

Labor and Employment Law

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AVOIDING TRAPS AND COMPLYING WITH I-9 REQUIREMENTS

By Dee H. Stasnopolis

The Immigration Reform and Control Act ("IRCA") was passed in 1986. The Act prohibits employers from knowingly hiring, recruiting, and referring illegal aliens for work in the United States, either because the individual is in the country illegally, or because his or her immigration and residency status does not allow employment. The law also extends to employers who, after the date of hire, find an employee to be an illegal alien and continue to employ such an individual.

All employers are required by law to verify that all employees hired on or after November 6, 1986, are legally authorized to work in the United States. This law applies to organizations of any size and of any number of employees. It is applicable to part-time employees and includes domestic help and farm laborers. The only exception is for the employee classification of "casual" hire where a true employer/employee relationship does not exist.

In order to comply with IRCA, when an applicant is hired, an I-9 form must be completed. This form certifies the applicant's identity and their eligibility to work in the United States. The form must be completed within three working days from the date of hire. However, if the employee submits a receipt showing that they have applied for a particular

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Dee Stasnopolis



Dee H. Stasnopolis is a Partner in the Bakersfield office of Borton Petrini, LLP. Dee graduated from Southwestern School of Law in 1982. In addition to his admittance to the State Bar of California, he is admitted to practice before the U.S. Supreme Court, the Ninth Circuit Court of Appeals and all Federal District Courts for the State of California.

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Dee is a member of the Kern County Bar Association, as well as the State Bar of California. His professional involvement also has included instructing insurance companies on settlement tactics, conducting legal-liability assessments for companies, handling unfair labor practice charges in front of the NLRB, advising clients on collective bargaining issues, conducting seminars on employment law for businesses, and has served as an arbitrator for the Los Angeles and Kern County Superior Courts. He sits on the Labor and Employment Law Committee of the Bakersfield Chamber of Commerce. He is a member of the Bakersfield Employers Advisory Council and the Society for Human Resource Management. He also is a member of the Employment Law Section of the State Bar of California.

AVOIDING THE EXEMPT EMPLOYEE TRAP

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verification document, an additional 21 days is allowed to produce such documents. The only other exception is for the employees who have resigned or have been terminated. In the event of their rehire, within three years from the date of their previous I-9 form, it is not necessary to complete another. Employers must retain the form for either three years after the employee's date of hire, or, for one year after termination or resignation of an employee, whichever is longer.

The Act requires that documentation establishing both identity and employment eligibility be produced and that the employer examine the documentation to make a good faith effort to determine that the documentation presented by the employee not only satisfies both the identity and eligibility requirements, but appears to be true, correct and valid documents.

It is in this area where employers most often fall into several traps. First, the documentation that establishes identity and employment can be a single document, or, there may be two separate documents, one establishing identity and the other establishing employment eligibility. It is essential that employers fully understand which documents meet the requirements under IRCA.

Additionally, many times employers fall into the trap of violating the IRCA by only asking certain employees, usually those who have foreign accents or demonstrate foreign characteristics, to submit documentation and complete a I-9 form. Such activity is unlawful discrimination. I-9's should be requested from every employee in every job category.

A further problem associated with employer compliance with IRCA requirements is utilizing the I-9 verification process as a screening method in their employment decision. Such practice is unlawful. Rather, the I-9 verification process and review of documentation in compliance with the IRCA requirements should occur after a job offer has been tendered.

A final area of non-compliance often occurs when employers store the I-9 documents with their employee's personnel file. This should not occur. Rather, the I-9 documentation should be maintained in a separate file. It is also recommended that the employer not photocopy any of the verifying documents and maintain them with the I-9 forms. Thus, if an audit ever occurs, there can be no challenge to the employer's good faith evaluation and verification of the qualifying documents presented by an employee.

On March 1, 2003, the functions of U.S. Custom Service, Federal Protection Service and former Immigration and Naturalization Service were transferred into the Bureau of Immigration and Customs Enforcement (ICE), which is a division of a new department of home land security. ICE is charged with the task of conducting searches and inspections including noticed and unannounced I-9 inspection audits. It is recommended that an employer never consent to an immediate

review of the I-9 or any other records, by ICE inspectors. Under the law, employers are entitled to a three-day notice for production of the I-9's and if an unannounced request is made by an ICE agent, for inspection of I-9 documentation, the employer should decline and consult with their attorney. Furthermore original documents should never be removed from an employer by ICE agents, absent the appropriate warrants. Rather, photocopies should be provided to the agent.

While certain industries are clearly more likely to receive I-9 audits, it would behoove employers to take the time to review the requirements of IRCA and audit the I-9 documentation maintained by them and their procedures in responding to an ICE audit, to ensure that they are fully compliant, properly maintain their documentation and have the procedures in place to be prepared for any ICE audit.



