



The background of the page is a textured orange color. It features several stylized human figures. In the center, a large black figure stands with a circular head and a rectangular body. To its left, a smaller white figure with a patterned body and a semi-circular head stands. Below the central figure, two more white figures with patterned bodies and circular heads stand. The overall style is minimalist and graphic.

# HIRING PRACTICES

AND THE IMMIGRATION DEBATE

*Navigating  
a changing  
legal landscape*

**F**aced with a dwindling supply of available workers, you may be among the many employers looking to fill your ranks with foreign nationals. Hiring immigrants, after all, has long been a valued technique for getting the job done in America. Today, though, employers need to tread more carefully over what has become rougher legal terrain. As the nation's headlines attest, employers can be hit with stiff penalties when errors are made hiring workers from other nations who are in the United States temporarily or permanently.

**By Phillip M. Perry**

**F**ederal regulations are tightening up in ways that target employers of undocumented workers. Worse, state governments around the country are creating a confusing patchwork of laws that penalize employers who hire undocumented foreign nationals, following the failure of Congress to pass comprehensive immigration reform last summer. Last year, state lawmakers considered more than 1,560 bills related to immigration and enacted 244 of them in 46 states, according to the National Conference of State Legislatures. That pace was triple the previous year and the NCSL expects more such activity in 2008. (The organization's complete report is available at [www.ncsl.org](http://www.ncsl.org).) • "The states are having to pick up where the federal government did not come through," says David Kotick, managing partner of Apsan Law Group, an immigration law firm in New York.

#### LEADING THE WAY

**B**usinesses nationwide are assessing the impact of Arizona's new immigration law, believed to be the strictest in the nation. The law does the following:

- ▶ Encourages people to contact their county governments when businesses are suspected of employing illegal immigrants;
- ▶ Allows the county to revoke the business license of an employer who knowingly hires an illegal immigrant;
- ▶ Requires all Arizona businesses to use E-Verify, a federal online database, to confirm that new hires have valid Social Security numbers and are eligible for employment.

The law is being challenged in court by the Arizona Chamber of Commerce and Industry. "It's crystal clear that the employer sanctions law will harm the state economy," says Chamber President Glenn Hamer. "It's simply a question of degree."

Another high profile state is Virginia, where more than 50 pieces of immigration-related legislation are expected to be considered in 2008. One law would revoke the business license of any employer found to hire undocumented workers; another would require employers themselves to pay any workers' compensation claims for undocumented employees. A coalition of businesses and trade groups called Virginia Employers for Sensible Immigration Policy has been created to fight the laws.

Even municipalities are getting into the act. "Many local communities are fighting illegal immigration by targeting businesses," says Kotick. "Employers who hire undocumented aliens face steep fines and the loss of their business licenses. Some laws even mandate jail time for repeat offenders."

#### VERIFYING ELIGIBILITY

**W**hatever your state, you are subject to federal regulations that require you to verify the employment eligibility of anyone you hire. "Every individual, once hired,

must be asked for documents that prove their identity and their work authorization," says Carlina Tapia-Ruano, a partner at Chicago-based Tapia-Ruano & Gunn, an immigration law firm ([www.trgpc.com](http://www.trgpc.com)). The employer must have each hired individual fill out an I-9 form, titled "Employment Eligibility Verification," issued by the U.S. Citizen and Immigration Services, a division of the Department of Homeland Security. (To avoid any appearance of discrimination, the law requires that you have individuals complete this form only after being hired, not during the recruitment process.)

You can download a copy of an I-9 form from [www.uscis.gov](http://www.uscis.gov). Click on "Immigration Forms" and then "Employment Eligibility Verification" or I-9, toward the bottom of the list.

On part 1 of the I-9 form, the employee enters basic information such as name, address, Social Security number and date of birth. Just as important is the section on the employment status of the individual. There are only three choices

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here: The individual is either: 1) a U.S. citizen; 2) a legal permanent resident, or 3) an alien authorized to work until a given date. The employee must sign and date the form.

In part 2 of the form, you must certify that you have made sure the documents provided by the employee establish the individual's identity and employment authorization. What documents are acceptable? There is an extensive list on the back of the I-9 form. Any one document from a list of 10 is acceptable as proof of both identity and employment eligibility. (A passport and a permanent resident card are two examples.) Additionally, there are nearly two dozen additional documents that have been certified as proof of one of the two criteria.

Part 3 provides space for updating the form's information after a worker's previous work authorization has expired.

"The law requires that the signatures and the information be completed within three days of the employee's hire date,"

says Tapia-Ruano. "Many attorneys recommend that employers attach photocopies of the reviewed documents to each I-9, to help protect the business in the event of an audit."

#### **AVOIDING ERRORS**

**G**athering documents is one thing. Making sure they are authentic and that all of the blanks are filled in correctly is another. Failure to do so can be costly. Penalties for errors can range from \$1,000 to \$10,000 per violation. "The penalties can accumulate very quickly even with a single I-9 form if there are numerous violations," says Tapia-Ruano. "Some employers have been hit with hundreds and thousands of dollars in penalties and fines."

