



Immigrant Work Authorization FAQ for Employers

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The termination of the Deferred Action for Childhood Arrivals (DACA) program, the phasing out of certain Temporary Protected Status (TPS) designations, and the heightened focus on immigration issues under the new administration have raised a number of questions for employers. Below are answers to some of the most common questions we are receiving in the area of employee hiring and Employment Eligibility Verification Form (Form I-9) compliance.¹

This publication provides general guidance only and should not be construed as legal advice. The law on the topics discussed in this publication is highly context-specific. If your organization needs legal assistance, or if you have further questions about these topics, please contact Public Counsel’s Community Development Project at (213) 385-2977, ext. 200. The Community Development Project provides free legal assistance to qualifying low-income entrepreneurs and qualifying nonprofit organizations that share our mission of serving low-income communities and addressing issues of poverty within Los Angeles County.

1. What are my obligations under the Immigration Reform and Control Act of 1986 (IRCA) to confirm authorization to work when hiring?

IRCA makes it unlawful to hire an individual for employment “knowing” the individual is not authorized to work in the U.S.² What does “knowing” mean in this context?

A hiring violation under IRCA occurs when an employer hires an individual with either “actual” or “constructive” knowledge of that individual’s lack of employment authorization. An employer will have actual knowledge when, for example, the individual tells the employer that he or she is not authorized to work in the United States, or the employer otherwise acquires direct knowledge of the individual’s unauthorized status from a reliable source. An employer will be deemed to have “constructive knowledge” when the employer has “notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition.”³ In other words, even when an employer does not actually know that an individual lacks

¹ Public Counsel is grateful to the National Immigration Law Center for its review of this publication.

² 8 U.S.C. § 1324a(a)(1)(A)

³ 8 C.F.R. § 274a.1(l)(1)

work authorization, the employer could be deemed to “know” that fact for purposes of IRCA when it has information available to it that would lead to such knowledge.

According to federal regulations under IRCA, one specific way constructive knowledge can be imputed to an employer is through the employer’s failure to properly complete the Form I-9.⁴ IRCA requires every U.S. employer, within three days of a new hire⁵, to complete and retain this form in order to verify the identity and employment authorization of each individual hired for employment in the U.S.⁶ On the form, an employee must attest to his or her own employment authorization and provide documentation (from the list of acceptable I-9 documents) that evidences this authorization. The employer must then examine this documentation to make sure it reasonably appears to be genuine and relates to the employee, and record the document information on the Form I-9.⁷

The I-9 rules do not require an employer to independently verify the authenticity of documentation provided by an employee as long as the documentation “reasonably appears on its face to be genuine.”⁸ Applying this reasonableness standard, the Ninth Circuit Court of Appeals has held that an employer’s failure to compare the back of a new hire’s Social Security card with the example provided in an INS handbook during the I-9 process was not sufficient grounds to charge the employer with constructive knowledge because it was not reasonable for the employer to apply that level of scrutiny.⁹ By contrast, an unreasonable failure by an employer to follow up on obvious irregularities in the Form I-9 or associated documentation provided by a new hire could lead to a charge of constructive knowledge.

A “knowing hire” violation under IRCA commonly leads to civil penalties ranging from hundreds to thousands of dollars per unauthorized employee for a first-time violation, and increasing with each subsequent violation.¹⁰ In cases where there is a “pattern or practice” of such violations, the employer can also face criminal penalties.¹¹ U.S. Immigration and Customs Enforcement (ICE) also warns that violations may prevent

⁴ 8 C.F.R. § 274a.1(l)(1)(i)

⁵ For I-9 deadline purposes, an employee is considered “hired” when he or she actually commences work for wages, as opposed to simply being offered and accepting the job. 8 C.F.R. § 274a.1(c). Note that if the job is for fewer than three days, the employer must complete the I-9 no later than the first day of work. (Employees must always complete their portion of the I-9 no later than the first day of work.)

⁶ This requirement applies to all employees hired after Nov. 6, 1986.

