2009

Arizona Dairy Production Conference

Proceedings

Hilton Garden Inn Phoenix Airport Hotel
Phoenix, Arizona
October 15, 2009

Presented by

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Department of Animal Sciences
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Zinpro Corp. – Reno, NV
Arizona Dairy Production Conference

What's It Going To Take To Make A Profit?
By: Gary Genske, C.P.A.

Sponsored by University of Arizona
Airport Hilton Garden Inn
3422 E. Elwood
Phoenix, AZ
October 15, 2009

Gary Genske
Genske, Mulder & Co., LLP
1835 Newport Blvd., Suite D-263
Costa Mesa, CA 92627
V(949)650-9580 F(949)650-9585
garyg@genskemulder.com
What's it going to take to make a profit?

- Our Arizona income/loss averages through June 30, 2009

- Our projections for 2010
  - With no milk price changes
  - With milk price changes

- Dairy industry price change concepts

- Summary

- Questions
"INITIAL DRAFT ONLY"
AVERAGE INCOME AND EXPENSES
FOR GENSKE, MULDER & CO. ARIZONA DAIRY CLIENTS
FOR THE SIX MONTHS ENDED JUNE 30, 2009

<table>
<thead>
<tr>
<th>INCOME:</th>
<th>PER CWT</th>
<th>PER COW</th>
<th>PERCENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Milk</td>
<td>$11.51</td>
<td>$1,159</td>
<td>96.6 %</td>
</tr>
<tr>
<td>Milk futures</td>
<td>0.00</td>
<td>0</td>
<td>0.0</td>
</tr>
<tr>
<td>Calves and heifers</td>
<td>0.17</td>
<td>17</td>
<td>1.5</td>
</tr>
<tr>
<td>Patronage dividend</td>
<td>0.11</td>
<td>11</td>
<td>0.9</td>
</tr>
<tr>
<td>Other</td>
<td>0.12</td>
<td>12</td>
<td>1.0</td>
</tr>
<tr>
<td>Total income</td>
<td>$11.81</td>
<td>$1,199</td>
<td>100.0 %</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>EXPENSES:</th>
<th>PER CWT</th>
<th>PER COW</th>
<th>PERCENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Feed:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hay, silage and farming</td>
<td>$6.14</td>
<td>$617</td>
<td>51.5 %</td>
</tr>
<tr>
<td>Grain</td>
<td>5.98</td>
<td>603</td>
<td>50.3</td>
</tr>
<tr>
<td>Less cost of feeding heifers</td>
<td>(2.34)</td>
<td>(236)</td>
<td>(19.7)</td>
</tr>
<tr>
<td>Total feed</td>
<td>$9.76</td>
<td>$984</td>
<td>82.1 %</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Herd replacement cost:</th>
<th>PER CWT</th>
<th>PER COW</th>
<th>PERCENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Depreciation - dairy cows</td>
<td>$1.21</td>
<td>$122</td>
<td>10.2 %</td>
</tr>
<tr>
<td>Loss on sale of cows</td>
<td>0.91</td>
<td>91</td>
<td>7.6</td>
</tr>
<tr>
<td>Total herd replacement cost</td>
<td>$2.12</td>
<td>$213</td>
<td>17.8 %</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Other operating expenses:</th>
<th>PER CWT</th>
<th>PER COW</th>
<th>PERCENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interest and rent</td>
<td>$0.76</td>
<td>$77</td>
<td>6.4 %</td>
</tr>
<tr>
<td>Equipment lease</td>
<td>0.17</td>
<td>16</td>
<td>1.3</td>
</tr>
<tr>
<td>Labor</td>
<td>1.31</td>
<td>132</td>
<td>11.0</td>
</tr>
<tr>
<td>Depreciation - other</td>
<td>0.86</td>
<td>87</td>
<td>7.2</td>
</tr>
<tr>
<td>Milk hauling</td>
<td>0.78</td>
<td>79</td>
<td>6.6</td>
</tr>
<tr>
<td>Industry assessments</td>
<td>0.30</td>
<td>31</td>
<td>2.6</td>
</tr>
<tr>
<td>Supplies</td>
<td>0.59</td>
<td>60</td>
<td>5.0</td>
</tr>
<tr>
<td>BST</td>
<td>0.02</td>
<td>2</td>
<td>0.2</td>
</tr>
<tr>
<td>Corral cleaning</td>
<td>0.11</td>
<td>11</td>
<td>0.9</td>
</tr>
<tr>
<td>Repairs and maintenance</td>
<td>0.27</td>
<td>27</td>
<td>2.3</td>
</tr>
<tr>
<td>Utilities</td>
<td>0.43</td>
<td>45</td>
<td>3.7</td>
</tr>
<tr>
<td>Taxes and licenses</td>
<td>0.14</td>
<td>14</td>
<td>1.2</td>
</tr>
<tr>
<td>Insurance</td>
<td>0.12</td>
<td>12</td>
<td>1.0</td>
</tr>
<tr>
<td>Fuel and oil</td>
<td>0.14</td>
<td>14</td>
<td>1.2</td>
</tr>
<tr>
<td>Legal and accounting</td>
<td>0.06</td>
<td>6</td>
<td>0.5</td>
</tr>
<tr>
<td>Employee benefits</td>
<td>0.05</td>
<td>5</td>
<td>0.4</td>
</tr>
<tr>
<td>Veterinary and breeding</td>
<td>0.13</td>
<td>13</td>
<td>1.1</td>
</tr>
<tr>
<td>Testing and trimming</td>
<td>0.06</td>
<td>7</td>
<td>0.5</td>
</tr>
<tr>
<td>Hauling livestock</td>
<td>0.02</td>
<td>3</td>
<td>0.2</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>0.01</td>
<td>1</td>
<td>0.2</td>
</tr>
<tr>
<td>Less cost of raising heifers</td>
<td>(0.44)</td>
<td>(44)</td>
<td>(3.7)</td>
</tr>
<tr>
<td>Total other expenses</td>
<td>$5.89</td>
<td>$599</td>
<td>49.8 %</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>NET INCOME</th>
<th>PER CWT</th>
<th>PER COW</th>
<th>PERCENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total expenses</td>
<td>$17.79</td>
<td>$1,795</td>
<td>149.7 %</td>
</tr>
<tr>
<td>NET INCOME</td>
<td>($5.89)</td>
<td>($599)</td>
<td>(49.8 %)</td>
</tr>
</tbody>
</table>

AVERAGE DAIRY STATISTICAL DATA:

Average daily production per cow 65
Average butterfat test 3.62%
Average protein test 3.32%
Herd turnover rate 37.44%
Loss per milking cow per day $3.86
Feed cost per milk cow per day $5.81
ESTIMATED INCOME AND EXPENSES
ARIZONA DAIRY FARMS
FOR THE YEAR 2010

INCOME:

<table>
<thead>
<tr>
<th>Item</th>
<th>PER QWT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Milk</td>
<td>$14.00</td>
</tr>
<tr>
<td>Milk futures</td>
<td>0.00</td>
</tr>
<tr>
<td>Calves and heifers</td>
<td>0.15</td>
</tr>
<tr>
<td>Patronage dividend</td>
<td>0.15</td>
</tr>
<tr>
<td>Other</td>
<td>0.05</td>
</tr>
<tr>
<td><strong>Total income</strong></td>
<td><strong>$14.35</strong></td>
</tr>
</tbody>
</table>

EXPENSES:

Feed:

<table>
<thead>
<tr>
<th>Item</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Hay, silage and farming</td>
<td>$4.00</td>
</tr>
<tr>
<td>Grain</td>
<td>4.65</td>
</tr>
<tr>
<td><strong>Total feed</strong></td>
<td><strong>$8.65</strong></td>
</tr>
</tbody>
</table>

Herd replacement cost - 15% DECREASE $1.80

Other operating expenses:

<table>
<thead>
<tr>
<th>Item</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Interest and rent - 20% INCREASE</td>
<td>$0.91</td>
</tr>
<tr>
<td>Equipment lease</td>
<td>0.16</td>
</tr>
<tr>
<td>Labor</td>
<td>1.31</td>
</tr>
<tr>
<td>Depreciation - other</td>
<td>0.85</td>
</tr>
<tr>
<td>Milk hauling</td>
<td>0.78</td>
</tr>
<tr>
<td>Industry assessments</td>
<td>0.30</td>
</tr>
<tr>
<td>Supplies</td>
<td>0.60</td>
</tr>
<tr>
<td>BST</td>
<td>0.02</td>
</tr>
<tr>
<td>Corral cleaning - 30% INCREASE</td>
<td>0.15</td>
</tr>
<tr>
<td>Repairs and maintenance - 10% INCREASE</td>
<td>0.30</td>
</tr>
<tr>
<td>Utilities</td>
<td>0.45</td>
</tr>
<tr>
<td>Taxes and licenses</td>
<td>0.15</td>
</tr>
<tr>
<td>Insurance</td>
<td>0.13</td>
</tr>
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<td>Fuel and oil</td>
<td>0.15</td>
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<tr>
<td>Legal and accounting</td>
<td>0.06</td>
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<td>Employee benefits</td>
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<td>Hauling livestock</td>
<td>0.02</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>0.01</td>
</tr>
<tr>
<td>Less cost of raising heifers</td>
<td>(0.45)</td>
</tr>
<tr>
<td><strong>Total other expenses</strong></td>
<td><strong>$5.16</strong></td>
</tr>
<tr>
<td><strong>Total expenses</strong></td>
<td><strong>$16.61</strong></td>
</tr>
<tr>
<td><strong>NET INCOME</strong></td>
<td><strong>($2.26)</strong></td>
</tr>
</tbody>
</table>

AVERAGE DAIRY STATISTICAL DATA:

<table>
<thead>
<tr>
<th>Item</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average daily production per cow</td>
<td>66</td>
</tr>
<tr>
<td>Herd turnover rate</td>
<td>40%</td>
</tr>
<tr>
<td>Loss per milking cow per day</td>
<td>$1.49</td>
</tr>
<tr>
<td>Feed cost per milk cow per day</td>
<td>$5.14</td>
</tr>
</tbody>
</table>
What's it going to take to make a profit?

U.S. Senate Bill S-1645
Originally the Spector - Casey Bill
"Federal Milk Marketing Improvement Act of 2009"

- Only 2 classes of milk, I and II

- Class II (mfg) pay prices = cost of production from NASS

- Class I (fluid) pay price = Class II price plus current Class I price differentials

- Price reduction on up to 5% of any overproduction of milk, calculated quarterly

- Excess imports over exports will not change pay prices

- Additional assessment may be assessed on over base production up to ½ of Class II price

- All U. S. producers will participate
What’s it going to take to make a profit?

Dairy Price Stabilization Plan (DPSP)
Introduced by National Holstein Association along with Milk Producers Council

– Assessment called “Market Access Fee”

– $1 - $2 assessment on all milk produced if you produce over historical production or assessment of $6 on over base production

– Acquire the production history the year after you pay assessment

– Attempts to match milk supply with anticipated demand quarterly

– Minor government involvement or cost

– All U.S. producers will participate
What's it going to take to make a profit?

**Dairy Growth Management Initiative (DGMI)**
announced by Dairy Farmers of America in mid-September, 2009

- Continuation or expansion of current CWT program with a national check off assessment by governmental action

- Create a 30 member Advisory Board to:
  - Modify assessment rate
  - Consider supply and demand needs

- Current Dairy Price Support Program to be reviewed

- Encourage dairy products for humanitarian needs

- Board to have broad authority to consider:
  - Continue cattle retirement programs
  - Regional or National base program
  - Diversion program
  - Export assistance
  - Dairy commodity production incentives to displace imports (MPC’s?)
  - Programs to enhance forward contracting
What's it going to take to make a profit?

National Milk Producer Federations Ideas
as announced September 21, 2009

- Elimination or “revamping” of price supports
- Elimination or “revamping” MILC
- Create new producer “income insurance program”
- Improve participation in CWT program
- Reform the Federal Milk Marketing Order program
What's it going to take to make a profit?

**Secretary Vilsak's Advisory Committee**

- 2 year review and recommendations for a new dairy farm pay price system

- Consider other proposals as short-term until, Advisory Committee's proposals are implemented
What's it going to take to make a profit?

Short-Term Help

- Enforcement of the Pasturized Milk Ordinance (PMO) (750,000 scc)
- Enforcement of the CME (½ of 1%)
- Enforcement of the Milk Protein Concentrates (MPC) in food products - not approved by FDA
- Enforcement by FDA - MPC product labeling
- Include MPC and Casein in "milk" import tariff rate schedules (IDFA ‘05)
- UDA Emergency Order - Sec. 608C(18) of 1937 Agriculture Act - can set dairy pay prices to reflect farmer's cost of production
- Standardize milk tests at 3.5/8.7 vs. 3.2/8.2
- Regionally approved production cut backs at co-op level
- Produce milk products the world wants
IMMIGRATION AND EMPLOYMENT COMPLIANCE: NEW LAWS, NEW CHALLENGES, NEW STRATEGIES

Presented by
Julie A. Pace
Ballard Spahr Andrews & Ingersoll, LLP
pacej@ballardspahr.com
(602) 798-5475

For:
8th Annual Arizona Dairy Production Conference
October 15, 2009

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This document provides information of a general nature regarding legislative or other developments. None of the information contained herein is intended as legal advice or opinion relative to specific matters, facts, situations or issues. Additional facts and information or future developments may affect the subjects addressed in this document.
Julie A. Pace is a partner in the Litigation Department and a member of the Labor, Employment & Immigration Group.

Ms. Pace concentrates her practice in the fields of employment, OSHA, health care, and construction. She is a litigator, defending sexual harassment, employment discrimination, retaliation, whistleblower, wrongful discharge suits, and EEOC charges. She handles matters involving ICE, OFCCP, DOL, NLRB, and is well-versed in wage and hour laws. She frequently conducts investigations and provides training to managers and employees, including I-9 audits and training.

Ms. Pace also counsels employers on non-compete contracts, confidentiality agreements, employee discipline, drug testing, accommodation of disabled individuals, leaves of absences, workplace violence, safety policies, and other human resource policies and procedures, contract disputes, business torts, trade practices and construction. She regularly prepares and reviews employee handbooks and safety manuals.

For over fifteen years, Ms. Pace has regularly represented companies in OSHA proceedings and has handled hundreds of OSHA matters and over 45 fatalities in the workplace. She has been working on fall protection issues since the fall protection standard went into effect in 1995.

Ms. Pace has served as a Judge Pro Tem in the Arizona Court of Appeals. She was a law clerk for the Honorable Joe W. Contreras, Arizona Court of Appeals from 1992-93. She was also a legal extern for the Honorable Robert C. Broomfield, United States District Court, District of Arizona, in 1990.

Ms. Pace is an active member of the American Bar Association, Arizona Bar Association, Maricopa County Bar Association, National Women Lawyer’s Association and the Arizona Women Lawyer’s Association.


Ms. Pace is a well-known, professional speaker and trainer, with a training DVD called “Respect” that is marketed nationally. She regularly speaks at national conventions for the accounting, hospitality, and home building industries as well as...
various OSHA conferences. Ms. Pace speaks at approximately 20 seminars per year.

Ms. Pace has been actively involved in the Phoenix community for many years. Her community leadership includes serving as co-chair of the statewide coalition of business, labor, religious and civil rights groups that opposed anti-employer immigration ballot initiatives and serving as chair of the committee that sponsored a new Arizona Cardinals football stadium. Ms. Pace is also the Immigration Committee Chair of the Arizona Chamber of Commerce.

Ms. Pace is a graduate of Arizona State University (B.S., magna cum laude 1983) and Arizona State University College of Law (J.D., cum laude, 1992) where she served as symposium and articles editor of the *Arizona State Law Journal* and received the Dean’s Award for Outstanding Service to the College of Law.

Below is a detailed listing of Ms. Pace’s recent speaking engagements, professional memberships, and community and civic involvement.

**Recent Speaking Engagements**

“I-9s and I-9 Audits, ICE Audits and Investigations,” Staffing Management Association of Greater Phoenix

“Here We Go Again: New Federal and Arizona Immigration Laws Require New Compliance Strategies,” Ballard Spahr Andrews & Ingersoll, LLP

“Employee Discharge and Documentation,” Lorman Education Services

“Don’t Tell Me What I Should Have Done: What Do I Do Now?” ABA Annual Construction Forum

“Employer Sanctions Law and Other Employment Updates,” ASSE

“Immigration Issues for the Construction Industry,” Lorman Education Services


“Immigration Law,” National Precast Concrete Association, Denver Colorado

“EEOC Compliance,” Lorman Education Services

“Panel Discussion – Legal Arizona Workers Act,” Arizona State University College of Law

“I-9 and Immigration Compliance Strategies,” Rainbird Corporation National Conference

**Professional Memberships**

National Association of Homebuilders
Home Builders of Central Arizona
Construction Financial Management Association
Arizona Contractors Association
Arizona Roofing Contractors Association
Arizona Chamber of Commerce
American Society of Safety Engineers
Civic and Community Involvement

Chair and member, Mesa Downtown Redevelopment Commission (ten years)
Chair, Immigration Task Force, Arizona Chamber of Commerce
Former Director, Home Builders Association of Central Arizona
Former Director, Construction Financial Management Association
Former Vice-President of Economic Development, Director, East Valley Partnership
Former Vice President of Soroptimists International
Cofounder, East Valley Economic Forum
Cofounder, Southwest Shakespeare Company
Cofounder, Dr. Martin Luther King Jr. Celebration in Mesa
David A. Selden is a partner in the Litigation Department and a member of the Labor, Employment & Immigration Group.

Mr. Selden concentrates his practice representing management in a wide variety of employment law matters, including discrimination, wrongful discharge, employment contracts, workplace torts, EEOC, ACRD, OSHA, DOL, restrictive covenants, non-competition, trade secrets, and other employment litigation and human resources counseling, investigation and training.

Mr. Selden has successfully defended employers in state and federal trial and appellate courts in Arizona and elsewhere, including The Neiman Marcus Group, Safeway, Troy Corp., Scripps-Howard Broadcasting, Century Surety, the City of Mesa, and AdobeAir.

Mr. Selden is consistently listed as a leader in the field of labor and employment law in Chambers USA America’s Leading Lawyers for Business, a directory built primarily on client interviews. Chambers praises his “incredible knowledge coupled with a tenacious style of litigation” and described him as “a cerebral professor-type” who is “very astute.” He has also been listed in The Best Lawyers in America for more than a dozen years.

He is co-editor-in-chief of Arizona and Federal Employment Law: An Employer’s Guide, a 500 page book published by the Arizona Chamber of Commerce, now in its ninth edition. He is an Adjunct Professor of Law at Phoenix School of Law, teaching courses in Employment Law and Employment Discrimination Law. He is a frequent speaker before professional groups, giving more than 20 seminars per year.

Prior to law school, Mr. Selden began his career in Washington, DC working as a legislative and administrative assistant to several members of Congress from 1971 through 1982. Mr. Selden remains active in legislative and administrative matters. He wrote and was the primary advocate to achieve enactment of the Employment Protection Act, which overhauled Arizona’s employment laws, Arizona’s 1997 constructive discharge law, and other laws to limit employment litigation. He has testified before the Arizona Legislature as an expert in employment law matters dozens of times.

Mr. Selden has served as chairman of the Arizona Chamber of Commerce Employee Relations Committee since 1990, in addition to being a member of the Chamber’s Board of Directors and serving as its General Counsel. In 2004, the
Chamber honored Mr. Selden with the Volunteer of the Year award.

Mr. Selden has served as a member of the Board of Directors of the Phoenix Symphony since 1995 and serves as its General Counsel.


Mr. Selden is a graduate of George Washington University (B.A. 1973 and M.A. 1976) and Georgetown University (J.D., magna cum laude, 1982), where he served as Editor of The Tax Lawyer.

**Published Opinions**

The following are published court opinions in cases in which Mr. Selden was counsel of record.

- **Swanson v. The Image Bank, Inc. and Swanstock, Inc.**, 206 Ariz. 264, 77 P.3d 439 (Ariz. 2003)
- **Caudle v. Bristow Optical Co.**, 224 F.3d 1014 (9th Cir. 2000)
- **Cooper v. Neiman Marcus Group**, 125 F.3d 786 (9th Cir. 1997)
Ballard Spahr Andrews & Ingersoll, LLP was founded in 1886 by a group of lawyers committed to excellence in the practice of law. Today, we remain dedicated to that fundamental principle. We have grown to be one of the largest law firms in the country, with over 500 lawyers and ten offices located throughout the mid-Atlantic corridor and the western United States. As a large, multi-practice, multi-regional law firm, we are able to combine a national scope of practice with strong local market knowledge to represent companies, individuals, and other entities in virtually every state and around the world.

In addition, the firm’s lawyers practice in the following areas of law:

- Business & Finance
- Litigation
- Public Finance
- Real Estate

**Specialty Practice Areas:**

- Bankruptcy, Reorganization and Capital Recovery
- Life Sciences/Technology
- Construction
- Consumer Financial Services
- Eminent Domain and Valuation
- Employee Benefits and Executive Compensation
- Energy and Project Finance
- Environmental
- Family Wealth Management
- Franchise and Distribution
- Health Care
- Housing
- Insurance
- Intellectual Property
- International
- Investment Management
- Labor, Employment & Immigration
- Mergers and Acquisitions
- Planned Communities and Condominiums
- Product Liability and Mass Tort
- Public-Private Partnerships
- Real Estate Development
- Real Estate Finance
Real Estate Leasing
Resort and Hotel
Securities
Securitization
Tax
Technology and Emerging Companies
Telecommunications
Transactional Finance
White Collar Litigation
Zoning and Land Use
Our attorneys regularly assist employers regarding compliance and investigations involving U.S. immigration laws, including the following:

» I-9 training, I-9 audits;

» Procedures and responses to no-match letters from the SSA;

» Advice concerning various database verification programs including: E-Verify Program, formerly known as the Basic Pilot Program; the SSA’s Social Security Number Verification Service, and “IMAGE” program;

» Strategies to respond to law enforcement, government inspections, inquiries about identity, I-9s, subpoenas or raids;

» Providing guidance regarding compliance with state immigration laws and regulations;

» Contract considerations regarding immigration compliance;

» Strategies to respond and defend against national origin discrimination, unlawful hiring, IRCA violations, civil penalties, and criminal charges;

» Strategies to deal with internal investigations based on identity issues;

» Strategies to respond to customer or third party complaints about an employee’s legal status;

» Strategies to respond to employee absences from work to attend rallies or boycotts and other actions potentially protected as concerted activity under the NLRB;

» Strategies to implement when using leased or contingent workforce companies.
Labor, Employment & Immigration Group
Occupational Safety and Health Act Practice

The firm represents clients on a national basis in defending OSHA citations. We have been involved in representing trade associations in shaping federal OSHA standards, particularly in the construction and manufacturing industries. We have defended clients in numerous fatality cases and have prevailed at hearings in defeating all citations arising out of fatality cases. Our lawyers help companies promote safety through drafting and implementing safety programs, policies and manuals and providing safety training.

» Drafting safety policies and handbook for employers to help prevent violations and to improve worker safety;

» Counseling employers regarding specific measures to comply with OSHA standards;

» Advising employers regarding procedures to adopt in anticipation and preparation for a potential OSHA inspection;

» Counseling employers regarding how to conduct themselves during OSHA inspections, and handling communications with OSHA following an inspection;

» Contesting OSHA citations, including representing clients in OSHA settlement proceedings, OSHA administrative hearings, and court challenges to OSHA citations and penalties;

» Influencing the adoption of new OSHA standards, including negotiating with federal and state OSHA officials regarding adoption or revision of OSHA standards or approving variances to OSHA standards;

» Assisting with collateral civil litigation; and

» Handling the special circumstances that arise in fatality matters, including media relations, employee counseling, and government recommendations that the matter should proceed as a criminal prosecution.
The Labor, Employment & Immigration Group is a national practice that provides advice and handles litigation on behalf of clients in the private and public sectors in the areas of labor-management relations, employment, and ERISA.

The types of matters that are handled regularly on behalf of clients include:

» Representing employers in collective bargaining negotiations, interest arbitration, private and AAA labor arbitration, NLRA and state labor law compliance advice, labor implications of mergers, acquisitions and asset purchases, strike prevention and control, union campaigns, union-free training of management and supervisors, and unfair labor practice proceedings before the NLRB and state labor boards;

» Employment discrimination advice and defense of claims on grounds of protected class membership such as age, race, ethnicity, national origin, disability, religion, sexual orientation, sexual harassment, pregnancy, gender, Equal Pay Act claims;

» Preparation and defense of affirmative action plans under Executive Order 11246 and other federal and state laws, including advice on implementation of monitoring processes; plan analyses and drafting; and advice, counseling, and litigation over OFCCP audits;

» ERISA and other employee benefits advice and litigation, including administrative claims appeals; breach of fiduciary duty claims; litigation of benefit claims and interference with protected rights; ERISA preemption; and plan design counseling for litigation avoidance and defense;

» Defense of class action and collective action cases brought against employers, benefit plans, and benefit plan fiduciaries;

» Defense of at-will employment, wrongful discharge, and employment tort claims;

» Design and implementation of corporate wide HR and labor strategies and initiatives;

» Preparation of, and advice and litigation concerning, employment agreements, executive compensation programs, restrictive covenants and trade secret agreements, handbook and policies, employment discipline and terminations; leaves of absences;

» Advice and litigation on behalf of public employers such as cities, states, school districts, authorities, and municipalities in traditional labor and
employment matters, as well as under specialized labor laws regarding police, fire, and other personnel (e.g., Heart and Lung Act and Civil Service Laws);

» Training of managers and employees on topics such as: anti-harassment, anti-discrimination, diversity; EEO compliance, ADA, FMLA, chronic absenteeism, managing the difficult employee, health and safety compliance; hiring and interviewing, wage and hour compliance, counseling, discipline and terminations, and leaves of absences;

» Conduct investigations;

» Review and legal audit of personnel policies, manuals and employment forms, formulation of personnel policies such as FMLA, sexual harassment and drug and alcohol abuse and testing, privacy rights, and ADA compliance;

» Advice concerning OSHA and state health and safety laws, including compliance and self-audits; governmental investigations and citations; negotiations with OSHA; and litigation before the OSHRC and the courts;

» Wage and hour investigations and FLSA advice;

» Immigration law, including employer sanctions and I-9 compliance, social security mismatch letters, employment-based immigrant petitions, nonimmigrant visa petitions for intra-company transfers and specialty workers, labor certifications, investor visas, family-based immigration services, and litigation before administrative and judicial courts on immigration matters;

» Public and private school law matters;

» Reduction in force design, counseling, and litigation, including WARN compliance, early exit programs, severance pay, and effective use of releases; and

» Representation of professional athletes and professional sport franchises.
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THE IMPORTANCE OF FULLY COMPLETING THE FORM I-9

By
Julie A. Pace
David A. Selden
Heidi Nunn-Gilman
Ballard Spahr Andrews & Ingersoll, LLP


A. Introduction.

In 1986 and again in 1990, Congress vastly expanded employer responsibility for enforcing federal immigration law by imposing substantial penalties upon employers for knowingly hiring aliens who are not authorized to work in the United States.

Under the Immigration Reform and Control Act of 1986, 8 U.S.C. §§ 1324a, 1324b, 1324c, and the Immigration Act of 1990 (collectively, “IRCA” or the “Act”), employers must verify that each of their employees is authorized to work in this country. IRCA, however, also subjects employers to severe sanctions if they discriminate against current or prospective employees on the basis of national origin or citizenship. Therefore, IRCA forces employers to walk a fine line between verification and discrimination. Remarkably, despite the potential for substantial liability under IRCA, the government estimates that many employers are unaware of its provisions.

B. Prohibited Employer Conduct.

IRCA makes it illegal for any person who employs four or more persons to:

1. hire, continue to employ, or refer for a fee, an alien knowing that the alien is not authorized to work in the United States;
2. hire any person without complying with the verification procedures contained in the Act; and
3. discriminate against any person on the basis of national origin or citizenship status.

An employer may not circumvent the Act’s prohibitions by using the services of independent contractors in lieu of employees.

C. Defense.

Generally, the only defense to a charge that an employer has hired unauthorized workers is that the employer did not have actual or constructive knowledge of the employee’s unauthorized status.
Complying with the verification procedure contained in IRCA creates a good faith defense to an alleged violation. Failing to comply with the verification procedure creates a presumption that the employer had constructive knowledge that the employee is not authorized to work in this country.

D. **Verification Procedure: I-9 Form.**

The verification procedure requires employers to verify the identity and authorized status of every employee. This process must be documented by completing an I-9 Form (“Employment Eligibility Verification Form”) for every person the employer hires, regardless of the person’s purported or apparent citizenship.

To complete this form, the employer must review original unexpired documents from the employee and verify the employee’s identity and employability. In completing the I-9 Form, the employer must list the following information about the documents presented by the employee:

1. title,
2. issuing authority,
3. number, and
4. expiration date, if any.

The employer also must state on the I-9 Form the date that employment begins. The form must be completed after the offer of employment. While the regulations technically require the employee to complete Section 1 of the Form I-9 on the first day of employment, the regulations allow the employer three business days after hiring the employee to complete the I-9 Form. The employer must update the I-9 Form within 90 days of the presentation of the receipt that shows the application for replacement documentation, however, if a receipt is properly used on the initial I-9 Form. An employer must complete the I-9 form by the start of employment for employees who will work three days or less.

Generally, if any of the documents demonstrating authorized status expire during the employment, the employer must update the I-9 Form before the temporary work authorization expires.

Section 1 of the I-9 Form must be completed by the employee. The employee must complete, sign, and date this section. The employee must fill out one the four boxes regarding citizenship.

If the employee does not read English, a translator/preparer can be used to complete Section 1. The employee still must sign his or her name, and the translator/preparer must sign the bottom of section 1. In the event of an investigation, ICE may interview the translator/preparer.

The current I-9 Form contains a non-inclusive list of various documents that satisfy these purposes. All documents must be unexpired. Moreover, the I-9 Form breaks down the various documents into three columns -- A, B, and C.
Column A lists documents that establish both the employee’s identity and authorized status. These include such documents as a U.S. Passport, Lawful Permanent Resident Card, and Employment Authorization Card. Various other documents are acceptable. A complete list of acceptable documents is contained on the reverse side of the I-9 Form in Appendix A.

If an employee cannot present a single document demonstrating both identity and authorized status, the employer must accept two documents that together demonstrate the employee’s identity and authorized status.

The documents demonstrating identity are listed in Column B on the I-9 Form and include valid drivers’ licenses or voter registration cards. Documents demonstrating authorized status are Column C documents, and include social security cards or certified birth certificates.

Many employers choose to photocopy the original documents presented by the employee and attach the copies to the Form I-9, but they are not required to do so. As more fully discussed below maintaining copies of the back-up documentation may be harmful to employers if ICE investigates your company and reviews copies of the documents reviewed by your company personnel. Currently federal law does not require companies to photocopy documents used for identification.

Both the employer and employee must attest to the Form I-9 under penalty of perjury. The employee verifies that he or she is a United States citizen, a noncitizen national, a permanent resident, or authorized to work in the United States on a temporary basis, and that he or she has presented legitimate documents.

The employer merely verifies that it has reviewed the documents submitted by the employee, and that the documents reasonably appear to be genuine and relate to the person presenting them. Employers may obtain a revised Handbook for Employers dated 4/03/09, which is the last published guidance for employers.

Employers must maintain I-9 forms for all current employees. Employers may not knowingly use, possess, obtain, accept or receive any forged, counterfeit, altered, or falsely made document submitted by an employee to comply with these verification procedures.

E. **Facts from Real I-9 Cases.**

Issue: Did the employer knowingly hire and employ an illegal alien?

The record reflects that:

1. The hiring manager and the alien grew up together in Mexico.
2. The alien had been in the hiring manager’s house in Mexico when they were younger.
3. The alien is currently married to the hiring manager’s cousin, a U.S. citizen.
4. The alien’s brother called the hiring manager from California and:
5. He asked the manager to hire the alien to work at the manager’s Arizona store;
6. The manager said he would hire the alien;
7. In response to the manager’s question, the brother said the alien had appropriate documentation.
8. Upon arrival at the store in Phoenix, the alien presented to the hiring manager a California driver’s license and a social security card.
9. The alien’s last name was misspelled on the front of the social security card.
10. The back of the social security card did not match any of the exemplars in the INS “Handbook for Employers” on the completion of I-9 forms.
11. The alien resided with the hiring manager during his employment.
12. The alien spoke poor English and testified through an interpreter.

Despite the above facts, the court found in favor of the employer. The administrative law judge (“ALJ”) had found against the employer. The court reversed because the ALJ had based its decision primarily on (1) the fact that the employer had offered the employee the job before the documents were presented to the employer; and (2) that the employer had failed to compare the reverse side of the social security card with the example in the INS Handbook. There are no regulations, however, that require employers to review examples in the INS Handbook. The ALJ failed to base its decision on the other facts in the case, which could have made the employer liable. USA v. Collins Foods International, Inc. D/B/A Sizzler Restaurant, 948 F.2d 549 (9th Cir. 1991).

In another case, decided shortly after the employment eligibility verification requirements of IRCA were passed, the Court found that an employer did have knowledge based on the following facts:

1. The INS had conducted an I-9 audit and cited the Company for paperwork violations that included failing to reverify work authorization when it expired but continuing to employ the individual.
2. The INS officers had identified several employees that it suspected were using false green cards and provided the Company with a list of numbers which, if they were being used at the Company, indicated that the person using them was an unauthorized alien. The Company did not follow up on the information and allowed the employees to continue working.
3. The Company failed to complete a Form I-9 for some employees and continued to employ them after the Company was cited for paperwork violations regarding the individual and the citation identified him as “an illegal alien.”

Mester Manufacturing Company v. Immigration and Naturalization Service, 879 F.2d 561 (9th Cir. 1989). An employer clearly must take reasonable steps to determine the status of an employee or terminate the individual’s employment after ICE indicates that the individual is not
authorized to work in the United States or risk charges of “knowingly” employing an unauthorized worker.

II. CHANGES IN FORM I-9 VERIFICATION PROCEDURE UNDER THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") changed employment verification procedures significantly. The changes were supposed to become effective no later than September 30, 1997, but the government was not ready to implement the new regulations and distribute new I-9 forms so a lengthy postponement occurred, and a new Form I-9 incorporating the regulations was not issued for over a decade.

A. Increased Enforcement.

At the time, the law increased the number of investigators by 300 in each of the three fiscal years following its enactment. Under the Act, at least one-half of the investigators must investigate possible employer sanctions for violations. This means at least 450 new employer sanctions investigators were added in 1998, 1999, and 2000. The Act required at least ten investigators to be assigned to each state.

The law also authorized the Attorney General of the United States to enter into agreements with states or political subdivisions of the states to allow state officers to perform functions of an immigration officer.

B. New I-9 Form and Acceptable Documents.

The Immigration and Naturalization Service ("INS") stated that it would develop a new Form I-9 to comply with this law. More than ten years after the IIRIRA was passed, the INS was renamed the United States Citizenship and Immigration Services ("USCIS") with the Immigration and Customs Enforcement ("ICE") as the enforcement division. Several versions of the I-9 form have been released in the past few years. Employers need to use the most current Form I-9. The USCIS issued the new I-9 form and list of acceptable documents in April 2009. The actual date in the lower right-hand corner of the I-9 Form is 2-2-09. The date on the upper right-hand corner of the form is 6-30-09.

C. Good Faith Defense.

IIRIRA provides employers with a new defense for paperwork violations. IIRIRA creates a good faith defense for procedural or technical violations in completing the Form I-9. (Sonny Bono Amendment.)

Prior to IIRIRA, employers who committed “paperwork” violations, such as incomplete I-9 forms, were subject to penalties. Under IIRIRA, employers are still subject to penalties. However, the new law distinguishes between “substantive” and “procedural or technical” violations. An exemption has been created for employers who commit “technical or procedural” violations if employers made a “good faith attempt” to comply.
The exemption does not apply if ICE has discovered the violation, given the employer ten days to cure the violation, and the employer has failed to cure the violation. Also, this exemption does not apply if the employer has engaged in a “pattern and practice” of paperwork violations.

Employers who commit a “technical or procedural” violation in completing the I-9 Form are excused if a “good faith attempt” to comply exists. The new law distinguishes between “substantive” and “procedural or technical” violations.

III. ENFORCEMENT AND CONTESTING FINES.

Immigration and Customs Enforcement (“ICE”) is primarily responsible for enforcing the Act, although the Department of Labor also has limited enforcement authority. ICE may assess penalties against an employer that it concludes has violated the Act.

ICE initiates this process by serving on the employer a “Notice of Intent to Fine.” The notice must set forth the alleged violations and proposed penalty.

Within 30 days of the notice being served by ICE, the employer may file a written request for a hearing, which will take place before an administrative law judge. The judge’s determination becomes final 30 days after it is served.

Within 45 days after service of the judge’s decision, an employer may petition the federal Court of Appeals. If an employer does not comply with a final order, the United States Department of Justice may file an enforcement action in any federal district court.

IV. PENALTIES.

The Act provides for monetary fines on a sliding scale depending upon the number of previous offenses by the employer. The Department of Homeland Security recently increased these penalties to adjust for inflation.

A. For Employing Unauthorized Aliens:

1. For the first offense, the employer may be fined $375 to $3,200 per unauthorized alien;

2. For the second violation the employer may be fined $3,200 to $6,500 per unauthorized alien;

3. For the third and any further violations, an employer may be fined $4,300 to $16,000 per unauthorized alien; and

4. For pattern and practice violations, the employer may be enjoined or fined up to $3,000 in criminal penalties for each unauthorized alien and/or imprisoned up to six months.

B. For Accepting Fraudulent Documents:

1. For the first offense, the employer may be fined $375 to $3,200 per fraudulent document; and
2. For subsequent violations the employer may be fined $3,200 to $6,500 per fraudulent document.

C. **For Violations of the Verification Procedures.**

An employer may be fined $110 to $1,100 for each violation.

D. **For Joint Violations of the Verification Process and the Prohibition on Hiring Unauthorized Aliens.**

ICE will take various factors into consideration in assessing the appropriate penalty, including the size of the business, the employer’s good faith, the seriousness of the violation, whether the individual was actually an unauthorized alien, and the history of violations by the employer.

Thus far, courts have interpreted the good faith requirement as imposing a substantial burden on the employer to demonstrate that it acted reasonably and honestly. Courts have concluded that negligence, mistake, and ignorance of the law do not satisfy the good faith standard. Moreover, this defense is not available to an employer who fails to complete the Form I-9.

E. **For Document Fraud.**

Penalties are no less than $275 and no more than $2,200 for the first offense and no less than $2,200 but no more than $5,500 for subsequent offenses and possible imprisonment for no more than 5 years for anyone who prepares, files, or assists another in preparing an application for immigration benefits or support documentation with “knowledge or reckless disregard of the fact that such application was falsely made or, in whole or in part, does not relate to the person on whose benefit it was or is submitted.”

Falsely made means preparing or providing an application or document “with knowledge or in reckless disregard of the fact that it contains a false, fictitious, or fraudulent statement or material misrepresentation.”

F. **For Harboring Illegal Aliens.**

Employers who knowingly hire ten or more illegal aliens in a 12-month period are subject to civil penalties and imprisonment of more than 5 years if the employer had actual knowledge that the aliens were unauthorized and the fact that the aliens were brought into the United States illegally.

G. **For Pattern and Practice Violations.**

If an employer is found to have engaged in a “pattern or practice” of knowingly employing unauthorized workers, the employer may be subject to criminal penalties. Criminal sanctions may include a fine of $3,000.00 per unauthorized worker or imprisonment for six months or both.
V. **ICE INVESTIGATIONS.**

What was formerly INS is now two organizations, the United States Citizenship and Immigration Services (“USCIS”) and U.S. Immigration and Customs Enforcement (“ICE”). On March 1, 2003, the Homeland Security Act of 2002 transferred the functions of the former INS from the Department of Justice to the Department of Homeland Security.

A. **Notice of Investigation.**

Employers generally will receive a letter from ICE indicating that an ICE investigator will meet with the employer no sooner than 3 days later and that the employer should have all original I-9 forms available for the ICE investigator to review.

B. **Maintenance of I-9 Forms.**

Employers are not required to maintain I-9 forms in any particular order. Employers do not need to alphabetize the forms if the forms are not normally kept in alphabetical order. Employers may produce the I-9 forms in the manner in which they generally maintain them.

C. **Copying I-9 Forms Before Investigator Arrives.**

Employers, however, should make copies of all I-9 forms before the ICE investigator arrives. Generally, the ICE investigator will take all the original I-9 forms. ICE does lose documents. Also, in some cases, a company is subject to an inspection, but it may not hear from ICE for more than two years before receiving the Notice of Intent to Fine. Furthermore, the company is without any I-9 forms during this time period if it has not made copies of such forms.

D. **ICE Review and Response.**

The ICE investigator will generally remain at your company for a very short time on this first visit. The investigator’s goal is to pick up the documents and be as inconspicuous to your employees as possible.

E. **Employees Identified as Reverification or Counterfeit Documents.**

Generally, after a short period of time, the ICE investigator will forward a chart to the company identifying employees with counterfeit documents or who need reverification. Upon receipt of this chart, the company is required to reverify documents.

The company is generally precluded from discharging employees who have previously provided counterfeit or suspect documents merely based on the individual being included on the ICE investigator’s chart. The company is supposed to allow the employee to present documents for reverification and completion of a new I-9 Form.

The company should send a notification letter to employees requiring reverification. The letter should inform the employee that he or she must provide documents within a reasonable time (3 days, one week, etc.) or the employee will be terminated. Technically, the employee is not supposed to work for the employer until the reverification process has occurred. ICE
investigators, however, generally provide a reasonable time for employers to reverify documents. Some employers suspend the employee without pay until the employee presents valid documents or the deadline to provide such document expires and the employee is discharged if the employee has failed to comply.

F. **Employee Surveys/Raids.**

ICE investigators also may return to conduct employee surveys. Sometimes they will bring buses to remove individuals from the workplace. Numerous investigators may arrive to interview employees and surround the facility while the employee surveys are being conducted.

