Proposal Addressing the Handling of Social Security Mismatch Letter**

On June 14, 2006, the Bureau of Immigration and Customs Enforcement ("ICE") of the Department of Homeland Security issued a proposed rule addressing how employers are to handle the receipt of social security mismatch letters. The proposed rule provides that an employer will not be found to have knowingly employed an unauthorized person if after receipt of a mismatch letter the employer acts as follows:

1. Within 14 days of receipt of a mismatch letter, the employer reviews the information in its records to confirm that its records match the information provided by the employee. If the records show that the employer used incorrect social security number information, the employer should correct its records and use the proper information going forward.

2. If the information on the mismatch letter is consistent with the information provided by the employee and filed with the IRS and/or Social Security Administration ("SSA"), the employer must send a note to the employee explaining that a mismatch letter was received and asking the employee to contact the SSA to correct the discrepancy.

3. If the employee presents a new social security number, the correctness of the number must be verified by the

employer with the SSA.

4. If the employee does not report back or if the employee is not able to resolve the mismatch issue within sixty days of the employer's receipt of the mismatch letter, the employer should verify the employee's I-9 form documentation as if the employee is a new hire. This should be done by completing a new I-9 by the 63rd day after receipt of the mismatch letter. The employee should not be allowed to use a social security card with the number which has been listed on a mismatch notice to complete the verification process. The employee must be allowed to present any other documents permitted under the law for use in I-9 completion. The old and new I-9 forms should be kept together.

5. Employers should use a similar process for all employees who are listed in mismatch letters.

The regulation in question is not yet implemented and may never be implemented. However, it appears that ICE will expect that employers take immediate steps to address mismatch letters. If those steps do not yield correct social security number information within a reasonable period of time and the employer takes no further steps, ICE may determine that the employer has continued to employ someone the employer "should have known" was not authorized to work in the U.S. in violation of IRCA.

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