RECENT APPELLATE DECISIONS

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NINTH CIRCUIT CASES

In International Chemical Workers Union Council v. NLRB (2006), the Ninth Circuit held that the NLRB conclusion that the employer, during negotiations for a successor collective bargaining agreement, bargained in good faith was unsupported by substantial evidence. The Ninth Circuit held that when the employer took the position during negotiations that the company would go broke if it continued to pay benefits required under the previous agreement, but refused a request by the union to turn over its financial documents, such activity constituted bad faith negotiations, inasmuch as the employer did not effectively retract the statement during the negotiations.

In Americo v. NLRB (2006), the Ninth Circuit held that district courts do not have jurisdiction to enjoin an unfair labor practice hearing, holding that jurisdiction attaches only after the NLRB has issued a final decision.

Sample I-9 Form

In *Health Care Employees Union Local 399 v. NLRB* (2006), the Ninth Circuit held that the NLRB erred in finding that the union failed to carry its burden of showing that anti-union animus was a motivating factor in the hospital's decision to subcontract out its respiratory care department. The Ninth Circuit noted that the finding was unsupported by substantial evidence where there was un rebutted evidence concerning the employer's knowledge of union activity and the timing of the employer's decision to subcontract was made just prior to a unionization election, raising a compelling inference of anti-union animus. The court held that the ALJ mistakenly relied upon post-subcontracting evidence in formulating its ruling and overturned the NLRB decision.

In *Freitag v. Ayers* (2006), a correctional officer was terminated after she continued to complain about the sexually hostile environment created by prison inmates. The Ninth Circuit Court of Appeal held that the Corrections Department was not, by simple virtue of its status as a correctional institution, immune under Title VII from a legal obligation to take such measures and to protect its employees to the extent possible from inmate sexual abuse which created a hostile work environment due to the inmates' sexual misconduct. Because the Correctional Department failed to take prompt and effective remedial action reasonably calculated to address the misconduct and retaliated against the correctional officer for complaining, the judgment rendered in favor of the correctional officer was affirmed by the Ninth Circuit Court of Appeal.

CALIFORNIA SUPREME COURT DECISIONS

In *Carter v. California Department of Veteran Affairs* (2006), the California Supreme Court decided, once and for all, an issue that resulted in a split in the appellate divisions relative to their interpretation of the retroactivity of the 2003 amendment to the Fair Employment & Housing Act. The California Supreme Court held that the 2003 amendment was to be applied retroactively and that employers are potentially liable for sexual harassment of employees by third parties prior to that amendment. The Court held the amendment constituted a clarification of existing law as compared to the creation of new law.

In *Smith v. Superior Court* (2006), the California Supreme Court held that the penalties associated with Labor Code sections 201 and 203 are applicable to employment situations when an employer releases an employee after completion of a specific job assignment or time duration for which the employee was hired. Labor Code section

201 provides that if an employer discharges an employee wages earned and unpaid at the time of discharge are due and payable immediate and Labor Code section 203 imposes penalties for violation of that statute.

In *Dora v. Arnold Worldwide, Inc.* (2006), the Supreme Court reviewed the granting of a summary judgment in favor of the employer on plaintiff's wrongful termination action. At issue in the case was whether plaintiff was an at-will employee as compared to a for-cause employee. The California Supreme Court reaffirmed the prior ruling in *Guz v. Bechtel*, holding that a clear and unambiguous at-will provision in a written employment contract signed by the employee cannot be overcome by evidence of a prior or contemporaneous implied-in-fact contract requiring good cause for termination.

OTHER CALIFORNIA APPELLATE DECISIONS

In *Hess Collection Winery v. ALRB* (2006), the appellate court held that the state law providing for private mediators to set binding terms of initial farm union collective bargaining agreements where the parties cannot reach an agreement through collective bargaining negotiation, does not violate the due process or equal protection rights of an employer, nor does it invalidly delegate legislative authority to a private party.

In *Blum v. Superior Court* (2006), the California Appellate Court held that a Department of Fair Employment & Housing complaint, which is required to

be verified, may be verified by an attorney on behalf of his client.

In *Service Employees International Union Local 1000 v. Department of Personnel Administration* (2006), the California Appellate Court held that the trial court properly dismissed the union's complaint challenging the state's refusal to permit work site distribution of materials supporting a ballot proposition, where the union, prior to filing the complaint, failed to follow any of the informal or formal grievance and arbitration procedures under its collective bargaining agreement.

In *Koehl v. Berio* (2006), the California Court of Appeal held that, although commission payments can be wages as defined by Labor Code section 200, an employer can advance commissions to its employees prior to the completion of all conditions for payment and, by agreement, charge back any excess advance over commissions earned against future advances, should the conditions not be satisfied and that such conduct did not violate Labor Code section 221.



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