Employers should consider certain issues when ICE inspects your workplace. ICE investigators almost always carry firearms and companies should determine the best location for the investigators to conduct employee surveys.

Employers should seek to ensure that the employee surveys are conducted safely. In fact, OSHA requires employers to make the workplace safe. Some circumstances could place ICE directly at odds with OSHA’s requirement that work be performed safely, including government investigations by ICE.

Safety issues, therefore, should be adequately addressed with the ICE investigator prior to the start of the inspection. If the ICE investigator requests the employer to call all employees to a specific location for a meeting, the employer should be cautious to ensure that if employees try to escape during the meeting they are not exposed to unnecessary injury. For example, if the company calls a meeting but places all employees within a locked, fenced yard that contains razor wire or barbed wire across the top of the fence, there is a high risk that employees may be hurt if they try to escape. It may be better to have ICE investigators conduct their employee surveys at disperse job sites, if possible.

Another issue for employers to address is the media and helicopters. ICE sometimes conducts high profile raids, and the media shows up to obtain coverage of the raid. The company should consult with ICE ahead of time and request that ICE not contact the media. The media, however, does listen to police scanners. Furthermore, the media thrives on tips provided by various individuals and entities. Trade secrets should be protected prior to a raid if the company suspects the media may arrive during the raid.

Employers also may want to designate an appropriate staging area for the ICE investigators and their vehicles, including buses, as well as the media. Employers will need to consider an area or two for interviews, and a holding area for individuals who ICE will be removing from the job site.

G. **Notice of Violation.**

After an investigation is complete, it may take some time for an employer to learn whether it will be fined by ICE. A Notice of Violation may be issued. Most matters are resolved through a negotiation and settlement process.
H. Examples of Real Life ICE Enforcement Actions.

The Department of Homeland Security on April 19, 2006 conducted a raid on IFCO Systems North America, Inc. (IFCO), the largest pallet services company in the U.S. (headquartered in Houston). The government arrested seven current and former managers of IFCO pursuant to criminal complaints issued in a New York federal court. All seven managers are charged with conspiring to transport, harbor, encourage and induce undocumented persons to reside in the U.S. for commercial advantage and private financial gain, in violation of the immigration laws. The conspiracy charge carries a penalty of up to 10 years in prison and a fine of up to $250,000 for each alien with respect to whom the violation takes place. Two other IFCO employees were arrested on criminal charges relating to fraudulent documents.

In addition to the criminal arrests, ICE agents conducted “consent” searches or executed criminal search warrants at more than 40 IFCO plants and related locations in 26 states that resulted in the apprehension of approximately 1,187 unauthorized IFCO employees. The consent searches and search warrants were conducted at locations in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, new Jersey, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, South Carolina, Virginia and Utah.

The government’s investigation of IFCO began over a year before the raids, and the government alleges that:

1. IFCO officials transported illegal aliens to and from work; paid rent for the housing of illegal alien employees; and deducted money from the aliens’ monthly paycheck to cover these expenses.

2. It was common for IFCO to hire workers who lacked Social Security cards or who produced bogus identification cards.

3. IFCO hired an informant for ICE; reimbursed the informant for obtaining fraudulent identity documents for other unauthorized employees; used the informant to recruit other illegal workers; and advised the person and other unauthorized employees on how to avoid law enforcement detection.

4. Approximately 53.4 percent of Social Security numbers contained on IFCO’s payroll of roughly 5,400 workers during 2005 were either invalid, did not match the true name registered with the Social Security Administration for that number, or belonged to children or deceased persons.

5. The Social Security Administration sent at least 13 written notifications to IFCO about such discrepancies on its payroll records in 2004 and 2005.
VI. **ANTI-DISCRIMINATION UNDER THE ACT.**

A. **Prohibited Conduct.**

IRCA outlaws discrimination on the basis of national origin or citizenship status (other than unauthorized status). Discrimination on the basis of national origin is also prohibited by the Civil Rights Act of 1964 ("Title VII").

While Title VII applies only to businesses that have fifteen or more employees, IRCA’s prohibitions apply to employers of four or more employees.

Employers also may not retaliate against employees who have filed a charge of discrimination under the Act.

Under IRCA, employers commit an unfair immigration-related employment practice if they asked for more or different documents in the employment verification process than those required by the verification provisions. Under IIRIRA, there is a new standard for discrimination. Under IIRIRA, an employer will commit an unfair immigration-related employment practice only if the employee proves the employer intended to discriminate.

B. **The Discrimination Risk: Some Examples.**

1. An employee presents an apparently genuine green card for Section 2 verification purposes. Later, the HR manager is notified that the social security number the employee provided for payroll records is incorrect. The HR manager decides to require the employee to complete another I-9.

2. The employer undergoes an ICE investigation which finds the hiring of undocumented workers and paperwork violations. The employer then implements a policy requiring all non-citizen workers to produce documents issued by the USCIS to show work authorization.

3. The employer routinely asks all new hires to bring green cards and social security cards to the job site. The employer does this to determine whether Section 1 of the I-9 is properly completed. No one is denied employment if the requested documents are not produced.

C. **Enforcement.**

An ICE representative or any person who believes an employer has engaged in discrimination may file an unfair immigration-related employment practice charge with the Special Counsel for Immigration-Related Unfair Employment Practices within the Department of Justice. The charge must be filed within 180 days after the alleged unfair employment practice. Moreover, the Special Counsel may initiate an investigation without a charge being filed.

The Special Counsel is required to investigate each charge and has the right of reasonable access to evidence in the possession or control of the employer. The Special Counsel will provide the employer notice of the charge within ten (10) days after receiving the charge.
Within 120 days after receiving the charge, the Special Counsel will determine whether to bring a complaint against the employer. If the Special Counsel does not bring a complaint within 120 days, the claimant may do so within 90 days after being notified by the Special Counsel that it is not filing a complaint, provided the charge alleges knowing violations or a pattern and practice of violations. The Special Counsel, however, retains authority to continue its investigation or bring a complaint during that 90-day period.

Any complaint will be brought before an administrative law judge. The employer has a right to answer the complaint and to present evidence to the judge, who then issues an order. The judge may impose any of the penalties listed below.

In addition, applicants or employees of an employer with 15 or more employees can bring charges of discrimination under Title VII or many State civil rights laws to the EEOC. They cannot file a charge with both the OSC and the EEOC.

D. Penalties.

Penalties for discrimination on the basis of national origin or citizenship status include a broad range of non-monetary, monetary, and other relief.

Non-monetary remedies that might be imposed include an order compelling the employer to:

1. Maintain various records regarding applicants;
2. Hire the individual discriminated against (with or without back pay);
3. Conform to the Act;
4. Educate employees about their rights and/or post notices regarding employee rights under the Act; and
5. Remove disciplinary notices in an employee’s personnel file.

Monetary liability under the anti-discrimination provisions of the Act includes:

1. Possible back pay for up to two years before the charge was filed;
2. For a first offense, the employer may be required to pay a civil penalty of $375 to $3,200 for each individual discriminated against;
3. For the second violation the employer may be required to pay a civil penalty of $3,200 to $6,500 for each individual discriminated against;
4. For the third and any further violations, the employer may be required to pay a civil penalty of $4,300 to $16,000 for each individual discriminated against;
5. For asking for more or different documents than required by the Act, an employer may be fined not less than $110 nor more than $1,100 for each individual discriminated against.
E. **Facts From Real Discrimination Cases.**

1. *Incalza v. Fendi North America.*

Giancarlo Incalza was an Italian national working as a manager of a Fendi store in Beverly Hills on an E-1 visa. When Fendi was purchased by a French company, the E-1 visa was no longer valid work authorization for Fendi employees. Incalza and one other employee were affected. The Company helped the other employee acquire an H1-B visa and he continued working for Fendi with no break in service.

Rather than assist Incalza to obtain a different work visa, the Company terminated his employment. The Company told him, falsely, that nothing could be done about his work authorization status. Incalza asked for unpaid leave in order to get different work authorization. He was engaged to an American citizen and would be able to get temporary work authorization after his marriage. The Company refused to grant him leave.

Incalza sued under California law for wrongful termination, breach of an oral contract, and discrimination based on national origin. He alleged that the Company had made him promises of continued employment and it breached those promises and acted in a discriminatory fashion when it terminated his employment. The jury found for Incalza and awarded him over $1,000,000.

Fendi appealed. It argued that it was required to terminate Incalza’s employment because his visa was no longer valid. The Court rejected this argument, finding that the Company could have helped him obtain an H1-B visa as it had with the other employee or that it could have placed him on unpaid leave to give him time to resolve his employment authorization situation.

The Ninth Circuit reviewed the definitions of employee and employer in the regulations regarding the employment of unauthorized workers and concluded that an employee is only “employed” under the Immigration Reform and Control Act (IRCA) if the employee is actually providing services, not if he is merely on the payroll and on leave. Therefore, the Company would not have been in violation of IRCA for knowingly employing an unauthorized worker had it placed Incalza on leave to allow him to seek other work authorization. The Court, however, differentiated Incalza’s situation from that of an undocumented worker who did not have any basis or prospect for getting legal work authorization and suggested that immediate termination of such an employee may be more justified than the termination of Incalza’s employment, and may be required.

In this case, IRCA was found to have been a pretense for a wrongful termination. The Company was not protected from the discrimination and wrongful discharge suit by its strict compliance with IRCA, because the Company could have complied with IRCA and still not terminated Incalza’s employment.

*Incalza v. Fendi North America, 479 F.3d 1005 (9th Cir. 2007).*

In December 2001, Elite Logistics heard rumors of an INS raid so they hired independent contractors to check the social security numbers of all employees. Approximately 35 employees came back with errors or inconsistencies, including Ramon Zamora, who was a Mexican national who had become a permanent lawful resident in 1987.

In May 2002, the Company gave Zamora and the other 35 people a letter that the work documents they previously provided were questionable and required that the employees provide documents within 10 days to verify work authorization. Zamora did not provide the required documents within 10 days. After the Company met with him again, Zamora provided an earnings report from the Social Security Administration, but it also had discrepancies, so the Company refused to accept it. The Company also refused an INS document showing that Zamora had applied for naturalization. The next day Zamora brought a letter from the Social Security Administration. The Company said that they wanted to verify it before he could return to work. The Company verified the information with the Social Security Administration. When Zamora was supposed to return to work, he demanded an apology and an explanation from the Company. The Company refused to apologize and terminated his employment. He sued under Title VII. The district court granted summary judgment for Elite Logistics.

The Tenth Circuit originally reversed the lower court’s grant of summary judgment for the employer, but an en banc panel, divided 7/7, affirmed summary judgment for the company on rehearing. Seven judges of the Tenth Circuit said that there was insufficient evidence that the termination was discriminatory or that the fears of an INS raid and charge were pretext for a discriminatory termination. However, seven judges thought that there was evidence enough to create a jury question regarding whether the suspension and termination were discriminatory. Seven judges implied that asking for more or different documents than Zamora provided for the I-9 was discriminatory. Although the employer avoided liability in this case, the Circuit split demonstrates that employers need to be cautious when verifying identity and work authorization to not go overboard and act in a discriminatory manner.

Zamora v. Elite Logistics, 478 F.3d 1160 (10th Circ. 2007)

F. SPECIAL ISSUE FACING EMPLOYERS DEALING WITH DEFENSE ARTICLES: INTERSECTION BETWEEN ITAR AND ANTI-DISCRIMINATION STATUTES

Title VII of the Civil Rights Act of 1964 prohibits discrimination in hiring, firing or other employment actions on the basis of an employee’s national origin. The statute also prohibits employers from limiting, classifying or segregating employees or applicants for employment on the basis of national origin, in any way that could have an adverse impact on his employment. Title VII permits discrimination on the basis of national origin only in situations where the employer can prove that the classification is a bona fide occupational qualification [“BFOQ”] that is reasonably necessary to the normal operation of that particular business. The International Reform and Control Act of 1986 (“IRCA”) which states that it is unlawful for an employer to hire or to continue to employ an unauthorized alien, also prohibits discrimination in hiring, recruitment or discharge because of an employee’s national origin or citizenship status. An
employer can defend itself against such claims by proving that national origin is a BFOQ or that discrimination based on citizenship status is required in order to comply with another law or regulation.

These statutes potentially conflict with the International Traffic in Arms Regulations ("ITAR"). The Arms Export Control Act authorizes the President to control export and import of defense articles. To that end ITAR implements that authority. ITAR states that it is unlawful for an employer to export or import defense related technology or technical data to unauthorized foreign nationals. This type of information can only be shared with U.S. citizens unless the State Department approves access to a foreign national. While the regulations define a foreign national as a person who is not lawfully admitted for permanent residence in the United States and is not protected under the Immigration and Naturalization Act, it has also been interpreted to consider a person’s birthplace, not just their citizenship, when determining which people will be allowed access to the information. An export can occur through a number of mechanisms, including: a visual inspection of equipment and facilities, verbal exchanges of technology, electronic transfers, facsimile transmissions, the application of knowledge gained in the United States to situations abroad or through posting regulated technology on the internet. Additionally, people affected by ITAR are not only the people who work with the technology, but anyone who could possibly access it, even if they never do. Specific countries are also named in the statute and, because of their relationships with the United States or the United Nations, these country’s nationals will likely be denied licenses and/or approval to access the regulated information. These countries include: Belarus, Cuba, Iran, North Korea, Syria, Venezuela, Burma, China, Liberia, Sudan, Cote d’Ivoire (the Ivory Coast), Congo, Iraq, Lebanon, Rwanda, Sierra Leone, Somalia, Afghanistan Haiti, Libya and Vietnam.

The intersection of these statutes presents a dilemma. While Title VII and IRCA prohibit employers from discriminating against potential or existing employees because of their national origin, under ITAR the same employers are also prohibited from employing foreign nationals, without proper authorization, if their facility contains protected information. A reasonable solution to this dilemma is a conditional employment offer when hiring new employees. Workplaces which contain protected information are aware of their situation (they usually have to obtain licenses for the information) and therefore could extend a job offer to a potential employee on the condition that they get approved by the State Department for this ITAR position. While this is not an ideal solution, the existence of the conflicting statutes makes it impossible to extend unconditional employment offers to potential employees without first differentiating candidates based on their national origin (which would be illegal) or firing the employee soon after he is hired because he does not meet the State Department’s requirements.

VII. INVESTIGATION BY OFFICE OF SPECIAL COUNSEL OF THE CIVIL RIGHTS DIVISION OF DEPARTMENT OF JUSTICE.

Under IRCA, employers may not discriminate on the basis of citizenship or national origin. It is important that employers do not target individuals, such as Latinos, or ask for additional documents when completing the I-9 Form. Employers may not specify the type of document that an employee presents for purposes of completing the I-9 Form. The employee has the choice of the types of documents to present to the employer. An employer may not ask an employee to show identification or complete the I-9 Form until after the person is hired.
An individual may file a charge of discrimination with the Office of Special Counsel of the Civil Rights Division of the Department of Justice (“OSC”). For example, we had an employee of a company file a charge of discrimination because the employer did not accept a document for purposes of identification that had the individual’s name misspelled on the document. The document was the only document presented for purposes of completing the I-9 Form and was a document from List A documents. The company asked the employee to correct the misspelling. INS refused to reissue an identification card with the appropriate spelling of the person’s name. The individual filed a charge of discrimination with the OSC.

Companies want to be cautious in the manner in which they reject documents presented for the completion of I-9 Forms. An employer is merely required to properly complete the I-9 Form and to look at actual documents to determine if they are genuine. The OSC has recently expressed concern about employers being too diligent in the review of documents presented for identification. Employers may want to reevaluate their practices to ensure that employees who are reviewing I-9 Forms and documents are not being overzealous in searching for counterfeit documents. If an employer has a concern about a particular document, the employer can always send the document to ICE for review and approval, but, again, employers want to be cautious that they are not singling out certain groups of individuals and that the employer is not over utilizing this method of approval.

The OSC became involved with INS educational seminars held in Phoenix in 1998-1999 and later, which may have taught employers to become overzealous in their review of documents presented for work authorization or identity purposes. This situation has resulted in contradictory information arising between the ICE enforcement office in Phoenix and the OSC in Washington, D.C. Employers should evaluate their practices to ensure that they do not violate the anti-discrimination statutes. Overzealousness in reviewing documents is an area in which the OSC is extremely sensitive and is looking for violations.

We have recently seen an increase in charges filed with the OSC. For example, we have already seen a discrimination charge filed with the OSC based on allegations that the employer failed to properly follow E-Verify procedures and abide by the requirements and limitations of the program. OSC officials in some states where E-Verify use is the highest have reported a dramatic increase in phone calls to their employee-information lines.

If an individual files a charge of discrimination with the OSC, an employer should provide a complete position statement in response to the charge of discrimination, realizing this may be the first level of discovery for a later administrative hearing. The OSC may request information that employers should address when responding to the charge of discrimination. The OSC may conduct employee interviews, and review completed I-9 Forms. Employers should consider mediation, if it is offered as an option.

Employers should take these matters seriously. Employers should also consider involving legal counsel as soon as they receive notice that a charge of discrimination has been filed. As discussed above, penalties can include reinstatement with back pay and monetary fines of up to $375-$16,000 per employee, depending on whether it is a first or subsequent offense.
Another red flag for the OSC is if employers randomly decide to renew the completion of I-9 Forms on an annual basis or on an arbitrary audit basis. Employers should ensure that they are not requiring employees to complete a new I-9 Form on an annual basis. Once an employer has a properly completed I-9 Form, there are limited circumstances that would cause the employer to have to recomplete the I-9 Form. Those limited circumstances would include completing a pre-audit of a company’s I-9 Forms and determining that a particular I-9 Form is incomplete. In that circumstance, it is appropriate to complete a new I-9 Form and attach it to the old I-9 Form to ensure that the company is in compliance with the laws. A company, however, may not randomly select individuals whom they suspect may have counterfeit documents and ask them to present the documents and complete an additional I-9 Form. As red flag issues arise at your company, please check with legal counsel to determine the best way to handle such situations, and steer clear of trouble with either the ICE Enforcement Office or the OSC.

VIII. I-9 FORMS AND PRE-AUDIT STEPS TO PREVENT LIABILITY.

A. Employees hired after November 6, 1986, must have properly completed I-9 forms.

B. Review I-9 forms for completeness.

C. Employee must fill out, sign, and date Section 1. Entire section must be completed by employee. The regulations technically require Section 1 to be completed on the first day of employment, but employers are permitted three (3) business days to complete the entire form.

D. There is no requirement that the employee present any documents to complete Section 1. Employers may not request documents to verify information provided in Section 1. To do so may be an immigration-related unfair employment practice.

E. If the employee does not read English, a translator/preparer can be used to fill out Section 1. The employee is still required to sign his or her name. The translator/preparer must also sign at the bottom of Section 1. ICE may interview the translator/preparer during an investigation.

F. The employee must check one of the four boxes regarding citizenship in Section 1. If the employee has a permanent resident alien card, the employee should check box 3, Permanent Resident. If the employee has an EAD card, the employee should check box 4.

G. If information is missing, have new I-9 form completed with current date. Keep both old and updated I-9 forms together.

H. Keep I-9 forms separate from personnel files.

I. ALWAYS KEEP CURRENT EMPLOYEES’ I-9 FORMS. After an employee has resigned or is terminated from the company, the length of time after
separation the company must keep the I-9 depends on the duration of employment. An easy way to make sure the Company is in compliance with the retention of I-9 forms is to abide by the following rules:

- Employee works less than one year = keep I-9 for three years after separation (<1 year = 3 years)
- Employee works between one year and two years = keep I-9 for two years after separation (<2 years = 2 years)
- Employee works two years or more = keep I-9 for one year after separation (2 + years = 1 year)

J. Do not maintain a copy of back-up documentation, as long as I-9 form is properly completed, unless otherwise required, for example, by E-Verify or by state law (e.g. Colorado).

K. Consider whether or not to keep back-up copies of documents received from individuals who present counterfeit, false or suspect documents. On the one hand, this can be helpful when dealing with ICE as it can be used to show that an employer takes verification seriously. On the other hand, when dealing with the Office of Special Counsel of the Department of Justice (“OSC”), this documentation will provide a list of individuals they may want to interview to seek out discriminatory verification efforts.

L. The I-9 Form will be used by ICE as evidence in any ICE investigation.

M. ICE Suggestions Regarding Review of Documents.

1. Application for Social Security card is not proper identification. An employer may accept a receipt from the Social Security Administration for an employee who has lost his or her Social Security card and is waiting for a new card for an existing number.

2. Employees must present original unexpired documents, not photocopies.

3. Social Security cards are not immigration documents, but can be used to establish employment authorization. Social Security cards have been issued since 1936, and have been revised more than 20 times. The following provides some information about Social Security card validation:

   (a) If Social Security card starts with a “9”, it is a temporary SSN and cannot be used for employment purposes.

   (b) Issue date of card is on reverse side (i.e., 1-88).

   (c) All cards issued after 1983 include:
(i) columns on right and left side should be raised when touched.

(ii) If card held under magnifying glass, employer should see “Social Security Administration” throughout card.

(iii) The signature line should consist of microline printing of the words “Social Security Administration” in a repeating pattern.

(d) Cards issued after April 1995 should read “Social Security Administration” on the seal in lieu of “Health Human Services.” Cards issued prior to 1980 may have a seal that reads “Social Security Board.”

(e) Do not accept laminated, metal or plastic reproductions of Social Security cards.

(f) Social Security cards marked “not valid for employment” or “valid for work with DHS authorization” are not acceptable to show work authorization.

(g) If an employee informs the Company that his Social Security number is invalid and provides the correct number, the employer should file a Form W-2C with the Social Security Administration for years in which employer reported income and withholding under the incorrect number. The company does not need to amend employment tax returns.

Make sure that the names on the documents generally appear to match the name the person is using on the I-9 form and any other employment-related documents. Paychecks should be made payable to the same name used on I-9 form and qualifying documents.

IX. RECOMMENDATIONS REGARDING I-9 FORMS.

Employers can significantly lessen the likelihood of litigation and liability under the Act by taking the following steps:

1. Train specific individuals to handle completion of I-9 forms and centralize this process. Maintain records of all training provided.

2. Conduct a Pre-Audit.

3. Advise all supervisors and human resources representatives about IRCA and IIRIRA.

4. Note that discrimination on the basis of citizenship is generally illegal.
5. Recognize that employment decisions cannot be made on the basis that an individual’s work authorization will expire at some point in the future.

6. Keep detailed records regarding verification procedures.

7. Do not specify for employees what documents need to be presented. Rather, allow the applicant/employee to review a list the employer maintains separately or simply review the list contained on the Form I-9.

8. If necessary, have the list of acceptable documents translated into another language.

9. Be aware that requiring employees to present a permanent resident card may constitute a violation of the Act if intent to discriminate is shown.

10. Remember that an employee is not required to provide documents to verify information in Section 1, and an employer may not ask for documents.

11. Do not question the employee about documents that appear to be genuine.

12. Be consistent in applying the verification procedures. Verify each employee’s status in the same manner and at the same time (i.e., the first day of employment).

13. Singling out employees, particularly if they look “foreign” or have an accent, leads to potential discrimination claims.

14. An I-9 Form and employment authorization verification should be completed only after the employee has been hired.

15. Make sure your company has established a tickler system regarding the expiration dates of documents such as temporary work cards. Companies may want to begin notifying employees six months prior to the expiration date to ensure the employee has sufficient time to obtain a new card.

16. The Social Security Administration can be contacted at (800) 772-6270 to verify up to ten (10) employee’s Social Security numbers using the Telephone Number Employer Verification system (TNEV). Employers may also use the online Social Security Number Verification Service (SSNVS) at www.SocialSecurity.gov/employer to verify employees’ Social Security numbers. Employers must be registered with the Social Security Administration before using the TNEV. Do not arbitrarily select some individuals for verification. Apply any policy uniformly.
IMMIGRATION LAWS:  
CRIMINAL IMPLICATIONS FOR EMPLOYERS  

By  
Kenya S. Mann  
Ballard Spahr Andrews & Ingersoll, LLP  

I. INTRODUCTION  

The Immigration and Customs Enforcement (I.C.E.) is an investigative branch of the Department of Homeland Security (D.H.S.) and is charged with enforcing immigration and customs laws. Formed in 2003, I.C.E. is a combination of the former Immigration and Naturalization Service (I.N.S.) and the former United States Customs Service. According to the agency’s 2006 Annual Report, I.C.E. Agents made an average of 279 administrative arrests and 55 criminal arrests per day. I.C.E. Fiscal Year 2006 Annual Report (2007).  

I.C.E. agents have express authority to interrogate any person believed to be an alien, and to arrest any alien if it is believed the alien will escape before a warrant can be obtained.  

Although ICE is permitted to question and seize suspected aliens, the agents are constrained by the Fourth Amendment. Thus, ICE agents’ authority does not include entering the private areas of an employer’s workplace in order to conduct a raid, or “enforcement action” without a proper warrant or consent.  

II. REASONABLE EXPECTATION OF PRIVACY  

1. Businesses have a reasonable expectation of privacy.  
   (a) Business privacy is a relevant consideration.  
   (b) Assessing the legitimacy of a privacy expectation entails a balancing of interests. No single factor is determinative.  

2. The defendant bears the burden of showing a reasonable expectation of privacy for the items seized or areas searched.  

3. Examples of reasonable privacy expectations.  
   (a) Greenhouse (enclosed building, not an open field): The INS/Border Patrol agents violated reasonable expectations of privacy when they entered the greenhouses without a warrant and without consent. “Under no stretch of the imagination can the greenhouses, enclosed buildings where the business of growing plants is accomplished, be considered open fields[.]”  
   (b) Brickyard: INS violated business’ reasonable expectation of privacy and freedom from physical searches when the agents drove into the brickyard to search for and arrest the employees near the forklift. The INS did not possess a warrant, nor was consent even
sought to enter the premises. The Court noted that the agents, having parked near the office could easily have requested the consent of the manager to enter and question the employees.

(c) Non-public kitchen area in a restaurant: INS violated restaurant’s expectations of privacy in the non-public kitchen area when the agent entered the kitchen without a warrant and without consent. “Under defendants’ theory of the plain view doctrine, every business or residence with a window to the world is subject to a physical search. If the residence or business has an Hispanic or visibly ethnic employee or resident, neither a warrant nor consent is required. Such a scenario is repugnant to this country’s historically held notions of freedom and privacy. Businesses are not required to board up their windows and cover their doors in order to enjoy an expectation of privacy. And an open window[] does not make a private place public. Unlike contraband, an undocumented alien is not easily identifiable from any distance. The sighting of an Hispanic worker, even an Hispanic worker speaking Spanish can not, without more, form the basis for a warrantless entry.”

III. STANDING TO OBJECT TO SEARCH

1. The business owner or manager may object to unlawful entries.

   (a) “Accordingly, the named employer plaintiffs must have standing to object to the entry of the INS onto business premises where the class members are employed. Only the owner or manager of the business has standing to object to unlawful entries.”

2. Employers and employees cannot “vicariously” assert 4th amendment rights.

   (a) “It is true that employers and employees cannot vicariously assert each others’ fourth amendment rights.”

IV. WARRANT ANALYSIS

A. I.C.E. Enforcement Actions Require Warrants

   A. Private businesses enjoy the same protection under the Fourth Amendment from warrantless searches as private homes.

   B. The requirement of a warrant to search a business applies to both criminal and civil investigations.

   C. Outdoor fields, production areas, and other so-called “commercial curtilage” areas are subject to the Fourth Amendment protections so long as the business has a reasonable expectation of privacy over the curtilage.
B. I.C.E. Enforcement Warrant Standards

A. I.C.E. enforcement actions targeting illegal alien employees are based on a civil mandate and thus have a lesser standard than traditional criminal warrants.

(a) The warrant and supporting affidavits should include sufficient specificity and reliability “to prevent the exercise of unbridled discretion by law enforcement officials.”

(b) A showing less than that required for criminal warrants is deemed appropriate because (1) Congress contemplated vigorous I.C.E. enforcement, including entries onto private premises to question aliens, and (2) I.C.E. activities are “not analogous to a criminal investigation” where the employer faces “no sanctions of any kind” for employing illegal aliens.

B. Warrants for the search or arrest of illegal aliens are not required to list the individuals by name or even provide enough information to assure that the search is likely to result in finding that person.

C. Warrants for I.C.E. enforcement actions that target an employer’s criminal employment of undocumented or illegal aliens must comport to Fourth Amendment standards.

(a) For criminal enforcement actions against employers, search warrants must describe the persons or things to be searched or seized and the description must permit an executing officer to reasonably know what items are to be seized. This may include extensive categories of items up to and including “virtually all business records since the business inception.”

V. INTERROGATION AND ARREST OF INDIVIDUALS BY I.C.E. AGENTS

1. I.C.E. agents are authorized to interrogate “any alien or person believed to be an alien as to his right to be or to remain in the United States.”

2. An individual may not be detained absent a “reasonable suspicion that each questioned person, so detained, is an alien illegally in this country.” However, non-detentive interrogation is permitted based solely on a reasonable suspicion that the person is an alien.

Example: Pursuant to a warranted enforcement action at a factory, agents positioned themselves at the factory exits while other agents moved throughout the factory floor interrogating employees about their citizenship. During questioning, employees were permitted to continue working and were free to walk around on the factory floor. Even though no member of the workforce was permitted to leave without being questioned by the agents at the exit doors, the
Supreme Court found that this enforcement action was not a “detention” under the Fourth Amendment because “when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers’ voluntary obligations to their employers.” The Court reasoned that “[i]f mere questioning does not constitute a seizure when it occurs inside the factory, it is no more a seizure when it occurs at the exits.”

Example: Immigration agents that boarded a bus and questioned each passenger about his citizenship did not “detain” the passengers because the agents permitted passengers to exit the bus after questioning and the agents did not brandish weapons or threaten the passengers. The agent moved down the aisle from the front towards the back of the bus to make sure all passengers were questioned and not to prevent them from leaving. Indeed, some passengers got up to leave and did so. The fact that the agent asked them whether they were American citizens does not turn the encounter into a detention or seizure.

3. Agents have the authority to arrest individuals, but must advise those arrested as to their Miranda rights.

   (a) Handcuffing or otherwise restraining an individual does not automatically amount to an arrest but the agent must show that there was a reasonable threat to the safety of the agent or potential flight of the detained.

   (b) “An individual’s admission that she is an alien coupled with her failure to produce her green card, provides probable cause for an arrest”

**VI. WARRANTLESS SEARCHES**

Warrantless searches are permitted when defendant gives consent, if an item is in “plain view,” or where exigent circumstances exist:

1. In order for I.C.E. agents to interrogate a suspected alien without a warrant, the agents must have a “reasonable suspicion, not rising to the level of probable cause to arrest, that the individual so detained is illegally in this country.”

   (a) If an individual refuses to answer the agent’s question or requests an attorney, the agent may detain the individual in order to investigate the individual’s citizenship status, provided the agent has a reasonable suspicion that the individual is not legally present in the country.

   (b) Not answering questions regarding citizenship status can create a reasonable suspicion that the individual is not legally present in the country. Example: Upon learning that Defendant's passenger did not speak English and had only foreign identification, Deputy’s reasonable questioning led to his suspicion of illegal alien status.
When Deputy asked Defendant about his passenger's legal status, the Defendant asked Deputy to give his friend a break, further bolstering his suspicions. Therefore, Deputy's continued detention of Defendant and his passenger, to investigate their legal citizenship status was supported by probable cause and suspicion.

(c) I.C.E. agents must believe that an individual is an alien prior to questioning. Example: An immigration officer was found to have reasonable belief that two men questioned were aliens when the officers observed two men who appeared Chinese speaking Chinese, dressed in kitchen staff attire, and walking toward a restaurant that was known to have employed illegal aliens in the past.

A. **Exigent Circumstances**

“Exigent circumstances, such as the pursuit of a fleeing suspect, provide a legitimate exception to the rule requiring warrants for non-consensual entries . . . Such entries and the circumstances on which they are based are normally permitted, however, only when unforeseeable events or emergencies require swift entry.”

A. Requires probable cause and good faith. “When police officers, acting on probable cause and in good faith, reasonably believe from the totality of the circumstances that . . . evidence of contraband will imminently be destroyed . . . exigent circumstances justify a warrantless entry, search or seizure of the premises.”

B. Even if exception applies, the scope of the search is narrow.

C. Exception does not apply if fear of escape is created by law enforcement.

B. **Plain view**

A. Open garage door doesn’t make a factory in “plain view.” “The open garage door does not provide authorization to physically enter the factory.”

B. Seeing Mexicans in plain view from the street is not enough. In one case, two armed agents ran into the work area. When questioned as to the justification for entering without a warrant, they answered that they did not need one ‘if they could see Mexicans in plain view from the street.’ Court found that, in the absence of a warrant or consent, the search was unconstitutional.

C. Offices: Employees retain some expectation of privacy in their offices. E.g. reasonable expectation of privacy exists where office is locked and not shared by co-workers.
D. Public places: Warrants are not needed to question suspected aliens in public places such as restaurants, airports, or stores.

VII. CONSENT ANALYSIS

1. “Consent . . . is not a magic elixir.” Government has the burden of proving that consent was properly authorized.

2. An employer who gave consent is free to withdraw that consent at any time.

A. Voluntariness of Consent

Voluntariness of consent is a question of fact; a reviewing court will look at the totality of circumstances. “[W]hether a consent to search was in fact ‘voluntary’ or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.

1. Mere submission to legal authorities is not enough. In other words, the government “must demonstrate more than mere ‘acquiescence to a claim of lawful authority.’” Example: A defendant’s response of “okay” was insufficient to show consent where a group of police officers woke the teenager up in the middle of the night with the words “we need to go talk.”

2. Factors to consider in determining voluntaries of consent
   
   (a) Age
   (b) Education
   (c) Intelligence or “[B]usiness sophistication”
   (d) Whether defendant was advised of his rights
   (e) How long Defendant was detained prior to the consent
   (f) Whether authorities made repeated requests for consent
   (g) Number of officers
   (h) Whether authorities used physical coercion, or had already taken the defendant into custody
   (i) Whether officers were armed and/or showed force (e.g. whether officers had their guns drawn)
   (j) Whether a Miranda warning had been given
   (k) Whether defendant was told that a search warrant could be obtained
(l) Whether the defendant’s will was overborne or capacity critically impaired.

(m) Examples of voluntariness.

(i) No threats or show of force, guns hidden: Consent found to be voluntary when “agents ‘made no threats or show of force,’ and . . . ‘their guns remained holstered and under their coats.’”

(ii) No physical restraint or weapons drawn: “Defendant voluntarily consented to a search of his bedroom. Defendant was neither physically restrained, nor did any of the arresting officers have their weapons drawn. There is no evidence that Defendant was physically threatened or coerced.”

3. Examples of involuntariness.

(a) Threats.

(i) Involuntary consent if threatened, where officer in a loud voice said, “For your information, I can come back and close the shop” or “Let me in or else.”

(ii) Raid where agents demanded consent from an office manager. The INS agent allegedly told the manager that INS would return to “close the shop.” Manager felt that he had no choice but to consent.

(iii) “When the manager, a naturalized citizen, refused and asked for a warrant, the agent allegedly told her that her citizenship would be revoked and her store closed down. The agent then accompanied her to a back room.”

(b) High speed raids, showing INS can carry out the operation immediately. Typically, ICE agents to “arrive unannounced at premises that they have selected for a raid, and request permission to conduct the raid immediately. Although only the agent in charge makes the request, the other agents who are to participate in the raid are already in position, often guarding each exit. At some raids there are twenty or more agents who are visible to both management and workers. Thus, when consent is requested, it is usually clear that INS has both the intent and the ability to carry out the operation immediately . . . the evidence suggests that INS vehicles and agents first entered at high speed onto the production areas of the premises, across the highway from the location of the office where the agents knew the managers were likely to be
found. . . . Viewed in their totality, the circumstances of these raids support plaintiffs’ contention that defendants often intend to either coerce consent, or rely on exigent circumstances before such consent is obtained, to avoid the inconvenience of obtaining a warrant.”

4. Scope of consent: Agents cannot exceed the scope of consent given. The court evaluates scope based on objective reasonableness, which the Supreme Court explains as “what would the typical reasonable person have understood by the exchange between the officer and the suspect?”

5. Third party consent:

   (a) Law enforcement may rely on third party consent if that party has or reasonably appears to have “common authority.” To be constitutionally valid, the third party consent must be given by someone with actual or apparent authority to consent to the search. Moreover, the third party’s consent must be voluntary. As with first party consent, the Government bears the burden of proving both the existence and voluntariness of third party consent.

   (b) “Law enforcement officers may obtain valid consent from the individual whose property is searched, someone who has common authority over the premises, or someone who reasonably appears to have common authority over the premises.”

   (c) An Employer may have “common authority” and may give consent if ICE is searching workplace property within the employer’s control. For example, an employer may consent to a search of an office computer, not a piece of personal luggage. The hard drive and computer were “work-related items that contained business information and which were provided to, or created by, the employee in the context of the business relationship. [Employee’s] downloading of personal items to the computer did not destroy the employer’s common authority.”
TRENDS IN CRIMINAL ENFORCEMENT OF IMMIGRATION SANCTIONS AND I-9 AUDITS

By
Julie A. Pace
Heidi Nunn-Gilman
Ballard Spahr Andrews & Ingersoll

I. INCREASED CRIMINAL ENFORCEMENT AGAINST EMPLOYERS

A. Introduction

Over the past few years, ICE has shifted its enforcement philosophy to emphasize criminal sanctions over fines.\(^1\) Julie L. Myers, then Assistant Secretary of Homeland Security for ICE, compared fines for unlawful hiring practices to an “average traffic ticket,” and noted that under the new enforcement strategy, offending employers “now face jail time and risk significant asset forfeiture.”\(^2\)

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1. http://www.ice.gov/pi/news/factsheets/worksite.htm (table showing increase in criminal arrests from twenty-five in FY02 to 1,103 in FY08 and increase in administrative arrests from 485 in FY02 to 5,184 in FY08).

B. **Trend to Harsher Penalties**

In addition to the prohibition against hiring unauthorized aliens, authorities may also criminally charge employers under statutes prohibiting harboring unauthorized aliens and under money laundering statutes. The penalties for these criminal offenses include fines, prison time, and forfeiture of assets used in the offense. The government is increasingly pursuing employers under these alternate statutes because their fines are much harsher than those for unlawful hiring and contain forfeiture provisions. It is essential for employers to implement effective policies and procedures to avoid possible criminal liability.

II. **FELONY HARBORING**

A. **Prohibited Conduct**

The Immigration Reform and Control Act ("IRCA") makes it a felony for any person to:

1. bring or attempt to bring a person into the United States knowing that they are an alien;
2. move or attempt to transport a person within the United States knowing or recklessly disregarding the fact that they are an alien;
3. conceal, harbor, or shield from detection, or attempt to conceal, harbor, or shield from detection, any person knowing or recklessly disregarding the fact that they are an alien;
4. encourage or induce an alien to come to, enter, or reside in the United States, knowing or recklessly disregarding the fact that such action will be in violation of the law;
5. conspire to commit, or aiding and abetting the commission of, any of the above;
6. bring in or attempt to bring an alien into the U.S. when knowing or recklessly disregarding that they are an alien and do not have prior authorization to enter the U.S.
7. knowingly hire for employment at least 10 individuals with actual knowledge that said individuals are aliens.


B. **Penalties**

Criminal sanctions for violations of the harboring statute include:

1. Up to 10 years imprisonment for bringing an alien into the U.S. or conspiring to do so;
2. Up to 10 years imprisonment for transporting, concealing/harboring, or encouraging an alien to come to the U.S. illegally if the act was done for the purpose of commercial advantage or private financial gain;

3. Up to 5 years imprisonment for transporting, concealing/harboring, encouraging an alien to come to the U.S. illegally, or aiding and abetting if the act was NOT done for the purpose of commercial advantage or private financial gain;

4. Up to 20 years imprisonment for any violation of § 1324(a)(1)(A) in which the alien causes serious bodily injury or places any person’s life in jeopardy.

5. Up to death or life imprisonment for any violation of § 1324(a)(1)(A) that results in the death of any person.

6. Up to 10 years for bringing in or attempting to bring in an alien knowingly or recklessly; more than three years if done for commercial advantage, financial gain, or reason to believe the alien will commit a felony; five to fifteen years if it is a third offense or greater.

7. Up to 5 years for knowingly employing 10 or more aliens in a 12-month period.

8. Fines of the greater of $250,000 or twice the defendant’s gain. Organizations can be fined up to $500,000.


C. Forfeiture

An additional serious consequence of felony harboring offenses is the forfeiture power contained in IRCA. It allows the government to subject any conveyance used in the commission of a violation, the gross proceeds of such violation, and any property traceable to such conveyance or proceeds to seizure and potential forfeiture. 8 U.S.C. § 1324(b). The significant financial consequences of such seizures have made the harboring statute the preferred tool for ICE in their recent enforcement actions against employers.

D. Examples

1. Golden State Fence

In July 1999, the Immigration and Nationalization Service (“INS”) informed Golden State Fence that at least 15 of its employees were unauthorized alien workers. At that time Golden State agreed to fire these workers. In September 2004, as a result of an audit of military contractors, ICE determined that at least 49 of Golden State’s employees were unauthorized aliens, and three were on the list that INS provided to Golden State in 1999. In 2005, ICE executed search warrants on Golden State, finding evidence in hiring records that Golden State had rehired unauthorized aliens named in previous audits, and that their employees’ social security numbers did not match Social Security Administration records.

Golden State’s president and vice-president pled guilty to knowingly hiring 10 or more unauthorized aliens in a 12-month period. Melvin Kay, Golden State’s president and founder,
was sentenced to three years probation, six months of home confinement, and a $200,000 fine. Michael McLaughlin, the vice-president, was sentenced to the same probation and confinement with a $100,000 fine. A condition of the plea agreement required the company to forfeit $4.7 million in assets. Assistant Secretary Myers cited the case as proof “that employers who knowingly and blatantly hire illegal workers will pay dearly for such transgressions.”

