

THE BUILDER

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Are You Authorized?

*The Immigration Law Department Of Seyfarth Shaw LLP
Examines What It Takes To Get And Keep A Legal Workforce*

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Due to the nature of the business, the construction industry is a high-risk industry when it comes to authorized employment. Construction companies are more likely than many other kinds of employers to employ unauthorized workers (those without the proper documents to make them eligible to accept employment in the United States), and, in the process, become targets for investigations and raids conducted by U.S. Immigration and Customs Enforcement (ICE). For many employers in the construction industry, the Form I-9 that employees should complete when they begin work is an afterthought. It may or may not be completed on time (or at all), and the company representatives tasked with certifying the form are often not trained to complete the certification process properly. I-9s retained by the employer are rife with errors, and I-9s are retained well after they can—and should—be purged.

In addition, employers have tended to ignore, or pay scant attention to, social security mismatch letters. [The U.S. Social Security Administration (SSA) sends these letters to employers on an annual

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basis to inform them about names and social security numbers provided by the employers to the SSA that do not match the SSA's records.] Although employers have begun notifying employees whose names appear on these letters, few employers take further action to clear up the mismatch, and the federal government has begun to target them for violating immigration law. Further, many employers believe that they are insulated from liability for using unauthorized workers if they employ the workers indirectly, through a subcontractor or labor staffing firm. **Experience shows that a subcontract relationship does not protect against immigration law violations, and recent enforcement trends strengthen that conclusion.**

If these situations and attitudes toward I-9s, mismatch letters and subcontracted workers sound familiar to you, it is time to worry. Missing and poorly completed I-9s, in combination with neglected mismatch letters and cavalier attitudes toward subcontracted labor, leave employers and individuals open to significant risks for liability. Fines for I-9 violations can reach \$16,000 per employee, and individual managers, human resources staff members, supervisors, owners, and recruiters may ultimately face civil and criminal charges. For some, these immigration-related violations may result in prison sentences.

THE BROAD MEANINGS OF "EMPLOYER" AND "KNOWING"

The Immigration Reform and Control Act of 1986 (IRCA or Act) prohibits employers from knowingly hiring or continuing to employ unauthorized workers. Under the Act, proper completion of Form I-9 by reviewing an employee's original documentation of identity and employment authorization shows "good faith" compliance with the law and can be used as an affirmative defense by an employer charged with violation of the Act.

Regulations implementing IRCA define the word "employer" broadly to mean "an individual or an entity, including an agent or anyone acting directly or indirectly in the interests thereof..." **This means that many agents from different levels of management in a company may be classified as "employers" and face liability, including criminal liability,** if the company is found to employ unauthorized workers. The regulations also define "knowing" more broadly than many employers expect. To be liable for knowingly hiring an unauthorized worker does not require that the employer actually be aware that the individual being hired is not legally authorized to work in the United States.

"Knowing" includes "constructive knowledge," which is defined as "knowledge which may fairly be inferred through notice of

certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition." **If an employer has sufficient information to suspect that an employee is working illegally and the employer does not take action, that employer may be deemed to be "knowingly" employing undocumented workers.** For many years "constructive knowledge" was understood to include only willful and obvious disregard of an employee's likely unauthorized status. On August 10, 2007, however, ICE changed this understanding when it announced a rule requiring employers who receive a social security mismatch letter to take specific steps to resolve the mismatch within a given time frame.

Under the rule, if the mismatch is not resolved and if the employer continues to employ the individual, then ICE can use the mismatch letter as the basis to find that the employer knowingly continued to employ an unauthorized worker in violation of IRCA. While enforcement of this rule has been enjoined by a federal judge, it is clear that ICE intends to treat receipt of a mismatch letter as evidence that an employer has knowingly continued to employ an unauthorized worker.

TOUGHER REGULATIONS AND ENFORCEMENT POLICIES

In recent years, ICE has changed its focus in the area of employment authorization from one of education to one of enforcement and has begun cracking down on employers who hire undocumented workers. For example, in 2003, ICE collected a total of \$73,000 in fines from employers nationwide in connection with I-9 violations and the employment of undocumented workers. In the first half of 2007 alone, ICE collected over \$30 million for similar violations. In March 2008, civil monetary fines for I-9 violations and for the employment of unauthorized workers were increased by as much as \$4,000 per violation.

In addition to the civil fines and penalties that ICE has typically used to enforce IRCA, ICE has recently sought to use criminal laws associated with organized crime as enforcement tools. If an individual's or a company's actions go beyond I-9 violations, charges of racketeering, money laundering, and/or harboring may be faced. A sympathetic manager who warns employees that ICE is on the way will not only be charged with the knowing hire of unauthorized workers. He or she may also be charged with harboring and could face a prison sentence.

Within the past two years, more than 20 states have also enacted legislation in this area. Employing undocumented workers may, due to tougher state and federal laws and regulations, lead to the loss of government contracts, the revocation of business licenses, forfeiture of property, fines, and lengthy prison sentences. The message to employers is clear: taking steps to ensure that you have an authorized workforce should be a top priority.

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