

## Employer Self Regulation of Undocumented Workers

Worksite enforcement of undocumented workers has shifted from high-security areas to low wage sectors of the employment community such as the construction, hospitality and restaurant industries. Most recently, this shift in attention has caused many businesses to be investigated and subjected to civil and criminal sanctions. The most common complaint is failure to properly inspect and identify undocumented employees in the workforce. For example, Swift and Company, the third largest meat packing company in the United States, was recently raided by federal agents resulting in an arrest of 1,200 employees in six plants resulting in penalties for harboring aliens, money laundering and alien smuggling. In the face of such a harsh reality, what can your company do to protect itself?

Under the Immigration Reform and Control Act of 1986, all employers must verify eligibility of their prospective employees through the use of I-9 Forms with the U.S. Department of Labor. As proof of documentation, employers are required to complete each I-9 form, review original substantiating documents (e.g. social security cards, drivers licenses), and provide copies of these documents to the government. However, employers may still be subject to investigation and liability even if they follow this procedure.

Therefore, the Department of Homeland Security has offered a free online verification program to employers called the “Basic Pilot.” Employers are able to register for the “Basic Pilot”, enter the Social Security number and name of the prospective employee, and quickly receive confirmation of that prospective employee’s work eligibility. Approximately 13,000 U.S. employers are currently using the program. But yet again, the company’s good faith use of “Basic Pilot” creates only a rebuttable presumption that the employer has not violated immigration laws by hiring that worker. Thus, further liability protection is necessary.

Along with the “Basic Pilot” system, employers can protect themselves from civil liability and criminal sanctions due to violation of immigration laws by complying with “No Match Letters” issued by the Social Security Administration. A “No Match Letter” is a letter generated to give employers notice of a possible undocumented worker. It does so by issuing a letter that notifies the employer that the employee’s social security number and name do not match records on file with the government. Every year, hundreds of thousands of employers receive such “No Match Letters” and most employers find themselves confused as to the proper course of action. The letter specifically states that the employee must not be fired solely on the basis of the letter. This creates a “Catch 22” scenario for the employer because failure to follow up with the Social Security Administration with regard to the letter may be deemed as constructive knowledge of unauthorized employment, but firing that employee may be in contravention of protective discriminatory employment and federal immigration laws.

In response to this conundrum, the Social Security Administration has recently issued guidelines for employers on how to respond to these “No Match Letters.” First, employers must attempt to resolve the discrepancy within 14 days of receipt of the “No Match Letter”, and second, verify employment authorization by filing another I-9 form within 63 days of receipt of the letter. If the employer is filing another I-9 form, the documentation gathered to prove identity and employment must contain a photograph and must not contain the social security number or alien identification number of the employee. It is critical that the employer timely respond to the “No Match Letter” because a failure to respond can be used to prove violations of federal immigration laws. Such violations could lead to sizeable fines and prison terms.

There are an estimated 14 million undocumented workers in the United States. Currently, the White House plans on doubling the number of investigative agents and dedicating an additional \$41.7 million toward work site enforcement. As a result, your company may be the next one investigated. To protect your company, you must make certain that you are complying with and abiding by all federal immigration laws in place.

If you have any questions with regard to this article or immigration law compliance please contact any of the attorneys at Enterprise Law Group at (312) 578.0200.