2. **IFCO**

ICE started its investigation of IFCO -- a manufacturer of wooden pallets, crates and containers -- in September 2005 when an employee called to report Hispanic employees tearing up their W-2 forms. The employee reported that a manager told him they were doing so because they were unauthorized aliens with fake social security cards and no intention of filing taxes. On April 19, 2006, agents executed search warrants and arrested several managers on felony and misdemeanor charges.

The indictment alleged a conspiracy among several of the company’s managers to harbor unauthorized aliens, to encourage and induce them to enter the U.S., and to transport them within the U.S. The government alleged that the conspiracy harbored the workers by moving alien workers between IFCO plants to avoid arrest and by allowing them to use multiple social security numbers and identities during the course of employment, and on occasion providing them with such numbers and identities. When the conspirators could not find Hispanic laborers in the vicinity of a new plant, they would allegedly recruit and transport alien laborers to the site of the new plant, provide them with housing, and give them other financial assistance like check-cashing and purchase of food, clothing, and personal items. The aiding and abetting charge carries a 5 year maximum, and all other charges carry a maximum 10 year sentence and $250,000 maximum fine.

On December 19, 2008, ICE announced a settlement with IFCO. IFCO agreed to pay a total of $20.7 million to resolve the criminal ICE investigation. $18.1 million was civil fines for the immigration violations. $2.6 million represented FLSA backpay and penalties resulting from overtime violations relating to the undocumented workers.

In the settlement agreement, IFCO accepted responsibility for the unlawful conduct of its managers and employees. The agreement was reached before the Company was to be indicted by the US District Court for Northern District of New York.

IFCO will not be prosecuted as a company. However, IFCO employees may still face criminal charges. 7 IFCO managers were charged in a superseding indictment on January 23, 2009, for various federal offenses, including conspiracy to harbor and encourage unauthorized foreign nationals to reside in the United States, conspiracy to defraud the United States, harboring unauthorized aliens, and transporting unauthorized aliens. Those charged include the Senior VP of Human Resources, the Senior VP of Finance and Accounting, the VP of New Market Development, the controller of pallet services, a human resources manager, and a new market development manager, and an operations manager of new market development for the Cincinnati area. According to the January 2009 indictment, all seven managers conspired to harbor unauthorized aliens and induce them to work in the U.S. Four of the managers are charged with conspiracy to defraud the IRS and SSA by submitting false payroll information to
those companies. Various of the managers are charged with harboring and with transporting unauthorized aliens.

To date, 9 IFCO managers have entered guilty pleas related to hiring and harboring unauthorized aliens.

3. *United States v. Tyson Foods*

The Tyson case is a valuable example of how an effective corporate compliance policy can help to establish a company’s innocence at trial. The Department of Justice began investigating Tyson Foods in 1997. Federal agents posing as smugglers of aliens tried to persuade local managers to hire the undocumented workers they brought to Tyson’s local plants from Mexico. At the same time, Tyson’s upper management volunteered the company for a pilot employee verification system offered by the government. When they independently uncovered evidence of false documentation, they alerted the government and worked on a joint investigation.

DOJ continued its secret investigation and obtained a 36-count indictment against Tyson in 2001. The indictment alleged that Tyson had conspired to violate IRCA by hiring 136 undocumented aliens. It further alleged that Tyson created a corporate culture that condoned hiring undocumented workers. Tyson argued that despite the shortcomings of their hiring system, upper management had not conspired to break immigration laws, as evidenced by their status as one of the first companies to volunteer for the government’s pilot verification program.

At trial, Tyson employed a “rogue employee” defense, arguing that the lower level managers who broke the laws were acting against upper management’s stated policy. Tyson’s CEO and Compliance officer both testified that upper management was committed to compliance with immigration laws. Records documenting Tyson’s attempts to comply were key evidence for the defense. On cross-examination, the government’s witnesses, who were Tyson lower-level managers, admitted that they understood that their conduct was against corporate policy and hidden from senior management. The trial judge dismissed 24 of the charges related to immigrant smuggling, and the jury acquitted Tyson of the remaining 12 charges.

4. *Agriprocessors*

On May 12, 2008, ICE conducted the largest criminal worksite enforcement operation in U.S. history at the Agriprocessors kosher meatpacking plant in Postville, Iowa. Agents arrested 389 workers, and charged 302 with immigration violations. This was the most ever arrests at a single worksite. Ultimately, 297 pled guilty and were sentenced. In the affidavit for the search warrant, Senior Special Agent David Hoagland said that ICE sought the warrant to investigate allegations of harboring unauthorized aliens, a pattern and practice of hiring unauthorized workers, misuse of social security numbers, and aggravated identity theft.

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Anonymous sources alleged several incidents that led to the raid. One source alleged that a human resources manager laughed when presented with a situation where social security cards from three separate employees had the same social security number. Sources reported that an Agriprocessors’ supervisor was helping unauthorized aliens to falsify vehicle registrations and that another employee was referring them to sources for falsified official documents. Several sources reported a manager who hired employees without any identification, issued their paychecks to an unknown name and SSN, and cashed the checks onsite. In many cases, the employees without documentation were allegedly paid below minimum wage. Agents seized the site’s computer system, identification documents, biometric information, and company employee records to investigate harboring charges. Later indictments indicate that 96 fake green cards and employment applications were seized.

Two Agriprocessors supervisors were arrested in July 2008. Charges against the supervisors included aiding and abetting aggravated identity theft and encouraging unauthorized foreign nationals to reside illegally in the United States. One supervisor pled guilty to charges of conspiracy to hire unauthorized aliens and aiding and abetting the hiring of unauthorized aliens. In November 2008, the former CEO, three managers, and a human resources employee were indicted on 12 counts, including conspiracy to harbor unauthorized aliens for profit, harboring unauthorized aliens for profit, conspiracy to commit document fraud, aiding and abetting aggravated identify theft, and aiding and abetting document fraud.

A 99 count superceding indictment was filed January 16, 2009. Many of the charges relate to money laundering, bank fraud and making false statements to a bank. The indictment alleges that the Company’s executives certified legal compliance to the bank while knowing the Company employed unauthorized aliens.

III. MONEY LAUNDERING

Generally, money laundering is using proceeds from a “specified unlawful activity” with knowledge that the money came from a crime. Felony harboring is listed as a “specified unlawful activity,” but misdemeanor hiring is not. 18 U.S.C § 1956(c)(7). Charges for aiding and abetting money laundering and conspiracy to launder money, 18 U.S.C. §§ 3, 1956, 1957, are also available to prosecutors.

Prosecutors use the money laundering offense in employer immigration enforcement for several reasons. It allows them to introduce evidence of defendant’s gain and how the defendant spent the money after it was laundered that would likely not be admissible otherwise. This tends to make juries less sympathetic with defendants. Money laundering also has longer available sentences and increases the amount of the defendant’s property that is forfeitable. While “illegal proceeds” are forfeitable under the harboring statute, all money “involved in” a money laundering violation may be subject to forfeiture. 18 U.S.C. § 981(a)(1).

A. Prohibited Conduct

There are several types of money laundering, but all require the defendant to know that the property involved in the transaction is the proceeds of a “specified unlawful activity.” It is unlawful to conduct a financial transaction:
1. conducted in the proceeds of a specified unlawful activity with intent to promote specified unlawful activity;

2. conducted in the proceeds of a specified unlawful activity with intent to violate 26 U.S.C. §§ 7201, 7206 (tax evasion, false statement on tax document);

3. designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of proceeds of specified unlawful activity;

4. designed in whole or in part to avoid a transaction reporting requirement under state or federal law;

5. conducted in more than $10,000 in proceeds of specified unlawful activity.


B. Penalties

Criminal sanctions for money laundering offenses include:

1. Up to 10 years for each violation (each transaction is a separate violation) in the fifth category above;

2. Up to 20 years for each violation in categories 1–4 above;

3. Fines of up to twice the amount laundered in each violation in the fifth category above;

4. Fines of the greater of $500,000 or twice the amount laundered for each violation in categories 1–4 above.


C. Forfeiture

Money laundering forfeiture authorizes the forfeiture of all property “involved in” the money laundering offense, which may be more than the “gross proceeds” forfeiture in a harboring offense. 18 U.S.C. §§ 981(a)(1), 982(a)(1). The government can use criminal forfeiture to get a money judgment that is executable against any of the defendant’s property. 18 U.S.C. § 853. In satisfying such a judgment, defendants are jointly and severally liable (all defendants are responsible for the entire value of the judgment until it is paid in full).

D. Examples

1. HV Connect, Inc.

HV Connect, Inc. (HVC) was a temporary employment agency that contracted with companies to supply temporary workers. On Oct. 12, 2006, Trung Nguyen, a company official, pleaded guilty to bringing in and harboring certain aliens, mail fraud, wire fraud, conspiracy and money laundering. An ICE investigation revealed that most of HVC’s employees were not
lawfully present and did not possess employment authorization. The investigation resulted in the arrest of 33 unauthorized aliens unlawfully employed through HVC.

HVC provided housing and transportation to the unauthorized employees and assisted them in obtaining fraudulent permanent resident cards, Social Security cards, driver's licenses, and other identification documents. HVC had earned over $5.3 million for supplying the unauthorized labor force. On March 14, 2007, ICE agents obtained a Final Order of Forfeiture for property owned by Nguyen that had approximately $100,000 in equity.

2. Kentucky Limited Liability Corporations.

On July 20, 2006, two corporations in Kentucky pleaded guilty to criminal charges of harboring unauthorized aliens and money laundering in connection with a scheme that provided unauthorized workers to Holiday Inn, Days Inn and other hotels in Kentucky. As part of the plea, Asha Ventures, LLC, and Narayan, LLC, agreed to pay $1.5 million in lieu of forfeiture and to create internal compliance programs. Through their agents, the companies employed numerous unauthorized aliens at hotels in London, Ky., who were often paid by check made payable to fictitious cleaning companies. On Oct. 20, 2006, Ventures and Narayan were sentenced in the Eastern District of Kentucky to one year supervised probation and each company was fined $75,000.

IV. MISDEMEANOR HIRING OF ALIENS

A. Prohibited Conduct

IRCA makes it a misdemeanor for any person to engage in a “pattern or practice” of the following:

1. hire, recruit, or refer an alien for a fee knowing that the alien is not authorized to work in the U.S;
2. hire an individual for employment without complying with IRCA’s employment verification requirements;
3. hire, recruit, or refer an individual for a fee without complying with IRCA’s employment verification requirements;
4. knowingly continue to employ an alien who has become unauthorized for employment, even if their hiring was authorized.


B. Penalties

Criminal sanctions for violations of the hiring statute include:

1. Up to $3,000 for each unauthorized alien;
2. Up to six month imprisonment for the entire pattern.

C. **Forfeiture**

There is no forfeiture provision associated with the misdemeanor offense.

D. **Good Faith Defense**

Employers who attempt to comply with the employment verification system have a good faith defense against the criminal charge unless the enforcement agency gives the employer notice of a technical or procedural failure and the employer fails to correct the problem within ten days. 8 U.S.C. § 1324a(b)(6).

E. **Frequency of Use**

The misdemeanor charge for IRCA violations has fallen out of favor due to ICE’s expressed preference for the harsher penalties and forfeiture provisions of the harboring and money laundering statutes.

V. **FURTHER CIVIL CONSEQUENCES (RICO)**

The Racketeer Influenced and Corrupt Organizations Act (“RICO”) includes civil penalties for persons and organizations who engage in a “pattern of racketeering activity.” 18 U.S.C. § 1962(a). These penalties allow private plaintiffs to collect treble damages, costs of the lawsuit, and attorney’s fees against defendants who commit any act that falls under the statute’s list of “racketeering activity.”

A. **Inclusion of IRCA Violations**

Acts that would be indictable under 8 U.S.C. § 1324 (harboring aliens), 8 U.S.C. § 1327 (aiding or assisting aliens in entering the U.S.), and 8 U.S.C. § 1328 (importing aliens for an immoral purpose) are considered racketeering activity under RICO if the act was committed for the purpose of financial gain. 18 U.S.C. § 1961(1)(F). Therefore, corporate defendants who violate the IRCA provisions mentioned previously could “be forced to provide high levels of compensation to the plaintiff, be restricted from engaging in future business activities, and even lose its business completely.”

B. **Potential Liability**

Private liability for RICO violations includes:

1. Treble damages to private plaintiffs;
2. The cost of the plaintiff’s suit and attorney’s fees;
3. Court order for defendant to divest from the enterprise;

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4 Green et al., supra note 3, at 96.
4. Court order restricting defendant's future investment;

5. Court order forcing “dissolution or reorganization” of defendant’s enterprise;

To bring a RICO suit, a plaintiff must plead: “(1) the defendant’s violation of RICO, (2) an injury to the plaintiff’s business or property, and (3) causation of the injury by the defendant’s violation.” 18 U.S.C. § 1964.

C. Examples

1. *Trollinger v. Tyson Foods*

   After the Tyson trial mentioned above, a class of current and former Tyson employees authorized to work in the U.S. brought suit against Tyson for violating RICO. The class alleged that Tyson conspired to knowingly bring unauthorized immigrants into the country, employ them, and conceal them from government detection in violation of IRCA’s harboring provision. The class argued that this conspiracy enabled Tyson to pay all of its employees less than the going market wage, thus paying the plaintiffs less than they otherwise would be paid. The court dismissed all but one of these claims because the plaintiffs were unable to make a sufficient factual showing that Tyson had acted knowingly, but the parties continue to trial on the remaining claim.

2. *Valenzuela v. Swift*

   On December 12, 2006, ICE officials arrested 1,282 undocumented workers on administrative immigration violations at Swift & Company meat packing plants around the country. ICE did not bring charges against Swift officials resulting from the raids. Three days later, eighteen Swift employees filed suit against Swift & Company, alleging that Swift hired undocumented workers in violation of RICO to “illegally depress and artificially lower” its employees’ wages. On December 20, 2007, the court ruled that Swift is potentially liable for any depression in wages that the plaintiffs can show (at trial) was caused by management’s harboring of undocumented workers. Thus, at the upcoming trial, the plaintiffs can recover treble damages, costs, and fees if they are able to show that Swift knowingly employed unauthorized aliens that it assisted in obtaining false documentation.
ARIZONA: LEGAL ARIZONA WORKERS ACT (LAWA)

By
Julie A. Pace
David A. Selden
Heidi Nunn-Gilman
Ballard Spahr Andrews & Ingersoll, LLP

I. ARIZONA: LEGAL ARIZONA WORKERS ACT (LAWA)

The Arizona Legislature, in its final hours before adjournment on June 20, 2007, passed the so-called Legal Arizona Workers Act, ("LAWA" or the "Act"). Governor Napolitano signed the Act on July 2, 2007, which passed with bipartisan support despite the opposition of representatives of the business community. Some legislators felt pressured to pass a bill because its backers threatened to put an even stronger measure on the ballot and, if passed by voters, the law could not be easily amended by the Legislature to correct problems that arise. The need for amendments to LAWA became immediately apparent, and on April 28, 2008 the Arizona legislature passed HB 2745 to amend LAWA and clarify some of its provisions.

LAWA makes sweeping changes for Arizona employers, including:

- Employers who "knowingly" or "intentionally" employ an unauthorized worker after January 1, 2008 could have their business license suspended or revoked. The “mens rea” or employer’s “knowledge” for knowingly or intentionally employing an unauthorized worker should be a high standard according to the Maricopa County Attorney.

- Employers will face investigation and prosecution by County Attorneys and the Arizona Attorney General, in addition to federal ICE authorities. County Sheriff’s offices and other local law enforcement agencies may participate in investigations under LAWA.

- All employers must use E-Verify to verify employment eligibility of all newly hired employees after January 1, 2008.

- Employers who enroll in a voluntary employer-enhanced compliance program that includes the Social Security Number Verification Service and certain other requirements are provided an additional defense against LAWA violations.

- HB 2745 added penalties on employers who pay employees cash and fail to withhold taxes, pay unemployment insurance or worker’s compensation premiums.
A. **Prohibition Against "Knowingly" or "Intentionally" Employing an Unauthorized Worker.**

LAWA prohibits employers from "knowingly" or "intentionally" employing an unauthorized alien. A "knowing" violation is defined to mean the same thing as a knowing violation of federal immigration law, which allows violations to be based on an employer’s constructive knowledge of a person’s lack of legal status, other than the person’s appearance or accent. "Intentionally" employing an unauthorized alien means that the Company has knowledge of the circumstances that make its conduct illegal, even if the Company did not know that its acts or omissions violated the law. The penalties imposed are more severe for "intentionally" employing an unauthorized alien than for "knowingly" doing so.

B. **Effective Date of LAWA Was January 1, 2008.**

LAWA went into effect on January 1, 2008. Originally, it appeared to apply to all employees at a company, regardless of when they were hired. The Legislature, however, clarified in the amendments to LAWA passed in April, 2008 that the sanctions apply only to employees hired on or after January 1, 2008.

C. **The State Attorney General and All County Attorneys Will Investigate Complaints and May Be Assisted by the County Sheriff and Local Law Enforcement.**

LAWA requires the Attorney General and County Attorneys to investigate employers when they receive a complaint that the employer employs an unauthorized worker in violation of the law. The law specifically authorizes the County Sheriff or local law enforcement to assist in the investigation. The law requires the Attorney General to investigate complaints submitted in writing on an official complaint form. They may, but are not required to, investigate complaints that are not on the official form, including anonymous complaints. Some county attorneys will accept anonymous complaints, while others will not.

The Attorney General or County Attorney is required to verify the worker’s status by checking with federal immigration authorities through the use of a computer determination pursuant to an 8 U.S.C. § 1373(c) determination. There are penalties for knowingly filing a false or frivolous complaint against an employer.

D. **Complaints Based Solely on Race or National Origin May Not Be Investigated.**

The original Act did not include any limitations on race-based or discriminatory complaints. The amendments in HB 2745 prohibit the investigation of complaints based solely on race or national origin. It does not, however, prohibit the investigation of complaints based partially or primarily on race or national origin.

E. **County Attorneys Will Prosecute Complaints That Are "Not Frivolous".**

If the Attorney General or County Attorney determines that the complaint is "not frivolous," it is expected that they generally will:
• Notify federal immigration authorities.
• Notify local law enforcement.
• File a lawsuit against the employer.

There are 15 county attorneys in Arizona, and many have developed their own procedures for handling these types of complaints and prosecutions. Courts are required to expedite the lawsuits by holding a hearing as soon as "practicable." Companies should be able to introduce in the courts the immigration compliance steps taken to demonstrate good faith, including but not limited to the affirmative defense of I-9 compliance, training classes, immigration policies included in handbooks and new hire packets, W-9s signed by the employees verifying the employee’s SSN, etc.

F. Penalties for Knowingly or Intentionally Employing an Unauthorized Worker.

The penalties for employing unauthorized workers differ depending on whether the employer "knowingly" employed the unauthorized alien or "intentionally" employed an unauthorized alien.

1. Penalties for "Knowingly" Employing an Unauthorized Worker.

If the Court finds an employer to have "knowingly" employed an unauthorized alien, the Court may suspend the employer’s business licenses for 10 days. When deciding whether and for how long to suspend the employer’s business license, the court is to consider factors such as (i) the number and duration of unauthorized aliens employed; (ii) whether the employer made good faith efforts to comply with immigration laws; and (iii) the role of the employer’s directors, officers, or principals in the violation.

In addition to facing a suspension of business licenses, the employer is subject to a three year probationary period. If the employer knowingly or intentionally employs an unauthorized worker during the probationary period, the employer’s business license(s) is permanently revoked. After three years with no additional violations, the employer has a clean slate.

2. Penalties for "Intentionally" Hiring an Unauthorized Worker.

If an employer is found to have "intentionally" employed an unauthorized alien, the court must suspend the employer’s business license(s) for at least ten days. The Court may suspend the employer’s business license(s) for more than ten days, based on the same factors described above for suspending an employer’s license(s) after a "knowing" violation.

In addition to the license suspension, the employer is subject to a five year probationary period. If the employer knowingly or intentionally employs an unauthorized worker during the probationary period, the employer’s business license(s) is permanently revoked. After five years with no additional violations, the employer has a clean slate.
3. Licenses Subject to Suspension or Revocation.

The licenses that will be suspended or revoked upon a finding of a knowing or intentional violation include "any agency permit, certificate, approval, registration, charter, or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business" in Arizona, such as articles of incorporation, certificates of partnership, and transaction privilege (sales) tax licenses. There are a few exceptions, such as some environmental licenses and professional licenses. There are various provisions and words that may require court interpretation when LAWA is used against a company. There is a legal question as to whether a company’s articles of incorporation or partnership agreements actually constitute a license for purposes of LAWA.

The licenses at risk are all those “specific to” the business location where the unauthorized worker performed services. If the employer does not hold a license “specific to” that location, all licenses for the employer’s primary place of business are subject to suspension or revocation.

4. Requirements During Probationary Period: Affidavits and Quarterly Reports.

Upon finding a violation, the court will order the employer to terminate the employment of all unauthorized aliens employed in the state of Arizona. In addition, the company must file a sworn affidavit with the County Attorney within three business days after the date of the order affirming that the employer has done so and will not intentionally or knowingly employ an unauthorized alien in Arizona. If the employer does not submit the sworn affidavit, the employer’s business license(s) will be suspended until the sworn affidavit is submitted to the County Attorney.

During the three or five year probationary period for either a knowing or intentional violation, the employer must file quarterly reports with the County Attorney in the form provided in A.R.S. § 23-722.01 identifying all new employees hired in the location where the unauthorized alien performed work.

5. Permanent License Revocation for Second Violations.

If an employer commits a second violation during a probationary period, the employer’s business licenses applicable to that business entity will be permanently revoked. For a business, this is the equivalent of capital punishment. A violation cannot be considered a second violation unless it occurred while the Company was on probation for a first violation.

6. Violators Will Be Identified on the Attorney General’s Website.

LAWA requires the Attorney General to post on its website the employers who have violated the law, and copies of the court orders finding a violation.
G. **The Defense That Employers Are Not Required to Violate Other Laws.**

LAWA specifically states that it shall not be construed to require an employer to take an action that the employer, in good faith, believes would violate federal or state law. For example, theoretically an employer would not be required to refuse to hire a person if it believes that rejecting the person would violate laws prohibiting discrimination based on national origin or citizenship status.

H. **Mandatory Use of the E-Verify Program and Defenses for Employers.**

Under LAWA, effective January 1, 2008, every employer in Arizona is required to use the federal E-Verify program to verify the employment eligibility of all newly hired employees. If an employer proves that it used E-Verify to verify the employment eligibility of a worker who is later determined to be an unauthorized worker, the employer is entitled to rebuttable presumption for the individual at issue that the company did not knowingly or intentionally employ an unauthorized worker. In addition, employers also have an affirmative defense to a violation if they can show that it, in good faith, they followed the federal I-9 employment verification process. Employers also have a good faith defense if they can show a good faith attempt to comply with the I-9 requirements and that the violation was “isolated, sporadic or accidental, technical or procedural failure.”

E-Verify is a federal program jointly operated by the Social Security Administration ("SSA") and the Department of Homeland Security ("DHS"). Computer and internet access is required to use E-Verify. E-Verify can only be used with new hires. E-verify cannot be used with existing employees or as a screening tool prior to hiring an employee.

Employers are still required to complete the Form I-9 within three business days from the date of hire. After hiring the employee and completing the I-9, and if the employee completes the I-9 verification process, then the I-9 information is entered into E-Verify and the company should follow the steps for confirmation or tentative non-confirmation.

Employers can register for E-verify online at https://www.vis-dhs.com/EmployerRegistration/. Employers are required to sign a Memorandum of Understanding and follow the program requirements.

I. **Voluntary Employer-Enhanced Compliance Program.**

The amendments to LAWA, passed in April, 2008, created a new defense to sanctions under LAWA. If an employer enrolls in the voluntary program and follows all of its requirements, an employer will not be found liable for a LAWA violation upon a showing that the employee named in the complaint had been verified through E-Verify or the Social Security Number Verification Service ("SSNVS"). The voluntary employer enhanced compliance program requires employers (1) to use E-Verify for all newly hired employees, (2) for all existing employees not verified through E-Verify to verify the employee’s Social Security numbers through the SSNVS and resolve any discrepancies within 90 days, if possible (more time is permitted as long as the employer can show proof of good faith efforts by the employee to resolve the discrepancy); and (3) upon request of Attorney General or County Attorney stating the name of an employee about whom they have received a complaint, provide documents
proving the employee was verified through E-Verify or the SSNVS. Employers are required to file a sworn affidavit with the Attorney General that they agree to perform all the foregoing actions “in good faith” in order to enroll in the voluntary program.

The SSNVS clearly states that employers should not take adverse employment action against employees based on a Social Security number “no-match” communication. The availability of this defense is dependent on both the employer and employee being able to document ongoing good-faith efforts to resolve the discrepancy. This provision places the employer’s defense in the hands of the employee. Further, because of privacy laws, the employer cannot control what occurs between the Social Security Administration and the employee. The SSNVS is not designed for immigration compliance and is not an accurate tool for immigration compliance. The SSNVS, and limitations on its use, are discussed more fully later in these materials.

**J. Penalties for Paying Cash and Not Following Other Employment Laws.**

HB 2745, the amendments to LAWA, provides additional penalties for employers of two or more persons who pay their employees in cash and fail to comply with all of the following: tax withholdings, workers’ compensation coverage, unemployment insurance, and new hire reporting requirements. A.R.S. § 23-361.01. Violations are a penalty that is triple the amount of all withholdings, payments, contributions or premiums that the employer failed to pay, or $5,000 for each employee, whichever is greater.

**K. Extension of LAWA to Contractors’ Hiring Practices, but Exclusion of Independent Contractor Relationship from Definition of Employee.**

HB 2745 makes several changes to the language of LAWA regarding employment and independent contractor relationships. The new language is both somewhat ambiguous and contradictory. The amendment changes the definition of “employee” in a way that deletes references to an employment relationship and expands it to include persons who provide “services” for “other remuneration.” The language is deliberately broader than those who provide “labor” for “wages.” This new language might be interpreted to expand coverage to independent contractors, not just employees, but the definition of “employ” is changed to state that it “does not include an independent contractor.” A.R.S. § 23-211(3)(b)

Other portions of the amendments reinforce that the definition of “employer” in LAWA does not include independent contractors. A.R.S. § 23-211(2)(b); 23-211(3) and (5). LAWA now also includes a non-exclusive list of seven factors for determining whether persons are independent contractors or employees. Those seven factors are not the only factors utilized under common law or federal or state statutes. The trend in the law has been to try to make the concepts of employee and independent contractor uniform among the various laws, such as workers compensation, unemployment insurance, income tax withholding, and other employment regulatory laws. The new amendments create a potential inconsistency in which a worker might be considered an employee under LAWA but considered an independent contractor under other laws. That, of course would put employers in an untenable position.
Contradicting the exclusion of independent contractors described above, the law now also states that employers violate the law and may have their business licenses revoked if the employer “knowingly contracts to obtain the labor of an unauthorized alien or with a person who employs or contracts with an unauthorized alien to perform the labor.” A.R.S. § 23-212(A). That is a huge expansion of LAWA and is at odds with the definition of employer that purports to exclude independent contractors.

Under the above provisions, Arizona businesses could lose their licenses based on the hiring practices of the persons or companies with whom they contract i.e., the “first-tier contractors,” and the subcontractors or service providers to the first-tier contractors. For example, some vendors who might fall under this analysis could include cleaning companies used at a company’s offices, caterer of food, messenger services, temporary or leased employment agencies, subcontractors, etc.

I. Verification of Immigration Status for Issuance of Licenses.

LAWA includes a provision that state and local governments must determine whether a person is an unauthorized alien before issuing a license. A.R.S. § 41-1080. That provision closes what the advocates of the law had described as a loophole. For example, to renew a pesticide license, the state has already started using a new form and identified documents that a person must provide to prove legal status.

M. E-Verify Requirement for Government Contractors and Grant Recipients.

After the April, 2008 amendments, LAWA now requires that employers must participate in the E-Verify program in order to be eligible to receive any economic development incentive from a state or local government. A.R.S. § 23-214(B).

N. Disclosure of Businesses Enrolled in E-Verify.

HB 2745 requires the Attorney General to request from the United States Department of Homeland Security every three months a list of employers who have registered to use the E-Verify Program. The Attorney General must also post the list on its website. A.R.S. § 23-214(C). Businesses that are not enrolled in the E-Verify Program may find themselves targeted as a result of the fact that they are not named as enrollees on the Attorney General’s website.

O. Prohibition Against Knowingly Accepting Identity Of Another Person In Hiring Employee.

LAWA amends the State’s identity theft law to make it easier to prosecute individuals using a false identity or false personal information to gain employment. Employers can expect more police inquiries relating to employees who may have used an erroneous social security number or name.

Additionally, the amendments to LAWA make it a Class 4 felony for a person to accept the identifying information of another person from an individual knowing that the individual is not the actual person identified by the information and using the information for employment verification procedures. Employer representatives who accept documents knowing that the
documents do not properly belong to the individual, if convicted, could be sentenced to 2-1/2 years in prison or a fine of up to $150,000. For purposes of this provision, knowing requires actual knowledge.

P. **Issues and Strategies for Employers.**

Employers should implement a comprehensive strategy to recruit and hire workers in a way that documents their compliance with employment immigration laws. I-9 and immigration training for hiring personnel is critical in order to be able to demonstrate that the employer did not knowingly or intentionally hire undocumented workers. Companies should conduct I-9 audits. Employers will have to walk a tightrope between the immigration laws and discrimination laws. Employers cannot engage in discrimination when trying to implement immigration compliance strategies and must avoid conducting investigations based on race, national origin, or a foreign appearance or accent.

Employers should train their personnel how to deal with inquiries and complaints about immigration status that may be directed at the employer a large and, under the new law, a growing list of government agencies, including federal immigration authorities, the Attorney General’s office, County Attorneys, local law enforcement, the Department of Economic Security, city agencies, licensing agencies, and more.

The capital punishment of license suspension or revocation is particularly problematic. Because the revocation applies first to those licenses specific to the business location where the unauthorized worker performed services, it would be beneficial for businesses to have a license of some sort specific to each business location. Companies will need to consider the implications of the possible loss of business licenses not only for themselves, but for vendors in their supply chain and for their customers. Arizona businesses will be at risk that they, their local suppliers, or their customers can be shut down if hiring personnel do not follow proper procedures in hiring workers. The challenge of obtaining a sufficient supply of qualified workers will also be more formidable.

The enforcement of LAWA will also be complicated by the shifting landscape of federal immigration laws. Congress is expected to eventually address comprehensive immigration reform, and those changes could affect the State’s enforcement practices. In the meantime, many states are looking at following the Arizona experiment to enact employer sanctions law.

II. **CONCLUSION.**

Several states have proposed legislation that would impose penalties on employers who knowingly employ unauthorized workers. The existing laws and proposed laws take three major approaches: (1) attacking companies’ business licenses, (2) requiring E-Verify for public contractors or all employer, and (3) creating a private right of action for terminated employees against an employer who has retained unauthorized workers. In addition, states are enhancing their criminal laws and employers may face criminal liability for transporting an unauthorized alien, harboring an unauthorized alien, or aiding a felony. Employers need to ensure that they are familiar with the state immigration laws in the states in which they operate. Companies
should also make sure to train their employees on the applicable state immigration laws, as well as federal immigration laws.
E-VERIFY

By
Julie A. Pace
David A. Selden
Ballard Spahr Andrews & Ingersoll, LLP

I. INTRODUCTION.

In an attempt to address problems with the employment of unauthorized aliens and the employment verification procedures, the federal government, under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), created three employment eligibility verification pilot programs: the Basic Pilot Program, the Citizens Attestation Program, and the Machine Readable Program. The only one that continues to be in use is the Basic Pilot Program, which has been renamed E-Verify and is jointly administered by the Social Security Administration (“SSA”) and the Department of Homeland Security (“DHS”).

Several states have passed laws that require some employers (those with state government contracts) to use E-Verify. Other states, such as Arizona, require all employers to use E-Verify. On a national level, however, E-Verify remains a voluntary program.

II. NUTS AND BOLTS OF USING E-VERIFY

A. Employers Register Online.

Employers can register for E-Verify online at https://www.vis-dhs.com/EmployerRegistration. Employers should not enroll until they are ready to begin verifying employment eligibility through the program. Employers are required to sign a Memorandum of Understanding (“MOU”) that identifies the responsibilities of the employer, the SSA, and the DHS.

Every employee that uses E-Verify for the company must complete an online tutorial and proficiency test. The tutorial may take up to two hours. In addition, each user should maintain a copy of the E-Verify User Manual, an approximately 80 page manual describing E-Verify process employers must follow.

B. Employers Sign a Memorandum of Understanding.

The MOU may be “signed” electronically by checking a box online saying “I agree that I have read and agree with the terms and conditions of the MOU, and am authorized by my company to act on its behalf with respect to the E-Verify program. I understand that I must complete the electronic registration in order for the MOU to take effect.” This is one of the first pages of the registration process. By completing the registration, the Company is committing itself to comply with the MOU.

The company should print the MOU from this screen and ensure that all employees who will be using E-Verify for the company have read and understand the MOU. DHS warns that violations of the MOU may lead to legal liability for the company under federal or state law,
including Title VII of the Civil Rights Act of 1964 and the anti-discrimination provision of the Immigration and Nationality Act.

In the MOU, employers agree to follow the program requirements, including the following:

1. The employer may not submit an inquiry to E-Verify until after an employee is hired and an I-9 has been completed for the employee.

2. The employer may use E-Verify to verify the employment eligibility only for new employees, and not for employees hired before the employer signed the MOU.

3. The employer must agree not to discriminate against employees based on national origin or citizenship status.

4. The employer must post notices provided by DHS regarding its participation in E-Verify and must post anti-discrimination notices issued by the DOJ Office of Special Counsel.

5. The employer may not use E-Verify to selectively verify employment eligibility. If used, it must be used for all new hires, regardless of their race, ethnicity, national origin, or citizenship status.

6. The employer may not use E-Verify to reverify the employment eligibility of an employee whose original work authorization documents have expired.

7. The employer must provide the employee copies of the written Notice of Tentative Non-Confirmation, if applicable, and the opportunity to resolve the tentative non-confirmation.

8. The employer must not take adverse action against an employee while the employee is challenging a tentative non-confirmation, unless the employer obtains knowledge (as defined in 8 C.F.R. § 274a.1(1)) that the employee is not authorized to work.

9. The employer must take steps to safeguard the information used for E-Verify and ensure it is not used for any purpose other than employment eligibility verification.

10. The employer must continue to use E-Verify while the MOU is in effect. The employer may formally terminate the MOU and close using the program upon 30 days written notice to SSA and DHS. The employer may request termination of its involvement in E-Verify online from the “Site Administration” page on the program.

C. Employers may be subject to discrimination charges for violating the MOU or the requirements and limitations of the E-Verify program.

The DHS warns that violations of the MOU may lead to legal liability for the company under federal or state law, including Title VII of the Civil Rights Act of 1964 and the non-discrimination provision of the Immigration and Nationality Act. The Department of Justice
Civil Rights Division Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) enforces the non-discrimination provisions of the Immigration and Nationality Act. Employees who believe that a company has used E-Verify in a discriminatory manner may file a complaint with the OSC, who has received a growing number of E-Verify complaints since states, such as Arizona, have mandated its use.

An employer could be subject to a discrimination charge if it uses E-Verify as a pre-screening tool to verify work authorization of applicants. It could also be subject to a discrimination charge for failing to provide the employee the notice of tentative non-confirmation and right to challenge the tentative non-confirmation, selectively using E-Verify, using E-Verify to verify work authorization of existing employees or taking adverse action based on a tentative non-confirmation. The following is a list of “E-Verify Employer DOs and DON’Ts” from the OSC.

<table>
<thead>
<tr>
<th>DO</th>
<th>DON’T</th>
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<tbody>
<tr>
<td>• Use program to verify employment eligibility of new hires</td>
<td>• Use program to verify current employees</td>
</tr>
<tr>
<td>• Use program for all new hires regardless of national origin or citizenship status</td>
<td>• use program selectively based on a “suspicion” that new employee or current employee may not be authorized to work in the U.S., or based on national origin</td>
</tr>
<tr>
<td>• Use program for new employees after they have completed the I-9 Form</td>
<td>• Use program to pre-screen employment applicants</td>
</tr>
<tr>
<td>• Provide employee with notice of Tentative Nonconfirmation (TNC) promptly</td>
<td>• Influence or coerce an employee not to contest a Tentative Nonconfirmation (TNC)</td>
</tr>
<tr>
<td>• Provide employee who chooses to contest a Tentative Nonconfirmation (TNC) promptly with a referral notice to SSA or DHS</td>
<td>• Terminate - or take other adverse action against - an employee who is contesting a Tentative Nonconfirmation (TNC) unless and until receiving a Final Nonconfirmation</td>
</tr>
<tr>
<td>• Allow an employee who is contesting a Tentative Nonconfirmation (TNC) to continue to work during that period</td>
<td>• Ask an employee to obtain a printout or other written verification from SSA or DHS when referring that employee to either agency</td>
</tr>
<tr>
<td>• Post required notices of the employer’s participation in E-Verify and the antidiscrimination notice issued by OSC</td>
<td>• Ask an employee to provide additional documentation of his or her employment eligibility after obtaining a Tentative Nonconfirmation (TNC) for</td>
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that employee

- Secure the privacy of employees’ personal information and the password used for access to the program
- Request specific documents in order to use E-Verify’s photo tool feature

D. **Employers May Use E-Verify for the Entire Company or on a Site-by-Site Basis.**

Companies may register to use E-Verify at individual work sites and not use it at the entire company. Each site that verifies the employment authorization of employees at that site must sign its own Memorandum of Understanding. If the company’s human resource functions are centralized, the central office can perform the employment verification for all sites. Employers may use E-Verify for individual work sites or may use it for their entire company. However, employers should be aware of state laws that may impact their use of E-Verify. For example, Arizona law requires Arizona employers to use E-Verify. Other states require contractors with state contracts to use E-Verify.

E. **Employers May Outsource the Employment Verification Duties.**

Additionally, an employer can outsource employment authorization verification to a third party service provider called a Designated Agent. However, if a company outsources its employment verification under E-Verify, it will still be required to sign a Memorandum of Understanding and be assigned a unique number that the service provider will use only for that company.

F. **The Verification Process.**

1. **Complete a Form I-9.**

Employers start the employment verification process in essentially the same way that they would if not using E-Verify; by completing a Form I-9. This cannot be done until after a company hires an individual. E-Verify places one limitation on the I-9. The employer may accept a List B document to establish identity only if the List B document contains a picture. However, the employee still gets to choose whether to produce either (1) one List A document or (2) one List B and one List C document, and which document from the list to show, as long as the List B document has a photograph. If the employee presents a Permanent Resident Alien Card or a Form I-766 Employment Authorization Document, the MOU requires the employer to copy and maintain a copy of the permanent resident card or employment authorization document and must use the copy to verify the photo against the DHS database. This requirement does not exist for Designated Agents. In addition, the requirement is inconsistent with Federal I-9 regulations which require an employer to either keep copies of all documents used to complete the I-9 or no documents used to complete the I-1 but prohibits keeping them selectively. Therefore, USCIS has instructed the authors of these materials that employers who do not keep photocopies of the I-9 supporting documents may copy the permanent resident card or I-766 for
purposes of using the photo tool only, then destroy the copies pursuant to the employer’s policy not to keep photocopies of I-9 supporting documents.

The E-Verify Users Manual reminds employers that they must accept the documents the employee provides, with the single limitation that the List B document must contain a picture. It also reminds employers that they may not request documents to verify information that the employee provided on Section 1. The employee alone is responsible for the information in Section 1 of the I-9. The employer is only responsible for making sure it is complete.

2. Enter Information in E-Verify.

The employer must enter information from Sections 1 and 2 of the Form I-9 into E-Verify, including:

(a) Last name;
(b) First name;
(c) Social Security Number;
(d) Date of birth;
(e) Date of hire;
(f) Citizenship status;
(g) Alien registration or I-94 number (if applicable); and
(h) Type of document verified on the Form I-9 with expiration date.

3. The SSA and USCIS Verify the Data.

The SSA first verifies if the name, date of birth, social security number, and citizenship status reported match the SSA’s records. Inquiries regarding non-citizens are routed to the USCIS to verify the work authorization of the employee. If the information entered matches the SSA and USCIS databases, then no further action is required. The employer is provided a confirmation number and must retain a record of the confirmation number on the Form I-9 or print the confirmation screen and attach to the Form I-9.

4. If No Match, Employer Receives a Tentative Non-Confirmation.

If the SSA is unable to verify the information, the employer will receive an “SSA tentative non-confirmation.” If the USCIS is unable to verify that the worker has proper work authorization, the employer will receive a notice, “DHS verification is in progress.” An immigration status verifier will manually check the USCIS records if an automatic verification cannot be provided. If, after the manual check, USCIS cannot verify the employee’s work authorization, the employer will receive a “DHS tentative non-confirmation.” DHS plans to
more than triple the number of status verifiers it has on staff to accommodate the increased use of E-Verify.

5. **Employer Must Provide Notice to Employee of Tentative Non-Confirmation and Referral to the Appropriate Agency.**

   After the employer receives a tentative non-confirmation, it should first check to see that all information was entered correctly. If the non-confirmation did not result from a typographical error that the employer can fix, the employer must provide the employee with a written notice entitled “Notice to Employee of Tentative Non-Confirmation.” The notice form is generated by E-Verify. The employer must print the notice. If there is no copier available, the employer should print two copies, because the employer must provide one copy to the worker. The worker must indicate on the notice whether he or she intends to challenge the non-confirmation. Both the employee and the employer must sign the notice. One signed copy of the notice should be given to the employee. The employer should retain the other signed copy of the Notice to Employee with the individual’s Form I-9. Failure to give a signed copy of the Notice to Employee of Tentative Non-Confirmation may result in a charge of discrimination against the employer if the employee alleges that he or she was not informed of the tentative non-confirmation.

