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Knowing the Rules About Hiring Illegal Immigrants

Companies Can Avoid Trouble By Following Steps

EMPLOYMENT LAW

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In the midst of the Congressional debate over immigration reform, the federal government has announced its intention to crack down on employers who hire illegal aliens – bad news for countless numbers of California employers. There is, however, a safe harbor for employers who understand the details of new Department of Homeland Security regulations proposed last summer.

It has been illegal for companies to knowingly hire or continue employing undocumented workers since President Ronald Reagan signed the Immigration Reform and Control Act of 1986. Due to lax enforcement, employers were lulled into believing that it was okay to employ illegal aliens.

As a consequence, the number of California companies employing illegal aliens has grown considerably, and it's a good bet that most of them don't know the legal pitfalls for doing so. Under the guise of new Homeland Security regulations proposed this summer, these employers will soon face a serious risk of civil fines, not to mention possible jail time, if they don't step carefully.

How can employers avoid the pain? The process starts when they receive what the Social Security Administration calls a "no match" letter. Under immigration law, employers must record the Social Security numbers of their employees and submit them to the Social Security Administration to see whether they match up with numbers actually on record. As the term implies, a "no match" letter brings news that a number submitted by the employee does not match official Social Security records.

For two decades, many California employers ignored "no match" letters with impunity, but that will end under the new regulations unless they follow specific procedures.

For starters, employers can't avoid trouble altogether if they adopt "citizens only" hiring policies or if they restrict hiring to immigrants who hold "green cards." Not all immigrants who are authorized to work in the U.S. get green cards, and it is against anti-discrimination provisions in the immigration law to restrict hiring to U.S. citizens except when required by federal, state or local law, or by government contract.

Nor can employers simply fire any worker named in a "no match" letter. Instead, employers must make a good-faith effort to determine whether the worker is here legally, starting with a check of the employer's own records to see whether the error is due to a typographical error in recording the worker's Social Security number.

Fixing the problem

Assuming the employer finds no such error, the employer must instruct the worker to go to a Social Security Administration office in an effort to clear up the problem. The new regulations give employers only 60 days to clear up any problem, and they must set up "tickler" systems to make sure that no one falls through the cracks.

Once the 60 days passes, if the employee can't present documents legitimating his or her presence in this country, the worker must be let go. On the other hand, if the employee does present new documents, the employer must complete a new Form I-9 verifying the employee's work authorization and submit it to the Department of Homeland Security.

There are some additional punctilios in the new regulations. A worker may not base a new Form I-9 on the same documents questioned in the original "no match" letter, and a mere receipt showing that the worker has applied for new documentation will not suffice.

In addition, any document used to establish a worker's identity -- or the worker's identity and employment eligibility -- must bear a photograph of the individual, and employers must retain any new Form I-9, along with any old form I-9, for at least three years from the date of the former, or for at one year after the worker leaves the job, if later.

The proposed regulations offer employers a safe harbor if they follow these guidelines upon receipt of the no-match letter from Social Security. Otherwise, the government will assume that the employer who fails to follow these procedures had constructive knowledge that the employee in question was working illegally all the time.

Company fines

That, in government parlance, will constitute "willful indifference" to the law, and the consequences will not be pleasant. For example, if an employer fails to follow the "I-9 process" outlined above to establish a worker's legal status, the civil penalties can reach $1,100 for each violation.

For employers who fail to follow the safe harbor provisions of the new regulations, civil penalties can reach $2,200 for each unauthorized employee for the first offense, $5,500 for each unauthorized employee for a second offense, and $11,000 for each unauthorized employee for a third offense. In addition, if the government finds that the employer has engaged in a pattern or practice of such violations, it can seek a temporary or even a permanent injunction against the employer.

Finally, should the government seek criminal sanctions, penalties start at $3,000 for each unauthorized worker or six months in jail, or both.

Clearly, these sanctions can quickly reach ruinous levels, leaving them no choice but to step carefully when hiring new workers and, to be sure, when verifying the status of any "no match" people already on the payroll.

Though it has been against the law since 1987 to hire illegal aliens, government estimates show a nearly 5000% increase in the number of foreign born workers in the U.S. working illegally. As Congress debates the larger immigration issue, Homeland Security promises a crackdown on employers who violate the law. For some, this will mean a difficult choice: continuing to violate the law or face losing a significant number of qualified employees.

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