



Arizona State Senate *Issue Brief*

September 2, 2008

Note to Reader:

The Senate Research Staff provides nonpartisan, objective legislative research, policy analysis and related assistance to the members of the Arizona State Senate. The *Research Briefs* series, which includes the *Issue Brief*, *Background Brief* and *Issue Paper*, is intended to introduce a reader to various legislatively related issues and provide useful resources to assist the reader in learning more on a given topic. Because of frequent legislative and executive activity, topics may undergo frequent changes. Additionally, nothing in the *Brief* should be used to draw conclusions on the legality of an issue.

DETERMINATION OF EMPLOYMENT ELIGIBILITY BY EMPLOYERS

INTRODUCTION

The federal Immigration Reform and Control Act (IRCA) makes all U.S. employers responsible for verifying the identity and work authorization of all individuals hired after November 6, 1986. It provides penalties for any employer who knowingly hires an individual who is not authorized to work in the U.S. (unauthorized alien), or who knowingly continues to employ an unauthorized alien. An employer who establishes good faith compliance with the verification requirements has established an affirmative defense that the person or entity has not violated the provisions of IRCA relating to knowingly hiring an unauthorized alien.

Federal law preempts any state or local law imposing civil or criminal sanctions, other than through licensing and similar laws, upon those who employ unauthorized aliens. In 2007, Arizona enacted the Legal Arizona Workers Act (LAWA), prohibiting an employer from knowingly or intentionally employing an unauthorized alien and establishing penalties for employers in violation. LAWA was further amended during the 2008 legislative session.

The following summarizes employment eligibility verification requirements under federal and state law and the tools available for compliance.

FEDERAL LAW

I-9 Forms

To implement IRCA, employers must complete Employment Eligibility Verification forms (I-9 Form) for each employee when hired. I-9 Forms are divided into two sections. The first section must be filled out and signed by the employee. For the second section, the employer is required to personally review the original document(s) provided by the employee from a list of acceptable documents (the list of acceptable documents follows) establishing the employee's identity and eligibility to work. The employer must accept documents that reasonably appear on their face to be

genuine and to relate to the person presenting them. The employer must reject documents that do not reasonably appear to be genuine and ask the employee for another form of documentation from the list. The employer must then complete the second section, attesting to the document(s) presented. When an employer signs the I-9 Form, the employer attests to the fact that the employer has reviewed the original document and that it reasonably appears, upon reasonable inspection of its features and the information it contains, to be genuine and to relate to the employee who has presented it for employment eligibility verification purposes. Signage by the employer does not attest to the legitimacy of the status of the person presenting the documents. Employers are prohibited from requesting an employee to present more or different documents than required and cannot request specific documents.

I-9 Forms must be retained for three years after the date the person begins work or one year after the person's employment is terminated, whichever is later. Employers are required to make the I-9 Form available for inspection by the Bureau of Immigration and Customs Enforcement, the Department of Labor and/or the Justice Department's Office of Special Counsel for Immigration Related Unfair Employment Practices. IRCA prescribes penalties for employers that are found to have knowingly hired or knowingly continued to employ an unauthorized alien or have failed to comply with employment eligibility verification requirements. Penalties include monetary fines and imprisonment, depending on the severity of the offense.

I-9 Forms are unnecessary for the following: employees hired before November 6, 1986, and continuously employed by the same employer; individuals performing casual employment who provide domestic service in a private home that is sporadic, irregular or intermittent; independent contractors; and workers provided to employers by individuals or entities providing contract services, such as temporary agencies (the contracting party is the employer for I-9 purposes in this case).

E-Verify

The U.S. Citizenship and Immigration Services office administers the Systematic Alien Verification for Entitlements (SAVE) Program. The SAVE Program, together with the Social Security Administration (SSA), administers E-Verify (formerly the Basic Pilot/Employment Verification Program), which allows employers to electronically confirm the employment eligibility of all newly hired employees. E-Verify involves verification checks of SSA and Department of Homeland Security (U.S. DHS) databases by using an automated system to verify employment authorization. The system uses information from the I-9 form to perform the verification checks. As of September 17, 2007, the photo screening tool allows a participating employer to check the photos on Employment Authorization Documents or Permanent Resident Cards against images stored in the database.