   If the employee is challenging the non-confirmation, the employer is required to print a second letter, called a “referral letter,” that contains information about how to resolve the non-confirmation. The referral information from the referral letter is transmitted electronically to the DHS or the SSA. Both the employer and the employee must sign the referral letter. Again, one signed copy of the referral letter must be given to the employee. One signed copy of the referral letter must be retained with the individual’s Form I-9.

6. **Employee Has Eight Working Days; SSA & DHS Have Ten Working Days to Resolve Discrepancy.**

   The employee has eight (federal government) working days after receiving the referral letter from the employer to contact the SSA or DHS to try to resolve the discrepancy. The employee is to keep working during this time. The employer must treat this employee the same as it treats employees who received an automatic work authorization and cannot delay the employee’s start date or training opportunities based on a tentative non-confirmation.

   The SSA or DHS has ten working days to resolve the case after it receives the referral from the employer, which occurs electronically when the employer provides the employee with a “referral letter.” If more time is needed, the employer will receive a “case continuance” notice. The entire procedure is designed to provide a final confirmation or final non-confirmation within ten business days after the employer enters the information in E-Verify, but this does not always occur.

7. **Final Non-Confirmation Requires Employer Action.**

   If an employee does not challenge a tentative non-confirmation, the non-confirmation becomes final.
In the case of an SSA tentative non-confirmation, the employee should notify the employer when he or she visits the SSA. The employer must check the employee’s information through E-Verify at least 24 hours after the employee informs the employer he or she has visited the SSA office but no later than ten working days after the employer sent the referral information to the SSA. If the employee does not contact the SSA, the employer should resubmit the employee’s information for verification no later than ten working days after the employer sent the referral to the SSA.

The employer will then receive an employment authorization confirmation or an SSA final non-confirmation. The employer may also receive a notice that DHS verification is in progress if the SSA issue was resolved because the information matches SSA’s records but the SSA does not have employment authorization information for the individual.

In the case of a DHS tentative non-confirmation, ten business days after the employer makes the referral, it should check the employee’s information for verification through E-Verify. It will receive either an employment authorized notice, an employment unauthorized notice (final non-confirmation) or a DHS no show response. The DHS no show response is provided if the employee failed to contact the DHS within ten days after the referral. The no show response is considered a final non-confirmation.

After a non-confirmation becomes final, the employer must either terminate the individual’s employment or notify DHS if it continues to employ an employee after receiving a final non-confirmation. An employer is subject to fines of $500-$1,000 for each failure to notify the DHS that it continued to employ the individual. If the employer continues to employ an individual after a final non-confirmation, the employer is subject to a rebuttable presumption that it has knowingly employed an unauthorized alien.

8. Employer Cannot Take Action Against Employee Who is Contesting Tentative Non-Confirmation.

An employer is prohibited from taking adverse employment action against an employee who is contesting a tentative non-confirmation. The employee should continue to work during the window of ten business days with which the SSA or DHS has to resolve the discrepancy. The employer cannot treat the employee who is contesting a tentative non-confirmation any differently than the employee who gets an initial confirmation. If the employee is not challenging the non-confirmation, the employer should terminate the individual’s employment or report to DHS it is not terminating the individual’s employment after the non-confirmation.

An employee cannot face any adverse employment consequences based on a tentative non-confirmation. An employer may not delay the employee’s start date, delay training, or otherwise treat an employee with a tentative non-confirmation differently than an employee that received an instant confirmation. An employer cannot speed up an agreed-upon start date based on a confirmation from E-Verify, because this would be disparate treatment of employees based on results from E-Verify. If the employer generally offers training to employees in the first ten days of employment, it must provide the same training to the employee with the tentative non-confirmation.
III. PROBLEMS WITH E-VERIFY

E-Verify has several drawbacks as an employment verification vehicle. It requires employees to have a computer and internet access to use the program. E-Verify has a high rate of tentative non-confirmations and erroneous non-confirmations. Additionally, it is unable to detect fraud and identity theft. There is also a potential to allow access to employees’ personal, confidential information. Additionally, misuse of E-Verify may lead to discrimination and unfair employment practices.

A. E-Verify Requires Employers to Have a Computer and Internet Access.

E-Verify is a computer-based system that requires employers to have a computer and Internet access. There is no telephonic equivalent that would allow employers to verify employment eligibility.

Because E-Verify requires employers to enter personal, confidential information regarding employees, employers must use care to protect the information. If an employer does not have a computer with Internet access, the employer may be tempted to use a public computer, such as a computer at a public library. However, use of a public computer raises serious confidentiality and privacy concerns. If the information could be recovered by other computer users, they would have all the information they needed to steal a person’s identity. The employer could be liable for that loss.

B. The Government Admits E-Verify is Not Ready to Go National.

In June 2007, officials from the Government Accountability Office (“GAO”) testified before the House Ways and Means Subcommittee on Social Security in response to inquiries regarding E-Verify. According to the SSA, 4.1% of the Social Security records contain errors that would result in incorrect feedback under E-Verify. The error rate was even higher for individuals born outside of the United States.

The GAO estimated that if the federal government were to require all employers to use E-Verify, the DHS and SSA would be required to hire hundreds more employees and need several hundred million dollars. The DHS claims that right now E-Verify confirms 92% of response within seconds (other reports suggest that the number is closer to 85%), but that expanding the number of users will increase the number of potential errors. Therefore, the time and personnel required to respond to tentative non-confirmations would be immense.

C. Employers Misuse E-Verify.

Studies have shown that employers using E-Verify do not fully understand the requirements and restrictions of the program. The study found several employer practices that did not comply with the requirements of E-Verify that are considered prohibited employment practices, including:

1. Using E-Verify for pre-employment screening;
2. Taking adverse action against an employee while tentative non-confirmation results are being resolved;

3. Failing to maintain proper security of the information;

4. Failing to follow through on dismissal when a tentative non-confirmation was not resolved and became a final non-confirmation; and

5. Failing to properly notify employees of a tentative non-confirmation.

D. E-Verify Does Not Detect ID Theft or Document Fraud

E-Verify is highly susceptible to document fraud and identity theft. An employee could use valid documents in a fraudulent manner and the employer could receive a confirmation of work authorization that was false. For example, an alien from Russia with valid documents could lend them to his cousin, an unlawful alien that happens to look like him, and E-Verify would provide a confirmation of employment eligibility.

An employee could use fraudulent documents that contain some valid information, and get a confirmation of work authorization from E-Verify. For example, if Heidi stole Julie’s identity and made fraudulent documents with Julie’s name, date of birth, and social security number but Heidi’s picture, E-Verify would provide a confirmation, as long as the information entered into the system matched Julie’s correct information. However, if Heidi were to keep her own date of birth and use Julie’s social security number, E-Verify would provide a tentative non-confirmation.

The system is not designed to identify if an identification is being used at multiple worksites, so the same information could be used by multiple parties at different companies. The system would not identify that the documents had been used more than once.

E. E-Verify Provides Numerous Erroneous Nonconfirmation Results.

Because of errors in the SSA’s database or the DHS database, because of delays in information being input into those databases, because of limitations on data-input format, or because of user error by E-Verify user, E-Verify provides erroneous nonconfirmation results. Studies vary, but all agree that between 8% and 20% of E-Verify inquiries result in a tentative non-confirmation that requires additional work by the SSA or DHS to resolve. Inquiries that required manual verification by the DHS to resolve often take longer than the 10 business days that are allotted under the program.

IV. A CAUTIONARY TALE: SWIFT MEAT PACKING.

Swift & Company, the third largest processor of fresh pork and beef in the United States, started using the Basic Pilot Program when it was first introduced in 1997. It completed an I-9 on all new employees and verifies work authorization through the Basic Pilot Program. Swift was so zealous in verifying the employment eligibility of its employees that in 2001, the Department of Justice Office of Special Counsel sued Swift for unfair immigration related practices because the Company allegedly went too far in trying to verify employee’s work
eligibility. The DOJ sued for $2.5 million. The case was settled for $200,000.00 with no admission of wrongdoing by Swift.

Despite its long-term use of the Basic Pilot Program and its reputation as being overzealous when verifying employment eligibility, ICE raided six Swift production facilities and arrested 1,283 employees who were allegedly using false documents -- completely stolen identifications that slipped through the Basic Pilot Program. The raids and loss of employees cost Swift $30 million. Approximately 275 former Swift employees have been charged with identity theft or use of fraudulent documents. Additionally, 19 Swift employees were arrested in July 2007 and were charged with harboring illegal aliens. The arrests included human resources personnel and a union representative. Swift continues to be a target of investigation, despite the fact it has been using the Basic Pilot Program (now E-Verify) for ten years.
THE ICE IMAGE PROGRAM

By
Julie A. Pace
David A. Selden
Heidi Nunn-Gilman
Ballard Spahr Andrews & Ingersoll, LLP

I. INTRODUCTION.

A. Establishment of the IMAGE Program.

IMAGE, which stands for ICE Mutual Agreement Between Government and Employers, is an initiative launched by the U.S. Immigration and Customs Enforcement (ICE) on July 26, 2006 to help employers build and maintain a “legal workforce.” The goal of the program is to “assist employers in targeted sectors to develop a more secure and stable workforce and to enhance fraudulent document awareness through education and training.” It really is targeted at preventing the employment of unauthorized aliens that are using counterfeit documents or stolen identities.

B. Benefits Promoted by ICE.

Participants in the IMAGE program become “partners” with ICE to promote participation in and acceptance of the IMAGE program. Participants are required to follow a set of “best hiring practices” and comply with several other requirements of the program. In exchange, ICE and the U.S. Citizenship and Immigration Services (USCIS) will provide education and training on proper hiring procedures, detecting fraudulent documents, E-Verify, and anti-discrimination measures. ICE has stated that it will work with employers to review hiring and employment practices and work with them to correct “isolated, minor compliance issues that are detected.” ICE will update IMAGE participants on the latest illegal schemes being used to circumvent legal hiring processes. In addition, “IMAGE participation may be considered a mitigating factor in the determination of civil penalty (fine) amounts should they be levied.” Participating companies become “IMAGE Certified,” a designation ICE hopes becomes a distinctive label that businesses will seek. ICE envisions that participating companies will begin to require vendors and subcontractors to be IMAGE certified and that the requirement will spread and become a benchmark in certain industries where employment of unauthorized workers is most prevalent.

At this point, there are several additional burdens placed on the employer and no real benefit provided by participation in the IMAGE program. Essentially, the program asks employers to report on themselves but does not provide immunity for doing so. Participating employers may be prosecuted or fined for violations of IRCA that the employer self-reports.

II. ENROLLING IN IMAGE.

The first step for an employer that wants to participate in IMAGE is to submit to an I-9 audit by ICE. ICE will review the I-9 forms for all current employees. They may also request to review the I-9 forms for previous employees. Although the employer’s voluntary participation in IMAGE may be considered as a mitigating factor in determining the amount of penalties, ICE
has the authority to impose penalties based on the results of this I-9 audit. There is no immunity provided to the employers that volunteer to go through an I-9 audit in order to participate in IMAGE.

In addition, employers that want to participate in IMAGE are required to verify the social security numbers of every current employee using the Social Security Number Verification Service (SSNVS). The program does not spell out what employers are supposed to do if they receive a no-match from the SSNVS. The SSNVS is not a confirmation of work authorization, and a no-match from the SSNVS does not mean that a person is not authorized to work in the United States. The Social Security Administration has a website titled “Restrictions on Using SSNVS” (http://www.ssa.gov/employer/ssnvrestrict.htm) that states:

Do not use SSNVS to take punitive action against an employee whose name and Social Security number do not match Social Security's records.

A mismatch does not imply that the employer or the employee intentionally provided incorrect information.

A mismatch does not make any statement about an employee's immigration status and is not a basis, in and of itself, for taking any adverse action against an employee. Doing so could subject you to anti-discrimination or labor law sanctions.

An employer that terminates an employee based on a no-match from the Social Security Administration could be liable for violations of anti-discrimination laws. So it is unclear what ICE expects employers to do if they receive a no-match from the SSNVS.

III. 10 BEST HIRING PRACTICES.

Participants in IMAGE are required to adhere to a set of ten “best practices,” including:

1. Use the DHS employment eligibility verification program (E-Verify) to verify the employment eligibility of all new hires;

2. Establish an internal training program on the hiring process, with annual updates, i.e., on how to manage completion of Form I-9 (Employment Eligibility Verification Form) and on how to detect the fraudulent use of documents in the I-9 process, and cooperate with ICE to make employees available for ICE training sessions as deemed appropriate;

3. Permit the I-9 and Basic Pilot process to be conducted only by individuals who have received this 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;

4. Arrange for annual I-9 audits by an external auditing firm or a trained employee not otherwise involved in the I-9 process;
5. Establish a self-reporting procedure for the reporting to ICE of any violations or discovered deficiencies;

6. Ensure and document the definitive resolution of no-match letters received from the Social Security Administration (SSA), per SSA and DHS guidance;

7. Establish a tip line mechanism (inbox, e-mail, etc.) for employees to report activity relating to the employment of unauthorized aliens, and a protocol for responding to employee tips;

8. Establish and maintain appropriate policies, practices, and safeguards against use of the verification process for unlawful discrimination, and to ensure that U.S. citizens and authorized workers do not face discrimination with respect to hiring, firing, or recruitment or referral for a fee because of citizenship status or national origin;

9. Communicate IMAGE guidelines to other companies in the hiring network (such as employment services/agencies) and contractors/subcontractors. Work toward incorporating IMAGE guidelines into relationships and agreements with these companies and establish a protocol for assessing the adherence to the Best Practices guidelines by the company’s contractors/subcontractors;

10. Submit an annual report to ICE to track results and assess the effect of participation in the IMAGE program. The report should include (a) identification of individuals removed from employment in accordance with participation with the IMAGE program; (b) instances and resolution of SSA no-match letters (c) major organizational changes; (d) identification of any vulnerabilities discovered being exploited by unscrupulous employees and unauthorized aliens. When appropriate, ICE encourages timely disclosure in advance of the annual report. Discovery or allegations of substantive criminal violations will be immediately reported to ICE (in accordance with Best Practice #5), whereas technical violations may be documented in the annual report.

Additionally, companies with over 50 employees must designate a compliance officer to ensure that the Company is following the Best Practices in accordance with the IMAGE guidelines. Companies are required to immediately report to ICE the discovery of or allegation of substantive criminal violations.

IV. POTENTIAL DRAWBACKS.

Many of the “best hiring practices” are good practices that we recommend implementing. We advise providing I-9 training to all employees who will be completing I-9s on behalf of the Company. We also recommend doing I-9 audits. The Company should do regular self-audits. We also recommend having an external audit conducted every few years. We have developed a protocol for responding to no-match letters from the Social Security Administration and we strongly recommend that Company’s take some action in response to the letter, rather than just ignoring it. These are all good employment practices that the Company should adopt, whether it joins IMAGE or not.
However, there are some practices that could be negatives for companies participating in the IMAGE program. Participation does not protect a company from prosecution for violations of IRCA or other civil or criminal charges. Companies that report themselves may still be prosecuted and fined. There is no immunity or safe harbor. Companies may also face liability if the practices they adopt to respond to social security no-match letters are too strenuous and considered discriminatory.

As you may be aware, there are errors and other problems with the SSNVS, which IMAGE requires employers to use. The requirement that the Company allow its employees to report on each other may create an atmosphere of distrust and hostility and may damage employee relations. It could divide the workforce along racial or ethnic lines, which is not a positive development in a workplace.

In addition, there are administrative burdens involved in IMAGE participation. The Company would be required to participate in additional training and to complete additional paperwork in filing the annual reports. There will be other additional administrative burdens, such as appointing a compliance officer.

We do not recommend that any company participate in IMAGE.

V. CONCLUSION.

We were unable to locate statistics on how many employers participate in IMAGE. It does not appear to have become as popular as ICE intended. There are good practices involved, such as training and I-9 audits that the Company should definitely adopt. There are also potential drawbacks that the Company should consider before it decides to participate. If we can provide further information or guidance, please do not hesitate to contact us.
Companies need to be proactive and have procedures in place to help protect the company against charges that it knowingly or intentionally employed an unauthorized alien. The following are some issues and strategies to consider implementing as part of an overall strategy to avoid or defend against claims that the company is knowingly or intentionally employing an unauthorized alien. Companies should adopt comprehensive strategies that demonstrate the company’s commitment to complying with the laws and the due diligence it takes with regards to its own employees and the employees of companies it contracts with and that shows the company has taken appropriate action regarding employment eligibility issues.

I. IMPORTANCE OF ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK PRODUCT PROTECTION

It is more important for companies who want to avoid being found to have knowingly or intentionally employed an unauthorized worker, and the civil and criminal penalties that may be imposed, to integrate the benefits of the attorney-client and attorney work product privilege regarding matters of identity theft or identity issues. It is very important for companies to consider these privileges to protect their companies and their employees from being targeted and prosecuted.

1. Companies may want to have legal counsel be the liaison between the company and government agents, police officers, or prosecutors, rather than a company employee or manager acting as liaison or writing and signing letters. If a company employee acts as the liaison or writes letters, the employee might then be named in a subpoena or named for prosecution. Steps should be taken to protect the Company and its employees and still exhibit cooperation with law enforcement. Many companies today are outsourcing responsibility regarding request for personnel data relating to identity issues to lawyers to handle.

2. It is also important to have a legal team that includes not only employment attorneys to handle inquiries about personnel data from ICE, the SSA, the State Attorney General, or a County Attorney’s office, but also white collar criminal attorneys and corporate attorneys who may be needed as part of the team to implement some of the strategies and defenses to assist in defending IRCA prosecutions.

II. I-9 AND IMMIGRATION COMPLIANCE.

Federal law requires employers to verify the employment eligibility of all employees within three (3) business days after the employee begins work by using the Form I-9. Regulations technically require the employee to complete Section 1 of the I-9 on the first day of
employment, but the employer has three (3) business days to complete the Form I-9. It is essential to have a complete Form I-9 for every employee, both because good faith compliance with the I-9 process can provide an affirmative defense if the employer is charged with knowingly employing an undocumented worker and because failure to properly complete a Form I-9 may result in monetary fines being imposed on the company.

There are several steps a company can take to help ensure that it complies with the federal I-9 requirements and to help build a defense if the company is ever charged with knowingly employing an unauthorized worker. These are increasingly important in Arizona under the LAWA amendments, which provide a good-faith defense if an employer complies in good faith with the I-9 requirements notwithstanding “isolated, sporadic or accidental technical or procedural violations” of the I-9 requirements.

1. Print the Company’s current payroll register. Complete an audit of every employee’s I-9 form to make sure that the company has complete I-9s for every employee. If the company does not have an I-9 form or the I-9 form is incomplete, complete another I-9 and staple it to the original I-9. Do not backdate the I-9. Use the original hire date in Section 2.

2. Conduct I-9 and immigration compliance training for all employees that complete an I-9 on behalf of the company (Section 2 of the I-9). Train employees regarding what they may and may not do when completing the I-9 form on behalf of the company and what to look for to ensure that the I-9 is fully complete.

3. Weigh the advantages and disadvantages of electronically completing the Form I-9. There are processes available to have employees electronically complete and sign the Form I-9. However, using this system has drawbacks if the Form I-9 is ever audited and the information on the form is questioned. It may be better, especially in high-risk industries, to have the employee complete Section 1 in the employee’s own handwriting, which could later be verified to demonstrate that the employee provided the information. It is a business choice whether to complete the forms electronically or by hand, but requiring that the employee complete Section 1 in his or her own handwriting may have benefits if the company ever needs to defend itself.

III. ACTIONS AND DOCUMENTATION TO BOLSTER DEFENSES TO ALLEGED VIOLATIONS OF THE LEGAL ARIZONA WORKERS ACT.

The Legal Arizona Workers Act greatly increases the risks to employers for their immigration hiring compliance. The penalties are now the equivalent of “capital punishment” for any business because businesses cannot survive the suspension or revocation of their licenses and permits. All of the procedures that employers have implemented to ensure compliance with the I-9 process must be emphasized, scrupulously followed, and documented. Employers should discipline employees who cut corners in hiring practices so that if someone has failed to follow proper procedures, the business will be in a better position to contend that it did not knowingly or intentionally hire an unauthorized person because its policies prohibit doing so and it enforces and disciplines employees who fail to comply with those policies.
The Legal Arizona Workers Act contains a defense that the Act does not require an employer to take any actions that would violate state or federal law. Accordingly, employers should be ready to assert that defense and should prepare documentation to put them in a better position to assert the defense. Employers should emphasize their equal employment opportunity policies so that they may point to the EEO policies as part of their defense to allegations of immigration violations. In addition, if an employer declines to take follow-up action upon information alleging an immigration issue, the employer should document that it did not take action because doing so would violate EEO laws. For example, if someone reports to an employer an allegation that an employee is not authorized to work in this country, either expressly or apparently based upon a person’s race, national origin, accent, language ability, or manner of dress, the employer should document that it could not take action based upon such complaint because the employer has a good faith belief that to do so would violate discrimination laws.

A problem in this area, however, is that for small employers, those with fewer than 15 employees, they are not covered by federal or state discrimination laws and the good faith non-discrimination defense enacted as part of the Legal Arizona Workers Act is not available to very small businesses. The perverse effect of the Act, therefore, is that the smallest of businesses have the fewest defenses available to them.

IV. **ANTICIPATE AND DEAL WITH COMPLAINTS OR INQUIRIES REGARDING IMMIGRATION STATUS.**

There will be immigration vigilantes in the form of members of the public who will be motivated and empowered to make complaints to the Attorney General or County Attorneys regarding persons who are suspected of not being authorized to work in this country. Businesses that are vulnerable to such complaints, which will include businesses that serve the public or that have a diverse work force that is visible to the public, may consider public relations and customer relations strategies for anticipating and dealing with the expected inquiries or complaints by the public regarding the alleged immigration status of the business’s employees.

Customer service personnel should be trained to respond to inquiries or complaints by the public politely but firmly to inform members of the public that the company takes its obligations to comply with immigration laws very seriously, that it checks all documentation upon hire, and that it does everything that the law allows the company to do in checking to make sure that proper documentation is presented to the company upon hire, but that the company is prohibited by law from taking more stringent actions against people based upon the way they look, dress, their last name, or other characteristics that appear foreign.

Companies may want to consider removing the names of employees from their uniforms or name badges in order to make it more difficult for members of the public to make complaints about employees who appear foreign. A person will be less likely to make a complaint and it will be more difficult for the Attorney General or County Attorney to investigate a complaint about a worker when the member of the public does not know the name of the worker. Obviously this could have an adverse effect on customer service because a nameless worker is less accountable for the quality of service. However, most companies should still be able to react to any customer service complaints that occur by asking the customer to identify the worker from whom they receive less than satisfactory performance.
V. **RESPONDING TO GOVERNMENT INQUIRIES.**

Companies should have procedures in place to respond to government investigations or inquiries from government agencies or others regarding employees or employees’ social security numbers. The procedures should also address investigations by the County Attorney or State Attorney General initiated by a complaint that the company is knowingly or intentionally employing an unauthorized alien. For those states that enact employer sanctions laws, employers may expect many more visits from government agents asking questions or demanding to inspect records about employees.

A memo on responding to government investigations is included in the Appendix. Company managers should be cautious about the manner in which confidential personnel information is disclosed and most companies understand that they generally should not provide confidential personnel information about the company or its employees, but rather to refer inquiries to a designated company representative. Front-line employees can tell investigators or others that the Company is happy to cooperate, but that the employee is not the proper person to handle the inquiry and will refer it to the appropriate person or the Company’s attorney.

VI. **PROCEDURES FOR HR INVESTIGATIONS INTO IDENTITY ISSUES.**

Companies should develop and implement procedures to address identity issues. Companies need to have a procedure that is followed in all cases for two reasons: (1) to defend against charges that the company knowingly or intentionally employed an unauthorized alien by showing that the company is taking reasonable steps when it learns information that could suggest an employee is using false personal information and may not be authorized to work in the United States and (2) to defend against charges of discriminatory treatment by demonstrating that all employees are treated the same and in accordance with a pre-established policy.

The policy should contain provisions prohibiting discrimination based on national origin, race, ethnicity, appearance, language skills, and other protected characteristics.

VII. **EMPLOYMENT POLICIES AND HIRING PAPERWORK.**

1. Use new hire acknowledgement forms where the employee affirms he or she understands the company’s commitment to employing only an authorized workforce and that the employee is authorized to work in the United States. A sample immigration compliance policy and employee acknowledgment form is included in the Appendix.

2. Make sure the company has a written immigration compliance policy. Incorporate the policy into the company’s handbook if the company has one. If the company does not have a handbook, it should consider distributing the policy to employees as part of the new hire paperwork.

3. The company’s employment application should include a statement to be signed by the applicant affirming the accuracy of the information provided. For example:

   I hereby state that all information that I provide on this application and in any interview is true and accurate. I am aware that false
statements, misrepresentations of facts, or material omissions may be sufficient to disqualify me for employment, or if employed, may result in my termination.

4. The company’s employment application should include a carefully worded question regarding whether the individual is authorized to work in the United States. Depending on how the inquiry is worded, it could be used as evidence of discrimination. An employer may not ask about citizenship status. The question “Are you legally eligible for employment in the United States?” or “Are you authorized to work in the U.S.?” has thus far been found to be acceptable.

5. The company’s employment application could include a statement, to be signed by the applicant, which states, “If employed, I understand that I will be required to provide proof of identity and legal work authorization.”

6. Use the Form W-9 with all new hires and current employees. A form W-9 is included in the Appendix.

7. The company’s termination checklist should include as a possible reason for termination “Failure to properly complete a Form I-9.” Another reason for separation could be “Providing false information to the Company in violation of Company policy, practices, and procedures.” This could be the grounds for separation if after an investigation a company discovers that the employee provided false information to complete the Form I-9 or as part of a follow-up HR investigation.

VIII. EMPLOYEE TRAINING.

Companies should train their employees on the company’s immigration compliance policy and highlight to all employees the seriousness with which the company treats employment authorization matters.

1. Train the managers and supervisors on the company’s immigration compliance policy and what they should and should not do in interacting with employees and dealing with immigration status. A talking points memo for managers and supervisors is included in the Appendix.

2. Supervisors and managers should understand that the company is committed to legal employment practices and that as representatives of the company, supervisors and managers have special duties regarding legal work status.

3. Supervisors and managers should never discuss the immigration status or work authorization of an employee, whether they are at work or off work, whether they are speaking English or another language. Work authorization status is never a permissible topic of discussion after the employee has completed an I-9 and satisfied the federal employment authorization verification procedures.

4. All managers and employees should be told and understand that they should not ever discuss the legal status of an employee working for the Company; this means 24 hours a day, seven days per week.
IX. AVOIDING CHARGES OF DISCRIMINATION.

Federal law prohibits discrimination on the basis of race, national origin, and citizenship status. Companies need to take care that they are not overzealous in verifying the identity and work authorization of employees or the company may face a discrimination charge.

1. The company should ensure that it has a strong anti-harassment and anti-discrimination policy and that it implements the policy.

2. The company should be very cautious of actions that could be construed as national origin or citizenship discrimination or actions that could be construed as violating the anti-discrimination provisions of the IRCA.

3. Under current federal law, employers are prohibited from asking for more or different documents if the documents that the employee provides to complete the Form I-9 “on their face reasonably appear to be genuine.” 8 U.S.C. § 1324b(6).

4. The company should ensure that it does not make decisions based on race, national origin, language ability or characteristics, accent, physical appearance, clothing characteristics of an ethnic group, religious attire, or other national origin characteristics.

5. If the Company enrolls in the voluntary employer-enhanced compliance under LAWA, it should be rigorous about complying with the requirements and limitations of the SSNVS.

X. RECORDS RETENTION POLICIES.

It is important for a company to review their records retention policies and makes sure that the policy is being followed at all the company’s locations. If the company is under government audit, it is restricted from destroying or eliminating documents. Similarly, if the company is involved in a lawsuit, it has a duty to maintain the relevant documents and electronic data.

The company’s record retention policy should cover a number of items, including but not limited to I-9 forms, wage and hour records, leave records, social security no-match letters, safety records, resumes, e-mail correspondence, other electronic data, and other personnel information. Companies may want to consider having legal counsel review the records retention policy.

As long as the company is not required to keep records because it is under a government investigation or involved in litigation or potential litigation, the company should implement the records retention policy and make sure that it is uniformly followed. Clean up old records. Shred I-9 forms and other personnel records that the company is no longer required to keep.

Keep in mind that documents containing personal and confidential information, such as social security numbers, date of birth, home address, and medical information, must be disposed of in a manner that will ensure it cannot be stolen and used. The company should shred documents containing personal and confidential information or use a document service that can provide those services.
XI. USE OF LEASED EMPLOYEES, EMPLOYMENT AGENCIES, OR OUTSOURCING WORK.

Companies could consider using third party leased or temporary employment agencies, rather than hiring employees directly. The employment agency would become responsible for verifying the work authorization of the employees it provides to a company. Under LAWA, however, companies can still be liable if they use outsourced employees or independent contractors knowing the workers are not authorized to work in the U.S.

1. If the company decides to use a leased or temporary employee arrangement, require a strongly-worded written agreement wherein the agency certifies its compliance with federal and state laws relating to employment verification and anti-discrimination.

2. The contract the company has with the leased employee agency should contain a clause where the agency agrees to indemnify the company against any liability based on knowingly or intentionally employing an unauthorized alien.

3. Make sure that the contract contains a clause requiring the agency to provide the original I-9 forms for all employees within 72 hours in the event of a government inspection or request for I-9 forms.

4. Insert a clause in any contract that addresses what will happen if the agency is found to have knowingly or intentionally employed an unauthorized alien and has its license temporarily or permanently revoked.

5. The company should check the Attorney General’s website to make sure that the agency has not previously been found to have knowingly or intentionally employed an unauthorized alien.

6. Do not outsource work or hire subcontractors without a written contract and due diligence about the company or subcontractor. Due diligence should include a check of the Attorney General’s website to see if there are prior orders relating to that company and the Legal Arizona Workers Act. The written contract should contain provisions certifying that the Company complies with federal and state laws relating to employment verification.

XII. CONTRACT CONSIDERATIONS.

Any contract that the company enters into could be impacted by immigration issues if the other party to the contract or the company were to have a license or permit suspended or revoked. When entering into contracts, companies should consider what might happen if one party to the contract has its license suspended or revoked.

1. Consider adding assignment provisions to all contracts allowing them to be assigned to successor companies.

2. Consider the effect of the immigration-related issues on contract provisions regarding delays and penalties for delays, particularly in the construction industry. Usually there is a provision in construction contracts and other contracts imposing liability for delays on the company that does not perform or cannot meet
deadlines in the contract. Companies who have contracts that include delay provisions may want to consider including an exception not only for acts of war, acts of God, terrorist attacks, but also acts of the State that affect the company’s ability to conduct business because of immigration-related issues.

3. General contractors should consider adding a contract provision stating that the subcontractor agrees to comply with federal and state immigration and employment verification laws and will indemnify the general contractor for any liability arising from any failure by the subcontractor’s to comply with the applicable laws.

4. Companies should insert provisions in all contracts, whenever possible, saying that they are relieved from the obligation to perform or fulfill a contract if their license is suspended or revoked because of immigration-related issues.

5. All of the company’s employment contracts, handbooks, manuals and policies should state that it shall immediately cease payment of any wages or the provision of all employee benefits to any employees if the company’s licenses are suspended or revoked. Such provisions are necessary so that the company does not face claims that additional wages are owed or benefits must be provided during a period when the company is not authorized to transact business because of the enforcement proceedings under the Act. Payments for all time worked must, of course, be made, and businesses should consult with an attorney to ensure that they do not violate any Department of Labor regulations.

6. Companies should examine all of their supplier and customer relationships and attempt to negotiate provisions in contracts with their suppliers and customers with respect to the consequences of a suspension or revocation of business licenses or permits on the part of either the company, its vendors, or its customers. Obviously companies will not be able to fulfill contractual obligations if they are not authorized to do business because their business licenses or articles of corporation have been suspended or revoked. Performance guarantees, security interests, personal guarantees or other measures may be necessary to protect companies from non-compliance due to the extremely harsh penalties under the Act.

The above contractual provisions demonstrate the adverse impacts that can arise from the Legal Arizona Workers Act, not only on a particular company that is found to be in violation, but on all companies with whom that company does business. The Act could wreak havoc with the Arizona economy because it could disrupt the supply chain, transportation network, and customer base of Arizona companies. Moreover, when a company has its business license suspended or revoked, all of the company’s employees will suffer.

XIII. CORPORATE CONSIDERATIONS.

An overriding principle of corporate structures and transactions is that corporate actions should be taken for legitimate business purposes and not to evade the law. If separate corporations are formed to conduct different business operations, there should be a legitimate business purpose for all corporate structures and transactions. All transactions between affiliated
companies should be arms-length and reasonable from the standpoint of all parties to the transaction, and should be governed by the terms of written agreements.

The permanent revocation of any required license could effectively force the closure of any business. To avoid this result, an employer whose business requires a license may want to consider (a) utilizing a third party employee leasing company (discussed above), or (b) forming a separate entity to employ the employees used in the operation of the business. In either case the employees would then be leased to the operating entity. In the event the leasing entity’s licenses are revoked, the operating entity's licenses would remain in effect. The operating entity could then contract with a different employee leasing entity or form a new entity to employ the remaining employees and lease them back to the operating entity.

Companies should consider seeking a license of some sort for each location where the Company conducts business. Under LAWA, the license revoked is any license specific to the location where the undocumented worker was employed. Only if that location does not hold any licenses will the licenses held by the main location of the business be suspended or revoked. Under the Amendments to LAWA, passed in April 2008, the license does not have to be required to operate at that location, only a license specific to the location. Therefore, a company can try to protect its overall operating licenses by ensuring it has a license for each location, even if not required to operate in that location.

If one desires to utilize an Arizona corporation for a replacement employee leasing entity, after the revocation of the Articles of Incorporation of the first corporation, an impediment is the disclosure required under A.R.S. § 10-202(D), which requires the delivery to the Arizona Corporation Commission of a certificate of disclosure contemporaneously with the delivery to the Commission of the articles of incorporation for approval. The certificate requires disclosure if any person serving as an officer, director, incorporator or holder of over twenty percent of the shares or other ownership interest has ever served in such capacities or held twenty percent (20%) interest in any corporation whose charter has been revoked. An intentional untrue statement on, or intentional withholding of a material fact from, a certificate of disclosure constitutes a felony. If there is any common management or ownership requiring disclosure, the Corporation Commission may decide not to accept the Articles of Incorporation for filing.

It would be preferable to utilize an entity formed outside of Arizona for an employee leasing organization. While an Arizona entity’s Articles of Incorporation or organization would be revoked upon a second violation of the new law, a foreign entity would only have its authority to transact business in Arizona revoked as a result of twice violating the new law. The legal existence of the foreign entity would remain in effect. Adverse consequences of revocation of a corporation’s authority to transact business in Arizona enumerated under A.R.S. § 10-1502 include:

(a) a prohibition against maintaining a proceeding in any Arizona court,

(b) liability for fees and penalties for conducting business in Arizona without a grant of authority, and
(c) the Arizona Attorney General or any other person may sue to enjoin the foreign corporation from transacting business in Arizona and recover costs and reasonable attorneys’ fees.

An out-of-state limited liability company found to have transacted business in Arizona without registration:

(a) cannot bring a proceeding in any Arizona court, and

(b) may be subject to an action by the Arizona Attorney General to restrain the company from conducting business in Arizona without registering (A.R.S. §§ 29-809 and 810).

A certificate of disclosure is required for a foreign corporation to apply for authority to transact business in Arizona, creating the same problems outlined above for Arizona corporations. Certificates of disclosure are not required for the formation of limited liability companies, limited liability partnerships or limited liability limited partnerships, all of which afford liability protection. Consideration should be given to utilizing an LLC or LLP for a replacement employee leasing entity.

Employee leasing entities have existed for years. They have been attractive to some companies for the following reasons:

1. Companies can outsource their payroll administration functions to a leasing organization, which means that the leasing organization would handle paycheck processing, direct deposit, payroll and Federal income tax withholding and reporting, FMLA leave and short-term disability pay processing.

2. The leasing organization could handle workers compensation and unemployment compensation matters, including obtaining the requisite insurance coverage, paying any periodic taxes and filing quarterly reports, and arranging for claims processing.

3. Companies can exclude leased employees from their employee benefit plans, including pension, 401(k), health, life insurance, disability and equity compensation plans, provided that the plans specify that individuals classified by the Company as leased employees are excluded and provided further that the Company otherwise satisfies any applicable nondiscrimination tests (as discussed below).

Particularly if the leasing company and the operating entity share common ownership and control, there is a material risk that a court might conclude that the form of the arrangement should not prevail over its substance and that a violation by the leasing company should be deemed a violation by the operating company. This conclusion might be based, for example, on principles of agency law or reached by common law principles allowing an entity’s liability shield to be pierced when the entity is an alter ego of another person or entity. These principles need to be considered in establishing a leasing entity. Ideally, the ownership and control of the leasing and operating entities should not be identical. In light of the new law, one would expect that a number of independent employee leasing entities will be created for this purpose, and that operating entities will see their "payroll" expenses increase to cover the leasing entities' costs and profit margin.
Regardless of the risk that a court may deem an employee leasing company to be the alter ego of an operating entity for purposes of license revocations, some businesses may have little choice. Lenders will be wary of making loans to businesses whose licenses may be permanently revoked. Therefore, borrowers that are not employers will appear to be more insulated from the draconian impact of the Act. Even if loans are made, the revocation of a borrower's licenses to transact business will breach covenants in the loan documents, allowing acceleration of indebtedness.

Setting up a leasing company will require consultation with your tax advisor. If leased individuals are treated as employees of the operating company under Section 414(n) of the Internal Revenue Code (i.e., the individuals provide services to the operating company pursuant to a leasing agreement, the individuals have performed services for the operating company on a substantially full-time basis for at least one year, and the individuals' services are performed under the primary direction or control of the operating company), they must be counted as employees of the operating company for purposes of the coverage and nondiscrimination tests that apply to the operating company's tax-qualified pension and 401(k) plans. However, any contributions or benefits accrued under the leasing organization's pension or 401(k) plan attributable to services performed by the leased employee for the operating company may be counted by the operating company in its coverage and nondiscrimination testing. Thus, for example, if an operating company sponsors tax-qualified pension and 401(k) plans that cover the management team but exclude rank and file personnel on the basis that they are leased employees, the pension and 401(k) plans may not be able to satisfy the coverage and nondiscrimination requirements applicable to tax-qualified plans (unless the leasing organization sponsors its own tax-qualified pension or 401(k) plan and makes contributions or accrues benefits on behalf of the leased employees). A lack of coverage or benefits for rank and file employees under the operating company's plans may cause the benefits under those plans to become immediately taxable to the plan participants, and the operating company would lose any deduction attributable to unvested benefits.

If incorporating a new business, businesses should consider incorporating in a state other than Arizona. If the worst were to happen and a company was twice found to have knowingly or intentionally employed an unauthorized alien, the State of Arizona could revoke the company’s authorization to transact business in Arizona, but could not revoke the corporate charter.

**XIV. ACTIONS GUARANTEED TO TRIGGER LIABILITY.**

There are certain actions that repeatedly appear in the news as items ICE focuses on and are likely to cause a finding of knowingly or intentionally employing unauthorized workers. Employers should avoid the practices that are sure to raise suspicion.

1. Do not purchase or arrange for counterfeit documents to be used by employees.

2. Do not place orders for workers in other countries, unless using an approved U.S. Visa program.

3. Do not provide transportation across the border or transportation within the U.S. for workers just coming into the U.S. unless you are absolutely sure they have proper work authorization (for example, the company sponsored the individual for a visa).
4. Do not pay employees in cash. Particularly do not pay part of your work force in cash and others by check.

5. Make sure your company pays workers’ compensation and unemployment insurance.

6. Do not provide housing for individuals that you know are not lawfully present in the United States.

XV. SUMMARY OF KEY RECOMMENDATIONS

1. Take steps to utilize legal counsel and the attorney-client and attorney work-product privileges. Consider having legal counsel act as a liaison with law enforcement or government agencies rather than having employees sign letters and provide information directly.

2. Audit all I-9 forms and ensure employees have completed I-9s on file.

3. Conduct I-9 and immigration compliance training at your company and maintain records of the training.

4. Do not request more or different documents than the employee provides to complete Section 2 of the Form I-9 if the documents provided reasonably appear genuine on their face. Too much is too much!

5. Do not make decisions based on race, ethnicity, national origin or citizenship status or characteristics related to a certain race or ethnic group.

6. Adopt and enforce an immigration and I-9 compliance policy. Discipline employees who violate the policy or if they take shortcuts with any required procedures.

7. Use new hire acknowledgement forms requiring the employee to verify work eligibility and commitment to comply with the company’s immigration compliance policy.

8. Use the Form W-9 as an additional step to verify each employee’s Social Security number.

9. Make sure the Company has a strong anti-harassment and anti-discrimination policy that includes national origin. Do not discriminate based on language spoken or citizenship.

10. Develop strategies for responding to complaints or inquiries from the general public regarding an employee’s immigration status. Train customer service personnel how to respond.

11. Develop strategies for responding to government investigations, including ICE investigations or investigations by the Attorney General or similar state prosecutor.