⁷ 8 U.S.C. § 1324a(b)

⁸ 8 U.S.C. § 1324a(b)(1)(A)(ii). An employer that has complied in “good faith” (within the technical meaning of the statute) with the I-9 verification requirements can raise an affirmative defense to a “knowing hire” violation under IRCA if it turns out the employee in question is not in fact authorized to work. 8 U.S.C. § 1324a(a)(3).

⁹ *Collins Foods Int’l, Inc. v. U.S. INS*, 948 F.2d 549, 555 (9th Cir. 1991)

¹⁰ In 2017, the inflation-adjusted minimum penalty for a first-time unlawful employment violation is \$548 and the maximum penalty is \$4,384, per unauthorized employee.

<https://www.federalregister.gov/documents/2017/02/03/2017-01306/civil-monetary-penalties-inflation-adjustment-for-2017>

¹¹ 8 U.S.C. § 1324a(f)(1)

employers from participating in future federal contracts.¹² A 2015 analysis of worksite enforcement statistics states that, historically, a relatively low percentage of employers have been subjected to civil and criminal penalties for IRCA violations each year.¹³

Employers are encouraged to read the United States Citizenship and Immigration Services (USCIS) publication, *Handbook for Employers M-274: Guidance for Completing Form I-9*, which contains helpful information on the Form I-9 employment eligibility verification process.¹⁴

2. What are my obligations under IRCA to re-verify work authorization status after I have hired an employee?

After I hire an employee, does IRCA require me at any point to re-verify that she or he is still eligible to work in the U.S.? Are there any consequences if I do not re-verify? Are there any limitations on when I may re-verify?

IRCA makes it unlawful to continue to employ a person “knowing” that the person is, or has become, unauthorized to work in the U.S.¹⁵ Like a knowing hire violation, a “continuing to employ” violation requires either actual or constructive knowledge. The Ninth Circuit Court of Appeals has held that employers have constructive knowledge in situations where a federal agency, such as ICE, directly provides the employer with specific information that casts doubt on the employment authorization of particular employees and the employer subsequently fails to re-verify those employees.¹⁶ In each of the Ninth Circuit cases, a federal immigration agency inspected the employer’s records, determined that specific employees had provided false green cards or were otherwise unauthorized to work in the U.S., and alerted the employer to this fact. Because these employers were put on notice but took no further action to re-verify, they were deemed to have constructive knowledge and ultimately fined for an IRCA violation.¹⁷

If an employee’s Form I-9 states an expiration date for his or her work authorization, the employer will be deemed to have constructive knowledge of the employee’s unauthorized status as soon as that date passes. For example, if the Employment Authorization Document of an employee with DACA is set to expire on May 1 of the following year, the employer is legally responsible for re-verifying the employee’s work authorization on or before that date, even though the employer may have hired the employee years earlier and lacks any specific recollection of the expiration date. In such instances, the government does not need to notify the employer in order for the employer to be charged

¹² <https://www.ice.gov/factsheets/i9-inspection>

¹³ See “Immigration-Related Worksite Enforcement: Performance Measures” (Congressional Research Service, 2015): http://digitalcommons.ilr.cornell.edu/key_workplace/1441/

¹⁴ <https://www.uscis.gov/i-9-central/handbook-employers-m-274>

¹⁵ 8 U.S.C. § 1324a(a)(2)

¹⁶ Re-verification entails an employer asking an employee to provide proof of ongoing work authorization and then completing the relevant section of the Form I-9. <https://www.uscis.gov/i-9-central/complete-correct-form-i-9/completing-section-3-reverification-and-rehires>

¹⁷ *New El Rey Sausage Co. v. U.S. I.N.S.*, 925 F.2d 1153, 1155 (9th Cir. 1991); *Mester Mfg. Co. v. I.N.S.*, 879 F.2d 561, 567 (9th Cir. 1989)

with constructive knowledge. Failing to re-verify the employee's work status by her or his work authorization expiration date, or failing to terminate the employee if she or he cannot produce acceptable proof of renewed or ongoing work authorization, can result in liability under IRCA.¹⁸

As with a knowing hire violation, a continuing to employ violation under IRCA can give rise to both civil and criminal penalties. See the above discussion in FAQ #1.