Even employers who make innocent mistakes can be fined, says Tapia-Ruano. "If a receptionist or whoever is assisting employees in completing the I-9 forms makes mistakes, then even if the workers are U.S. born citizens, the employer is subject to fines. The fact that this can happen repeatedly makes employers very uncomfortable."

Employers should make sure that everyone who helps employees fill out I-9s is trained to avoid as many errors as possible, suggests Tapia-Ruano. "And I would encourage an internal audit of I-9s on a periodic basis. Don't wait for an audit by the Department of Homeland Security."

While the I-9 form looks simple, attorneys caution employers from making these common errors:

- ▶ **ILLEGAL BIAS:** Avoid charges of discrimination by requiring every employee—not just the ones whom you believe are from another country because of their appearance or their speech—to fill out an I-9 form.
- ▶ **ENTRY ERRORS:** "Any mistakes can or will result in fines," says Tapia-Ruano. One of the more common errors is incorrect indication of the employee's immigration status. An employee with a work visa, for example, may have erroneously filled in "permanent resident." Such a mistake is significant even if done innocently. "It is the employer's duty to make sure the entries are accurate."
- ▶ **OVER-RESTRICTIVE DOCUMENTATION:** Avoid requiring documentation that is more restrictive than what the law mandates. An employer might be tempted to do this to simplify record keeping, but it is illegal and can lead to fines as well as charges of discrimination. "The I-9 provides a list of documents that are acceptable as proof," says Tapia-Ruano. "You must accept the employee's decision as to which of the listed documents to provide."
- ▶ **FAILURE TO ASSESS AUTHENTICITY:** The employer must not accept documents that a reasonable person would suspect were fraudulent either because they look doctored or look like duplicates.
- ▶ **PROCRASTINATION:** Another mistake is to put off the task of examining the employee's documents and getting the I-9 in order. "It's not uncommon for employers to wait more than three days," says Tapia-Ruano. "Again, that can result in fines."

## **SAFE HARBOR FOR EMPLOYERS**

**F**or decades, the U.S. Social Security Administration has sent "no match" letters to employers when workers' names and Social Security numbers did not correspond to the agency's records.

*Employers have been unsure what to do after receiving the letters. There was no firm guidance from the government and in many cases employees remained on the payroll in a kind of limbo.*

*This situation has changed. In August 2007, the U.S. Immigrations and Customs Enforcement division of the Department of Homeland Security issued new regulations that defined the steps to be taken by employers receiving no match letters. Employers who follow the procedures were granted safe harbor from prosecution. At the same time, the regulations provided for increased civil or criminal penalties for employers who fail to comply.*

*Here is a brief synopsis of what employers would be required to do in the event of a no-match letter:*

- 1) *Within 30 days, check records to ensure that the mismatch was not the result of a clerical error;*
- 2) *If this does not resolve the problem, ask the employee to confirm the accuracy of the employer's records;*
- 3) *Ask the employee to resolve the issue with SSA within 90 days from the date the employer received the no-match letter;*
- 4) *If the employee is able to successfully resolve the mismatch, ensure that the instructions in the SSA letter have been followed;*
- 5) *If the issue is still unresolved, initiate another verification round as if the employee were newly hired.*

*Late in 2007, a federal court issued a preliminary injunction barring implementation of the safe harbor regulations, citing among other reasons a high incidence of errors in the government's Social Security database.*

*Even so, the government has not abandoned the basic concept outlined in the regulations and intends to issue revised rules in 2008. "Employers would be remiss to fall back on their due diligence and security if they think the injunction will cause the problem to be put on the back burner," says Angelo A. Paparelli, managing partner of Paparelli & Partners. "Employers should use this respite to adjust any employment-related immigration policies that need correcting."*

*To stay abreast of developments in this area visit the web site of the U.S. Immigration and Custom Enforcement at [www.ice.gov](http://www.ice.gov).*

▶ **ALLOWING EXPIRATION DATES TO SLIP BY:** Many employees have permission to work for only a limited period. "You need a system to continue to verify the employment status of an individual throughout the period of employment," says Tapia-Ruano. Prior to the expiration date, ask the employee to present new verification documents.

It's important to retain these I-9 forms in a safe place. "At any time, the Department of Homeland Security or the U.S. Department of Labor may come around and perform what they call an 'employment audit' of I-9s," says Tapia-Ruano.

## UNDERSTANDING EMPLOYMENT VISAS

**D**ocuments that certify that "foreign nationals"—people who are natives of other countries—are eligible to work in the United States are called "employment visas." Not all employment visas are alike. In fact, there are a host of different kinds. To peruse the full array of visas with explanations, navigate to the web page maintained by the U.S. Department of State at [www.unitedstatesvisas.gov](http://www.unitedstatesvisas.gov), and also <http://travel.state.gov/visa>.

