



IMMIGRATION PRACTICE

ALERT

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NEW FORM I-9 AND ACCEPTABLE DOCUMENTS BECOME MANDATORY ON FEBRUARY 2, 2009

On December 17, 2008, the Department of Homeland Security (DHS) published an Interim Final Rule in the *Federal Register* amending current regulations regarding the Employment Eligibility Verification Form, known as Form I-9. All U.S. employers are required to complete a Form I-9 for each employee hired in order to verify that the individual is authorized for employment in the United States under the Immigration Reform and Control Act of 1986 (IRCA).

The Interim Final Rule is meant to improve the security of the I-9 process by making it easier for employers to verify acceptable documents and identify fraudulent documents. It narrows the list of acceptable identity documents and further specifies that no expired documents are acceptable.

Key points of the new rule:

- 1) Requires that all documents presented during the verification process be unexpired
- 2) Removes three documents from List A (*USCIS no longer issues these cards, and any that had been issued have now expired*):
 - a) Form I-688, Temporary Resident Card

- b) Form I-688A, Employment Authorization Card
 - c) Form I-688B, Employment Authorization Card
- 3) Adds two documents to List A:
 - a) Foreign passports containing specially marked machine-readable visas (which include a pre-printed temporary I-551 notation)
 - b) Valid passports for certain citizens of the Federated States of Micronesia (FSM) and the Republic of the Marshall Islands (RMI)
 - 4) Makes several technical changes to the Form I-9 itself

The Interim Final Rule is scheduled to go into effect on **February 2, 2009**, at which time the new Form I-9 will be mandatory and all previous versions (in English or Spanish) will no longer be valid. **Employers will be required to use the new version of the Form I-9 for all new hires and for re-verifying any employees with expiring employment authorization as of February 2, 2009.** The revised Form I-9 and List of Acceptable Documents will be available as soon as effective on the USCIS website (<http://www.uscis.gov/files/form/I-9.pdf>).

NY APPEALS COURT: UNDOCUMENTED WORKERS CAN SUE EMPLOYERS THAT VIOLATE THEIR IRCA OBLIGATIONS FOR LOST WAGES

On November 12, 2008, New York's Appellate Division, which is an intermediate appellate court, ruled that unauthorized workers are not prevented from suing employers for lost wages just because they used fraudulent documentation to obtain the employment. The court rejected an employer's claim that it was not liable for lost wages resulting from a workplace accident because the

injured employee was neither lawfully in the United States nor lawfully employed. The touchstone of the court's decision was that even though the employee was not lawfully employed, the employer could not rely upon that fact as a defense since the employer did not properly execute its responsibilities under federal law and was itself "guilty" of not having properly and lawfully checked the

employee's status when it hired him. (*Coque v. Wildflower Estate Developers Inc.*, N.Y. App. Div., No. 2007-00680, 11/12/08).

According to the court, if an employer "knew or should have known of the worker's undocumented status or failed to verify the work eligibility for employment," that employer violated the federal Immigration Reform and Control Act (IRCA) and can still face lawsuits by undocumented employees. The court stated that "an employer should not be rewarded for its failure to comply with federal immigration law by being relieved of liability for its failure to provide a safe workplace."

In this case, a construction worker from Ecuador was an employee of City Wide Building Corp. (City Wide). Wildflower Estate Developers Inc. hired City Wide and Classic Construction, a roofing company, as subcontractors to build townhouses. When the worker was severely injured on the job, he sued Wildflower and Classic Construction for common law negligence and violation of New York labor law seeking damages including lost wages. Although the worker admitted that he was undocumented and had submitted a fake Social Security card at the time of hire by City Wide, the court found that he was nevertheless eligible to collect lost wages because City Wide failed to properly complete his employment eligibility form. By accepting only his Social Security card, City Wide did not properly execute a Form I-9 or its obligations under IRCA, which required that it

confirm both identity and employment eligibility by the showing of a proper document or combination of documents. A social security card alone is insufficient to comply; another document was required to meet the obligations.

Although the court held this employer liable, it clarified that if an undocumented alien uses false documents to obtain employment and that fraud leads innocent employers, who properly completed the Form I-9, to mistakenly believe that the employee is legally authorized to work in the U.S., employees bringing such an action are barred from recovering their lost wages since the employer complied with its legal obligations.

This area of decisional law is in a state of flux, particularly in view of the rapid rate of change in immigration law and policy at the federal and state levels. Courts have come to conflicting conclusions on similar facts. Nonetheless, this decision seems well-reasoned and quite likely to emerge as the controlling law.

Fox Rothschild can provide appropriate guidance to employers regarding immigration compliance and related issues. If you have further questions regarding these or other legal issues, please contact Alka Bahal at 973.994.7800 or immigration@foxrothschild.com, or any member of our Labor & Employment or Immigration Practices. Visit us on the web at www.foxrothschild.com.



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