Finally, employers may not re-verify employees in a discriminatory or retaliatory manner. Any re-verification process must be carried out in a manner that does not discriminate on the basis of national origin, citizenship, or immigration status, or the employer risks violating IRCA's non-discrimination provision as well as Title VII of the Civil Rights Act of 1964.¹⁹ For example, re-verifying the status of certain employees solely because they come from a certain country or region would constitute unlawful discrimination under IRCA. In addition, employers must not require more documents than the law itself requires, or refuse documents that appear genuine on their face, as such conduct can subject employers to discrimination charges under IRCA or Title VII. Also note that employers who engage in re-verification as a way to retaliate against employees who have engaged in protected activity under other labor and employment laws may be subject to liability under the anti-retaliation provisions of those labor laws.

California employers must also keep in mind that a new state law, Assembly Bill 450, prohibits employers from re-verifying employees' work authorization status unless required to do so by federal law.²⁰

3. I-9 Audits

What might trigger an audit and what does an audit entail?

ICE has the authority to conduct random audits, but it generally bases audits on specific evidence or intelligence it receives, or on its stated enforcement priorities.²¹ For example, ICE may decide to audit an employer after receiving a tip, after conducting an "educational visit," or after conducting surveillance.²² In October 2017, the acting director of ICE stated that worksite enforcement actions would increase by "four to five times" going forward; it is not yet clear how this will affect the frequency or focus of future I-9 audits.²³

¹⁸ See *United States v. Buckingham Ltd.*, 1 OCAHO 151 (Apr. 6, 1990); *U.S. v. Muniz Concrete & Contracting Inc.*, 12 OCAHO 1278 (Apr. 29, 2016)

¹⁹ 8 U.S.C. § 1324b(a); 42 U.S.C. § 2000e-2

²⁰ See Note 24, below.

²¹ <https://www.ice.gov/worksite>

²² The National Immigration Law Center and the National Employment Law Project have published a useful guide for employers on "What to Do if Immigration Comes to Your Workplace" (<https://www.nilc.org/issues/workersrights/employer-guide-workplace-imm-enforcement>).

²³ <http://www.cnn.com/2017/10/17/politics/ice-crackdown-workplaces/index.html>

To carry out its audit, ICE serves a Notice of Inspection (NOI) upon the employer, either in person or by certified U.S. mail, and the employer must be given at least three business days to produce its I-9 forms. This request is often not limited to the production of I-9 forms, but may include additional documents such as the payroll, a list of current employees, the company's articles of incorporation, and business licenses. ICE agents will then conduct their inspection either at the employer's place of business or at an ICE field office.

Employers can prepare for a potential audit by 1) training their employees and volunteers on how to refrain from speaking to or showing ICE any documents (except as required by federal law)²⁴, 2) designating specific staff members to handle all interactions with ICE and any other federal, state, and local agents, and 3) establishing a secure location for records. Employers should also remember that 1) subject to limited exceptions, they are not required to make copies of the supporting documentation provided by employees in conjunction with the I-9 process²⁵ and 2) they are permitted to discard the I-9 forms of former employees once the required retention period of one year post-termination (or three years post-hire, if later) has passed.²⁶ Discarding old I-9 forms reduces the risk of being fined for any errors on old forms that might otherwise be inspected in an audit.

In the event of an I-9 audit, an employer should immediately contact qualified legal counsel before responding to the NOI or any other ICE request. The employer should be careful not to waive the three-business-day period to produce the requested I-9 forms and should use this time to consult with its attorney and prepare to turn over documents to ICE. The employer may request an extension, which ICE will grant at its discretion.

An attorney can help the employer properly comply with requests from ICE while at the same time only turning over what is legally required pursuant to the NOI and any subpoenas. An attorney can also make sure an employer complies with its legal duties to its employees. Throughout this process, an employer should keep legible copies of every document provided to (and received from) ICE. At the conclusion of the process, the employer should obtain a signed and dated receipt from ICE stating the number of documents received and on which date.

