

Compliance and Management Issues

What is the Immigration Reform and Control Act and Who Does it Govern?

The Immigration Reform and Control Act of 1986 (IRCA) makes it unlawful for an employer to hire any person who is not legally authorized to work in the U.S., and it requires employers to verify the employment eligibility of all new employees. The IRCA also prohibits discrimination in hiring and discharge based on national origin (as does Title VII) or on citizenship status. IRCA's anti-discrimination provisions are intended to prevent employers from attempting to comply with the Act's work authorization requirements by discriminating against foreign-looking or foreign-sounding job applicants. The IRCA is enforced by the Department of Justice and applies to smaller employers than those covered by EEOC-enforced laws. IRCA's citizenship discrimination provisions apply to all employers with at least four employees.

The Social Security Administration's No-Match Rule

A rule from the Department of Homeland Security (DHS) was proposed to help employers ensure they are employing only those authorized to work in the U.S. and provide safe harbor provisions in the case of a "no match" letter. When a social security card is presented as evidence of one's ability to work in the U.S. and the name does not match the Social Security Administration's files, the agency can issue a "no match" letter to inform employers. Although there can be many reasons for a "no match," receiving this notification alerts the employer the employee may not be authorized to work in the U.S.

The rule outlines safe-harbor procedures employers should follow, including reasonable steps to correct the record within 30 days, resolving discrepancies within 90 days, and completing a revised I-9 within 93 days if the discrepancy is not resolved within the 90-day period. According to DHS, the rule does not create a new legal obligation for businesses. It simply outlines the steps a reasonable employer should take in resolving "no match" letters. The rule provides safe-harbor procedures that will make it likely DHS will not find the employer in violation of their legal obligation not to continue to employ those not authorized to work in the U.S. simply based on the receipt of a "no match" letter.

The rule can be viewed as a tool usable by businesses to help them navigate the points of action when they receive "no match" letters.

Compliance and Management Issues Related to Employment Based Immigration

The purpose of this white paper is to outline the compliance issues related to hiring workers from outside the United States (U.S.) and to review some of the issues an immigrant workforce can bring to an organization. Compliance with immigration law, including recent developments, is discussed followed by a review of common communication issues in a diverse organization.

It is important to note the safe-harbor provisions only apply to situations in which an employer receives a "no match" letter. Employers who are found to have knowingly hired unauthorized workers are still subject to either criminal or civil penalties. Currently, the rule is under preliminary injunction in Federal Court, and DHS has filed paperwork to allow the rule to go into effect in March 2009.

Electronic Signature and Storage of I-9 Forms

The new Electronic I-9 Rule would allow employers to electronically record and store their I-9 forms. According to DHS, storing I-9 forms electronically will enhance the effectiveness of Immigration and Customs Enforcement, and assist agencies in worksite enforcement.

The Electronic I-9 Rule assists efforts by U.S. businesses to electronically record and store their I-9 employment forms. All U.S. employers are responsible for verifying the identity and work authorization or eligibility for all individuals hired after November 6, 1986. To be in compliance, employers are required to complete an Employment Eligibility Verification Form I-9 for all newly hired employees. The employer is also required to keep the I-9 form for the latter of three years after hiring the individual employee, or one year after the termination of employment. DHS expects many employers will experience cost savings by storing these forms electronically rather than using conventional filing and storage methods. Electronically retained forms are more easily searchable, which is important for verification, quality assurance, and inspection purposes. Many employers have expressed frustrations with having to maintain I-9 paper files while the rest of their business is computerized. This new rule helps to resolve the problem and gives employers flexibility for storing records electronically.

Some Contractors Also Required to Use E-Verify

Beginning in early 2009, most federal contractors will be required to use the E-Verify system in addition to standard I-9 procedures. The E-Verify clause will be inserted into contracts over \$100,000 and agencies will begin amending existing contracts to include the clause. The clause requires most federal contractors to use E-Verify to verify all current employees working on a federal contract as well as all new hires, regardless if they will be assigned to work on a federal contract. However, higher education institutions, state or local governments, Indian tribes, and a few other exceptions, are only required to use E-Verify to confirm the status of existing employees and new hires assigned to a

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contract, as opposed to all new hires. There are four requirements under the new regulation:

- The contractor must enroll in E-Verify as a federal contractor.
- Within 90 days of enrollment, all new hires working in the U.S. and its territories must be verified through the E-Verify system within three working days of hire.
- Within 90 days of enrollment, or 30 days of assignment to the contract, the contractor must verify all employees currently working on contracts through the online system. Those employees hired before November 6, 1986 or working in support, indirect, or overhead positions not related to a contract are excluded.
- Employers must require their subcontractors with contracts of \$3,000 or more to use the E-Verify system by including a clause in all service/supply or construction subcontracts. Exceptions to this requirement include contracts under which all work will be performed outside the U.S., lasting for less than 120 days, or for commercially available off-the-shelf items.

Contractors have the option to verify the employment eligibility of all current employees, not just those assigned to a contract. These verifications must be complete within 180 days of enrollment and do not apply to individuals with a current security clearance.