12. Establish procedures to address identity and social security mismatch issues and other no match issues similarly to avoid charges of discrimination.
13. Anticipate increased union activity so plan accordingly.
14. Review and revise the Company’s records retention policy and clean up old documents.
15. Consider using leased employees or employment agencies, but only with a strongly-worded agreement requiring I-9 and immigration law compliance as well as other protections.
16. Ensure that if Company uses independent contractors, the Company is compliant with all laws, including wage and hour laws. Use of independent contractors can lead to liability.
17. Evaluate Company contracts.
18. Add language to construction contracts regarding delay due to immigration-related issues.
19. Add provisions to handbooks or employer policies stating that the company may be required to cease payment of wages or provision of benefits to employee if the company’s licenses are revoked or suspended pursuant to A.R.S. § 23-212 and it is unable to conduct business.
20. Try to ensure that each separate location in which the company operates has a license specific to that location.
21. Consider forming corporate entities outside of Arizona so that the company will not lose the protections of corporate status even if it loses the authority to transact business in Arizona.
22. Do not use E-Verify on applicants.
23. Do not verify existing employees using E-Verify.
24. Make sure employees are trained regarding E-Verify.
25. Ensure confidentiality procedures are in place to protect personnel information.
26. Companies should have E-Verify poster displayed.
27. Do not pay cash wages!
28. Ensure workers’ compensation and unemployment premiums are paid for each employee.
## APPENDIX

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Avoiding "Knowingly"

Fully Complete I-9 Forms

- Response to government investigations
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- Response to requests for personnel documents
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  - Police
  - Citizens
- SSA no-match
- Response to customers or third parties

COMPANY

People and Comments
- No discussions about legal status 24/7

- New hire packet
- W-9 forms
- Employment policies and handbooks
- Anti-harassment, anti-discrimination policies
- Avoiding national origin discrimination
- Agreements with leased employment agencies
- Contract provisions (delay, immigration compliance)
- Attorney-client privilege
MEMORANDUM

From: Julie A. Pace  
Ballard Spahr Andrews & Ingersoll, LLP  
(602) 798-5475

Re: Procedures & Processes for Government Agency Visits (ICE, OSHA, City or State Police, Sheriff, Border Patrol, Department of Economic Security, Department of Labor, etc.)

A. If Approached By Government Officer: If a government officer (ICE, OSHA, Police, Border Patrol, Department of Economic Security, etc.) approaches you and requests information on the Company or a Company employee:

1. Direct the officer to the supervisor, on-site manager, or company's attorney and allow that person to deal with the officer directly. Politely state:

   I am sure that the Company will cooperate. However, I am not the person to provide you that information. Let me get my supervisor or our lawyer who can work with you.

2. If there is no supervisor available or the officer will not wait to allow you to get a supervisor, the supervisor or you could follow the steps outlined below:

3. The supervisor should restate:

   I am sure the Company will cooperate. However, I am not the person to handle your request. Let me get some information and get the person who should handle this for you.

4. Ask the officer his or her name (or look for his name badge on his shirt, if any);

5. Ask the officer what agency/department he or she is with (local police, sheriff, DPS, ICE, Border Patrol, Dept. of Economic Security, etc.) or look for any insignia on uniform, etc.

6. Ask for a business card. If the officer does not have one, write down the information that he or she provides, such as name, agency, badge number, etc.;
7. If the officer is in “plain clothes” ask if you could see his official identification (to ferret out imposters or bounty hunters, etc.);

8. Try to determine why the officer is there, what he or she wants, and if he or she is looking for someone in particular. If the officer requests information about a specific individual, tell the officer that you are not authorized to provide that information, but you are happy to contact someone who can handle the request.

9. If the officer states that he has a subpoena or warrant, ask for a copy so that you may review it and also consider sending it to the company’s lawyer to review;

10. Contact the Company’s designated contact person immediately so that they may communicate with the officer directly by cell phone or in person.

B. **ICE: 3 Day Notice for Documents:** If ICE shows up to review 1-9’s, they are supposed to provide a three day written notice. Do not waive the three days. Do not voluntarily give ICE anything. Contact the Company’s designated contact person immediately so that they may communicate with the officer directly by cell phone.

C. **If Agent Has Warrant for the Arrest of an Individual:** If the agent has a warrant for an employee’s arrest, do NOT interfere with the officer, or you may be arrested for obstruction, etc. Allow the police to arrest the employee but, notify the Company’s designated contact person immediately so they can handle the incident.

D. **If Agent Has Search Warrant or Subpoena for Records:** If a government officer has a search warrant or subpoena for records, contact your supervisor and the Company’s designated contact person immediately. A supervisor or manager should:

1. Ask for and KEEP a copy of the search warrant or subpoena;

2. Comply with the warrant or subpoena;

3. Attempt to maintain a list or log of documents, records or other things taken away by law enforcement;

4. If asked by law enforcement if they may take certain documents, records or other things, reply as follows, “only if it is covered by the search warrant.” Refrain from providing consent to the removal of documents, records or things not covered in the search warrant;

5. Do not argue, resist or get into a confrontation with law enforcement;

6. Contact the Company’s designated contact person immediately so that they may communicate with the officer directly in person or by phone.
E. **If Agent Requests SSNs, I-9 forms, or Documents:** If law enforcement requests the names and Social Security Numbers of employees, requests copies of Company or employee records or files, or requests to review their I-9 forms, you should:

1. Politely state:

   I am not the individual authorized to handle such a request, but I would be willing to contact my supervisor. Let me get some information from you and get the person who should handle this.

   Then follow the steps outlined in Section A above.

2. Resist pressure from the agent to consent to provide documents or records even if they threaten to return with a search warrant or subpoena. Tell the agent that you do not have authority to provide the documents, but that you believe the company will cooperate and you will get the appropriate person who can communicate with them.

3. Contact the Company’s designated contact person immediately so that they may communicate with the officer directly in person or by phone.

JAP/jac
BALLARD SPAHR ANDREWS & INGERSOLL, LLP

MEMORANDUM

From: Julie A. Pace
Ballard Spahr Andrews & Ingersoll, LLP
(602) 798-5475

Re: Procedimientos y Procesos para Visitas de Agencias Gubernamentales (ICE, OSHA, Policía Estatal o Municipal, Sheriff, Departamento de Seguridad Económica o Departamento de Labor, etc.)

A. Si se le Acercan un Oficial del Gobierno: Si algún oficial del gobierno (ICE, OSHA, Policía, Patrulla Fronteriza, Departamento de Seguridad Económica, etc.) se le acerca y le pide información sobre la Compañía o un empleado de la Compañía:

1. Dirija al oficial al supervisor, gerente de la obra, o al abogado de la compañía y permita que aquella persona trate con el oficial directamente. Diga cortésmente:

   **Estoy seguro que la Compañía va a cooperar. Sin embargo, yo no soy la persona debida para darle esa información. Permitame hablarle a mi supervisor o nuestro abogado para que ellos puedan ayudarle.**

2. Si no está disponible un supervisor, o si el oficial no le permite hablarle a un supervisor, el supervisor o usted pueden seguir las direcciones que aparecen a continuación:

3. El supervisor debería repetir:

   **Estoy seguro que la Compañía va a cooperar. Sin embargo, yo no soy la persona debida para atenderle. Permitame obtener algo de información y encontrar a la persona que le debe atender.**

4. Pídale su nombre al oficial (o busque la placa de identificación, si la hubiere, sobre su camisa);

5. Pregúntele al oficial en cual agencia/departamento el o ella trabaja (policía local, sheriff, DPS, ICE, Patrulla Fronteriza, Depto. de Seguridad Económica, etc.) o busque si hay alguna insignia sobre su uniforme, etc.;
6. Pidale una tarjeta de negocios. Si el oficial no tiene una, anote la información que el o ella le da, tal como, agencia, número de insignia o placa, etc.;

7. Si el oficial no está uniformado, pregúntele si puede usted ver su identificación oficial (para descubrir a impostores o cazadores de recompensas, etc.);

8. Intente determinar la razón por la cual el oficial se ha presentado, qué pueda ser lo que el o ella quiere, y si el o ella está buscando a alguna persona en particular. Si el oficial pide información sobre algún individuo específico, dígale al oficial que usted no tiene la autorización para darle esa información, pero que tendrá el placer de informar a alguien quien pueda proporcionar la información que solicita.

9. Si el oficial declara que tiene una citación o mandamiento de arresto, pidale una copia para que usted la revise y también evalúe si se debe mandar al abogado de la compañía para que él lo revise;

10. Póngase en contacto con la persona indicada en la Compañía ______________ inmediatamente para que el o ella se pueda comunicar con el oficial directamente, por teléfono celular o en persona.

B. **ICE: Aviso de Tres Días para Revisar Documentos.** Si el ICE se presenta para revisar documentos 1-9, deben dar aviso por escrito de tres días. Asegúrese que han transcurrido los tres días. No de nada al ICE voluntariamente. Hable con la persona indicada de la Compañía ______________ inmediatamente para que esa persona se pueda comunicar con el oficial directamente por teléfono celular.

C. **Si el Agente Tiene Mandamiento de Arresto para Algún Individuo:** Si el agente tiene un mandamiento de arresto para un empleado, NO interfiera con el oficial; o usted podría ser arrestado por resistencia a un oficial, etc. Permita que la policía arrestå al empleado, pero notifique a la persona indicada en la Compañía ______________ inmediatamente para que el o ella se puedan encargar del asunto.

D. **Si el Agente Tiene Mandamiento de Registro o Citación para Exhibir Documentación:** Si un oficial del gobierno tiene mandamiento de registro o citación para obtener documentación, póngase en contacto con su supervisor y la persona indicada de la Compañía ______________ inmediatamente. El supervisor o gerente debe seguir los siguientes pasos;

1. Pida y RETENGA una copia del mandamiento de registro o citación;
2. Obedezca el mandamiento o citación;
3. Intente mantener una lista o registro de documentos, registros, u otras cosas requisitadas por los agentes de la ley;
4. Si los agentes de la ley le piden ciertos documentos, registros u otras cosas, responda de este modo: “sólo si está incluido en el mandamiento de registro.”
Evite dar su consentimiento al traslado de documentos, registros, o cosas no incluidas en la citación de registro.

5. No alegue, resista o confronte al oficial del gobierno.

6. Póngase en contacto con la persona indicada de la Compañía de inmediato para que la persona se pueda comunicar con el oficial directamente por teléfono o en persona.

E. Si el Agente Pide Números de Seguro Social, (SSNs), Formas I-9 o Documentos: Si los agentes de la ley piden los nombres y números de Seguro Social de empleados, copias de registros de empleados de la Compañía, o pide revisar sus documentos I-9 usted debe:

1. Decir cortésmente

   Yo no soy la persona autorizada para tratar con tal petición, pero sería mi placer hablarle a mi supervisor. Por favor déme algo de información, y hablaré con la persona quien debe tratar esto.

   Luego, siga las instrucciones delineadas en la Sección A, anterior.

2. Resista si el agente le sigue pidiendo su consentimiento para presentar documentos o registros, aun si amenaza regresar con un mandamiento de registro o citación. Digale al agente que usted no está autorizado para proporcionar los documentos, pero que Usted piensa que la Compañía va a cooperar, y que usted se pondrá en contacto con la persona apropiada, quien se puede comunicar con ellos.

3. Póngase en contacto con la persona indicada de la Compañía inmediatamente, para que esa persona se comunique con el oficial directamente en persona o por teléfono.
MEMORANDUM

From: Julie A. Pace  
Ballard Spahr Andrews & Ingersoll, LLP  
(602) 798-5475

Re: Procedures & Processes for Receptionists to Respond to Government Agency Visits and Calls Regarding Social Security Number Mismatches

A. Calls or Visits from Non-Governmental Third Parties (Parents or Others)  
Informing Company that an Employee is Using Someone-Else’s SSN. If an individual calls or comes to the Company’s office and says, “An employee of your company is using my child’s social security number,” or “An employee of your company is using my social security number,” stay calm and polite. People are often upset, accuse the Company of hiring undocumented workers, and threaten to contact the police or Immigration and Customs Enforcement:

1. Stay calm and politely state:

   Thank you for bringing this matter to the Company’s attention. Let me get some contact information from you so that I can have someone follow up directly with you.

2. Ask for the following information:

   a. The caller’s name, including spelling;
   b. The caller’s address;
   c. The caller’s phone number;
   d. The caller’s e-mail or fax number;
   e. If the caller said that someone was using a child’s social security number (or someone’s other than the caller), ask for the name of the child, including spelling; and
   f. The social security number at issue.

3. Never provide personnel information over the phone. Refer inquiries to your supervisor, Human Resources, the General Manager, or the Company’s lawyer.
4. If the caller requests information from you, you may tell the caller:

I am not the person to handle your request. I will pass on your information and someone will be communicating with you.

B. Calls or Visits from Government Officials: If a government officer (ICE, OSHA, Police, Border Patrol, Department of Economic Security, etc.) calls or comes to the office and requests information on the Company or a Company employee, DO NOT ask if the officer has a subpoena or search warrant:

1. Direct the officer to the supervisor, on-site manager, or Company’s attorney and allow that person to deal with the officer directly. Politely state:

I am sure that the Company will cooperate. However, I am not the person to handle your request. Let me get my supervisor.

2. If there is no supervisor available or the officer will not wait to allow you to get a supervisor, the supervisor or you could follow the steps outlined below:

3. Restate:

I am sure the Company will cooperate. However, I am not the person to handle your request. Let me get some information from you and get the person who should handle this for you.

4. Ask the officer his or her name (or look for his name badge on his shirt, if any);

5. Ask the officer what agency/department he or she is with (local police, sheriff, DPS, ICE, Border Patrol, Dept. of Economic Security, etc.) or look for any insignia on uniform, etc.

6. Ask for a business card. If the officer does not have one, write down the information that he or she provides, such as name, agency, badge number, etc.;

7. If the officer is in “plain clothes” ask if you could see his official identification (to ferret out imposters or bounty hunters, etc.);

8. Try to determine why the officer is there, what he or she wants, and if he or she is looking for someone in particular. If the officer requests information about a specific individual, tell the officer that you are not authorized to provide that information, but you are happy to contact someone who can handle the request.

9. If the officer states that he has a subpoena or warrant, ask for a copy so that you may review it and also consider sending it to the Company’s lawyer to review;
10. Contact the Company’s designated contact person ______________ immediately so that they may communicate with the officer directly by cell phone or in person.

C. **ICE: 3 Day Notice for Documents.** If ICE shows up to review I-9’s, they are supposed to provide a three day written notice. Do not waive the three days. Do not voluntarily give ICE anything. Tell the ICE officer:

   **I am not the person to handle this request. Let me get someone for you.**

   Contact the Company’s designated contact person ______________ immediately so that they may communicate with the officer directly by cell phone.

D. **If Agent Has Warrant for the Arrest of an Individual:** If the agent has a warrant for an employee’s arrest, do NOT interfere with the officer, or you may be arrested for obstruction, etc. Allow the police to arrest the employee, but notify the Company’s designated contact person ______________ immediately so they can handle the incident.

E. **If Agent Has Search Warrant or Subpoena for Records:** If a government officer has a search warrant or subpoena for records, contact your supervisor and the Company’s designated contact person ______________ immediately. Tell the officer:

   **I am sure that the Company will cooperate. However, I am not the person to handle your request. Let me get my supervisor.**

A supervisor or manager should:

1. Ask for and KEEP a copy of the search warrant or subpoena;

2. Comply with the warrant or subpoena;

3. Attempt to maintain a list or log of documents, records or other things taken away by law enforcement;

4. If asked by law enforcement if they may take certain documents, records or other things, reply as follows, “only if it is covered by the search warrant.” Refrain from providing consent to the removal of documents, records or things not covered in the search warrant.

5. Do not argue, resist or get into a confrontation with law enforcement.

6. Contact the Company’s designated contact person ______________ immediately so that they may communicate with the officer directly in person or by phone.
F. **If Agent Requests SSNs, I-9 forms, or Documents:** If law enforcement requests the names and Social Security Numbers of employees, requests copies of Company or employee records or files, or requests to review their I-9 forms, you should:

1. Politely state:

   I am not the individual authorized to handle such a request, but I would be willing to contact my supervisor. Let me get some information from you and get the person who should handle this.

   Then follow the steps outlined in Section B above.

2. Resist pressure from the agent to consent to provide documents or records even if they threaten to return with a search warrant or subpoena. Tell the agent that you do not have authority to provide the documents, but that you believe the company will cooperate and you will get the appropriate person who can communicate with them.

3. Contact the Company's designated contact person __________________________ immediately so that they may communicate with the officer directly in person or by phone.
RESPONDING TO CALLERS INQUIRING ABOUT IMMIGRATION COMPLIANCE, THREATENING TO REPORT COMPANY, OR EXPRESSING NEGATIVITY TOWARDS IMMIGRATION

I. THINGS TO KEEP IN MIND DURING THE COMMUNICATIONS:

1. Assume that you are being tape recorded.

2. Avoid getting caught up in an argument with the caller or visitor. Do not discuss the philosophy or politics of immigration or the current immigration laws (state or federal). Many of the callers or visitors will be fishing for statements that can be used against the Company, so each employee needs to use caution when speaking and not say anything that could be taken out of context and used against the Company.

3. Minimize providing your name. Instead you can refer the caller or visitor to legal counsel and provide our name and contact information. You can also provide a person with the attached memo.

4. Consider providing a copy of the attached letter explaining the Company’s hiring practices. If it is a caller, offer to take the caller’s name and address and send them the attached memo regarding the Company’s hiring practices.

II. THINGS YOU CAN DO AND SAY:

1. Thank you for your interest in the Company.

2. The Company is committed to employing only those individuals who are authorized to work in the United States. The Company has and enforces an immigration compliance policy. The Company does not unlawfully discriminate on the basis of citizenship or national origin.

3. If the caller or visitor states that he or she knows that the Company is employing undocumented workers, state:

   If you have specific information regarding a Company employee, please provide it to the Company in writing so that the Company can investigate and take appropriate action. The Company requests that you provide your information in writing.

4. Please provide your concerns or any information that you have to the Company’s legal counsel in writing. Include the name of the employee and any information you have that makes you believe that the employee is not authorized to work in the United States.
5. If a person is very pushy or aggressive, you can say:

I do not feel comfortable talking with you about this. Please direct your questions or concerns to the Company or the Company’s legal counsel in writing.

6. If a person is at the Company in person and refuses to leave and you feel threatened or the person is disrupting business, state:

I need to ask you to leave the business premises so that we can continue to do our jobs and serve our customers. We appreciate your concern and ask that you put any information you have in writing to the Company’s legal counsel. Thank you. Goodbye.

7. If the person still will not leave and is acting disruptive or threatening, you may need to call 911 and involve the police to get the person to leave.
MEMORANDUM REGARDING IMMIGRATION and I-9 COMPLIANCE

Thank you for your interest. We are pleased to have the opportunity to provide you information about the Company and its hiring practices. The Company has established and enforces an immigration compliance policy. We are committed to employing only those individuals who are authorized to work in the United States. The Company will not knowingly hire or continue to employ an unauthorized worker. At the same time, in compliance with federal and state law, the Company does not unlawfully discriminate on the basis of citizenship or national origin.

In compliance with the Immigration Reform and Control Act of 1986 (IRCA), each new employee, as a condition of employment, must complete the Employment Eligibility Verification Form (Form I-9) and present documentation establishing identity and employment eligibility. The Federal Government currently provides a list of documents that employees may choose from to show the Company at the time that Company completes Section 2 of the Form I-9. Under IRCA, an employer is prohibited from asking for more or different documents than the employee provides when completing Section 2 of the Form I-9, and the Company is also prohibited from refusing to accept the documents presented as long as the documents presented on their face reasonably appear to be genuine.

In addition to implementing and enforcing our immigration compliance policy, we train our employees on I-9 and immigration compliance. We also conduct anti-harassment and anti-discrimination training for our employees. We go a step beyond what is required by IRCA (while staying within the limits of the anti-discrimination provisions of IRCA) and require our newly hired employees to complete an IRS Form W-9 on which the employee affirms that the social security number that the employee provided is correct.

If you have specific information regarding a Company employee, please provide it to the Company in writing so that the Company can investigate and take appropriate action. The Company cannot act on vague reports based on appearance, ethnicity, or language skills because to do so could be discriminatory. In order to conduct an investigation and take appropriate action without violating anti-discrimination laws, the Company needs the complaint or concern in writing.

Please provide your concerns or any information that you have to the Company’s legal counsel in writing to the address below. Include the Company’s name, the name of the employee, the employee’s worksite, and any information you have that makes you believe that the employee is not authorized to work in the United States. Please also include your name, address, and phone number.

Direct letters to: Julie A. Pace
Ballard Spahr Andrews & Ingersoll, LLP
3300 N. Central Avenue, Suite 1800
Phoenix, Arizona 85012
pacej@ballardspahr.com
(602) 798-5475

Thank you for your cooperation.
MEMORANDUM

The Company is committed to obeying the law. The Company will only hire legal workers. It will not knowingly hire an undocumented or unauthorized worker. Additionally, it will not discriminate because of someone’s race, color, or national origin. It will not discriminate because of a person’s name, the language a person speaks, or because a person speaks with an accent.

Supervisors and managers are responsible for helping the Company obey the law and need to comply with the following:

1. NEVER say that there are undocumented workers or “illegal aliens” working at the Company. If you know for sure that an individual is not authorized to work in the United States you must report this information immediately to the President, General Manager, or Controller. The Company will then investigate your report in the same way it investigates all personnel and employment decisions and take the proper action.

2. NEVER assume that someone is not authorized to work in the United States merely because the person has a Spanish surname or does not speak English. DO NOT make off-hand or casual comments regarding whether someone is an undocumented worker or “illegal alien.” Such remarks can be construed as national origin discrimination.

3. DO NOT give rides to people you know are not legally working in the United States.

4. DO NOT provide housing or lodging for people you know are not legally working in the United States.

5. DO NOT help get documents or identification for people who are not authorized to work or assist them in getting hired.

6. DO NOT contact people in other countries to “place orders” for workers.

7. DO treat everyone respectfully and professionally.

8. DO use respectful words. When speaking of someone that is not authorized to work in the United States, use the terms “unauthorized worker” or “undocumented worker.” Do not use the terms mojado, wetback, illegal, or illegal alien.

9. DO remind supervisors not to talk casually about whether workers are unauthorized. You should never talk about whether someone is an undocumented worker or “illegal alien” unless you really know that they are unauthorized.

Violations of this policy can lead to discipline up to and including termination.
MEMORANDUM

La Compañía está comprometida a cumplir con la ley. La Compañía contratará solamente trabajadores legales. La Compañía no contratará intencionalmente ningún trabajador indocumentado o no autorizado. Además, no discriminará contra ninguno a causa de su raza, color de piel, u origen nacional, ni discriminará a causa del nombre de una persona, el idioma de esa persona, o porque una persona hable con un acento.

Supervisores y gerentes son responsables de ayudar a la Compañía a obedecer la ley y de la necesidad de cumplir con lo siguiente:

1. **NUNCA** diga que hay trabajadores indocumentados o “extranjeros ilegales” trabajando en la Compañía. Si usted está seguro que una persona no está autorizada a trabajar en los Estados Unidos, **ESTA OBLIGADO** a reportar esta información inmediatamente al Presidente, Gerente General, o Contralor. La Compañía entonces procederá a investigar su reporte de la misma manera en que investiga todo las decisiones de personal y empleo y tomará las medidas apropiadas.

2. **NUNCA** suponga que alguien no está autorizado a trabajar en los Estados Unidos simplemente porque la persona tiene un apellido español o no habla inglés. **NO haga** comentarios espontáneos o informales sobre si alguien es o no es un trabajador indocumentado o “extranjero ilegal.” Tales comentarios pueden considerarse como discriminación de origen nacional.

3. **NO** le de aventones a gente si sabe que no están trabajando legalmente en los Estados Unidos.

4. **NO** proporcione alojamiento para personas si sabe que no están trabajando legalmente en los Estados Unidos.

5. **NO** ayude a conseguir documentos o identificación para personas que no están autorizadas a trabajar ni ayúdelos a conseguir empleo.

6. **NO** se comunique con personas en otros países para “poner una orden” a conseguir trabajadores.

7. **SI** trate a los demás con respeto y en una manera profesional.

8. **SI** use términos respetuosos. Cuando se está refiriendo a alguien que no está autorizado a trabajar en los Estados Unidos, use los términos “trabajador sin autorización” o “trabajador indocumentado.” No use términos como mojado, ilegal, o extranjero ilegal.

9. **SI** reacuérdele a los supervisores y jefes de equipo que no deben comentar informalmente sobre si los trabajadores están o no están autorizados. Nunca debe usted comentar sobre si alguien es o no es un trabajador indocumentado o “extranjero ilegal” a menos que esté seguro que no están autorizados.

Violaciones de esta política pueden resultar en disciplina, hasta e incluyendo terminación de empleo.
Department of Homeland Security
U.S. Citizenship and Immigration Services

OMB No. 1615-0047; Expires 06/30/09

Form I-9, Employment Eligibility Verification

Read instructions carefully before completing this form. The instructions must be available during completion of this form.

ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work-authorized individuals. Employers CANNOT specify which document(s) they will accept from an employee. The refusal to hire an individual because the documents have a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Verification (To be completed and signed by employee at the time employment begins.)

<table>
<thead>
<tr>
<th>Print Name:</th>
<th>Last</th>
<th>First</th>
<th>Middle Initial</th>
<th>Maiden Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>Address (Street Name and Number)</td>
<td>Apt. #</td>
<td>Date of Birth (month/day/year)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>City</td>
<td>State</td>
<td>Zip Code</td>
<td>Social Security #</td>
<td></td>
</tr>
</tbody>
</table>

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

I attest, under penalty of perjury, that I am (check one of the following):
- A citizen of the United States
- A noncitizen national of the United States (see instructions)
- A lawful permanent resident (Alien #)
- An alien authorized to work (Alien # or Admission #) until (expiration date, if applicable - month/day/year)

Employee's Signature Date (month/day/year)

Preparer and/or Translator Certification (To be completed and signed if Section 1 is prepared by a person other than the employee.) I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.

Preparer's/Translator's Signature | Print Name |
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Address (Street Name and Number, City, State, Zip Code)</td>
<td>Date (month/day/year)</td>
</tr>
</tbody>
</table>

Section 2. Employer Review and Verification (To be completed and signed by employer. Examine one document from List A OR examine one document from List B AND one from List C, as listed on the reverse of this form, and record the title, number, and expiration date, if any, of the document(s).)

<table>
<thead>
<tr>
<th>List A OR</th>
<th>List B AND</th>
<th>List C</th>
</tr>
</thead>
<tbody>
<tr>
<td>Document title:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Issuing authority:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Document #:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Expiration Date (if any):</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Document #:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Expiration Date (if any):</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

CERTIFICATION: I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on (month/day/year) and that to the best of my knowledge the employee is authorized to work in the United States. (State employment agencies may omit the date the employee began employment.)

Signature of Employer or Authorized Representative | Print Name | Title |
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Business or Organization Name and Address (Street Name and Number, City, State, Zip Code)</td>
<td>Date (month/day/year)</td>
<td></td>
</tr>
</tbody>
</table>

Section 3. Updating and Reverification (To be completed and signed by employer.)

A. New Name (if applicable) B. Date of Rehire (month/day/year) (if applicable)

C. If employee's previous grant of work authorization has expired, provide the information below for the document that establishes current employment authorization.

<table>
<thead>
<tr>
<th>Document Title:</th>
<th>Document #:</th>
<th>Expiration Date (if any):</th>
</tr>
</thead>
</table>

I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Signature of Employer or Authorized Representative Date (month/day/year)
# Lists of Acceptable Documents

All documents must be unexpired.

## List A
Documents that Establish Both Identity and Employment Authorization

| 1. | U.S. Passport or U.S. Passport Card |
| 2. | Permanent Resident Card or Alien Registration Receipt Card (Form I-551) |
| 3. | Foreign passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa |
| 4. | Employment Authorization Document that contains a photograph (Form I-766) |
| 5. | In the case of a nonimmigrant alien authorized to work for a specific employer incident to status, a foreign passport with Form I-94 or Form I-94A bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, as long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the form |
| 6. | Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI |

## List B
Documents that Establish Identity

| 1. | Driver's license or ID card issued by a State or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, 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, date of birth, gender, height, eye color, and address |
| 3. | School ID card with a photograph |
| 4. | Voter's registration card |
| 5. | U.S. Military card or draft record |
| 6. | Military dependent's ID card |
| 7. | U.S. Coast Guard Merchant Mariner Card |
| 8. | Native American tribal document |
| 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 |

## List C
Documents that Establish Employment Authorization

| 1. | Social Security Account Number card other than one that specifies on the face that the issuance of the card does not authorize employment in the United States |
| 2. | Certification of Birth Abroad issued by the Department of State (Form FS-545) |
| 3. | Certification of Report of Birth issued by the Department of State (Form DS-1350) |
| 4. | Original or certified copy of birth certificate issued by a State, county, municipal authority, or territory of the United States bearing an official seal |
| 5. | Native American tribal document |
| 6. | U.S. Citizen ID Card (Form I-197) |
| 7. | Identification Card for Use of Resident Citizen in the United States (Form I-179) |
| 8. | Employment authorization document issued by the Department of Homeland Security |

Illustrations of many of these documents appear in Part 8 of the Handbook for Employers (M-274)
Formulario 1-9, Verificación de Elegibilidad para el Empleo

Lea atentamente las instrucciones antes de cumplimentar este formulario. Las instrucciones deben estar disponibles durante la cumplimentación de este formulario.

AVISO DE ANTIDISCRIMINACIÓN: Se considera ilegal discriminar a las personas autorizadas a trabajar. Los empresarios NO PUEDEN especificar qué documento(s) aceptarán de un empleado. El rechazo a la contratación de una persona debido a la existencia de una fecha futura de expiración en los documentos que ésta presenta puede constituir también una discriminación ilegal.

Sección 1. Información y verificación sobre el empleado

<table>
<thead>
<tr>
<th>Nombre en letra de imprenta:</th>
<th>Apellido</th>
<th>Inicial</th>
<th>Apellido de Soltera</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dirección (Nombre y Número de la Calle)</td>
<td>Apartamento núm.</td>
<td>Fecha de nacimiento (mes/día/año)</td>
<td></td>
</tr>
<tr>
<td>Ciudad</td>
<td>Estado</td>
<td>Código Postal</td>
<td>Seguro Social núm.</td>
</tr>
</tbody>
</table>

Soy consciente de que la ley federal establece penas de prisión y/o multas por declarar en falso o por utilizar documentos falsos durante la cumplimentación de este formulario.

<table>
<thead>
<tr>
<th>Firma del empleado</th>
<th>Fecha (mes/día/año)</th>
</tr>
</thead>
</table>

Certificado del redactor y/o traductor (A cumplimentarse y firmarse en caso de que la Sección 1 sea redactada por una persona distinta al empleado): Declaro, bajo pena de perjurio, que he presenciado la cumplimentación de este formulario y que, a mi leal saber y entender, la información indicada es cierta y correcta.

<table>
<thead>
<tr>
<th>Firma del Redactor/Traductor</th>
<th>Nombre en letra de imprenta</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dirección (Nombre y Número de la Calle, Ciudad, Estado, Código Postal)</td>
<td>Fecha (mes/día/año)</td>
</tr>
</tbody>
</table>

Sección 2. Revisión y verificación del empresario

<table>
<thead>
<tr>
<th>El título del documento:</th>
<th>Documento núm.:</th>
<th>Fecha de expiración (si existe):</th>
</tr>
</thead>
<tbody>
<tr>
<td>La autoridad que lo expide:</td>
<td>Documento núm.:</td>
<td>Fecha de expiración (si existe):</td>
</tr>
</tbody>
</table>

CERTIFICACIÓN: Declaro, bajo pena de perjurio, que he examinado el documento o los documentos presentado(s) por el empleado arriba mencionado, que el documento o los documentos arriba enumerado(s) parece(n) ser auténtico(s) y estar relacionado(s) con dicho empleado, que el empleado en cuestión empezará a trabajar el (mes/día/año) y que a mi leal saber y entender el empleado está autorizado a trabajar en los Estados Unidos. (Las agencias estatales de empleo pueden omitir la fecha en que el empleado empieza a trabajar).

<table>
<thead>
<tr>
<th>Firma del Empresario o de su Representante Autorizado</th>
<th>Nombre en letra de imprenta</th>
<th>Cargo</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nombre y Dirección de la Empresa u Organización (Nombre y Número de la Calle, Ciudad, Estado, Código Postal)</td>
<td>Fecha (mes/día/año)</td>
<td></td>
</tr>
</tbody>
</table>

Sección 3. Actualización y nueva verificación

<table>
<thead>
<tr>
<th>Nueva fecha (en caso de que sea aplicable)</th>
<th>Fecha de la nueva contratación (mes/día/año) (en caso de que sea aplicable)</th>
</tr>
</thead>
<tbody>
<tr>
<td>El título del documento:</td>
<td>Documento núm.:</td>
</tr>
</tbody>
</table>

Declaro, bajo pena de perjurio, que a mi leal saber y entender, este empleado está autorizado a trabajar en los Estados Unidos, y que el documento o los documentos que ha presentado y el documento o los documentos que he examinado parece(n) ser auténtico(s) y estar relacionado(s) con la persona en cuestión.

<table>
<thead>
<tr>
<th>Firma del empresario o de su representante autorizado</th>
<th>Fecha (mes/día/año)</th>
</tr>
</thead>
</table>
### LISTA DE LOS DOCUMENTOS ACEPTABLES

Todos los documentos deben estar en vigencia

<table>
<thead>
<tr>
<th>LISTA A</th>
<th>LISTA B</th>
<th>LISTA C</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Los documentos que establecen tanto la identidad como el permiso de empleo</strong></td>
<td><strong>Los documentos que establecen la identidad</strong></td>
<td><strong>Los documentos que establecen el permiso de empleo</strong></td>
</tr>
<tr>
<td>1. Un pasaporte estadounidense o una tarjeta de pasaporte estadounidense</td>
<td>1. Un permiso de conducir o una tarjeta de identidad expedida por un estado o por un territorio extranjero de los Estados Unidos siempre y cuando incluya una fotografía o información como el nombre, la fecha de nacimiento, el sexo, la altura, el color de los ojos y la dirección</td>
<td>1. Una tarjeta con el número de cuenta del Seguro Social diferente de la que especifica en su anverso que la mera expedición de la tarjeta no autoriza el empleo en los Estados Unidos</td>
</tr>
<tr>
<td>2. Una tarjeta de residencia permanente o una tarjeta que certifique el registro como extranjero (formulario I-551)</td>
<td>2. Una tarjeta de identidad expedida por agencias o entidades gubernamentales federales, estatales y locales siempre y cuando incluya una fotografía o información como el nombre, la fecha de nacimiento, el sexo, la altura, el color de los ojos y la dirección</td>
<td>2. El certificado de nacimiento en el extranjero expedido por el Departamento de Estado (Formulario FS-545)</td>
</tr>
<tr>
<td>3. Un pasaporte extranjero con el sello provisional I-551 o la anotación provisional I-551 impresa sobre un visado de inmigración legible con una máquina</td>
<td>3. La tarjeta de identidad expedida por extranjero expedido por el Departamento de Estado (formulario DS-1350)</td>
<td>3. El certificado de nacimiento expedido por el Departamento de Estado (Formulario DS-1350)</td>
</tr>
<tr>
<td>4. Un permiso de trabajo con fotografía (formulario-766)</td>
<td>4. La tarjeta del censo electoral</td>
<td>4. El original o una copia certificada del certificado de nacimiento expedido por un estado, un condado, una autoridad municipal o cualquier territorio de los Estados Unidos que disponga de sello oficial</td>
</tr>
<tr>
<td>5. En caso de que se trate de un extranjero no inmigrante autorizado a trabajar en una situación especial para un empresario, un pasaporte extranjero junto al formulario I-94 o al formulario I-94A en el que figure el mismo nombre que en el pasaporte y la aprobación del estatus del extranjero no inmigrante, siempre y cuando el periodo de dicha aprobación no haya expirado y el empleo propuesto no entre en conflicto con ninguna de las restricciones o limitaciones establecidas en el formulario</td>
<td>5. Una cartilla militar estadounidense o un documento de reclutamiento</td>
<td>5. El documento de pertenencia a una tribu nativa americana</td>
</tr>
<tr>
<td>6. La tarjeta de identidad de los empleados militares</td>
<td>6. La tarjeta de los guardacostas de la marina mercante estadounidense</td>
<td>6. Una tarjeta de identidad estadounidense (formulario I-197)</td>
</tr>
<tr>
<td>7. La tarjeta de identidad expedida con una fotografía</td>
<td>7. El documento de pertenencia a una tribu nativa americana</td>
<td>7. El documento de pertenencia a una tribu nativa americana</td>
</tr>
<tr>
<td><strong>En caso de personas menores de 18 años que no pueden presentar uno de los documentos enumerados previamente:</strong></td>
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<td>8. El documento de pertenencia a una tribu nativa americana</td>
<td>8. Un permiso de trabajar expedido por el Departamento de Seguridad Nacional</td>
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<td>9. Un permiso de conducir expedido por una autoridad gubernamental canadiense</td>
<td>9. Un permiso de conducir expedido por una autoridad gubernamental canadiense</td>
<td>9. Un permiso de conducir expedido por una autoridad gubernamental canadiense</td>
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<td>10. Un documento escolar o una boleta de calificaciones</td>
<td>10. Un documento escolar o una boleta de calificaciones</td>
<td>10. Un documento escolar o una boleta de calificaciones</td>
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<td>11. Un documento de la clinica, del médico o del hospital</td>
<td>11. Un documento de la clínica, del médico o del hospital</td>
<td>11. Un documento de la clínica, del médico o del hospital</td>
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<td>12. Un documento de la guardería o del jardín de infancia</td>
<td>12. Un documento de la guardería o del jardín de infancia</td>
<td>12. Un documento de la guardería o del jardín de infancia</td>
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En la parte 8 del Manual para empresarios (M-274) encontrarás ejemplos de muchos de estos documentos.
Handbook for Employers

Instructions for Completing Form I-9
(Employment Eligibility Verification Form)
Answers

1. A. Both Form I-9 and the Handbook for Employers are available as downloadable PDFs at www.uscis.gov. Employers with no computer access can order USCIS forms by calling our toll-free number at 1-800-870-3676. Individuals can also get USCIS forms and information on immigration laws, regulations, and procedures by calling our National Customer Service Center toll-free at 1-800-375-5283.

2. A. Yes. While citizens and noncitizen nationals of the United States are automatically eligible for employment, they too must present the required documents and complete a Form I-9. U.S. citizens include persons born in the United States, Puerto Rico, Guam, the U.S. Virgin Islands, and the Northern Mariana Islands. U.S. noncitizen nationals are persons who owe permanent allegiance to the United States, which include those born in American Samoa, including Swains Island.

3. A. No. You should not complete Forms I-9 for job applicants. You only need to complete Form I-9 for individuals you actually hire. For purposes of this law, a person is "hired" when he or she begins to work for you.

4. A. Yes. The law requires that you complete Form I-9 only when the person actually begins working. However, you may complete the form earlier, as long as the person has been offered and has accepted the job. You may not use Form I-9 process to screen job applicants.

5. A. Remuneration is anything of value given in exchange for labor or services rendered by an employee, including food and lodging.

6. A. No. For example, if you contract with a construction company to perform renovations on your building, you do not have to complete Forms I-9 for that company's employees. The construction company is responsible for completing Forms I-9 for its own employees. However, you must not knowingly use contract labor to circumvent the law against hiring unauthorized aliens.

7. A. If an employee is unable to present the required document or documents within 3 business days of the date employment begins, the employee must produce an acceptable receipt in lieu of a document listed on the last page of Form I-9. There are 3 types of acceptable receipts. See Question 25 below for a description of each receipt and the procedures required to fulfill Form I-9 requirements when an employee presents a receipt.
By having checked an appropriate box in Section 1, the employee must have indicated on or before the time employment began that he or she is already eligible to be employed in the United States.

NOTE: Employees hired for less than 3 business days cannot present a receipt, but instead must present the actual document(s) at the time employment begins.

9. Q. What happens if I properly complete and retain a Form 1-9 and DHS discovers that my employee is not actually authorized to work?
A. You cannot be charged with a verification violation. You will also have a good faith defense against the imposition of employer sanctions penalties for knowingly hiring an unauthorized alien, unless the government can show you had knowledge of the unauthorized status of the employee.

Questions About Documents

10. Q. May I specify which documents I will accept for verification?
A. No. The employee may choose which document(s) he or she wants to present from the lists of acceptable documents. You must accept any document (from List A) or combination of documents (one from List B and one from List C) listed on Form 1-9 and found in Part Eight of this Handbook that reasonably appear on their face to be genuine and to relate to the person presenting them. To do otherwise could be an unfair immigration-related employment practice in violation of the anti-discrimination provision in the INA. Individuals who look and/or sound foreign must not be treated differently in the recruiting, hiring, or verification process. For more information relating to discrimination during Form 1-9 process, contact OSC at 1-800-255-8155 (employers) or 1-800-237-2515 (TDD) or visit OSC's Web site at www.usdoj.gov/osc.

NOTE: An employer participating in the E-Verify Electronic Employment Eligibility Verification Program can only accept a List B document with a photograph.

11. Q. If an employee writes down an Alien Number or Admission Number when completing Section 1 of Form 1-9, may I ask to see a document with that number?
A. No. Although it is your responsibility as an employer to ensure that your employees fully complete Section 1 at the time employment begins, the employee is not required to present a document to complete this section.

When you complete Section 2, you may not ask to see a document with the employee's Alien Number or Admission Number or otherwise specify which document(s) an employee may present.

12. Q. What is my responsibility concerning the authenticity of document(s) presented to me?
A. You must examine the document(s), and if they reasonably appear on their face to be genuine and to relate to the person presenting them, you must accept them. To do otherwise could be an unfair immigration-related employment practice. If the document(s) do not reasonably appear on their face to be genuine or to relate to the person presenting them, you must not accept them.

13. Q. My employee has presented a U.S. passport card. Is this an acceptable document?
A. Yes. The passport card is a wallet-size document issued by the U.S. Department of State. While its permissible uses for international travel are more limited than the U.S. passport book, the passport card is a fully valid passport that attests to the U.S. citizenship and identity of the bearer. As such, the passport card is considered
a "passport" for purposes of Form 1-9 and has been included on List A of the Lists of Acceptable Documents on Form 1-9.

14. Q. Why was documentation for citizens of the Federated States of Micronesia (FSM) and the Republic of the Marshall Islands (RMI) added to the List of Acceptable Documents on Form 1-9?

