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"Immigration & New Hires: The Legal Aspects" by Kent J. Pagel & Bartt G. Thompson

Each and every day, we hear our clients complain of the complex web of legal entanglements that exist with respect to hiring, promoting and terminating their employees. Frustration often turns to criticism, much of it well deserved, that the many existing laws and regulations simply reflect attempts by legislators, who are lawyers, to keep their fellow lawyers employed. After the emotion passes, we generally attempt to slowly peel away the issues and in turn help these companies understand how to effectively comply, both from a cost and time standpoint, with the numerous restrictions. The area of immigration compliance has become a big part of this process.

UNDERSTANDING THE FUNDAMENTALS

It is unlawful for a company, of any size, to hire for employment in the United States an alien (any person not a U.S. citizen or national) knowing the alien is an unauthorized (many use the term "illegal") alien. An unauthorized alien is an alien who is not lawfully admitted into the U.S. for permanent residence or who is not otherwise authorized for employment by the Immigration and Nationality Act (in lawyers' jargon, this is the "Act") or the U.S. Attorney General. On the flip side, the Act also prohibits companies (who employ more than three employees) from discriminating against any individual, other than an unauthorized alien, in hiring or discharging because of the individual's national origin or citizenship status.

The Act furthermore requires that employers verify each employee's eligibility for employment under immigration law (this does not apply to independent contractors). Thus, hiring policies must be consistent for both U.S. citizens and aliens, and timing for completion of the Form I-9 should be the same for all employees. Verification, however, is not required until the employee is actually hired. The verification process requires that the employer obtain a Form I-9 completed by the employee and examine certain documents of each employee hired.

FORM I-9

Read the following closely: Section 1 ("Employee Information and Verification"). Employers **MUST** ensure that each employee complete and sign section 1 at the time of hire, and provide original documentation about the employee which establishes (1) the employee's identity and (2) the employee's employment eligibility. The reverse side of Form I-9 contains three lists of documents acceptable to identify the employee and the employee's employment eligibility. An employer **CANNOT** specify which of these documents it will accept. Documents from List A (on the reverse side of the form) establish both requirements; whereas documents from List B establish the employee's identity and documents from List C establish the employee's employment eligibility.

Section 2 (“Employer Review and Verification”). Within three days of hiring the employee (unless the hire is for less than three days, in which case at the time of hire) each employer **MUST** physically examine the documentation presented by the individual and ensure that the documents presented appear to be genuine and relate to the individual, and complete and sign section 2.

Section 3 (“Updating and Revivification”). When an employer hires a person who was previously employed by the employer, if the employer previously completed Form I-9, the employer (in lieu of completing a new Form I-9) may inspect the previously completed Form I-9 and if the employer determines that the information is still in order and the individual is hired within 3 years of the initial date of execution of the Form I-9, the previous Form I-9 may be used provided section 3 is completed and signed by the employer to reflect the date of rehire.

An employer may, but is not required to, copy a document presented by an individual for the purpose of complying with the verification requirements. If a copy is made, it **MUST** be retained with the Form I-9. Keep in mind however that making a copy of a document does not relieve the employer from the requirement of completing section 2 of Form I-9. In addition, **DO NOT** copy documents only of individuals of certain national origin. Doing so may violate anti-discrimination law.

RETENTION OF FORM I-9

Each employee’s Form I-9 **MUST** be retained by the employer until the later of: (a) 3 years after the date of hire, or (b) 1 year after the date the employee’s employment is terminated.

PENALTIES FOR FAILURE TO COMPLY

Any employer who is found to have failed to comply with the employment verification requirements involving Form I-9 is subject to a fine of between \$100 and \$1,000 for each employee with respect to whom such violation occurred.

A person found to have knowingly hired an unauthorized alien for employment in the U.S., or to have knowingly continued to employ an unauthorized alien in the U.S., shall be subject to a cease and desist order. Also, fines will be assessed ranging from \$250 to \$2,000 for each unauthorized alien for the first offense and between \$3,000 and \$10,000 for each unauthorized alien for two or more offenses. Further fines and imprisonment can also apply to those who engage in a pattern or practice of violations of the Act.

Complying with these requirements is not all that difficult. If you have not done so already, take a little time to develop a system to follow and train those employees who are involved in hiring. If you think you are already in compliance, spend a few minutes to run through the items listed above to make sure.

The April issue of *WOODWORDS* will include an article on important considerations relating to those unfortunate instances where companies become subjected to an investigation or illegal

alien raid conducted by the INS.

Kent J. Pagel and Bartt G. Thompson, are shareholders in the firm of Pagel, Davis & Hill, P.C. Mr. Pagel acts as the outside general counsel of WTCA. Mr. Thompson's practice involves advising business owners on transactional and legal compliance matters.

[SBC HOME PAGE](#)

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