Compliance with Immigration Employment Laws

In today's global economy, immigration compliance is a fundamental component of reasonable diligence. A company's failure to consider immigration issues can expose liability for immigration non-compliance, or can lead to the loss of key human capital. Recruiters in the U.S. are facing new obstacles as they work to attract and hire a new generation of immigrant innovators. Employers have two options for hiring a person from outside the U.S., either through the Employment Based Immigrant Visa (or green card) process, or through the Non-Immigrant Visa process (or H-1B work visa).

The H-1B visa is the primary work visa available to foreign workers outside the U.S. The purpose of the H-1B visa is to enable highly skilled foreign professionals to live and work in the U.S. for a specified period of time. Applicants must have a Bachelor's degree or higher, have training in a specialty occupation (e.g., engineering, medicine, or business specialties) and be sponsored by the employer. H-1B visa

holders are considered non-immigrant workers and the number of visas issued is capped each year. Green card holders are known as "lawful permanent residents" of the U.S. They have been authorized to live and work in the U.S. permanently and are considered immigrant workers. There are five categories of green card employment based immigration visas:

- **First Preference** (priority workers): include those with extraordinary ability, outstanding professors and researchers, and certain multinational executives and managers
- **Second Preference** (workers with advanced degrees or exceptional ability): those who are members of the profession holding advanced degrees or their equivalent, or who, because of their exceptional ability in the sciences, arts, or business, will substantially benefit the national economy, the cultural or educational interests, or the welfare of the U.S.
- **Third Preference** (professionals, skilled workers, and other workers): those with at least two years of experience as skilled workers, professionals with a baccalaureate degree, and others with less than two years experience, such as an unskilled worker who can perform labor for which qualified workers are not available in the U.S.
- **Fourth Preference** (special workers such as those in a religious occupation): those who, for at least two years before applying for admission to the U.S., have been a member of a religious denomination that has a non-profit religious organization in the U.S., and who will be working in a religious vocation at the request of the religious organization
- **Fifth Preference** (employment creation): immigrant status in the U.S. granted for the purpose of engaging in a new commercial enterprise

Talented global employees hoping to immigrate to the U.S. are increasingly frustrated with the extended waiting period and uncertainty of the immigration process. As a result, they are going to other areas such as Canada and Europe where they face fewer immigration restrictions. Employers actively seeking to hire top talent for difficult-to-fill positions would benefit from incorporating these employees into their recruiting strategy. If committed to this recruitment strategy, the company should create a solid route for

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foreign candidates, despite the grueling requirements for labor applications and the potentially time-consuming recruitment and documentation process.

Employee Communication

Once employed, a blended workforce faces many challenges in the workplace. One of the main challenges for these employees and their employers is effective communication. Communicating corporate vision, direction, and mission to an entire organization is vital, and effectively communicating with all employees is a complex task. Companies with a diverse workforce also have to incorporate the many cultural nuances distinctive populations can have, and that may create communication barriers. Built-in cultural values, behavior patterns, and ways of thinking have a profound effect on communication in the workplace. These considerations can make the task of employee communication all the more challenging.

A possible solution for improving employee communications includes identifying communication barriers. A new job, different work culture, and presence of diverse colleagues at the workplace can be very overwhelming for a newly hired employee, immigrant or not. A company's new hire orientation is an introductory program which provides the company with a significant opportunity to show a culture of inclusion, increase employees' comfort level, and provide ongoing support to integrate the employee into the company. Also, supervisors of diverse employee groups should participate in targeted diversity or cultural training to learn how to effectively handle differences, communicate expectations, provide feedback, and improve morale.

Additionally, language can be a large barrier to overcome. In many industries, especially the manufacturing sector, employers are realizing they cannot assume their workforce is only English speaking. Latinos are the fastest-growing ethnic group in the U.S. and the manufacturing sector employs a large part of this population. Some possible solutions for overcoming language barriers may include providing ESL (English as a Second Language) classes for employees and providing incentives upon completion of the course. Bilingual policy and procedures manuals, employee handbooks, and trainings can also be created and provided to this section of the workforce. It will help them understand their rights, safety rules, harassment policies, and benefits provided by the employer. Such initiatives can reduce company liability and impact participation in employer sponsored benefits. Presentations on the 401(k) plan, health insurance, direct deposit etc.

by the company or its third party administrators should be designed to meet the needs of all employees.

Lastly, with current workforce diversity levels, companies should make a concerted effort to prepare and promote a group of diverse employees into leadership roles to ensure equal employment opportunity. These efforts will build trust, increase participation in employer sponsored programs, increase retention, and control recruiting costs. Hiring employees who are immigrants can create challenges, but it also has its rewards, such as employee loyalty and dedication. At the end of the day, a good worker is a good worker and employees should be given the chance to do the job, regardless of protected class or first language.

Summary

Many nations do not have the privilege of having such diverse communities with an equally diverse workforce. The most successful economies and companies will be the ones who will integrate and embrace potential differences. During the 1990s, there was a huge wave of immigrants to the U.S. and many successful companies were launched by immigrants, such as Yahoo and Google. The next set of company leaders may be immigrating to the U.S. and should be treated fairly in employment decisions and provided with equal opportunity while working towards their American Dream.