A. Under the Compacts of Free Association between the United States and FSM and RMI, most citizens of FSM and RMI are eligible to reside and work in the United States as nonimmigrants. The compact also eliminated the need for citizens of these two countries to obtain employment authorization cards to work in the United States. Now FSM and RMI citizens can show a valid passport with a Form 1-94 or 1-94A to satisfy Form 1-9 requirements.

15. Q. There are 3 documents on Form 1-9 that are listed on both List B and List C. Does this mean that an employee may present 1 of those documents to prove both identity and employment authorization?

A. Three documents can be found in both List B and List C: a Native American tribal document, the U.S. Citizen Identification Card (Form 1-197) and the Identification Card for the Use of Resident Citizen in the United States (Form 1-179). If an employee presents any one of these documents, it establishes both identity and employment authorization on Form 1-9, so you do not need any other documents from the employee to complete Section 2 of Form 1-9.

16. Q. An employee has attested to being a U.S. citizen or U.S. noncitizen national on Section 1 of Form 1-9, but has presented me with an I-551, Permanent Resident Card, or "green card." Another employee has attested to being a lawful permanent resident but has presented a U.S. passport. Should I accept these documents?

A. In these situations, you should first ensure that the employee understood and properly completed the Section 1 attestation of status. If the employee made a mistake and corrects the attestation, he or she should initial and date the correction, or complete a new Form 1-9. If the employee confirms the accuracy of his or her initial attestation, you should not accept a "green card" from a U.S. citizen or a U.S. passport from an alien. Although you are not expected to be an immigration law expert, both documents in question are inconsistent with the status attested to and are, therefore, not documents that reasonably relate to the person presenting them.

17. Q. May I accept an expired document?

A. No. Expired documents are no longer acceptable for Form 1-9. However, you may accept Employment Authorization Documents (I-766) and Permanent Resident Cards (Form I-551) that appear to be expired on their face, but have been extended under the limited circumstances, described in Part 2, Section 2, Table 2.

Individuals under the Temporary Protected Status (TPS) Program whose Employment Authorization Documents appear to be expired but were actually automatically extended via Federal Register notice may continue to work based on their Employment Authorization Documents during the automatic extension period specified in the Federal Register notice announcing the extension.

NOTE: Some documents, such as birth certificates and Social Security cards, do not contain an expiration date and should be treated as unexpired.

18. Q. How can I tell if a DHS-issued document has expired? If it has expired, should I reverify the employee?

A. Some DHS-issued documents, such as older versions of the Alien Registration Receipt Card (Form I-551), do not have expiration dates, but are still acceptable for Form 1-9 purposes. However, all subsequent Permanent Resident Cards (I-551s) contain 2-year or 10-year expiration dates. You should not reverify an expired Alien Registration Receipt Card/Permanent Resident Card (Form I-551). Other DHS-issued documents, such as the Employment Authorization Document (Form I-766) also have expiration dates. These dates can be found either on the face of the document or on a sticker attached to the back of the document. All Employment Authorization Documents must be reverified upon expiration.
19. Q. Some employees are presenting me with Social Security cards that have been laminated. May I accept such cards as evidence of employment authorization?

A. It depends. You may not accept a laminated Social Security card as evidence of employment authorization if the card states on the back "not valid if laminated." Lamination of such cards renders them invalid. Metal or plastic reproductions of Social Security cards are not acceptable.

20. Q. Some employees have presented Social Security Administration printouts with their name, Social Security number, date of birth and their parents' names as proof of employment authorization. May I accept such printouts in place of a Social Security card as evidence of employment authorization?

A. No. Only a person's official Social Security card is acceptable.

21. Q. What should I do if an employee presents a Social Security card marked "NOT VALID FOR EMPLOYMENT," but states that he or she is now authorized to work?

A. You should ask the employee to provide another document to establish his or her employment authorization, since such Social Security cards do not establish this and are not acceptable documents for Form I-9. Such an employee should go to the local SSA office with proof of his or her lawful employment status to be issued a Social Security card without employment restrictions.

22. Q. May I accept a photocopy of a document presented by an employee?

A. No. Employees must present original documents. The only exception is that an employee may present a certified copy of a birth certificate.

23. Q. I noticed on Form I-9 that under List A there are two spaces for document numbers and expiration dates. Does this mean I have to see two List A documents?

A. No. One of the documents found in List A is a foreign passport with an attached Form I-94 or I-94A, bearing the same name as the passport and containing endorsement of the alien's nonimmigrant status, if that status authorizes the alien to work for the employer. Form I-9 provides space for you to record the document number and expiration date for both the passport and Form I-94 or I-94A.

24. Q. When I review an employee's identity and employment authorization documents, should I make copies of them?

A. If you participate in E-Verify and the employee presents a document used as part of the Photo Screening Tool (currently the Permanent Resident Card (Form I-551) and the Employment Authorization Document (Form I-766)), you must retain a photocopy of the document he or she presents. If you do not participate in E-Verify, you are not required to make photocopies of documents. However, if you wish to make photocopies of documents other than those used in E-Verify, you should do so for all employees, and you should retain each photocopy with Form I-9. Photocopies must not be used for any other purpose. Photocopying documents does not relieve you of your obligation to fully complete Section 2 of Form I-9, nor is it an acceptable substitute for proper completion of Form I-9 in general.

25. Q. When can employees present receipts for documents in lieu of actual documents establishing employment authorization?

A. The "receipt rule" is designed to cover situations in which an employee is employment authorized at the time of initial hire or reverification, but he or she is not in possession of a document listed on page 5 of Form I-9. Receipts showing that a person has applied for an initial grant of employment authorization or for renewal of employment authorization are not acceptable.

An individual may present a receipt in lieu of a document listed on Form I-9 to complete Section 2 of Form I-9. The receipt is valid for a temporary period. There are three different documents that qualify as receipts under the rule:

1. A receipt for a replacement document when the document has been lost, stolen, or damaged. The receipt is valid for 90 days, after which the individual must present the
replacement document to complete Form 1-9.

NOTE: This rule does not apply to individuals who present receipts for new documents following the expiration of their previously held document.

2. A Form I-94 or Form I-94A containing a temporary I-551 stamp and a photograph of the individual, which is considered a receipt for the Permanent Resident Card (Form I-551). The individual must present Form I-551 by the expiration date of the temporary I-551 stamp; or within one year from the date of issuance of Form I-94 or I-94A if the I-551 stamp does not contain an expiration date.

3. A Form I-94 or I-94A containing an unexpired refugee admission stamp. This is considered a receipt for either an Employment Authorization Document (Form I-766) or a combination of an unrestricted Social Security card and List B document. The employee must present acceptable documentation to complete Form I-9 within 90 days after the date of hire or, in the case of reverification, the date employment authorization expires. For more information on receipts, see Table 1 in Part 2, Section 2.

26. Q. My employee has applied for a new Employment Authorization Document. When my employee's current Employment Authorization Document expires, how can I satisfy Form I-9 reverification requirement while the application is pending with USCIS? Is the USCIS receipt notice (Form I-797) covered by Form I-9 receipt rule?

A. An employee with temporary employment authorization and holding an Employment Authorization Document (I-766) should apply for a new card at least 90 days prior to the expiration of his or her current document. DHS regulations provide that if it does not adjudicate the application for employment authorization within 90 days, it will grant an interim Employment Authorization Document valid for a period not to exceed 240 days. If your employee applied for a new card at least 90 days prior to the expiration of his or her current card but is nearing the end of the 90-day processing period without a decision from USCIS, instruct your employee to inquire about an interim Employment Authorization Document with the local USCIS office or by calling the National Customer Service Center at (800) 375-5283 or (800) 767-1833 (TTY). Upon expiration of your employee’s current Employment Authorization Document, he or she should be able to present either a new or interim card, or a List C document, to satisfy Form I-9 reverification requirements. In this case, the USCIS receipt notice (Form I-797) is not an acceptable receipt for Form I-9 purposes.

27. Q. My employee has presented a foreign passport with a Form I-94 or I-94A (List A, Item 5) indicating an employment-authorized nonimmigrant status. How do I know if this nonimmigrant status authorizes the employee to work?

A. You, as the employer, likely have submitted a petition to USCIS on a nonimmigrant worker’s behalf. However, there are some exceptions to this rule:

1. You made an offer of employment to a Canadian passport holder who entered the United States under NAFTA with an offer letter from your company. This nonimmigrant worker will have a Form I-94 or Form I-94A indicating TN status, and may present either a passport or a valid Canadian driver’s license in combination with Form I-94 or Form I-94A.

2. A student working in on-campus employment or participating in curricular practical training. (See questions 28 and 29.)

3. A J-1 exchange visitor. (See question 34.)

Most employees who present a foreign passport in combination with a Form I-94 or I-94A (List A, Item 5) are restricted to work for their petitioning employer. If you did not submit a petition for an employee who presents such documentation, then that nonimmigrant worker is not usually authorized to work for you.

The table below lists the nonimmigrant classifications that indicate that an employee is authorized to work incident to status. Such
classifications will be indicated on Form I-94 or I-94A.

<table>
<thead>
<tr>
<th>Classification</th>
<th>Details</th>
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<tbody>
<tr>
<td>A-1, A-2</td>
<td>Foreign Government Officials or employees of A-1 or A-2</td>
</tr>
<tr>
<td>A-3</td>
<td>Employee of an A-1, A-2</td>
</tr>
<tr>
<td>E-1, E-2, E-3</td>
<td>Treaty Trader/Investors</td>
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<tr>
<td>G-1, G-2, G-3, G-4</td>
<td>Foreign representatives or officers of an international organization</td>
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<tr>
<td>G-5</td>
<td>Employee of a G-1, G-2, G-3, or G-4</td>
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<tr>
<td>H-1B</td>
<td>Specialty Occupations, DOD workers</td>
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<tr>
<td>H-1C</td>
<td>Nurses in health professional shortage areas</td>
</tr>
<tr>
<td>H-2A</td>
<td>Temporary agricultural workers</td>
</tr>
<tr>
<td>H-2B</td>
<td>Temporary workers: skilled and unskilled</td>
</tr>
<tr>
<td>H-3</td>
<td>Trainees</td>
</tr>
<tr>
<td>J-1</td>
<td>Exchange visitors</td>
</tr>
<tr>
<td>L-1</td>
<td>Intra-company transfers</td>
</tr>
<tr>
<td>NATO-1 to NATO-6</td>
<td>Representatives to NATO</td>
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<tr>
<td>NATO-7</td>
<td>Employee of NATO representative</td>
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<tr>
<td>P-1</td>
<td>Individual or team athletes, entertainment groups, or artists</td>
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<tr>
<td>Q-1</td>
<td>International cultural exchange visitors</td>
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<tr>
<td>R-1</td>
<td>Religious workers</td>
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<tr>
<td>TN</td>
<td>NAFTA Trade visas for Canadians or Mexicans</td>
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28. Q. What document(s) can I accept from an employee who has applied for an extension of Optional Practical Training as a STEM student?

A. The expired Employment Authorization Document (Form I-766), combined with a Form I-20 endorsed to show that the student’s employment authorization is still valid, and the USCIS receipt notice (Form I-797, Notice of Action), showing receipt of the H-1B petition. This combination of documents satisfies Form I-9 requirements until September 30 of each year, or until the date the petition is rejected, denied, or withdrawn. If the receipt notice has not yet been issued, the expired card and Form I-20 are sufficient. This combination of documents satisfies Form I-9 until the expiration date noted on the Form I-20, but not later than September 30. If the student presents Form I-20 without a receipt notice, the employer must reverify upon the expiration date noted on the Form I-20. The student may present another Form I-20 indicating continued employment authorization to satisfy the reveryfication requirement.

29. Q. My employee is an F-1 student who was working for me as part of her Optional Practical Training. I have now submitted a petition on her behalf for an H-1B visa. Her Employment Authorization Document has expired and I must reverify her employment authorization. What documents may she present?

A. The expired Employment Authorization Document (Form I-766), combined with a Form I-20 endorsed to show that the student’s employment authorization is still valid, and the USCIS receipt notice (Form I-797, Notice of Action), showing receipt of the H-1B petition. This combination of documents satisfies Form I-9 requirements until September 30 of each year, or until the date the petition is rejected, denied, or withdrawn. If the receipt notice has not yet been issued, the expired card and Form I-20 are sufficient. This combination of documents satisfies Form I-9 until the expiration date noted on the Form I-20, but not later than September 30. If the student presents Form I-20 without a receipt notice, the employer must reverify upon the expiration date noted on the Form I-20. The student may present another Form I-20 indicating continued employment authorization to satisfy the reveryfication requirement.

30. Q. My employee’s Employment Authorization Document (Form I-766), expired and the employee now wants to show me a Social Security card. Do I need to see a current DHS document?

A. No. During both initial verification and reveryfication, an employee must be allowed to choose what documentation to present from Form I-9 lists of acceptable documents. If an employee presents an unrestricted Social Security card upon reveryfication, the employee does not also need to present a current DHS document. However, if an employee presents a restricted Social Security card upon reveryfication, you must reject the restricted Social Security card, since it is not an acceptable Form I-9 document, and ask the employee to choose different documentation from List A or List C of Form I-9.

31. Q. Can DHS double-check the status of an alien I hired, or “run” his or her number (typically an Alien Number or Social Security number) and tell me whether it’s good?

A. DHS cannot double-check a number for you, unless you participate in E-Verify, which con-
firms the employment authorization of your newly hired employees. For more information about this program, see Part Six. You may also call DHS at 1-888-464-4218 or visit www.dhs.gov/E-Verify. You also may contact DHS if you have a strong and articulable reason to believe documentation may not be valid, in which case ICE may investigate the possible violation of law.

32. Q. My employee presented me with a document issued by INS rather than DHS. Can I accept it?

A. Effective March 1, 2003, the functions of the former INS were transferred to three agencies within the new DHS: USCIS, CBP and ICE. Most immigration documents acceptable for Form I-9 use are issued by USCIS. Some documents issued by the former INS before March 1, 2003, such as Permanent Resident Cards, may still be within their period of validity. If otherwise acceptable, a document should not be rejected because it was issued by INS rather than DHS. It should also be noted that INS documents may bear dates of issuance after March 1, 2003, as it took some time in 2003 to modify document forms to reflect the new USCIS identity.

33. Q. What should I do if an employee presents a Form I-20 and says the document authorizes her to work?

A. Form I-20 is evidence of employment authorization in two specific situations:

1. The employee works on the campus of the school where he or she is an F-1 student for an employer that provides direct student services, or at an off-campus location that is educationally affiliated with the school's established curriculum or related to contractually funded research projects at the post-graduate level where the employment is an integral part of the student’s educational program.

2. The employee is an F-1 student who has been authorized by the Designated School Official (DSO) to participate in a curricular practical training program that is an integral part of an established curriculum (e.g., alternative work/study, internship, cooperative education, or other required internship offered by sponsoring employers through cooperative agreements with the school). Form I-20 must be endorsed by the DSO for curricular practical training, and list the employer offering the practical training, and the dates the student will be employed.

In both situations, Form I-20 must accompany a valid Form I-94 or I-94A indicating F-1 status. When combined with a foreign passport, the documentation is acceptable for List A of Form I-9.

34. Q. May I accept Form DS-2019 as proof of employment authorization?

A. Form DS-2019 can be used only by a J-1 exchange visitor for employment when such employment is part of his or her program. For J-1 students, the Responsible Officer of the school may authorize employment in writing. Form DS-2019 must accompany a valid Form I-94 or I-94A. When combined with a foreign passport, the documentation is acceptable for List A of Form I-9.

35. Q. When do I fill out Form I-9 if I hire someone for less than 3 business days?

A. Both you and the employee must complete Sections 1 and 2 of Form I-9 at the time of hire. This means Form I-9 must be fully completed when the person starts to work.

36. Q. What should I do if I rehire a person who previously filled out a Form I-9?

A. If the employee's Form I-9 is a version that is currently acceptable, you rehire the person within 3 years of the date that Form I-9 was originally completed, and the employee is still authorized to work, you may reverify the employee in Section 3 of the original Form I-9.

If the version of Form I-9 that you used for the employee's original verification is no longer
valid, you must complete Section 3 of the current Form I-9 upon reverification and attach it to the employee’s original Form I-9.

37. Q. What should I do if I need to reverify a Form I-9 for an employee who filled out an earlier version of the form?

A. The current version of Form I-9 can be found at www.uscis.gov. To reverify an employee who filled out an earlier version of the form, you may line through any outdated information on the form and initial and date any updated information. You may also choose, instead, to complete a new Form I-9.

If you used a version of Form I-9 when you originally verified the employee that is no longer valid, the employee must provide any document(s) he or she chooses from the current Lists of Acceptable Documents, which you must enter in Section 3 of the current version of Form I-9.

38. Q. Do I need to complete a new Form I-9 when one of my employees is promoted within my company or transfers to another company office at a different location?

A. No. You do not need to complete a new Form I-9 for employees who have been promoted or transferred.

39. Q. What do I do when an employee’s employment authorization expires?

A. You will need to reverify on Form I-9 to continue to employ the person. Reverification must occur no later than the date that employment authorization (or evidence thereof) expires. The employee must present a document from either List A or List C that shows either an extension of his or her initial employment authorization or new employment authorization. You must review this document and, if it reasonably appears on its face to be genuine and to relate to the person presenting it, record the document title, number, and expiration date (if any), in the Updating and Reverification Section (Section 3), and sign in the appropriate space.

If the version of Form I-9 that you used for the employee’s original verification is no longer valid, you must complete Section 3 of the current Form I-9 upon reverification and attach it to the original Form I-9.

You may want to establish a calendar call-up system for employees whose employment authorization (or evidence of employment authorization) will expire in the future.

You may not reverify an expired U.S. passport or passport card, an Alien Registration Receipt Card/Permanent Resident Card (Form I-551), or a List B document that has expired.

NOTE: You cannot refuse to accept a document because it has a future expiration date. You must accept any document (from List A or List C) listed on Form I-9 that on its face reasonably appears to be genuine and to relate to the person presenting it. To do otherwise could be an unfair immigration-related employment practice in violation of the anti-discrimination provision of the INA.

If an employee’s employment authorization document expires before the employee receives a new one, the employee may take the application receipt to a local USCIS office to receive temporary employment authorization if it has been more than 90 days since the employee applied for the new card.

40. Q. Can I avoid reverifying an employee on Form I-9 by not hiring persons whose employment authorization has an expiration date?

A. You cannot refuse to hire persons solely because their employment authorization is temporary. The existence of a future expiration date does not preclude continuous employment authorization for an employee and does not mean that subsequent employment authorization will not be granted. In addition, consideration of a future employment authorization expiration date in determining whether an alien is qualified for a particular job may be an unfair immigration-related employment practice in violation of the anti-discrimination provision of the INA.

41. Q. As an employer, do I have to fill out all the Forms I-9 myself?

A. No. You may designate someone to fill out Forms I-9 for you, such as a personnel officer, foreman, agent or anyone else acting in your interest, such as a notary public. Please note that if someone else fills out Form I-9 on your behalf, they must
carry out full Form 1-9 responsibilities. For example, it is not acceptable for a notary public to view employment authorization and identity documents, but leave Section 2 for you to complete. The person who views an employee’s employment authorization documents should also complete and sign Section 2 on your behalf. However, you are still liable for any violations of the employer sanctions laws.

42. Q. Can I contract with someone to complete Forms 1-9 for my business?

A. Yes. You can contract with another person or business to verify employees’ identities and employment authorization and to complete Forms 1-9 for you. However, you are still responsible for the contractor’s actions and are liable for any violations of the employer sanctions laws.

43. Q. I use a professional employer organization (PEO) that “co-employs” my employees. Am I responsible for Form 1-9 compliance for these employees or is the PEO?

A. “Co-employment” arrangements can take many forms. As an employer, you continue to be responsible for compliance with Form 1-9 requirements.

If the arrangement into which you have entered is one where an employer-employee relationship also exists between the PEO and the employee (e.g., the employee performs labor or services for the PEO), the PEO would be considered an employer for Form 1-9 purposes and:

1. The PEO may rely upon the previously completed Form 1-9 at the time of initial hire for each employee continuing employment as a co-employee of you and the PEO, or

2. The PEO may choose to complete new Forms 1-9 at the time of co-employment.

If more co-employees are subsequently hired, only one Form 1-9 must be completed by either the PEO or the client. However, both you and your PEO are responsible for complying with Form 1-9 requirements, and DHS may impose penalties on either party for failure to do so. Penalties for verification violations, if any, may vary depending on:

1. A party’s control or lack of control over Form 1-9 process,

2. Size of the business,

3. Good faith in complying with Form 1-9 requirements,

4. The seriousness of the party’s violation,

5. Whether or not the employee was an unauthorized alien,

6. The history of the party’s previous violations and

7. Other relevant factors.

44. Q. As an employer, can I negotiate my responsibility to complete Forms 1-9 in a collective bargaining agreement with a union?

A. Yes. However, you are still liable for any violations of the employer sanctions laws. If the agreement is for a multi-employer bargaining unit, certain rules apply. The association must track the employee’s hire and termination dates each time the employee is hired or terminated by an employer in the multi-employer association.

45. Q. What are the requirements for retaining Forms 1-9?

A. If you are an employer, you must retain Forms 1-9 for 3 years after the date employment begins or 1 year after the date the person’s employment is terminated, whichever is later. If you are an agricultural association, agricultural employer, or farm labor contractor, you must retain Forms 1-9 for 3 years after the date employment begins for persons you recruit or refer for a fee.

46. Q. Will I get any advance notice if a DHS or DOL officer wishes to inspect my Forms 1-9?

A. Yes. The officer will give you at least 3 days’ (72 hours) advance notice before the inspection. If it is more convenient for you, you may waive the 3-day notice. You may also request an extension of time to produce the Forms 1-9. The DHS or DOL officer will not need to show you a subpoena or a warrant at the time of the inspection.
NOTE: This does not preclude DHS or DOJ from obtaining warrants based on probable cause for entry onto the premises of suspected violators without advance notice.

Failure to provide Forms I-9 for inspection is a violation of the employer sanctions laws and could result in the imposition of civil money penalties.

47. Q. How does OSC obtain information necessary to determine whether an employer has committed an unfair immigration-related employment practice under the anti-discrimination provision of the INA?

A. OSC will notify you in writing to initiate an investigation, request information and documents, and interview your employees. If you refuse to cooperate, OSC can obtain a subpoena to compel you to produce the information requested or to appear for an investigative interview.

48. Q. Do I have to complete Forms I-9 for Canadians or Mexicans who entered the United States under the North American Free Trade Agreement (NAFTA)?

A. Yes. You must complete Forms I-9 for all employees. NAFTA entrants must show identity and employment authorization documents just like all other employees.

49. Q. If I acquire a business, can I rely on Forms I-9 completed by the previous owner/employer?

A. Yes. However, you also accept full responsibility and liability for all Forms I-9 completed by the previous employer relating to individuals who are continuing in their employment.

50. Q. If I am a recruiter or referrer for a fee, do I have to fill out Forms I-9 on persons whom I recruit or refer?

A. No, with 3 exceptions: Agricultural associations, agricultural employers, and farm labor contractors are still required to complete Forms I-9 on all individuals who are recruited or referred for a fee. However, all recruiters and referrers for a fee must still complete Forms I-9 for their own employees hired after November 6, 1986. Also, all recruiters and referrers for a fee are still liable for knowingly recruiting or referring for a fee aliens not authorized to work in the United States and must comply with federal anti-discrimination laws.

51. Q. Can I complete Section 1 of Form I-9 for an employee?

A. Yes. You may help an employee who needs assistance in completing Section 1 of Form I-9. However, you must also complete the “Preparer/Translator Certification” block. The employee must still sign the certification block in Section 1.

52. Q. If I am self-employed, do I have to fill out a Form I-9 on myself?

A. A self-employed person does not need to complete a Form I-9 on his or her own behalf unless the person is an employee of a business entity, such as a corporation or partnership. If the person is a business entity, he or she, and any authorized employees, will have to complete Form I-9.

53. Q. I have heard that some state employment agencies can certify that people they refer are authorized to work. Is that true?

A. Yes. State employment agencies may choose to verify the employment authorization and identity of individuals they refer for employment on Form I-9. In such cases, they must issue a certificate to the employer within 21 business days of the date that the referred individual is hired. If one of these agencies refers potential employees to you with a job order or other appropriate referral form, and the agency sends you a certification within 21 business days of the referral, you do not have to check documents or complete a Form I-9 if you hire that person. However, you must review the certification to ensure that it relates to the person hired and observe the person sign the certification. You must also retain the certification as you would a Form I-9 and make it available for inspection, if requested. You should check with your state employment agency to see if it provides this service and become familiar with its certification document.
Questions About Avoiding Discrimination

54. Q. How can I avoid discriminating against certain employees while still complying with this law?

A. You should:

1. Treat employees equally when recruiting, hiring, and terminating them, and when verifying their employment authorization and completing Form I-9.

2. Allow all employees, regardless of national origin or immigration status, to choose which document or combination of documents they want to present from the Lists of Acceptable Documents on the back of Form I-9. For example, you may not require an employee to present an employment authorization document issued by DHS if he or she chooses to present a driver’s license and unrestricted Social Security card.

You should not:

1. Set different employment eligibility verification standards or require that different documents be presented by employees because of their national origin or citizenship status. For example, you cannot demand that non-U.S. citizens present DHS-issued documents such as “green cards.”

2. Ask to see a document with an employee’s Alien or Admission Number when completing Section 1 of Form I-9.

3. Request to see employment authorization verification documents before hire or completion of Form I-9 because someone looks or sounds “foreign,” or because someone states that he or she is not a U.S. citizen.

4. Refuse to accept a valid employment authorization document, or refuse to hire an individual, because the document has a future expiration date.

5. Reverify the employment authorization of a lawful permanent resident (LPR) whose “green card” has expired after the LPR is hired.

6. Request that, during reverification, an employee present a specific employment authorization document. Employees are free to choose any document either from List A or from List C of Form I-9.

7. Limit jobs to U.S. citizens unless U.S. citizenship is required for the specific position by law; regulation; executive order; or federal, state or local government contract.

NOTE: On an individual basis, you may legally prefer a U.S. citizen over an equally qualified alien to fill a specific position, but you may not adopt a blanket policy of always preferring citizens over noncitizens.

55. Q. Who is protected from discrimination on the basis of citizenship status or national origin under the anti-discrimination provision of the INA?

A. All U.S. citizens, lawful permanent residents, temporary residents, asylees, and refugees are protected from citizenship status discrimination, except for those lawful permanent residents who have failed to make a timely application for naturalization after they become eligible.

You cannot discriminate against any employment authorized individual in hiring, firing, or recruitment because of his or her national origin.

Similarly, all employment-authorized individuals are protected from document abuse.

56. Q. Can I be charged with discrimination if I contact DHS about a document presented to me that does not reasonably appear to be genuine and relate to the person presenting it?

A. No. If you are presented with documentation that does not reasonably appear to be genuine or to relate to the employee, you cannot accept that documentation. While you are not legally required to inform DHS of such situations, you may do so if you choose. However, DHS is unable to provide employment eligibility verification services other than through its E-Verify program. If you treat all employees equally and do not single out employees who look or sound foreign for closer scrutiny, you cannot be charged with discrimination.

57. Q. I recently hired someone who checked the fourth box in the immigration status attestation section on Section 1 of Form I-9, indicat-
ing that he is an alien. However, he informed me that he does not have an employment authorization expiration date, which appears to be required by the form. What should I do?

A. Refugees and asylees, as well as some other classes of alien such as certain nationals of the Federated States of Micronesia, the Republic of the Marshall Islands, and Palau, are authorized to work because of status. Such aliens may not possess an Employment Authorization Document (I-766), yet can still establish employment authorization and identity by presenting other documentation, including a driver's license and an unrestricted Social Security card, or a Form I-94 or I-94A indicating their work-authorized status. Such individuals should write "N/A" in Section 1 next to the alien box. The refusal to hire work-authorized aliens because of their immigration status, or because they are unable to provide an expiration date on Form I-9, is a violation of the anti-discrimination provision in the INA.

58. Q. What should I do if I have further questions regarding the INA’s anti-discrimination provision and Form I-9 verification process?

A. Call the OSC employer hotline with questions:
   1-800-255-8155
   1-800-362-2735 (TDD); or

59. Q. What if someone believes they have experienced discrimination under the INA's anti-discrimination provision?

A. Call the OSC employee hotline:
   1-800-255-7688
   1-800-237-2515 (TDD); or

60. Q. What if someone believes he or she has experienced discrimination under Title VII of the Civil Rights Act of 1964?

A. Call the EEOC:
   1-800-USA-EEOC
   1-800-669-6820 (TTY); or

Questions About Employees Hired Before November 7, 1986

61. Q. Does this law apply to my employees if I hired them before November 7, 1986?

A. No. You are not required to complete Forms I-9 for employees hired before November 7, 1986.

NOTE: This "grandfather" status does not apply to seasonal employees or to employees who change employers within a multi-employer association.

Questions About Different Versions of Form I-9

63. Q. Is Form I-9 available in different languages?

A. Form I-9 is available in English and Spanish. However, only employers in Puerto Rico may use the Spanish version to meet the verification and retention requirements of the law. Employers in the United States and other U.S. territories may use the Spanish version as a translation guide for Spanish-speaking employees, but the English version must be completed and retained in the employer’s records. Employees may also use or
ask for a preparer/translator to assist them in completing the form.

64. Q. Are employers in Puerto Rico required to use the Spanish version of Form 1-9?
A. No. Employers in Puerto Rico may use either the Spanish or the English version of Form 1-9 to verify new employees.

65. Q. May I continue to use earlier versions of Form 1-9?

A. No, employers must use the current version of Form 1-9. All previous editions of Form 1-9, in English or Spanish, are no longer valid.

66. Q. Where do I get the Spanish version of Form 1-9?
A. You may download the Spanish version of this form from the USCIS Web site at www.uscis.gov. Click on Immigration Forms and scroll down to Form 1-9. For employers without internet access, you may call the USCIS Forms Center toll-free at 1-800-870-3636.

Questions about Military Installations

67. Q. I know that a valid unexpired military ID card is a valid List B identification document. Is a military ID card ever acceptable as List A evidence of both identity and employment authorization?

A. Yes, but only if the employer is the U.S. military and the Form 1-9 is completed in the context of military enlistment itself. In the case of an individual lawfully enlisted in the U.S. Armed Forces, a valid, unexpired military ID card may be accepted as a List A document by the Armed Forces only. No other employer may accept a military ID card as a List A document.
TIPS TO COMPLETE I-9 FORM

OVERVIEW

1. **DO NOT FILL OUT AN I-9 FORM UNTIL THE EMPLOYEE IS HIRED.**

2. Use the new I-9 Form. The revision date at the bottom of the I-9 Form is 2/2/09.

The I-9 Form contains three separate and distinct sections:

   a) Section 1: Employee Information and Verification
   
   b) Section 2: Employer Review and Verification
   
   c) Section 3: Updating and Reverification

These tips are designed to assist managers in properly filling out I-9 Forms. These tips do not cover all of the rules and regulations, but provide some tips. Please refer to applicable rules and regulations for requirements and more details. Please consult with legal counsel for individual circumstances and questions.

TIPS FOR ENTIRE I-9 FORM:

(1) Use **black** or **blue** ink on the I-9 Form.

(2) Do not use different color or type of ink in the same Section.

(3) Do not have more than one handwriting in the same Section (unless person filling out Section 2 is also preparer/translator).

(4) Do not use pencil.

(5) Expiration date of documents must be written as month/day/year (do not use day/month/year).

(6) **DO NOT KEEP PHOTOCOPIES OF DOCUMENTS,** unless otherwise required by state law (e.g. Colorado) or by E-verify (e.g. permanent resident card). Instead learn to complete the form correctly.

(7) If a new form must be redone after an employee has worked at Company, the old I-9 Form should be stapled to the new form and kept together.
SECTION 1: EMPLOYEE INFORMATION AND VERIFICATION

(1) The employee should complete Section 1. It is important to review Section 1 and have employee complete any missing information before completing Section 2.

(2) Highlight the sections for employee to fill out in Section 1 so employee does not miss any boxes.

(3) Section 1 of the I-9 Form must be completed on or before the employee’s first day of work.

(4) The employee must do the following to complete Section 1:
   a) Enter personal information, including full name and address.
   b) Mark the appropriate checkbox to confirm employment eligibility.
   c) The employee should only fill out the information for the box checked: either document number for box 3 OR work authorization expiration date and document number for box 4.
   d) Employee should read, sign and date the form.
   e) If a preparer or translator assists the employee, the preparer/translator should enter his or her name and address, signature, and date in the appropriate spaces.

(5) Additional Tips for Completing Section 1:
   a) Do not complete Section 1 for the employee unless you are serving as translator/preparer.
   b) Section 1 must not have any missing information.
   c) If there is no middle name/initial or maiden name a dash should be inserted by the employee.
   d) Make sure the address is complete, including city, state and zip code.
   e) Review the employee’s completed form and if anything is missing or wrong have employee redo a new I-9 Form and start over.
   f) Do not ask for any document to substantiate the information provided by the employee in Section 1.
   g) Make sure date is written as month/date/year.
h) Make sure employee has not signed or dated the translator/preparer section.

i) Make sure the employee signs and dates Section 1 in the proper spot.

j) The employee’s name on Section 1 should match the name on the documents provided for Section 2.

**SECTION 2: EMPLOYER REVIEW AND VERIFICATION**

Section 2 of the I-9 Form must be completed within 3 business days of the date the person starts working. It is the employee’s choice which documents he/she presents. Acceptable documents are listed on the form included with this Section. All documents must be unexpired. The documents presented by employees from the list of acceptable documents are used to establish identity and work eligibility. The employer personally reviews the original documents, completes Section 2, and signs and dates the I-9 Form.

An employee must present either an acceptable document from List A OR acceptable documents from both List B and List C.

- List A contains a list of acceptable documents that verify both identity and work eligibility.
  
  Only one document needs to be shown to complete Section 2 under the List A column. DO NOT FILL ANYTHING IN UNDER THE LIST B OR LIST C COLUMN IF THE EMPLOYEE SHOWS YOU A LIST A DOCUMENT.

- List B contains a list of acceptable documents that verify identity; and

- List C contains a list of acceptable documents that verify work eligibility.

The employee must show you a List B and a List C document and you need to complete Section 2 under the List B and List C column.

The same person who is the employer representative must both review the original documents and fill out and sign Section 2.

(1) The employee chooses the documents to present to the employer.

(2) For List A OR Lists B and C, the employer representative reviews the original documents and records the following information for each one:

- document title
- issuing authority
- document number
• expiration date (if any)

(3) Under Certification, you record:

• the employee’s start date (sometimes estimated)
• your signature
• your name, title, organization name and address
• the date

(4) Additional Tips for Completing Section 2:

a) Do not use whiteout.
b) Do not cross out mistakes or scratch out mistakes.
c) If a mistake occurs during completion of the form, start over with a new form.
d) Do not tell an employee what documents to produce but instead have the employee review the list of acceptable documents and choose what documents the employee wants to produce.
e) If you use a List A document, DO NOT FILL OUT LIST B AND LIST C DOCUMENTS.
f) Your responsibility under Section 2 is to certify you examined the original documents and they appeared genuine and reasonable.
g) Your responsibility under Section 2 is to check to make sure the photo or the description of the person reasonably matches the person showing the documents to you (i.e. height, age, race or gender).
h) The employee must present original unexpired documents.
i) DO NOT ACCEPT PHOTOCOPIES OF DOCUMENTS. ONLY ORIGINAL DOCUMENTS ARE ACCEPTABLE.
j) If the employee cannot produce original documents to complete the I-9 Form, the employee cannot work at the Company.
k) Do not accept SSNs that are 000-00-0000 OR 123-45-6789. Also, SSNs that start with 9 are generally not acceptable.
An application to obtain a SS card is not acceptable, but a document from SSA indicating the person has applied for a replacement or lost SS card is acceptable.

It may be helpful to review the DHS Handbook published by DHS, which provides additional tips.

SECTION 3: EMPLOYMENT REVERIFICATION

Section 3 of the I-9 Form can be used for employment reverification when an employee’s work authorization expires, when an employee’s name changes (i.e., marriage or divorce), or when an employee is rehired.

Section 3 of the I-9 Form, employment reverification, must be completed when an employee’s work authorization nears expiration but he/she is currently eligible to work on a different basis or under a new grant of work authorization. Reverification must be completed on or before the expiration date of the document used and recorded in Section I.

Employers should develop a system to remind employees 4 to 5 months prior of the expiration date that the employee needs new authorization by the expiration date or the employee cannot continue to work for the company. The employer does not need to reverify US Passports or drivers licenses when they expire.

The employer must do the following to complete Section 3 (the same person must both review the documents and fill out and sign Section 3):

1. The employee presents a document that reflects that the employee is authorized to work in the U.S. (see List A or C).

2. Review the document and record the following information under Section 3:
   a) new name (if applicable)
   b) date of rehire (if applicable)
   c) document title
   d) document number
   e) expiration date (if any)

3. Sign and date Section 3.

4. Additional Tips to Complete Section 3:
   a) Document Title must be spelled out.
b) The same document used to initially fill out the form does not need to be shown. The employee can select any List A or C document.

c) Complete Section 3 in its entirety.

d) Only fill out Section 3 **ONCE.** Use a new I-9 Form for future updates.

e) If authorization expires again, fill out Section 3 of a new I-9 Form and staple to old form.
The Immigration Reform and Control Act (IRCA) Prohibits Employment Discrimination

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.

Employers can demonstrate compliance with the law by following the verification (I-9 Form) requirements and treating all new hires the same. This includes the following steps:

- Establish a policy of hiring only individuals who are authorized to work. A U.S. citizens only" policy in hiring is illegal. An employer may require U.S. citizenship for a particular job only if it is required by federal, state, or local law, or by government contract.

- Complete the I-9 Form for all new hires. This form gives employers a way to establish that the individuals they hire are authorized to work in the United States.

- Permit employees to present any document or combination of documents acceptable by law. Employers cannot prefer one document over others for purposes of completing the I-9 Form. Authorized aliens do not carry the same documents. For example, not all aliens who are authorized to work are issued "green cards." As long as the documents are allowed by law and appear to be genuine on their face and to relate to the person, they should be accepted. Not to do so is illegal. Acceptable documents are listed on the reverse side.

IRCA established the Office of Special Counsel for Immigration-Related Unfair Employment Practices to enforce the IRCA antidiscrimination provision. Discrimination charges are filed with this Office. Changes or written inquiries should be sent to: Civil Rights Division, The Office of Special Counsel for Immigration-Related Unfair Employment Practices, 930 Pennsylvania Ave., N.W., Washington, DC 20530. For more information, call the OSC Employer Hotline at 1-800-255-8155 (toll free); 9-800-362-2735 (TDD device for the hearing impaired). For questions about Title VII, please contact the Equal Employment Opportunity Commission at 1-800-669-4000 (toll free) or 202-273-7518 (TDD).
“Look at the Facts. Not at the Faces”
10 Steps To Take To Avoid Immigration-Related Employment Discrimination

1. Treat all people the same when announcing a job, taking applications, interviewing, offering a job, verifying eligibility to work, hiring, and firing.

2. Accept the document(s) the employee presents. As long as the documents prove identity and work authorization and are included in the list on the back of the I-9 form, they are acceptable.

3. Accept documents that appear to be genuine. Establishing the authenticity of a document is not your responsibility.

4. Avoid "citizen only" or "permanent resident only" hiring policies. In most cases, it is illegal to require job applicants to have a particular immigration status.

5. Give out the same job information over the telephone to all callers, and use the same application form for all applicants.

6. Base all decisions about firing on job performance and/or behavior, not on the appearance, accent, name, or citizenship status of your employees.

7. Complete the I-9 form and keep it on file for at least 3 years from the date of employment or for 1 year after the employee leaves the job, whichever is later. You must also make the form available to government inspectors upon request.


9. Remember that many work authorization documents must be renewed on or before their expiration date, and the I-9 form must be updated. This process is called reverification. At this time, you must accept any valid documents your employee chooses to present, whether or not they are the same documents provided initially. (Note: You do not need to see an identity document when the I-9 form is updated.)

10. Be aware that U.S. citizenship, or nationality, belongs not only to persons born in the United States but also to all individuals born to a U.S. citizen, and those born in Puerto Rico, Guam, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, American Samoa, and Swains Island. Citizenship is granted to legal immigrants after they complete the naturalization process.

For more information, call the OSC Employer Hotline
1-800-255-8155
www.usdoj.gov/crt/osc
Form W-9 Request for Taxpayer Identification Number and Certification

General Instructions

Purpose of Form
A person who is required to file an information return with the IRS must obtain your correct taxpayer identification number (TIN) to report, for example, income paid to you, real estate transactions, mortgage interest you paid, acquisition or abandonment of secured property, cancellation of debt, contributions to an individual retirement arrangement (IRA), and generally, payments other than interest and dividends, you are not required to sign the Certification, but you must provide your correct TIN. See the instructions on page 4.

1. Certify that the TIN you are giving is correct (or you are waiting for a number to be issued),
2. Certify that you are not subject to backup withholding, or
3. Claim exemption from backup withholding if you are a U.S. exempt payee. If applicable, you are also certifying that as a U.S. person, your allocable share of any partnership income from a U.S. trade or business is not subject to the withholding tax on foreign partners' share of effectively connected income.

Special rules for partnerships. Partnerships that conduct a trade or business in the United States are generally required to pay a withholding tax on any foreign partners' share of income from such business. Further, in certain cases where a Form W-9 has not been received, a partnership is required to presume that a partner is a foreign person, and pay the withholding tax. Therefore, if you are a U.S. person that is a partner in a partnership conducting a trade or business in the United States, provide Form W-9 to the partnership to establish your U.S. status and avoid withholding on your share of partnership income.

The person who gives Form W-9 to the partnership for purposes of establishing its U.S. status and avoiding withholding on its allocable share of net income from the partnership conducting a trade or business in the United States is in the following cases:

- The U.S. owner of a disregarded entity and not the entity,
Solicitud y Certificación del Número de Identificación del Contribuyente

Nombre (tal como aparece en su declaración de impuestos sobre el ingreso)

Dirección (número, calle y apartamento u oficina)

Cuidad, estado y código postal (ZIP)

Firma de la persona de los EE.UU.