Many employers hire unskilled workers with H-2B visas, valid for temporary employment for up to a year. "There is a tremendous need for people to fill such positions in this country," says David Kotick, managing partner of Apsan Law Group.

Arranging for H-2B visas can take up to four months to complete. The process begins when the employer obtains a labor verification from the U.S. Department of Labor. Then the employer files a petition with the Department of Homeland Security. When that petition is approved, the worker can apply for a visa and a passport from the U.S. consulate in his or her own country.

The United States limits such visas to 66,000 annually. "It's nowhere near enough," says Kotick. "They run out very quickly and there is a severe labor shortage for these workers that affect business profits and the economy as a whole."

"What's really needed is a program that provides for a year-round legal status for guest workers," says Kotick. "That was part of the Congressional immigration reform package that fell through."

### SAFE-HARBOR RULES

**T**he U.S. Social Security Administration has long been in the practice of sending "no-match" letters to employers when workers' names and Social Security numbers on W-2 Forms do not match the SSA records. In the past, employers had never been sure what to do after receiving these letters. Should a worker who cannot reconcile the discrepancy be fired?

***"While the safe-harbor regulations were intended to reduce ambiguity, employers still face the costly task of checking and double-checking documents. And the safe-harbor regulations carry their own heightened risk of financial penalty."***

"In many cases, employers have kept the employees on board, fearing that a termination decision based on a no-match letter might lead to charges of discrimination," says Angelo A. Paparelli, managing partner of Paparelli & Partners, an immigration law firm with offices in New York City and Irvine, California ([www.entertheusa.com](http://www.entertheusa.com)). "After all, there can be legitimate reasons why a no-match occurs. A female employee might have gotten married, for example, and changed her name to her husband's without notifying the Social Security Administration. Or the Social Security Administration could have misspelled the name."

Indeed, the Web site of the U.S. Immigration and Customs Enforcement division of the Department of Homeland Security states that, "an employer who takes action against an employee based on nothing more substantial than a mismatch letter may, in fact, violate the law."

Times, though, are changing. Today's employers face more severe fines for hiring illegal immigrants and there is a general national mood shift against undocumented foreign nationals. Many observers, therefore, are concerned that employers will opt to risk discrimination lawsuits over the federal government's civil and criminal penalties for employment of undocumented workers. "The fear is that many people will be terminated based on foreign appearance and name," says Paparelli.

As partial mitigation for this problem, in August 2007, the Department of Homeland Security issued new regulations intended to clarify matters while providing a "safe harbor" for employers who hire foreign nationals. The regulations define what steps employers must take within what time periods to avoid legal liability for hiring undocumented workers.

While the safe-harbor regulations were intended to reduce ambiguity, employers still face the costly task of

checking and double-checking documents. And the safe-harbor regulations carry their own heightened risk of financial penalty. "The procedures defined in the rules are not really voluntary," says Paparelli. "The employer who fails to carry out the defined steps risks being charged with 'constructive knowledge' of the employment of workers who lack the right to work. This would put the employer in violation of immigration laws."

An injunction by a federal court in late 2007 delayed implementation of the new regulations. However, the reprieve is expected to be short-lived. "We're currently seeing what we can do to address the concerns that the judge entered in order to see whether we can get the injunction lifted, and then go forward with this regulation," Homeland Security Secretary Michael Chertoff recently told Congress.

The government has stated that it intends to reissue the safe-harbor rules in revised form to satisfy the court's concerns. This delay provides employers with additional time to study the proposed rules as well any related regulations that are likely to flow from the federal pipeline. (For details, see the sidebar, "Safe Harbor for Employers.")

#### STAYING INFORMED

**M**any feel that recent changes in federal regulations represent an attempt to shift the border control effort from the government to the private sector. "Employers feel an unreasonable burden is being placed on their shoulders to control undocumented employees," says attorney Tapia-Ruano. If more is expected of the employer than ever before, though, it only highlights the need to maintain vigilance in hiring procedures. As the face of America's workforce changes, employers can be sure there will be additional changes in federal, state and local regulations. ■

*Phillip Perry is a business writer based in New York City.*

## GETTING HELP

**E**mployers requiring legal assistance on immigration law may turn to these resources:

- **The Academy of Business Immigration Lawyers, [www.abil.com](http://www.abil.com)**
- **The American Immigration Lawyers Association, [www.aila.org](http://www.aila.org)**
- **FindLaw—categorizes attorneys by legal issue, including immigration law, <http://lawyers.findlaw.com>**

THERE'S NOT ENOUGH  
ART IN OUR SCHOOLS.

NO WONDER  
PEOPLE THINK  
**LOUIS  
ARMSTRONG**  
WAS THE FIRST  
MAN TO WALK  
ON THE MOON.

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For more information about the importance of arts education, please contact [www.AmericansForTheArts.org](http://www.AmericansForTheArts.org).

