

Immigration Issues Affecting All Employers

Whether or not they realize it, immigration rules affect every employer, large and small. The two primary immigration issues affecting employers, even those who do not sponsor employees, stem from two forms: the job application form and the I-9 form. Improper handling of these two documents can cause employers serious problems and can lead to discrimination charges, civil sanctions, and even criminal prosecutions. Employers who take the time to establish proper procedures, however, can avoid the most serious problems.

Employment Applications

Employment applications have traditionally attempted to address immigration issues by asking a number of improper questions, many of which can lead to an inference of discrimination. Various government agencies, including United States Citizenship and Immigration Services (USCIS), the Office of Special Counsel (OSC), and the EEOC have endorsed specific questions on job applications that are viewed as the “proper” way to elicit information about job applicants.

According to the governmental guidance, employers may ask the following two questions on a job application:

- 1) Are you legally authorized to work in the U.S.?
- 2) Will you now or in the future require sponsorship visa status (e.g., H-1B status)?

To enjoy this safe harbor, these questions should be asked together and should only seek a "yes" or a "no" answer. Employers can follow up with more questions concerning what sort of sponsorship might be necessary if the candidate answers "yes" to both questions.

This is important because asking the wrong questions or asking these questions of some applicants and not others can raise a host of problems. The Immigration & Nationality Act (“INA”), 8 U.S.C. §1324b, contains anti-discrimination provisions that protect individuals from national origin discrimination, unfair documentary practices, and retaliation; these provisions also protect certain other individuals against citizenship status discrimination. Understanding and implementing this policy now, can avoid many problems in the future. For more information, contact us to assist you with establishing a process to secure needed information while avoiding needless risks.

I-9 Forms

This form has created considerable confusion for employers. A large part of the trouble with the Form I-9 is that it is considered to be ‘simple paperwork’ by many business owners, who tend to assign to lower level clerical staff to complete with other ‘onboarding’ paperwork. The form is not, however, quite so simple and incorrect

completion or improper processes can create serious (i.e., expensive) problems for employers. Enforcement efforts focused on I-9 completion have increased significantly in the past few years, resulting in very substantial civil penalties and even some criminal sanctions.

Many of the errors in completing the Form I-9 are the result of employers not giving this form appropriate consideration. For example, the majority of fines occur because Section 1 is not complete fully and properly or is completed too late. Another area of concern arises when Section 2 is completed. Employers often dictate what documents an employee should produce in order to save time. That is improper, unwise, and risky. Employers should simply give the new employee the list of acceptable documents and let the employee decide which documents to produce. Some employees provide too much documentation, and employers copy it all. This could lead to a claim that employers are over-documenting certain employees' status. Employers should only accept the documents that are required; one of the items identified in List A or one of the items identified in List B and in List C. Retaining more documents than is required can result in civil penalties and charges of discrimination.

Many employers improperly store the Form I-9s, keeping them in employees' personnel files. The ideal, however, is to keep them separate so that they can easily be produce in the event of an audit. It would also be wise to store them in two groupings: one for current employees and a second for former employees. It would also be prudent to keep a copy of each completed form, again in these two groupings. Having a copy ensures that you have access to the forms if they are under audit and will enable you to review the forms and prepare explanations and/or defenses to an auditor's conclusions, making a defense easier to accomplish.

Finally, some employers discard completed I-9 forms too soon. Termination of an employee does not mean that the I-9 for that employee can be discarded. To the contrary, completed I-9 forms must be retained for one year after an employee's termination or three years after hire, whichever is later.

This is a brief overview of immigration concerns and necessary procedures for every employer. As with all legal issues, if there are any questions about these matters, consultation with knowledgeable legal counsel is a must.