Fecha

Instrucciones generales

Las secciones a las cuales se les hace referencia son del Código Federal de Impuestos Internos, a menos que se indique de otra manera.

Propósito del formulario

Una persona a quien se le requiera presentar una declaración ante el IRS para facilitar información debe obtener el número de identificación del contribuyente (TIN) correcto de usted para declarar, por ejemplo, ingresos que se le han pagado, transacciones de bienes inmuebles, intereses hipotecarios que usted pago, adquisición o abandono de bienes asegurados, cancelación de deudas o contribuciones que usted hizo a arreglos FRA.

Use el Formulario W-9(SP) (o el Formulario W-9, en inglés) sólo si es una persona de los EE.UU., incluyendo a un extranjero residente, para proveerle su número de identificación del contribuyente (TIN) correcto a la persona que se lo solicita (el solicitante) y, cuando se aplique, para:

1. Certificar que el TIN que está facilitando es correcto (o está esperando para que se le asigne)
2. Certificar que el TIN que se facilita no está sujeto a la retención adicional de impuestos
3. Reclamar una exención de la retención adicional si es un beneficiario de pago exento de los EE.UU.

Si le corresponde, también certifica que, como persona de los EE.UU., su participación asignable de todo ingreso de una sociedad colectiva provee de un comercio o negocio estadounidense no está sujeta al impuesto retenido sobre la participación de socios extranjeros en los ingresos relacionados efectivamente.

Notas:

- Si un solicitante le da un formulario que no es el Formulario W-9(SP) (o el Formulario W-9, en inglés), para solicitar su número de identificación del contribuyente, debe usar el formulario del solicitante si es considerablemente similar a este Formulario W-9(SP) (o el Formulario W-9, en inglés).

- Una sociedad colectiva, sociedad anónima, compañía o asociación creada o organizada en los EE.UU., está sujeta a la retención adicional de impuestos.

- Un contribuyente debe llenar el formulario para facilitar la información.

- Si se le requiere que la sociedad colectiva que dé por supuesto que un socio no es persona extranjera y que debe pagar el impuesto de retención.

- Sin embargo, para un extranjero residente, empresario por cuenta propia o entidad no considerada separada, vea las instrucciones para la Parte I en la página 3. Para otras entidades, es su número de identificación patronal (EIN). Si no tiene un número, vea Cómo obtener un TIN, en la página 5.

- Nota: Si la cuenta está a nombre de más de una persona, vea la tabla en la página 4 para recibir asesoramiento sobre qué nombre debe escribir.

Parte I Número de identificación del contribuyente (TIN)

Anote su número de identificación del contribuyente en el encabezado. El número de identificación del contribuyente debe coincidir con el número provisto en la línea 1 para evitar la retención adicional del impuesto. Para los individuos, éste es su número de seguro social (SSN). Sin embargo, para un extranjero residente, empresario por cuenta propia o entidad no considerada separada, vea las instrucciones para la Parte I en la página 3. Para otras entidades, es su número de identificación patronal (EIN). Si no tiene un número, vea Cómo obtener un TIN, en la página 5.

Notas:

- Si un solicitante le da un formulario que no es el Formulario W-9(SP) (o el Formulario W-9, en inglés), para solicitar su número de identificación del contribuyente, debe usar el formulario del solicitante si es considerablemente similar a este Formulario W-9(SP) (o el Formulario W-9, en inglés).

- Una sociedad colectiva, sociedad anónima, compañía o asociación creada o organizada en los EE.UU., está sujeta a la retención adicional de impuestos.

- Un contribuyente debe llenar el formulario para facilitar la información.

- Si se le requiere que la sociedad colectiva que dé por supuesto que un socio no es persona extranjera y que debe pagar el impuesto de retención.

- Sin embargo, para un extranjero residente, empresario por cuenta propia o entidad no considerada separada, vea las instrucciones para la Parte I en la página 3. Para otras entidades, es su número de identificación patronal (EIN). Si no tiene un número, vea Cómo obtener un TIN, en la página 5.

- Nota: Si la cuenta está a nombre de más de una persona, vea la tabla en la página 4 para recibir asesoramiento sobre qué nombre debe escribir.

Parte II Certificación

Bajo pena de perjurio, yo declaro que:

1. El número que aparece en este formulario es mi número de identificación del contribuyente correcto (o estoy esperando que me asignen un número) y
2. No estoy sujeto a la retención adicional de impuestos porque: (a) Estoy exento de la retención adicional o (b) No he sido notificado por el Servicio de Impuestos Internos (IRS) de que estoy sujeto a la retención adicional de impuestos como resultado de no declarar todos los intereses y dividendos; o (c) El IRS me ha notificado que ya no estoy sujeto a la retención adicional y
3. Soy ciudadano o residente de los EE.UU. u otra persona de los Estados Unidos (que se define después).

Instrucciones para la certificación. Debe tachar la parte 2 anterior si el IRS le ha notificado que usted en este momento está sujeto a la retención adicional de impuestos porque no declaró todos los intereses y dividendos en su declaración de impuestos. Para las transacciones de bienes inmuebles, la parte 2 no corresponde. Para los intereses hipotecarios pagados, la adquisición o abandono de bienes asegurados, la cancelación de deudas, las contribuciones a un arreglo de jubilación individual (IRA) y, en general, los pagos que no sean intereses y dividendos, no se le requiere firmar la Certificación, pero tiene que proveer su número de identificación del contribuyente correcto. Vea las instrucciones en la página 4.

Firme Aquí

Firma de la persona de los EE.UU.

Fecha

Nota: Si un solicitante le da un formulario que no es el Formulario W-9(SP) (o el Formulario W-9, en inglés), para solicitar su número de identificación del contribuyente, debe usar el formulario del solicitante si es considerablemente similar a este Formulario W-9(SP) (o el Formulario W-9, en inglés).

Definición de persona de los EE.UU. Para propósitos tributarios, a usted se le considera una persona de los EE.UU. si es:

- Un individuo que es ciudadano o residente de los EE.UU.,
- Una sociedad colectiva, sociedad anónima, compañía o asociación creada u organizada en los EE.UU., o bajo las leyes de los EE.UU.,
- Un cajal hereditario (que no sea un cajal hereditario extranjero),
- Un fideicomiso doméstico (como se define en la sección 301.7701-7 de la Reglamentación).

Reglas especiales para las sociedades colectivas. A las sociedades colectivas que desempeñan actividades comerciales o de negocios en los EE.UU., por lo general se les requiere pagar un impuesto de retención sobre toda participación en los ingresos de socios extranjeros procedentes de tal negocio. Además, en ciertos casos, en los que un Formulario W-9(SP) (o Formulario W-9, en inglés) no haya sido recibido, se requiere que la sociedad colectiva que dé por supuesto que un socio es persona extranjera y que debe pagar el impuesto de retención. Por lo tanto, si usted es una persona de los EE.UU. que no es socio en una sociedad colectiva que desempeña actividades comerciales o de negocios en los EE.UU., provea el Formulario W-9(SP) (o un Formulario W-9, en inglés) a la sociedad colectiva para establecer su condición de estadounidense y evitar la retención sobre su participación asignables de esos ingresos.
IMMIGRATION COMPLIANCE POLICY
AND ACKNOWLEDGEMENT FORM

The Company is committed to employing only those individuals who are authorized to work in the United States. The Company does not unlawfully discriminate on the basis of citizenship or national origin. In compliance with the Immigration Reform and Control Act of 1986, each new employee, as a condition of employment, must complete the Employment Eligibility Verification Form I-9 and present documentation establishing identity and employment eligibility. The Federal Government currently provides approximately 24 documents from which employees may choose to show the Company at the time Company completes Section 2 of the I-9 Form.

1. I understand that the Company will only hire individuals who are authorized to work in the United States.

2. I understand that the Company does not unlawfully discriminate on the basis of citizenship or national origin.

3. I understand that under federal law I am required to provide the Company with valid and accurate documents to establish my identity and my authorization to work in the United States and I am required to complete Section 1 of the Form I-9 completely and truthfully.

4. By my signature below, I affirm that I am legally eligible for employment in the United States.

5. I hereby state that all information provided to the Company on the Form I-9 is true and accurate. I am aware that false statements, misrepresentations of fact, or material omissions may result in the termination of my employment.

6. I understand that I am an at-will employee, and that the Company and I both have the right to terminate my employment at any time, for any reason or no reason, with or without cause, and with or without notice. I understand that violation of the Company’s policies and practices, including the Immigration Law Compliance Policy, may result in discipline, up to and including termination.

7. I understand and agree to comply with all of the Company’s policies, practices, and procedures.

Employee Name (Print):

Employee Signature                                      Date

Julie A. Pace
(602) 798-5475
pacej@ballardspahr.com
POLÍTICA DE CUMPLIMIENTO CON INMIGRACIÓN
Y FORMA DE RECONOCIMIENTO

La Compañía está comprometida a emplear solamente aquellas personas quienes tengan autorización de trabajar en los Estados Unidos. La Compañía no discrimina ilegalmente a base de ciudadanía ni origen nacional. En conformidad con el Acta de Reforma y Control de Inmigración de 1986, cada empleado nuevo, como condición de empleo, tendrá que llenar la Forma de Verificación de Elegibilidad de Empleo Forma I-9 y presentar documentos estableciendo su identidad y elegibilidad de empleo. Actualmente el Gobierno Federal está aceptando aproximadamente 24 documentos de los cuales el empleado podrá escoger para presentar a la Compañía al estarse completando la Sección 2 de la Forma I-9.

1. Entiendo que la Compañía contratará únicamente aquellas personas quienes estén autorizadas para trabajar en los Estados Unidos.

2. Entiendo que la Compañía no discrimina ilegalmente a base de ciudadanía ni origen nacional.

3. Entiendo que bajo ley federal estoy obligado a proporcionar a la Compañía documentos válidos y correctos para establecer mi identidad y mi autorización para trabajar en los Estados Unidos y estoy requerido a llenar la Sección 1 de la Forma I-9 completamente y en forma veraz.

4. Por medio de mi firma al calce, declaro que puedo trabajar legalmente en los Estados Unidos.

5. Por medio de la presente declaro que todos los datos proporcionados a la Compañía en la Forma I-9 son verdaderos y precisos. Entiendo que declaraciones falsas, falsedades de hechos, u omisiones de hechos pertinentes pudieran ser motivo para la terminación de mi empleo.

6. Entiendo que soy un empleado a voluntad propia, y que tanto yo como la Compañía ambos tenemos el derecho de terminar mi empleo en cualquier momento, con o sin motivo, y con o sin aviso. Entiendo que violaciones de las políticas y prácticas de la Compañía, inclusive la Política de Cumplimiento con las Leyes de Inmigración, pudieran resultar en disciplina, hasta e inclusive terminación.

7. Entiendo y acepto cumplir con todas las políticas, prácticas y procedimientos de la Compañía.

Nombre de Empleado (letras de impresa):

Firma de Empleado Fecha

Esta traducción se incluye únicamente para su conveniencia. El texto del original en inglés controlará en todos aspectos los derechos y obligaciones de un empleado.
This memo addresses the use of documents containing expiration dates when completing an I-9 Employment Eligibility Verification Form. The memo discusses when documents with expiration dates must be reverified and the I-9 Form updated. In addition, this memo addresses the circumstances under which a receipt for an application for a document verifying employment eligibility may be used when completing the I-9 Form.

I. DOCUMENTS WITH EXPIRATION DATES.

Several documents acceptable for use on the I-9 contain expiration dates, including passports, driver’s licenses, permanent resident cards (I-551), and employment authorization documents (EADs), such as the Form I-766. Some of the documents must be reverified upon expiration, while others do not. Whether or not the document must be reverified depends largely on whether the employee’s eligibility to work in the United States expires when the document expires.

It is slightly misleading to speak of “reverifying documents,” because it is technically an employee’s eligibility for employment in the U.S. that the employer is verifying, not the document establishing the employee’s work eligibility. An employer may not require an employee to present a renewed or unexpired version of the document that has expired. Upon expiration of a document, the employee may present any document on List A or List C of the I-9 Form that verifies employment eligibility. The expiration of a document merely triggers the duty to reverify employment eligibility. With that caveat, this memo will continue to speak in terms of reverifying documents.

A. United States Passports

The regulations regarding employment eligibility verification allow an employer to accept an unexpired U.S. passport or passport card as proof of eligibility for employment in the United States. Citizens and nationals of the United States are automatically eligible for employment in the United States. The expiration of a United States passport will not affect an employee’s eligibility for employment in the United States, because the employee is a citizen. Therefore, when a United States passport that was used on an I-9 expires, it does not need to be reverified and the I-9 does not need to be updated.
B. **List B Documents.**

Documents on List B of the I-9 Form are used to establish an employee’s identity. They are not used to verify employment eligibility. Documents on List B must be unexpired when the I-9 is completed, but do not have to be reverified after they expire. Because eligibility to work in the United States may change, documents used to establish work eligibility may have to be reverified. However, an individual’s identity should not change, so logically documents used solely to establish identity do not have to be reverified.

C. **Form I-551 “Green Card”.**

An employer is not required to reverify employment eligibility when the Permanent Resident Card or Alien Registration Receipt Card, Form I-551, expires. Forms I-551 are issued only to lawful permanent residents of the United States. The expiration of the Form I-551 does not affect a lawful permanent resident’s authorization to work in the United States. However, expired Forms I-551 must be renewed so that cardholders will have evidence of their status when applying for new employment, traveling outside the United States, and certain other benefits. Note, however, that temporary evidence of permanent resident status, such as a temporary I-551 stamp on a foreign passport, must be reverified upon expiration.

D. **Documents That Trigger the Employer’s Duty to Reverify Employment Eligibility When the Document Expires.**

While all documents presented for I-9 purposes must be unexpired at the time the I-9 form is completed, only some documents trigger the employer’s duty to reverify the employee’s employment eligibility upon expiration.

Documents triggering the requirement to reverify employment eligibility upon their expiration include:

- A foreign passport with an I-551 stamp;
- An employment authorization document, such as Form I-766 or Form I-94.
- Any other employment authorization document issued by the Department of Homeland Security not listed under List A.

The U.S. Citizenship and Immigration Services Division of the Department of Homeland Security (USCIS) recommends employers remind employees of the date of expiration of documents on the I-9 at least 90 days in advance of the expiration, because it may take CIS 90 days to process an application for an employment authorization card. The employer must reverify on the I-9 Form that the individual is authorized to work in the U.S. not later than the date the work authorization expires. Receipt for an application for a document to replace a document that has expired does not verify authorization to work in the United States.
II. RECEIPT FOR APPLICATION FOR A DOCUMENT VERIFYING EMPLOYMENT ELIGIBILITY.

The receipt for application for a replacement document is acceptable as proof of authority to work in the U.S. only if the original document was lost, stolen or damaged. The receipt should indicate that it is for a replacement card, not a newly issued card. The employee must present the replacement document to the employer within 90 days of being hired or before the employee’s current authorization to work in the United States expires (for work verification documents that have to be reverified when they expire). Receipt for an application to replace an expired document proving work eligibility is not acceptable. Thus, a receipt acknowledging application for an Employment Authorization Document (Form I-766) is not acceptable to reverify eligibility for employment after the Employment Authorization Document expires. The new employment authorization document must be obtained prior to the expiration of the current document. The regulations make clear that when revalidating eligibility for employment in the United States, the replacement document must be presented by the date the employment authorization expires.
MEMORANDUM

From: Julie A. Pace
Ballard Spahr Andrews & Ingersoll, LLP
(602) 798-5475

Re: Creation and Maintenance of Personnel Files Including Confidential Information

I. PERSONNEL FILES.

Employees are not entitled to access or to review their own personnel files in Arizona. The files are considered the property of the employer and access is limited according to the employer’s own policies. As a result, employers must ensure that any policy regarding personnel files is consistently enforced.

The files should be kept in a confidential and secure manner, such as a locked filing cabinet with limited access to named individuals. If the files are left unlocked and unsecured, the employer risks an invasion of privacy claim should an unauthorized individual gain access to personal information of the employee. Thus, security is a major factor to consider when determining how to create and maintain employees’ personnel files. Recommendations as to security will be discussed at the conclusion of this memorandum.

It is imperative that the personnel file not contain any inappropriate references to employees’ protected classification, such as: age, race, sex, religion, color, national origin, or disability. If a manager has included such references or used inappropriate terms in any personnel documents, such references should be removed from the documents and the manager counseled or disciplined for the use of the terms.

II. DOCUMENTS TO INCLUDE IN EMPLOYEE’S GENERAL PERSONNEL FILE.

At a minimum, the general personnel file of an employee should include all of the documents that the employee submitted as part of the process of being hired. The following are examples of these documents.

1. Application forms
2. Resumes
3. Letters of reference and similar documents
4. Job description for the employee’s position
5. Offer of employment or employment contract
In addition, documents that reflect the initial hiring process of the employee should be included in the personnel file. The following are examples of these documents.

1. Tax withholding and benefit election forms
2. Acknowledgement of receipt of Company documents (handbooks, sexual harassment policy, etc.)
3. Documents reflecting the orientation and training the employee received
4. Any employment agreements between the employee and Company (i.e. non-compete agreements)
5. Record of all Company property provided to employee

The general personnel file should also contain documents that trace and reflect the employee’s job assignments with the Company, compensation history and any changes to benefit elections. The following are examples of these documents:

1. Personnel action records reflecting transfers or promotions
2. Personnel action records reflecting pay raises
3. Changes in benefit election forms

The last items to be included in the general personnel file relate to employee performance. These documents will generally be generated on a regular basis or in response to a problem with the employee. The following are examples of these documents.

1. Periodic employee performance evaluations
2. Employee counseling and disciplinary notices
3. Examples of work product or other documents that support the basis for counseling or disciplinary notices
4. All performance appraisals, including any given at end of probationary period, and all later periodic evaluations

III. DOCUMENTS TO EXCLUDE FROM EMPLOYEE’S GENERAL PERSONNEL FILE.

The following categories of information should not be maintained in the employee’s general personnel file for the reasons discussed under each specific heading.

A. I-9 Forms.

These forms should not be maintained in the employee’s personnel file. The forms should be kept in a separate file or notebook that is exclusively maintained for I-9 Forms. As a general recommendation, an employer should not make copies of the supporting documentation.
provided by the employee when filling out the I-9. This information is not required by the INS and could be used adversely by the INS should they conduct an investigation of the Company.

**ALWAYS KEEP CURRENT EMPLOYEES’ I-9 FORMS.**

For former employees, I-9 forms must be kept for one (1) year if the employee worked for the Company over one (1) year, or kept for three (3) years if the employee worked with Company for less than one (1) year. An easy way to make sure the Company is in compliance with the retention of I-9 forms is to abide by the following rules:

1. Employee works less than one year = keep I-9 for three years <1 year = 3 years
2. Employee works less than two years = keep I-9 for two years <2 years = 2 years
3. Employee works two years or more = keep I-9 for one year 2 + years = 1 year

**B. Discrimination and Harassment Investigations.**

Any documentation gathered during an investigation into a discrimination or harassment complaint should be maintained in a file separate from employees’ personnel files. If the materials are in the general personnel file, the employee may later argue that a supervisor who checked in the personnel file became aware of the employee’s charge of discrimination and, based on that knowledge of the protected activity, denied a future promotion or pay. The documentation should be kept together in one separate confidential and secure area. The following are examples of these documents.

1. Interviews with employees
2. Documentation gathered from employees’ personnel files during investigation
3. Outcome of the investigation
4. Any evidence gathered during the investigation
5. Any charges filed by the employee with federal or state civil rights agencies
6. Any legal action filed by the employee

If the investigation results in disciplinary action toward any employee, the document related to the discipline may be included in an employee’s general personnel file.
C. **Medical Information.**

Special guidelines apply to medical information that has been gathered about an employee. The Americans with Disabilities Act ("ADA") imposes on employers very strict regulations concerning the confidentiality of medical information received through post-offer medical examinations and inquiries. Similarly, the Family Medical Leave Act ("FMLA") also adopts regulations for any medical information gathered under the Act.

An employer must keep medical records separate from non-medical records, on a separate form and in a separate confidential area. A limited number of persons should have access to the area, preferably just one. Included under the umbrella of medical information is any of the following type of documents.

1. FMLA requests, employer responses, health care provider certifications and any other documents containing medical information
2. Post-offer medical examinations or inquiries
3. Information on ADA disability and reasonable accommodation
4. Workers’ Compensation information that relates to medical diagnosis or treatment
5. Health insurance information containing medical information
6. Drug test results
7. Doctor’s notes
8. Return to work forms if it contains medical diagnosis or treatment
9. Any other medical information gathered from employees (i.e. emergency medical treatment forms listing medical conditions)

In order to facilitate gathering information regarding charges of disparate treatment or impact, a separate file should be maintained for ADA information, FMLA information, health insurance information, and other medical related information. If the files are maintained in this manner, it will be easier to research how similarly situated employees have been treated since all the files are kept together.

Disclosure of this type of information is allowed in the following situations; other types of disclosure risk legal liability.

1. Supervisors and managers may be told of necessary restrictions regarding an employee’s duties and about necessary accommodations;
2. First Aid and safety workers may be told about an employee’s disability that may require emergency treatment or about specific procedures that are needed if the workplace needs to be evacuated; or
3. Government officials investigating compliance with federal law or at hearings or other proceedings may learn medical information.

D. Manager or Supervisor’s File.

An individual supervisor may maintain a file related to an employee’s job performance and conduct for matters that are not maintained in the official personnel file. These documents will usually reflect the day-to-day interactions between the employee and others in the workplace, conduct the employee has been counseled or disciplined for, and the Manager’s observations. These documents may then be used to support employee counseling, evaluation, discipline or termination.

These documents can be transferred to the employee’s personnel file when appropriate, either at termination or when a problem arises. Or copies may be maintained in the Manager’s file and the originals sent to the personnel file upon creation of the document. These files are the Company’s property and not subject to inspection by the employee. The Manager should maintain files on all employees supervised in order to avoid a charge of disparate treatment or retaliation.

IV. SECURITY MEASURES FOR EMPLOYEE FILES.

As discussed above, there are certain types of employee information that must be kept confidential and maintained separately from other employee files. It is recommended that each set of the confidential files discussed above be kept in individual locked cabinets. Access to these cabinets should be limited to a named individual, for instance, the Human Resources Manager, or specified individuals, i.e., human resources personnel.

As an alternative, the information may be stored in a secure location where access is limited to only those employees with authorization to access the files. For instance, if all of the files are kept in a locked room with access restricted to the Human Resources Manager, the individual employee’s files could be kept in separate files but maintained in the same location (i.e. file cabinet). This would fulfill the intent of the law that confidential information not be disclosed to unauthorized persons.

However, it is still beneficial for the employer to maintain files of like character, such as discrimination investigations, together instead of filing them according to the employee. Maintaining separate files for each confidential topic facilitates gathering information regarding charges of disparate treatment or impact.

Additionally, care should be taken to ensure that any documentation that contains confidential information (discussed above) or personal information (such as social security number or home address) of the employee not be thrown away, but instead should be shredded for security reasons. This should prevent invasion of privacy claims based on the negligent disposal of confidential or personal information and should prevent the selling of such information.
V. MAINTAINING PERSONNEL FILES.

Care should also be taken to periodically review the employee’s personnel file, for instance, when the employee’s performance evaluation is being conducted. The review should encompass ensuring that all documents in the file are accurate, up-to-date, and complete. Additionally, if the Company’s policies call for removing certain documents, such as disciplinary records, after a specified time frame that can be accomplished during the review of the file. Issues to consider during the review include the following.

1. Does the file reflect all of the employee’s raises, promotions and commendations?
2. Does the file contain every written evaluation of the employee?
3. Does the file show every warning or other disciplinary action against the employee?
4. Had the file been purged of documents in accordance with the Company’s established policy?
5. Is the most current acknowledgment of any handbook or policy in the file?
6. Does the file contain current versions of every contract or agreement with the employee?

Regulations issued by the Equal Employment Opportunity Commission require that personnel files be maintained for one (1) year after the termination of the employee. But if an employee has filed a charge of discrimination, the personnel file must be maintained until the end of any resulting litigation. Payroll records and FMLA information must be maintained for a minimum of three (3) years. Information relating to Social Security mismatch requests should be maintained separately for approximately seven (7) years.

The most conservative approach is to keep all employee personnel files for seven years, which would be the outside limit of most statute of limitations for any claims that could be brought by an employee. At the point where personnel files are going to storage, after the employee’s termination, it is then allowable to collapse all of the individual files into one condensed file. However, it would be best if the consolidation still showed the separation of materials between the confidential files and the general files in the event the employee ever brings a claim against the Company.
ERROR! Electronic Employment Verification Systems: What Will Happen When Citizens Have to Ask the Government For Permission to Work?

Many on Capitol Hill are eyeing favorably bills that create a massive electronic employment database. While proponents of the Shuler-Tancredo "SAVE Act" (HR 4068) and the Johnson "New Employee Verification Act of 2008" (HR 5515) talk tough about cracking down on illegal immigrants, the truth is their bills' nationwide mandatory electronic employment verification system require all American workers, foreign- and native-born alike, to seek the government's permission to work. If the government database isn't accurate, Americans will be denied employment and paychecks, at least temporarily, while they attempt to resolve the problem with the government agencies.

The proposed bills build upon the E-Verify program, a small pilot program that taps Social Security Administration (SSA) and Department of Homeland Security (DHS) databases to make determinations about employment authorization. Here is what we know about the databases and what we can expect if these bills are passed:

Errors in the database that E-Verify checks to determine work authorization status impact millions.

4.1%: error rate in the SSA database

17.8 million: number of discrepancies in the SSA database

12.7 million: number of database discrepancies pertaining to native-born U.S. citizens

1 in 25: number of new hires that would receive a tentative nonconfirmation based on error rates

55 million: approximate number of new hires per year in the U.S.

11,000: number of workers per day who would be flagged as ineligible for employment if E-Verify were mandatory for all employers

25: workers per work day per congressional district who would be flagged as ineligible for employment if the Shuler or Johnson bill passed, making E-Verify mandatory for all employers
If the Shuler or Johnson bills are passed, E-Verify would have to be expanded exponentially in a short time period.

55,000: the number of employers currently enrolled in E-Verify

7 million: the approximate number of employers in the U.S.

13,000%: approximate increase from number of current users

6,500: approximate number of employers per day (including weekends and holidays) that would have to enroll in E-Verify to meet the Johnson bill requirement of enrollment of all employers within 3 years. 4,800 per day to meet the Shuler bill 4-year requirements.

50-60 million: number of queries per year E-Verify would have to respond to if the Johnson or Shuler bill were enacted

3.6 million: number of queries E-Verify received in 2007

Impact on the Social Security Administration if E-Verify were made mandatory for all employers

751,676: number of cases waiting for decisions on disability claims today

499: average number of days a person waits for a disability claim decision today

50%: percentage of calls to SSA field offices that receive a busy signal today

78 million: number of baby boomers soon to be eligible for Social Security retirement benefits

1 million: increase in the number of claims submitted to SSA per year for the next ten years due to the retirement of baby boomers

3.6 million: number of extra visits or calls to SSA field offices if the “SAVE Act” or the “New Employee Verification Act” were to make E-Verify mandatory

2,000-3,000: number of work years SSA would need to address increases in demand
Employers in the voluntary pilot program misuse E-Verify. A 2007 evaluation of E-Verify commissioned by DHS found that:

47%: employers who improperly put workers through E-Verify before the employees’ first day of work.

22%: employers who restricted work assignments based on tentative nonconfirmations

16%: employers who delayed job training based on tentative non-confirmations

Sources:


HELPFUL STEPS TO COMPLY WITH REQUIREMENTS OF E-VERIFY PROGRAM

By Julie A. Pace
602-798-5475
pacej@ballardspahr.com

GENERAL TIPS

- Make sure to post the required E-Verify posters.
- Apply the process uniformly to all newly hired employees.
- Do not use on existing employees.
- Do not use prior to hiring individual or as a screening tool.
- Do not terminate employment, refuse to provide training, refuse to provide benefits, or otherwise take adverse action based on TENTATIVE non-confirmation.
- Make sure the employee signs the tentative non-confirmation notice and make sure to give the employee copies of tentative non-confirmation documents.
- The employer must allow the employee to keep working during the verification process until a FINAL non-confirmation, unless the employment is terminated for a reason other than the verification process.
- E-Verify Customer Service: 888-464-4218
- E-Verify Technical Support: 800-741-5023

TIMING TO COMPLETE E-VERIFY

1. Complete Form I-9 verification process **after** the date of hire but within **3 business days** after the employee’s first day of employment. Regulations technically require the employee to complete Section 1 on the first day of employment but the employer has three (3) business days to complete the form.

After completing the Form I-9 and within **3 business days** after employee’s first day of employment, enter the information from Section 1 and Section 2 of the Form I-9 into E-Verify by selecting “Initial Verification” from the Case Administration page.

(a) If employee chooses to provide List B document, it must contain a photograph.

(b) Under I-9 rules, there is no requirement that the Company retain copies of the documents presented to complete the I-9 form.

THIS DOCUMENT IS MEANT TO ASSIST IN A GENERAL UNDERSTANDING OF THE LAW. IT IS NOT TO BE REGARDED AS LEGAL ADVICE.
(c) There is an issue that arises regarding photocopies and E-Verify. The E-Verify MOU states that employers (except employers using an E-Verify Designated Agent) are required to keep photocopies of only Permanent Resident Card or Form I-766 Employment Authorization Document. Federal discrimination laws require employers to treat all new hires in the same manner and may not discriminate or treat new hires differently in the I-9 process based on citizenship.

PHOTO TOOL

2. If the employee provided a Permanent Resident Card or Employment Authorization Document, you may be prompted to verify the picture on the card against the picture in the DHS database using the Photo Tool.

   (a) The pictures should be exactly the same. If the picture does not match (allowing for variances in color and gradation given the age of the photo, color settings on computer monitor, etc), select “no” the photos do not match. You will receive a “DHS Tentative Non-confirmation” -- go to Step 8.

   (b) If you cannot determine whether the picture is the same, enter “cannot be determined,” when asked if the photo matches. You will receive a “DHS Verification in Process.” You must inform the employee by printing the Notification to Employee: Verification In Process and giving it to the employee. You must send a copy of the employee’s photo to DHS electronically using the E-Verify system or by mail to the address in Step 8(e) and go to Step 6. You may want to retain a copy of the photo until the case has been completely resolved.

COMPUTER RESPONSES AND POTENTIAL STEPS

3. E-Verify will provide one of the following responses:

   (a) “Employment Authorized” – go to Step 4.

   (b) “SSA Tentative Non-Confirmation” – go to Step 5.

   (c) “DHS Verification in Process” – go to Step 6.

4. “EMPLOYMENT AUTHORIZED”

If E-Verify provides “Employment Authorized” response, check the first and last names on the confirmation to ensure that they match employee’s name.

   (a) If the information is incorrect, request additional verification from the Case Details page. Check the E-Verify system periodically for a response to your request for additional verification. E-verify should provide a response within three business days.

   (i) If the response is “Employment Authorized” go to Step 4(b).
(ii) If the response is “DHS Tentative Non-Confirmation” go to Step 7.

(iii) If the response is “DHS Employment Unauthorized” this acts as a FINAL NONCONFIRMATION. Go to Step 10.

(b) If the name on the confirmation matches the employee’s name, “resolve the case” in E-Verify from case details screen. Then print the Case Details page (the confirmation), staple to the Form I-9, and file in I-9 file. END PROCESS.

5. “SSA TENTATIVE NON-CONFIRMATION”

If E-Verify provides “SSA Tentative Non-Confirmation,” then print two copies of the “Notice to Employee of Tentative Non-Confirmation” and meet with the employee to provide the notice to the employee and review it with them.¹

(a) Employer and employee must both sign both copies of the “Notice to Employee of Tentative Non-Confirmation.”

(b) Keep one copy of the signed “Notice to Employee of Tentative Non-Confirmation” with employee’s I-9 and give one copy to employee. If the employee is no longer employed at the Company or does not show up to meet with the employer and therefore cannot sign the Notice to Employee, indicate this on the notice, sign the employer representative section, and staple to the employee’s I-9. Failure to provide an employee with the signed “Notice to Employee of Tentative Non-Confirmation” and right to contest can lead to discrimination charges. Therefore, it is important to have the employee sign the Notice to Employee of Tentative Non-Confirmation or to document the reasons you are unable to do so.

(c) Employee must choose to contest or not contest tentative non-confirmation and sign the Notice.

(i) If employee contests, go to Step 5(d).

(ii) If employee does not contest, this acts as FINAL NONCONFIRMATION. Go to Step 10.

(d) Select “Initiate SSA Referral” from Case Details page. Print two copies of the referral letter, sign and date both copies, and have the employee

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¹ Anywhere that these instructions require the employer to print two copies of a document and have the employer and employee sign both copies, the employer alternatively could print one copy, have the employee and employer both sign the printed copy, photocopy the signed document, staple the original to the I-9, and then give a photocopy of the signed document to the employee. The key is to ensure that the employee receives a signed copy of all the documents and a signed copy is attached to the employee’s I-9. If the meeting with the employee is going to occur somewhere that there is no copier available, it is better practice to print two copies so that the employee and employer can both have a signed copy.

THIS DOCUMENT IS MEANT TO ASSIST IN A GENERAL UNDERSTANDING OF THE LAW. IT IS NOT TO BE REGARDED AS LEGAL ADVICE.

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DMWEST #6547368 v10
sign both copies. Provide a copy of the referral letter to the employee and keep a copy with the employee’s 1-9.

(e) **10 business days** after initiating the referral (or 24 hours after employee returns referral letter stamped by the SSA office or tells you they have resolved the issue with the SSA, whichever is earlier), resubmit the verification through E-Verify. Locate the employee’s record in E-Verify, update information as necessary, and click “Initiate SSA Resubmittal.”

   (i) If E-Verify returns “Employment Authorized” go to Step 4(b).

   (ii) If E-Verify returns “SSA FINAL NONCONFIRMATION” go to Step 10.

   (iii) If E-Verify returns “DHS Verification in Process,” go to Step 6.

   (iv) If E-Verify returns “DHS Tentative Non-Confirmation — (Photo Tool Non-Match),” go to Step 8.

   (v) If E-Verify returns “Review and Update Employee Data” then review the information originally entered into E-Verify. To correct information, select “Initiate SSA Resubmittal” from the Case Details page, then “Modify SSA Information.” Correct information and “Submit SSA Resubmittal.”

6. **“DHS VERIFICATION IN PROCESS”**

   If E-Verify provides “DHS Verification in Process,” check the E-Verify system periodically for a response from DHS. DHS should provide a response within 3 business days, but it may take longer.

   (a) If the response is “Employment Authorized” go to Step 4(b).

   (b) If the response is “DHS Tentative Non-Confirmation” go to Step 7.

   (c) If the response is “DHS Tentative Non-Confirmation — (Photo Tool Non-Match),” go to Step 8.

7. **“DHS TENTATIVE NON-CONFIRMATION”**

   If E-Verify provides “DHS Tentative Non-Confirmation,” then print two copies of the “Notice to Employee of Tentative Non-Confirmation” and meet with the employee to provide the notice to the employee.

   (a) Employer and employee **must both sign both copies** of the “Notice to Employee of Tentative Non-Confirmation.”

   (b) **Keep one copy of the signed “Notice to Employee of Tentative Non-Confirmation” with employee’s 1-9 and give one copy to employee.** If the employee is no longer employed at the Company or does not show up
to meet with the employer and therefore cannot sign the Notice to Employee, indicate this on the notice, sign the employer representative section, and staple to the employee’s I-9. **Failure to provide an employee with the signed “Notice to Employee of Tentative Non-Confirmation” and right to contest can lead to discrimination charges.** Therefore, it is important to have the employee sign the Notice to Employee of Tentative Non-Confirmation or to document the reasons you are unable to do so if you are unable to do so.

(c) Employee must choose to contest or not contest tentative non-confirmation and sign the Notice.

(i) If employee contests, go to Step 7(d).

(ii) If employee does not contest, this acts as FINAL NONCONFIRMATION. Go to Step 10.

(d) Select “Initiate DHS Referral” from the Case Details screen, then print two copies of the DHS Referral Notice, sign both copies, have the employee sign both copies, and give one signed copy to the employee. Keep one signed copy of the referral notice with the employee’s I-9.

(e) **10 business days** after the referral notice (or 24 hours after employee contacts DHS, whichever is earlier), E-Verify should provide a response (it is possible that it could take more than 10 business days).

(i) If E-Verify returns “Employment Authorized” go to Step 4(b).

(ii) If the response is “DHS Employment Unauthorized” this is a FINAL NONCONFIRMATION. Go to Step 10.

(iii) If the response is “DHS No Show” this acts as a FINAL NONCONFIRMATION. Go to Step 10.

8. **“DHS TENTATIVE NON-CONFIRMATION (PHOTO TOOL NON-MATCH)”**

If E-Verify provides “DHS Tentative Non-Confirmation — (Photo Tool Non-Match),” then print two copies of the “Notice to Employee of Tentative Non-Confirmation” and meet with the employee to provide the notice to the employee.

(a) Employer and employee **must both sign both copies** of the “Notice to Employee of Tentative Non-Confirmation.”

(b) **Keep one copy of the signed “Notice to Employee of Tentative Non-Confirmation” with employee’s I-9 and give one copy to employee.** If the employee is no longer employed at the Company or does not show up to meet with the employer and therefore cannot sign the Notice to Employee, indicate this on the notice, sign the employer representative section, and staple to the employee’s I-9. **Failure to provide an employee with the signed “Notice to Employee of Tentative Non-**
Confirmation” and right to contest can lead to discrimination charges. Therefore, it is important to have the employee sign the Notice to Employee of Tentative Non-Confirmation or to document the reasons you are unable to do so if you are unable to do so.

(c) Employee must choose to contest or not contest tentative non-confirmation and sign the Notice.

(i) If employee contests, go to Step 8(d).

(ii) If employee does not contest, this acts as FINAL NONCONFIRMATION. Go to Step 10.

(d) Select “Initiate DHS Referral” from the Case Details screen, then print three copies of the DHS Referral Notice, sign all copies, have the employee sign all copies, and give a copy to the employee. Keep a copy of the referral notice with the employee’s I-9, and send one copy with the employee’s documentation to USCIS.

(e) The Company must send a photocopy of the documentation (either a Permanent Resident Card or Employment Authorization Card) that the employee provided to the Company for verification to the USCIS along with a copy of the signed DHS Referral Notice.

(i) The Company may send the documents electronically by choosing “Submit Electronic Copy” from the E-Verify system. The documents must be in .gif format.

(ii) The Company can mail a copy of the document along with a copy of the referral letter to:

U.S. CITIZENSHIP AND IMMIGRATION SERVICES
Verification Division
Attn: Status Verification Unit
490 L’Enfant Plaza East SW, Suite 8001
Washington, DC 20024

(f) After 10 business days (or 24 hours after employee contacts DHS, whichever is earlier), E-Verify should provide a response (it is possible that it could take more than 10 business days).

(i) If E-Verify returns “Employment Authorized” go to Step 4(b).

(ii) If the response is “DHS Employment Unauthorized” this is a FINAL NONCONFIRMATION. Go to Step 10.

(iii) If the response is “DHS No Show” this acts as a FINAL NONCONFIRMATION. Go to Step 10.
9. **“CASE IN CONTINUANCE”**

If E-Verify provides **“Case in Continuance”** check the E-Verify system periodically for a response from DHS.

(a) If the response is **“Employment Authorized”** go to Step (4)(b).

(b) If the response is **“DHS Employment Unauthorized”** this is a FINAL NONCONFIRMATION. Go to Step 10.

(c) If the response is **“DHS Tentative Nonconfirmation”** go to Step 7.

**FINAL NONCONFIRMATION AND CASE RESOLUTION.**

10. **FINAL NONCONFIRMATION.**

Once you receive a notice that acts as a **FINAL NONCONFIRMATION**, which includes **“SSA Final Non-Confirmation,”** **“DHS Employment Unauthorized,”** **“DHS No-Show,”** or employee does not contest a tentative non-confirmation:

(a) TERMINATE THE EMPLOYMENT OF THE INDIVIDUAL who was the subject of the final nonconfirmation. Complete a personnel status form identifying that the employee was unable to complete a valid I-9 and E-Verify process.

If the Company chooses not to terminate the employment, it must report in E-Verify during the case resolution, **“Employee Not Terminated”** and it will be presumed that the Company is knowingly employing an unauthorized worker if the individual turns out to be unauthorized.

(b) Resolve the Case on the Case Details Screen by selecting **“Resolve Case”** and selecting **“Resolved Unauthorized/Terminated.”**

(c) Print the Case Details Page and attach to the Form I-9. **END PROCESS.**

**OTHER CONSIDERATIONS.**

- This document is a summary for informational purposes and should not be relied upon as legal advice. Refer to the 79-Page E-Verify User Manual, the Memorandum of Understanding, and updates released by the USCIS at [www.uscis.gov](http://www.uscis.gov) for more information.

- The USCIS is making changes to the E-Verify system and the User Manual on a regular basis in response to feedback it receives from government studies and from registered users. Keep apprised of changes and complete refresher training when system changes are announced.