²⁴ Effective January 1, 2018, California law (Assembly Bill 450) will prohibit employers from voluntarily consenting to immigration enforcement agents entering non-public worksite areas or inspecting employee records without a judicial warrant or subpoena, except as required by federal law (and, more specifically, except for inspections of I-9s or other documents covered by a Notice of Inspection). It will also require employers to post a notice to all current employees (and their union) of any I-9 inspection within 72 hours of receiving notice of the inspection and to notify those specific employees (and their union) whose I-9s are deemed defective pursuant to the inspection. Finally, it will prohibit employers from re-verifying work authorization status unless required to do so by federal law. This law contains additional details and exceptions, including a description of civil penalties to be imposed in the event of a violation. For the full text of AB 450, see https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB450.

²⁵ See <https://www.uscis.gov/faq-page/i-9-central-questions-about-documents#t17077n46973>. Note, however, that if copies of supporting documentation are made, they must be retained. Any document retention policy should be applied equally to all employees, to avoid a possible discrimination charge. Employers should consult with counsel before adopting or significantly changing any such policies.

²⁶ <https://www.uscis.gov/i-9-central/retain-store-form-i-9/retaining-form-i-9>

After ICE conducts an audit of an employer's I-9 forms, it may deliver one of several possible notices to the employer. For “technical or procedural” (as opposed to substantive) errors found in the employer's I-9 forms, ICE will issue a Notice of Technical or Procedural Failures listing the errors and giving the employer 10 business days to correct them and avoid a violation. Examples of a technical or procedural error include the failure to add the form preparer's name or address and a failure to date the employer attestation in section 2 of the form. If such errors are not corrected within the 10-business-day period, they will be deemed to be violations of IRCA's verification provision²⁷ and result in civil monetary penalties. Note that this 10-business-day grace period does not apply to substantive verification errors, such as an employee's failure to check the box attesting to his or her authorized status in section 1 of the Form I-9.²⁸

For other IRCA violations, such as knowingly hiring or continuing to employ an unauthorized individual, ICE will deliver a Notice of Intent to Fine (NIF). This notice will specify the violations committed by the employer. The 10-business-day grace period does not apply to this type of violation, and an employer cannot avoid liability by simply terminating the employees that are the basis of the violations. The employer's recourse is to request a hearing in front of an Administrative Law Judge within 30 days of receipt of the NIF.

4. Independent Contractors

Does IRCA require me to verify the work authorization status of independent contractors?

No. However, you should be aware of IRCA's contract provision, which states that “a person or other entity who uses a contract, subcontract, or exchange...to obtain the labor of an alien in the U.S. knowing that the alien is an unauthorized alien...with respect to performing such labor, shall be considered to have hired the alien for employment in the United States in violation of [IRCA's hiring provision].”²⁹ This means that an employer could face liability under IRCA if it engages an independent contractor with knowledge (actual or constructive) that the individual is not authorized to work in the U.S.

An employer must therefore address two issues when engaging independent contractors. First, the position must be properly structured as an independent contractor arrangement, which requires a detailed facts-and-circumstances analysis.³⁰ Second, the employer must not have either actual or constructive knowledge (described above) that the individual is

²⁷ 8 U.S.C. § 1324a(a)(1)(B)

²⁸ For a detailed discussion of “technical or procedural” vs. “substantive” I-9 failures, see Memorandum from Paul S. Virtue, INS Acting Exec. Comm'r of Programs, “Interim Guidelines: Section 274A(b)(6) of the Immigration and Nationality Act Added by Section 411 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996” (March 6, 1997).

²⁹ 8 U.S.C. § 1324a(a)(4)

³⁰ For more information on classifying workers and the consequences of misclassification, please visit: <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee> and https://www.dir.ca.gov/dlse/faq_independentcontractor.htm. Employers should seek qualified legal counsel for assistance with this determination if in doubt.

not authorized to work in the U.S. Any enforcement investigation into this matter would likely focus on prior work history, interactions, or communications between the employer and the independent contractor to determine if there was knowledge.

5. Collectives

Does IRCA require an employer to verify the work authorization status of individuals that are members of a collective or other cooperative organization, when the contract is anticipated to be between the employer and the collective, not any individual member?

No. However, the employer should be aware that the same statutory provision that applies to independent contractors (described above) is relevant in this context as well. That provision prohibits an employer from using a contract or subcontract to obtain the services of an individual knowing that the individual is not authorized to work in the U.S.