- Please note that there is a potential issue with copying only the permanent resident card or Form I-766 and not copying any other supporting documents used to complete the I-9. Federal law prohibits employers from selectively copying documents employees present to complete the form I-9. Federal law and regulations state that the employer is not...
required to keep copies, but to selectively copy only the documents of individuals of
certain national origins or citizenship status could violate the nondiscrimination
provisions of the Immigration and Naturalization Act. 8 C.F.R. § 274a.2(3). We are
awaiting an opinion from the Office of Special Counsel for Immigration Related Unfair
Employment Practices regarding photocopies. In the meantime, we have had E-Verify
representatives from the E-Verify Help Desk state that companies can make copies of the
permanent resident card or I-766 to use the Photo Tool and then shred the copies after
completing the Photo Tool step. If the employee is challenging a tentative
nonconfirmation based on a photo no-match, you may want to keep the copy of the photo
until the tentative nonconfirmation is resolved and then shred the copies.
HELPFUL STEPS TO COMPLY WITH REQUIREMENTS OF I-9 AND E-VERIFY PROGRAMS

**DAY 1**
Hire Employee

**DAY 1 to DAY 3**
Fully Complete Sections 1 & 2 of the Form I-9

- Employee unable to provide documents to complete I-9.
  - Terminate employment.
  - End Process

- Employee completes I-9.
  - BY DAY 3 Initiate E-Verify Query.
  - Resolve Case, Print Confirmation and Staple to I-9.
  - End Process

**DAY 3**
Initial E-Verify Query Completed

- "Employment Authorized"
  - End Process

- "SSA Tentative Non-Confirmation" or "DHS Tentative Non-Confirmation"
  - Print 2 copies of "Notice to Employee of Tentative Non-Confirmation" - Company and employee sign both. Give one to employee and staple one to I-9.

- "DHS Verification in Process" or "Case Continuance"
  - Continue checking E-Verify system for different response and steps to follow.

- "SSA Final Non-Confirmation", "DHS Employment Unauthorized", "DHS No-Show" = FINAL NON-CONFIRMATION
  - Terminate employment - Resolve case unauthorized, print case details and staple to I-9.
  - End Process

**DAY 10**
(Generally) E-Verify Process Complete

- End Process

*Refer to the E-Verify User Manual, MOU, and USCIS for actual requirements. Seek legal counsel as appropriate*
E-Verify
Employer DOs and DON’Ts

DO
• Use program to verify employment eligibility of new hires
• Use program for all new hires regardless of national origin or citizenship status
• Use program for new employees after they have completed the I-9 Form
• Provide employee with notice of Tentative Nonconfirmation (TNC) promptly
• Provide employee who chooses to contest a Tentative Nonconfirmation (TNC) promptly with a referral notice to SSA or DHS
• Allow an employee who is contesting a Tentative Nonconfirmation (TNC) to continue to work during that period
• Post required notices of the employer’s participation in E-Verify and the antidiscrimination notice issued by OSC
• Secure the privacy of employees’ personal information and the password used for access to the program

DON’T
• Use program to verify current employees
• Use program selectively based on a “suspicion” that new employee or current employee may not be authorized to work in the U.S., or based on national origin
• Use program to pre-screen employment applicants
• Influence or coerce an employee not to contest a Tentative Nonconfirmation (TNC)
• Terminate - or take other adverse action against - an employee who is contesting a Tentative Nonconfirmation (TNC) unless and until receiving a Final Nonconfirmation
• Ask an employee to obtain a printout or other written verification from SSA or DHS when referring that employee to either agency
• Ask an employee to provide additional documentation of his or her employment eligibility after obtaining a Tentative Nonconfirmation (TNC) for that employee
• Request specific documents in order to use E-Verify’s photo tool feature

For more information, call the OSC Employer Hotline 1-800-255-8155; TDD for the hearing impaired: 1-800-237-2515
www.usdoj.gov/crt/osc
YOUR RESPONSIBILITIES:
Be polite and calm.
Never lie or give false information to an immigration agent or police.
Do not carry false ID.
Carry the name and phone number of an immigration attorney who will take your calls.

IF YOU ARE ARRESTED:
Give the name or card of your attorney to the agents and ask to speak to your attorney.
If you do not have an attorney, ask for the list of free legal services for your area.
Do not sign anything without talking to an attorney.
Do not sign anything in a language you do not read.

It is illegal for agents or police to pick someone out for questioning because of his or her ethnicity or race.
You have a right to be treated with dignity and respect. If you are beaten, threatened, called racist names, or mistreated, you have a right to complain about that treatment.
Be aware that just because you know your rights and choose to exercise them does not mean that the agents or police will follow the law and respect your rights.

TO LEARN MORE ABOUT YOUR RIGHTS, CONTACT:
ACLU of Southern California
1616 Beverly Blvd.
Los Angeles, CA 90026
(213) 977-5218

www.aclu-sc.org

WHAT TO DO IF....
YOU ARE STOPPED BY IMMIGRATION AGENTS OR POLICE WHILE ON FOOT.

YOUR CAR IS PULLED OVER BY IMMIGRATION AGENTS OR POLICE.

IMMIGRATION AGENTS OR POLICE COME TO YOUR HOME.

MY RIGHTS CARD
I am giving you this card because I do not wish to speak to you or have any further contact with you. I choose to exercise my right to remain silent and to refuse to answer your questions.
If you arrest me, I will continue to exercise my right to remain silent and to refuse to answer your questions. I want to speak with a lawyer before answering your questions.
YOUR RIGHTS ON FOOT

First, always ask the agents or police if you are free to go. If they say yes, you have an absolute right to remain silent and leave. If you do not want to talk to the agents or police, you may hand the agent your attorney’s card, or the Rights Card, and go. You have the absolute right not to answer any questions posed to you.

If the agents or police say that you are not free to go, you should give them your name. You do not have to give any other information, such as your address or immigration status.

YOUR RIGHTS AT YOUR HOME

You do not have to open the door to any immigration agent or police officer unless they have a search warrant from a court.

If you do not want to let an agent or officer inside, do not open the door. Ask the agent or officer, through the door, if they have a search warrant from a court allowing them to search your home. You have a right to review the warrant.

If you live in someone else’s house, you still do not have to open the door unless the agents or police have a search warrant from a court.

YOUR RIGHTS IN YOUR CAR

If immigration agents or police signal you to stop your car, you must pull over. Immigration agents may ask brief questions about your name, immigration status, nationality, and travel plans. You do not have to answer any questions other than giving your name.

Police officers may ask for your name, drivers license, and vehicle registration. You should show these documents if you have them. You do not have to answer any other questions.

If an agent or officer asks to search your car, you may refuse to give him permission.

If an agent or officer questions a passenger, that person should ask if he or she has to answer. If the agent or officer says yes, the passenger has to give his or her name, but does not have to give any other information. The agent may ask you and your passenger to exit the car.
CONOZCA SUS DERECHOS

SUS RESPONSABILIDADES:
Sea cortés y manténgase tranquilo.
Nunca mienta o de información falsa a un agente de inmigración o a la policía.
No cargue identificación falsa.
Cargue el nombre y el número de teléfono de un abogado de inmigración que aceptará sus llamadas.

SI USTED ES ARRESTADO:
Dele a los agentes el nombre de su abogado y pida hablar con su abogado.
Si no tiene un abogado, pida una lista de servicios legales gratuitos en su área.
No firme ningún documento sin hablar con un abogado.
Nunca firme un documento que esté en un idioma que no pueda leer o entender.

Es ilegal que agentes de inmigración o la policía interroguen a una persona solamente por su etnia o raza.
Usted tiene el derecho de ser tratado con dignidad y respeto. Si usted es golpeado, amenazado, llamado de mala manera durante el arresto, usted tiene el derecho de quejarse de maltrato.
Tenga en mente que simplemente porque usted conoce sus derechos y decide ejercitarlos no significa que los agentes de inmigración o la policía quieran mantener a la ley o respeten sus derechos.

QUE HACER SI ...
AGENTES DE INMIGRACIÓN O DE LA POLICÍA LO PARAN MIENTRAS QUE VA CAMINANDO.
AGENTES DE INMIGRACIÓN O DE LA POLICÍA DETIENEN SU AUTO.
AGENTES DE INMIGRACIÓN O DE LA POLICÍA VIENE A SU HOGAR.

PARA INFORMARSE MÁS SOBRE SUS DERECHOS, COMUNÍQUESE CON:
ACLU of Southern California
La Unión Americana de las Libertades Civiles del Sur de California
1616 Beverly Blvd.
Los Angeles, CA 90026
(213) 977-5218

www.aclu-sc.org

TABLA DE DERECHOS / RIGHTS CARD
Le doy esta tarjeta porque no deseo hablar o tener más contacto con usted. Yo elijo el derecho a mantenerme en silencio y me niego a contestar sus preguntas. Si me arresta, quiero ser llevado a una sala de abogado antes de contestar a ninguna pregunta. Yo quiero hablar con un abogado antes de contestar a ninguna pregunta.
SUS DERECHOS CAMINANDO

En primer lugar, siempre pregunte a los agentes o la policía si usted es libre a irse. Si dicen que sí, usted tiene todo el derecho a mantenerse en silencio e irse. Si no quiere hablar con los agentes o la policía, les puede dar la tarjeta de su abogado o la tarjeta de derechos y puede irse. Tiene el derecho absoluto de no contestar preguntas que se le hagan.

Si los agentes o la policía dicen que usted no puede irse, debe de dárles su nombre. Usted no tiene que dar ninguna otra información, como su estado de inmigración.

SUS DERECHOS EN SU HOGAR

Usted no tiene que abrir la puerta a ningún agente de inmigración o oficial de la policía al menos de que tengan un orden de registro.

Si usted no quiere permitir que un agente u oficial de la policía entre a su casa, no abra la puerta. Pregunte al agente u oficia por la puerta si ellos tienen un orden de registro permitiéndoles a inspeccionar su hogar. Usted tiene el derecho de revisar la orden.

Si vive en la casa de otra persona, aún no tiene que abrir la puerta al menos de que los agentes o la policía tengan un orden de inspección del juzgado.

SUS DERECHOS EN SU AUTO

Si los agentes de inmigración o la policía señalan que pare su auto, usted tiene que pararse.

Los agentes de inmigración pueden hacer preguntas breves sobre su nombre, su estado de inmigración, su nacionalidad, y sus planes de viaje. Usted no tiene que contestar ninguna otra pregunta a parte de su nombre.

Los oficiales de la policía pueden pedir su nombre, su licencia de conducir y el registro de su vehículo. Debe de demostrar estos documentos si los tiene. No tiene que contestar cualesquiera otras preguntas.

Si un agente u oficial pide revisar su auto, puede negarle su permiso.

Si un agente u oficial intenta hacerle preguntas a un pasajero, la persona debe de preguntar si tiene que contestar. Si el agente u oficial dice que sí, el pasajero tiene que dar su nombre pero no tiene que dar cualquier otra información. El oficial puede pedir que usted y su pasajero se bajen del auto.
Degree of Belief

Michael Swanson Ph.D.
Wells Fargo Ag Industries

October 2009
Everything is connected.

We just can’t see it.

Every new economic action comes from some other economic action’s end
Mixing bad and worse

- Economic cycles
  - Where are we
  - Is it “different this time”

- Dairy cycles
  - History is cyclical
  - Plans are linear

- The intersection
Planning isn’t about predicting

- Is the recession done?
- What is holding the economy back?
- What is pulling the economy ahead?
- So what does it mean to me?
How much GDP makes us happy?

\[ \text{C} + \text{I} + \text{G} - (\text{X-M}) \]

\[ \text{GDP} = 12,892 = 9,181 + 1,472 + 2,562 - 339 \times \]

\[ 72\% + 11\% + 20\% - 3\% \]

* Net exports bottomed out at ($757) or 5.7% in the 3rd quarter of 2006

Source: BEA 2nd Qtr (billions inflation adjusted dollars – base 2005)
A very difficult # to get a handle on

Class III Milk

Source: USDA, CME
Another view

Logarithm of Inflation Adjusted GDP

\[ y = 0.0029x + 6.1176 \]

\[ R^2 = 0.9941 \]

Source: BEA, Wells Fargo Ag Industries

Wells Fargo Ag Industries -
“Blinded by the lately”

GDP Change
Year over Year

Source: FRED, Wells Fargo Ag Industries
How does the US economy grow?

- Long-term GDP growth is **2.7%**

- Output grows with inputs and productivity
  - Larger labor pool: **0.4%**
  - More capital invested: **0.9%**
  - Productivity gains: **1.3%**

- A recession temporarily reduces demand not supply capacity
Another “gutless” forecast

Class III Milk

Source: USDA, Wells Fargo Ag Industries
Accelerating global demand

Economic activity

Productivity

Technology

R&D Investment

Food

Energy

Other
If you don’t have productivity …

Real GDP Growth Rate

<table>
<thead>
<tr>
<th>Period</th>
<th>Productivity</th>
<th>Capital</th>
<th>Hours</th>
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<tbody>
<tr>
<td>1950-1974</td>
<td>1.7</td>
<td>1.3</td>
<td>1.0</td>
</tr>
<tr>
<td>1975-1982</td>
<td>1.5</td>
<td>1.3</td>
<td>1.2</td>
</tr>
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<td>1.4</td>
<td>1.3</td>
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</tr>
<tr>
<td>2015-2019</td>
<td>1.2</td>
<td>1.3</td>
<td>1.5</td>
</tr>
</tbody>
</table>

Source: CBO, Wells Fargo Ag Industries
Can fiscal and monetary intervention really work?

And, at what cost?
When does the Fed pull the trigger?

History + futures

Fed Funds

Source: FRED, Wells Fargo Ag Industries
This won’t turn-out like they hope

Government Fiscal Stimulus

12 month average -
Billions $s

Spending
Revenues

Source: WF, CBO
What drives the value of the dollar?

- Trade surplus or deficit
- Relative interest rates
  - Real interest (nominal less inflation)
  - Risk of investment
- Stability of government issuing the money
- Expectations of traders
This one they don’t control

US Trade Weighted Dollar

Source: Federal Reserve, Wells Fargo Economics
The two components of asset value: cash flow and cap rate
Conclusions

- Trend continues / cycles up
- Interest rates flat than rising sharply
- Dollar continues to weaken
- Rising financing costs hurt asset values
Dairy’s role

- Different yardsticks
  - 100.0% of your business
  - 0.9% of their spending

- Futures
  - Not a forecast
  - They’re an offer

- Nothing will change cycles
It’s always about the supply response

Per Capita Consumption

Lbs. per capita

Source: USDA, CME

Wells Fargo Ag Industries - 22
Our recent history

Class III Milk

$ / CWT

Source: USDA, CME
Our recent history + “Their” current offer

Class III Milk

Source: USDA, CME
Biology matters for cycle length

- Cattle: 38 months
- Dairy: 26 months
- Hogs: 15 months
- Poultry: 3 months

Complete cyclical time in months
How to count cycle length?

National Milk Production

Source: Wells Fargo Ag Industries
What’s changed?
(Un?)intended Consequence

Agriculture

Energy

Global economic growth

Cost of food

Land Values

Expected Profit

Input cost 30%

Output value 100%

Global economic growth

Cost of food
Convergence: Temporary or permanent?

Nearby Crude Oil vs Corn

Source: NYMEX, Wells Fargo Economics
Predicting is not planning.

Planning is preparing.
A long way from working

Milk to Corn Price Ratio

All Milk per CWT / All Corn per bushel

Source: WF Ag Industries
Three scenarios – three challenges

- **Corn prices fall**
  - Milk price can stay “low”
  - # of cows stabilize

- **Corn prices stay flat**
  - Milk price needs to “rise”
  - # of cows still falls slightly

- **Corn prices go to $4.50+**
  - Milk price needs to rise dramatically
  - # of cows shrinks significantly – temporarily
Income elasticity dominates price elasticity
Count on export recovery, but when?
### USDA's WASDE Supply and Demand Estimates

<table>
<thead>
<tr>
<th>Dairy (billions of lbs.)</th>
<th>02</th>
<th>03</th>
<th>04</th>
<th>05</th>
<th>06</th>
<th>07</th>
<th>08</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Beginning stocks:</td>
<td>8.8</td>
<td>9.9</td>
<td>8.3</td>
<td>7.2</td>
<td>8.0</td>
<td>9.5</td>
<td>10.4</td>
<td>10.0</td>
<td>10.1</td>
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<td>Marketings</td>
<td>168.2</td>
<td>169.3</td>
<td>169.7</td>
<td>175.9</td>
<td>180.7</td>
<td>184.5</td>
<td>188.8</td>
<td>187.2</td>
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<td>Imports</td>
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<td>5.0</td>
<td>5.3</td>
<td>5.0</td>
<td>5.0</td>
<td>4.6</td>
<td>3.9</td>
<td>4.2</td>
<td>4.1</td>
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<tr>
<td>Total commercial supply</td>
<td>182.2</td>
<td>184.2</td>
<td>183.4</td>
<td>188.0</td>
<td>193.7</td>
<td>198.6</td>
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<tr>
<td>Commercial use</td>
<td>170.6</td>
<td>174.7</td>
<td>176.3</td>
<td>179.9</td>
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<td>182.6</td>
<td>184.3</td>
<td>187.0</td>
<td>187.1</td>
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<tr>
<td>Exports</td>
<td>1.7</td>
<td>1.2</td>
<td>-</td>
<td>-</td>
<td>3.4</td>
<td>5.7</td>
<td>8.7</td>
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<tr>
<td>Total use</td>
<td>172.3</td>
<td>175.9</td>
<td>176.3</td>
<td>179.9</td>
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<td>188.3</td>
<td>193.0</td>
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<tr>
<td>Ending stocks</td>
<td>9.9</td>
<td>8.3</td>
<td>7.1</td>
<td>8.1</td>
<td>9.6</td>
<td>10.4</td>
<td>10.0</td>
<td>10.1</td>
<td>8.7</td>
</tr>
<tr>
<td>Production chg</td>
<td>0.7%</td>
<td>0.2%</td>
<td>3.7%</td>
<td>2.7%</td>
<td>2.1%</td>
<td>2.3%</td>
<td>-0.8%</td>
<td>-0.9%</td>
<td></td>
</tr>
<tr>
<td>Usage chg</td>
<td>2.1%</td>
<td>0.2%</td>
<td>2.0%</td>
<td>2.3%</td>
<td>2.3%</td>
<td>2.5%</td>
<td>-1.0%</td>
<td>-0.1%</td>
<td></td>
</tr>
</tbody>
</table>
The net/net is very positive

Global Per Capita Real GDP

Source: USDA, Wells Fargo Ag Industries
Increasing volatility has consequences

- All commodities will have greater price volatility
- Margin management v. “guessing”
  - Risk management is never free
  - Deleveraging has a financial cost
- The “knowing doing gap”
- Rowing versus sailing
Everything is connected. We just can’t see it.

Every new economic action comes from some other economic action’s end.
Revisiting the Temperature Humidity Index On Farm

R.J. Collier and D. Armstrong
University of Arizona
Funded by Dairy Day
Previous Climate Lab results indicated Milk yield losses begin at THI = 68

<table>
<thead>
<tr>
<th>THI hours &gt; 68</th>
<th>Slope</th>
<th>P-value</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>-0.11</td>
<td>0.69</td>
</tr>
<tr>
<td>7</td>
<td>-1.01</td>
<td>0.26</td>
</tr>
<tr>
<td>17</td>
<td>-2.63</td>
<td>0.0007</td>
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<tr>
<td>19</td>
<td>-0.09</td>
<td>0.86</td>
</tr>
<tr>
<td>21</td>
<td>-2.04</td>
<td>&lt;0.0001</td>
</tr>
<tr>
<td>24</td>
<td>-1.08</td>
<td>0.015</td>
</tr>
</tbody>
</table>
Summary

• Current THI Chart underestimates heat stress effects on high producing cattle
• Current Data indicates that THI remains best measure of heat index on cattle.
• Milk yield losses in high producing cattle (> 35 kg/d) begin at average THI of 68
• Minimum THI threshold for milk yield loss is 68
• Cooling methods on commercial dairy farms should be implemented earlier to prevent these effects.
Objectives

• To determine if lowering the threshold for cooling systems improved milk production and reproductive performance in lactating dairy cows under farm conditions.
Study Conditions

- **Caballero Dairy**
  - Started 5/12/2009
  - Average DIM 75
  - Ran for 5 weeks
  - 4 pens (2 first, 2 older)
    - 300 cows per pen
    - 10% of cows used in analysis
  - Oscillating Fan System
  - Two temp settings
    - 68 °F - Lo
    - 78° F - Hi

- **Red River Dairy**
  - Started 05/08/09
  - Average DIM 72
  - Ran for 6 weeks
  - 2 pens (all multiparous)
    - 550 cows/pen
    - 10% of cows used in analysis
  - Korral Kool coolers
  - Two temp settings
    - 70-74 °F - Lo
    - 78-82 °F - Hi
# Type 3 Test of Fixed Effects For Milk Yield

<table>
<thead>
<tr>
<th>Effect</th>
<th>Num DF</th>
<th>Den DF</th>
<th>F Value</th>
<th>Pr &gt; F</th>
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</thead>
<tbody>
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<td>Trt</td>
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<td>1838</td>
<td>0.98</td>
<td>0.3228</td>
</tr>
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<td>period</td>
<td>2</td>
<td>1838</td>
<td>269.93</td>
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<td>parturition</td>
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<td>Trt*period</td>
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<td>1838</td>
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<td>0.9495</td>
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<td>Trt* parturition*</td>
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<td>1838</td>
<td>25.79</td>
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<tr>
<td>period</td>
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</table>
## Caballero Dairy Farm

<table>
<thead>
<tr>
<th>Trt</th>
<th>Group</th>
<th>Number</th>
<th>DIM started trial</th>
<th>DIM 1st bred</th>
<th>DO</th>
<th>Time Bred</th>
<th>% Preg</th>
</tr>
</thead>
<tbody>
<tr>
<td>High Temp.</td>
<td>cow</td>
<td>40</td>
<td>81.7</td>
<td>64.8</td>
<td>100.8</td>
<td>2.2</td>
<td>100</td>
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<tr>
<td></td>
<td>heifer</td>
<td>30</td>
<td>70.7</td>
<td>61.8</td>
<td>93.5</td>
<td>2.5</td>
<td>86.7</td>
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<tr>
<td>Low Temp.</td>
<td>cow</td>
<td>40</td>
<td>76.8</td>
<td>66.5</td>
<td>105.2</td>
<td>2.4</td>
<td>77.5</td>
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<tr>
<td></td>
<td>heifer</td>
<td>30</td>
<td>73.8</td>
<td>65.0</td>
<td>86.8</td>
<td>1.8</td>
<td>96.7</td>
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## Type 3 Test of Fixed Effects

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<th>Den DF</th>
<th>F Value</th>
<th>Pr &gt; F</th>
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<td>Trt*period</td>
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## Red River Dairy Farm

<table>
<thead>
<tr>
<th>Trt</th>
<th>Group</th>
<th>Number</th>
<th>DIM started trial</th>
<th>DIM 1st bred</th>
<th>DO</th>
<th>Time Bred</th>
<th>% Preg</th>
</tr>
</thead>
<tbody>
<tr>
<td>High Temp.</td>
<td>cow</td>
<td>55</td>
<td>62.6</td>
<td>67.1</td>
<td>120.1</td>
<td>2.5</td>
<td>72.7</td>
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<tr>
<td>Low Temp.</td>
<td>cow</td>
<td>54</td>
<td>56.6</td>
<td>73.5</td>
<td>120.1</td>
<td>2.6</td>
<td>68.5</td>
</tr>
</tbody>
</table>
Conclusions

- No evidence using these conditions that lowering the temperatures for cooling onset improved milk yield or reproductive performance
Protecting our Freedom to Operate
Earning and Maintaining Public Trust and our Social License

Charlie Arnot, APR
President, CMA
CEO, Center for Food Integrity
7501 NW Tiffany Springs Boulevard, Suite 200
Kansas City, MO 64153
Tel: (816) 880-0204

Animal agriculture is under increasing pressure. In addition to the traditional challenges of herd health, productivity and profitability there are growing questions about our production systems and practices. Finding an acceptable location for a livestock facility and generating local support is difficult. Activist groups opposed to contemporary production practices are pursuing litigation, pressuring customers and initiating legislation to change the way we operate. Customers and consumers are asking questions about animal welfare, sustainability, pre-harvest food safety, nutrition and immigration issues.

The changing structure of animal agriculture, the increasing influence of global brands, the sophistication and influence of activist groups and the explosion of social networking and new media create a new environment that requires those in animal agriculture to explore new ways to build consumer trust and protect our freedom to operate.

Our changing structure

The changes in agriculture over the past 100 years have been remarkable. Today we employ technology our grandparents never dreamed of. Our adoption of technology and the related increase in efficiency and productivity resulted in fewer Americans being involved in food production. According to the U.S. Census Bureau, in 1900, 36% of all U.S. occupations were “agricultural pursuits.” In 1950, 11.6% of all U.S. occupations were farmers, farm managers or farm laborers. In 2000, 0.7% of the U.S. population was employed in farming, forestry or fishing.

Until the late 20th century, we produced food using the agrarian model pictured below. We had millions of producers selling commodities to local buyers who would aggregate loads and take them to a packer or processor who would then sell to a regional or local brand. In this model it was very difficult to send an efficient market signal from the regional or local brand all the way back to the producer. In the agrarian model, if a non-governmental organization (NGO) or activist group wanted to change the behavior of a producer, the only way to do so was through legislation or regulation. NGOs could not apply pressure to the local or regional brand and expect change at the point of production.
But today, we no longer operate in the disintegrated agrarian model. Today we operate in an industrial model (pictured below) where the adoption of technology, consolidation and integration have dramatically changed how the food system operates and how it is perceived by consumers. In the U.S. today:

- The top ten food retailers sell more than 75% of food.
- The top ten chicken companies produce 79% of chicken.
- The top 50 dairy cooperatives produce 79% of the milk.
- The top 60 egg companies produce 85% of eggs.
- The top 20 pork producers produce more than 50% of pork. (Two percent of pork producers produce 80%)
- The top 10 pork packers process 87% of pork.
- The top four beef packers process more than 80% of beef.

The transition to the industrial model brought with it improved food safety, increased product variety, improved consistency and a reliable and affordable source of nutritious food for American consumers. Unfortunately, it also resulted in fewer people being connected to the food system and reduced understanding and appreciation for how food is produced. The result has been diminished consumer trust and confidence in contemporary animal agriculture and a corresponding increase in consumer concern and activist pressure.
Brands as agents of social change

In the industrial model of food production, the link between NGOs, global brands and food production is short and direct. NGOs like Greenpeace and The Humane Society of the United States (HSUS) are now embracing market based campaigns as well as legislation and litigation to achieve their objectives.

Kert Davies, director of research for Greenpeace, is quoted as saying that discovering brands was like discovering gunpowder, and that Greenpeace attacks the weakest link in a brand’s supply chain. If livestock production practices are perceived to be a threat to sustainability or environmental integrity, the industry should expect groups like Greenpeace to exert market pressure as well as legislation or litigation to change those practices believed to threaten environmental sustainability.

HSUS is one of the most respected and most effective NGOs impacting animal agriculture. They have adopted strategies and messages designed to appeal to the rational majority and distanced themselves from the radical tactics of groups like PETA in an effort to attract and maintain mainstream support. The result is a membership base of 11 million and a 2009 operating budget of approximately $130 million.

There is also growing interest in animal law. More than 90 colleges and universities now offer courses in animal law compared to only a handful a decade ago. USA Today compared the growing interest in animal law to the explosion in environmental law in the 1970s. Animal agriculture should work to ensure the environmental challenges the industry faced in the 1980’s and 1990’s aren’t a pre-cursor for twenty years of new animal welfare legislation, regulation, and litigation.
The only experience most Americans have with animals is with pets. Whether animals abandoned after Hurricane Katrina, the dog fighting conviction of Michael Vick or painful procedures in livestock production, HSUS is exploiting the anthropomorphism and agricultural alienation in our affluent society to promote their agenda. At times that includes pressuring branded food companies, and the companies are listening.

Global food companies have invested millions of dollars in building and defending their brand and they can ill afford to have the practices of their supply chain put the brand at risk. It is no more the job of McDonald’s or Wal-Mart to defend animal agriculture than it is of animal agriculture to defend those who supply the industry inputs.

At the same time, McDonald’s, Wal-Mart and others who sell products derived from food animals have a vested interest in a consistent, safe and affordable supply. Those in animal agriculture can help secure the support of customers by working to build consumer trust and understanding of contemporary production systems. Research indicates consumers want to continue to consume meat, milk and eggs; they also want permission to believe the products are produced in a responsible, humane manner.

Market leaders like McDonald’s and Wal-Mart are fully aware of the relationship between NGOs, brands and the supply chain and they work to manage the risk to their brand and their customers.

Animal agriculture can build customer support by increasing consumer trust and confidence and ensuring contemporary practices are consistent with the values and expectations of our stakeholders.

**The social license to operate**

Every organization, no matter how large or small, operates with some level of social license. A social license (illustrated below) is the privilege of operating with minimal government regulation based on maintaining public trust by doing what’s right. You are granted a social license when you operate in a way that is consistent with the ethics, values and expectations of your stakeholders. Your stakeholders include customers, employees, the local community, regulators, legislators and the media.

Once lost, either through a single event or a series of events that reduce or eliminate public trust, social license is replaced with social control. Social control is regulation, legislation or litigation designed to compel you to perform to the expectations of your stakeholders. Operating with a social license is flexible and low cost. Operating with a high degree of social control increases costs reduces operational flexibility and increases bureaucratic compliance.

Case in point - Arthur Anderson and Enron. Prior to the collapse of Enron, public accounting firms operated with a fairly broad social license. The accounting industry had established the Financial Accounting Standards Board to regulate the implementation of Generally Accepted Accounting Principles by Certified Public Accountants. The
accounting industry created a structure for self-regulation based on the expectations of their stakeholders which included investors, banks, the Securities and Exchange Commission, financial media and others.

The Social License To Operate

<table>
<thead>
<tr>
<th>Flexible</th>
<th>Rigid</th>
</tr>
</thead>
<tbody>
<tr>
<td>Responsive</td>
<td>Bureaucratic</td>
</tr>
<tr>
<td>Lower Cost</td>
<td>Higher Cost</td>
</tr>
</tbody>
</table>

Social License
- Ethics
- Values
- Expectations
- Self regulation

Tipping Point

Single triggering event
Cumulative impact

Social Control
- Regulation
- Legislation
- Litigation
- Compliance

Stakeholders relied on the industry to operate in a way that maintained public trust and in return the public was willing to grant accountants broad social license. The Enron debacle cost the accounting profession its social license. That single event was the tipping point that compelled Congress to replace the social license of the accounting profession with the Sarbanes-Oxley Act, a law that requires extensive reporting and verification of financial information by publicly traded companies. According to research by Foley & Lardner, the average cost for a public company to comply with Sarbanes-Oxley is between $10 and $15 million per year. Those are costs that could have been returned to shareholders as dividends, or reinvested in research and development.

The same principles apply to animal agriculture and environmental management. The social license once enjoyed by livestock producers to manage manure has been replaced with a costly system of permitting and compliance. Once public trust is violated, the tipping point is crossed and high cost, bureaucratic regulation replaces flexible, lower cost social license. Once social control is in place it can be modified, but social license is never fully recovered.

The question then becomes, what can be done to maintain public trust that grants the social license and protects freedom to operate?

A new model for building trust

In 2006, with financial support from the National Pork Board, CMA commissioned a meta-analysis of all the available research on the question of trust in the food system.
Through that analysis, done in partnership with Steve Sapp at Iowa State University, we were able to determine three primary elements that drive trust in the food system. Those three elements are confidence, competence and influential others (model shown below).

Confidence is related to perceived shared values and ethics and a belief that an individual or group will do the right thing. Competence is about skills, ability and technical capacity. Influential others includes family and friends as well as respected, credentialed individuals like doctors and veterinarians.

In late 2007, CMA launched a nationwide consumer survey on behalf of The Center for Food Integrity to determine the role that confidence, competence and influential others play in creating and maintaining trust. We specifically asked consumers to rate their level of confidence, competence and trust in various groups of influential others in the food system. We asked questions related to food safety, environmental protection, nutrition, animal well-being and worker care.

The results of the survey were consistent and conclusive. On every single issue, confidence, or shared values, was four to five times more important than competence for consumers in determining who they will trust in the food system. That research has now been peer reviewed and is scheduled to be published in the *Journal of Rural Sociology*.

These results should serve as a call to action for animal agriculture. No longer is it sufficient to rely solely on science or to attack our attackers as a means of protecting self-interest. This new environment requires new ways of engaging and new methods of communicating if we want to build trust, earn and maintain social license and protect our freedom to operate.

**A Model to Build Trust, Earn Social License and Protect Freedom to Operate**

(Sapp/CMA)
New models for building trust

The food system has an incredible challenge and opportunity ahead. Over the course of the next thirty years we need to increase food production to feed a total of 400 million Americans and 2.7 billion more people around the globe. To meet that challenge we have to embrace new models of public engagement that build and maintain public trust and our social license to operate.

We need consumers to understand that while our systems have changed and our use of technology has increased, our commitment to doing what’s right has never been stronger. We need to be able to verify our claims with objective science and we have to be able to continue to operate profitably if we want to survive. We need to adopt systems and practices that are ethically grounded, scientifically verified and economically viable. (model below)

### Balancing for Success

<table>
<thead>
<tr>
<th><strong>Economically Viable</strong></th>
<th><strong>Scientifically Verified</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>• ROI</td>
<td>• Data Driven</td>
</tr>
<tr>
<td>• Demand</td>
<td>• Repeatable</td>
</tr>
<tr>
<td>• Revenue</td>
<td>• Measurable</td>
</tr>
<tr>
<td>• Cost Control</td>
<td>• Specific</td>
</tr>
<tr>
<td>• Efficiency</td>
<td><strong>Objectivity</strong></td>
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</table>

<table>
<thead>
<tr>
<th><strong>Ethically Grounded</strong></th>
<th><strong>Sustainable Systems</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>• Compassion</td>
<td><strong>Economically Viable</strong></td>
</tr>
<tr>
<td>• Responsibility</td>
<td><strong>Scientifically verified</strong></td>
</tr>
<tr>
<td>• Respect</td>
<td></td>
</tr>
<tr>
<td>• Fairness</td>
<td></td>
</tr>
<tr>
<td>• Truth</td>
<td></td>
</tr>
<tr>
<td><strong>Value Similarity</strong></td>
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</tr>
</tbody>
</table>

It is only by achieving and maintaining this balance that we can create systems that are truly sustainable. Each side of the sustainability triangle has stakeholders focused on maintaining the strength of that side, even at the expense of maintaining balance. There may be times when stakeholders have to look beyond short term self-interest to foster sustainability.
If food system practices are not ethically grounded they will not achieve broad-based societal acceptance and support. If they are not scientifically verified there is no way to evaluate and validate the claims of sustainability, and if they are not economically viable they cannot be commercially sustained. For a system to be truly sustainable, it has to be ethically grounded, scientifically verified and economically viable. This model encourages stakeholders to look for balance in an effort to find true sustainability.

There is likely to be some tension inherent among stakeholders who place greater value on a single side of the sustainability triangle.

**Ethically Grounded**

Those who focus on ethics want food system practices that are consistent with the shared values of compassion, responsibility, respect, fairness and truth. They want to ensure that our increasingly sophisticated and technologically advanced food system doesn’t put profits ahead of ethical principles and that science is not used as moral justification. When this side of the triangle is out of balance, critics claim there is no scientific basis for the claims being made and that the ethical demands will jeopardize the economic viability of the system.

**Scientifically Verified**

Those with a primary interest in scientific verification are data driven. They want specific, measurable, and repeatable observations to provide the basis for their objective decisions. They believe science can provide the insight and guidance necessary to make reasonable determinations about how food systems should be managed. When this side of the triangle is out of balance, critics claim the organization is relying on science while ignoring ethical considerations and that research may be done and recommendations made without consideration of the economic impact.

**Economically Viable**

Those responsible for the “bottom line” are focused on profitability. They work every day to respond to demand, control costs and increase efficiency to maximize the return on investment. They have to manage the increasingly complex demands of competing in a global marketplace with volatile commodity markets and ruthless competition. When this side of the triangle is out of balance, critics claim profits outweigh ethical principles and that business decisions are made without the benefit of scientific verification, placing those decisions at risk when questioned by those who value validation.

If we can’t operate a system that maintains a balance of practices that are ethically grounded, scientifically verified and economically viable, it will collapse. That collapse may subject producers, processors, restaurants or retailers to undue pressure that includes consumer protests or boycotts, unfavorable shareholder resolutions, uninformed supply chain mandates, regulation, legislation, litigation or bankruptcy.
Maintaining balance is never easy. Success demands an increased level of communication and engagement and willingness to look for solutions that are ethically grounded, scientifically verified and economically viable for each segment of the food system. Only by working with stakeholders across the food chain can we maintain the integrity of the sustainable system.

**Conclusion – It’s about trust**

As we increase both the distance most consumers have from the farm and the level of technology we implement in food production we have to dramatically improve our ability and commitment to build trust with our customers and consumers. This will require a new way of thinking, a new way of operating and a new way of communicating. Albert Einstein is quoted as saying, “We cannot solve problems using the same thinking we used when we created them.” The old model of relying solely on science and attacking our critics is not sufficient to protect our freedom to operate in today’s environment.

Building trust requires an increase in early stakeholder engagement, transparency, professionalism, assessment and verification at all levels of the production and processing system. We have to give customers, policy makers, community leaders and consumers permission to believe that contemporary animal agriculture is consistent with their values and expectations. If we fail we will continue to see pressure to revoke our social license to operate and replace it with greater social control of our production practices, our environmental practices, and our use of technology.

To be successful we have to build and communicate an ethical foundation for our activity and engage in value based communication if we want to build the trust that protects our freedom to operate. We need to demonstrate our commitment to practices that are ethically grounded, scientifically verified and economically viable.
What Happens When the Money Runs Out?

“The Train Wreck”

Bob Matlick, Partner
Moore Stephens Wurth Frazer & Torbet, LLP
October 2009
AGENDA

• How did I get here?
• Income Generation vs. Expense Reduction
• Secured vs. Unsecured
• Planning for
  – Restructure
  – Liquidation - Partial vs. Full
• Creditor Negotiation
• Bankruptcy:
  – Chapter 11
  – Chapter 7
  – Chapter 13
HOW DID I GET HERE?

• Risk vs. Reward
  – Did you understand the risk vs. reward?

• Reactive vs. Proactive

• Price Taker vs. Price Maker
  – Margin Management
  – Use of Options & Futures
    • Education
HOW DID I GET HERE?

- DON’T “Stick your head in the sand”
- Acceptance
  - Blame vs. “My Part in It”
- Run vs. Communicate
- Honest vs. Dishonesty
Dairy Market Information – Volatility is the name of the game

Historical Class III Prices

Date


Price Per CWT.

Est. Cost of Production
INCOME GENERATION VS. EXPENSE REDUCTION

• When cash flow is negative
  – Be Proactive NOT Reactive

• Use Professionals – value outweighs cost
  – Nutritionist
  – Vet
  – Legal Counsel
  – Business Consultants

• Communicate Openly & Professionally
INCOME GENERATION VS. EXPENSE REDUCTION

- Develop a plan for YOUR management style
  - Keep yourself in business, not the neighbor

- Use Projected Monthly Cash Flows with various scenarios
  For Example:
  - Milk Price
  - Feed Cost
  - Production
  - Culling criteria
  - 3x vs. 2x

- EDUCATE, EVALUATE, REACT
SECURED VS. UNSECURE

• Secured Credit
  – Real Property
    • Deed of Trust
  – Personal Property
    • UCC filing AND Security Agreement
  – Foreclosure on Property

• Cross default, cross collateralized
  – Caution – most lenders utilize this language
SECURED VS. UNSECURE

• Loan Covenants
  – Debt coverage, tangible net worth, loan to value, financial reporting
    • Know your default covenants

• Unsecured
  – Feed Vendors
  – Professional Services
  – Suppliers
  – Litigate for Collection
If you insert legal counsel, be prepared to have counsel immediately on “the other side of the table”
PLANNING FOR RESTRUCTURE AND/OR LITIGATION

• Restructure/Partial Liquidation
  – Review non-performing assets
    • Return on asset
    • How critical is it to your operation?
      – Know where the mother ship is and protect it.
    • “The market value will go higher” syndrome
  – Management – know your style & commit to it
  – Heifers vs. Cows vs. Base vs. Land
  – Evaluate w/ Professionals & Educate yourself
  – Cash Flows – Monthly and 24 month period
  – Partial Liquidation – tax scenarios must be evaluated
PLANNING FOR RESTRUCTURE AND/OR LITIGATION

• Full Liquidation
  – Schedule Realistic Values
    • Assets, Debts, & All Payables
  – Impact of Tax
    • Use Professionals
  – Personal & Family Decision
    Do I walk with $3,000,000 today
    OR
    Lose additional sums?
CREDITOR NEGOTIATIONS

• BE:
  – Honest – First & Foremost
  – Prepare detailed requests with validated assumptions
  – Forceful but not contentious
  – Timely
  – Understanding & Open Minded
  – Communicate your fears & frustrations
CREDITOR NEGOTIATIONS

• Loan Adjustment Group & Special Assets
  – When & How are you going to pay in full
  – They are Collectors

• Farm Credit Services 47 Day Restructure
  – Formal

• Find the Decision Maker and have direct contact
BANKRUPTCY: Federal Law NOT State Law

- Chapter 11: Recognition Bankruptcy
  - Most flexible chapter
    - Generally most expensive
  - Used to Reorganize Debt
  - A 10% success rate on average
    - Plan usually culminates as a contentious liquidation
  - Automatic stay
BANKRUPTCY

• Chapter 11: Recognition Bankruptcy

  – No time limit – case may continue as long as trustee, creditors, & court allow it

  – Debtor is referred to as debtor in possession & will operate their business under supervision of the court for benefit of creditors
BANKRUPTCY

- Cash collateral = cull proceeds, milk checks, etc.
- Unsecured creditors committee
- Priority of liens
- 90 day Preference Period
- If plan is confirmed, debtor makes payments per the plan which supersedes any pre-bankruptcy contracts
- Can be utilized to preserve equity or gain additional loan funds in certain circumstances
BANKRUPTCY

• Chapter 7
  – Liquidation
  – No Liability to discharged debts

• Chapter 13
  – Wage Earners Plan
TAKE HOME THOUGHTS

• Risk vs. Reward
• Be Proactive NOT Reactive
• Be Honest
• Communicate
  – Family, creditors, vendors, employees, professionals
• Use Professionals when appropriate
• Be Open Minded
• Be Timely
• Bankruptcy is time consuming, expensive & on average has only a 10% success rate
THANK YOU!