Under federal law, use of E-Verify is free and voluntary for most employers. On June 9, 2008, President George W. Bush amended Executive Order 12989 of February 13, 1996, to direct all federal departments and agencies to require federal contractors to use an electronic employment eligibility verification system to verify the employment eligibility of all persons hired during the contract term and all persons performing work on the contract within the U.S. The U.S. DHS has designated E-Verify as the system of choice for the required verification; specific requirements are established by federal regulation. Employers can participate in E-Verify through the Internet by registering and completing a Memorandum of Understanding. Currently, E-Verify is scheduled to end in November 2008.

LEGAL ARIZONA WORKERS ACT

In 2007, the Arizona Legislature passed and Governor Janet Napolitano signed into law LAWA, which prohibits employers from knowingly or intentionally employing unauthorized aliens and establishes penalties for employers in violation of the law beginning January 1, 2008. Legislation that was signed

into law in 2008, limits this prohibition to employees hired after December 31, 2007. Penalties for a violation include requiring the employer to terminate the employment of all unauthorized aliens in Arizona, a probationary period during which the employer must file reports with the county attorney regarding new employees, and possible license suspension for a first violation and permanent license revocation for a second violation. Good faith compliance with the federal requirements pertaining to I-9 Forms establishes an affirmative defense that an employer did not knowingly or intentionally employ an unauthorized alien.

LAWA requires all Arizona employers to use E-Verify to verify the employment eligibility of new hires. Proof of verifying the employment authorization of an employee through E-Verify creates a rebuttable presumption that an employer did not intentionally or knowingly employ an unauthorized alien. The 2008 amendments to LAWA established additional requirements pertaining to E-Verify, including prohibiting a government entity from awarding a contract to any contractor or subcontractor that fails to use E-Verify and requiring an employer to provide proof of registration with and participation in E-Verify in order to receive an economic development incentive. The 2008 legislation further required the Arizona Attorney General to establish the Voluntary Employer Enhanced Compliance Program, which requires participants to verify the employment eligibility of employees through E-Verify or the federal Social Security Number Verification Service; a participant in compliance with program requirements does not commit a violation of knowingly or intentionally employing an unauthorized alien.

As of July 2008, LAWA is subject to ongoing litigation.

ADDITIONAL RESOURCES

- “Handbook for Employers: Instructions for Completing Form I-9”(M-274), provided by the U.S. Department of Justice
<http://www.uscis.gov/files/nativedocuments/m-274.pdf>
- Office of Business Liaison
111 Massachusetts Avenue, NW, 6th Floor
Washington, DC 20539
Toll-free line: 1-800-357-2099
TDD: 1-800-767-1833
<http://uscis.gov/graphics/services/employerinfo/oblhome.htm>
- U.S. Citizenship and Immigrations Services’ Frequently Asked Questions About Employment Eligibility
<http://uscis.gov/graphics/howdoi/EEV.htm>
- **E-Verify Program**
U.S. Citizenship and Immigration Services’ SAVE Program Information Page
<http://uscis.gov/graphics/services/SAVE.htm>
To Register:
<https://www.vis-dhs.com/EmployerRegistration/>
- U.S. Department of Labor’s Employment Law Guide
<http://www.dol.gov/asp/programs/guide.htm>
- Arizona Attorney General’s Office Voluntary Employer Enhanced Compliance Program
<http://www.azag.gov/LegalAZWorkersAct/index.html>
- Employment of Unauthorized Aliens Statutes: A.R.S., Title 23, Chapter 2, Article 2
- Authorized Presence Requirements Statutes: A.R.S., Title 41, Chapter 44, Article 1

LISTS OF ACCEPTABLE DOCUMENTS

List A Documents that Establish Both Identity and Employment Eligibility	List B Documents that Establish Identity	List C Documents that Establish Employment Eligibility
OR		AND
1. U.S. Passport (unexpired or expired)	1. Driver's license or ID card issued by a state or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color and address	1. U.S. Social Security card issued by the Social Security Administration (other than a card stating it is not valid for employment)
2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551)	2. ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color and address	2. Certification of Birth Abroad issued by the Department of State (Form FS-545 or Form DS-1350)
3. An unexpired foreign passport with a temporary I-551 stamp	3. School ID card with a photograph	3. Original or certified copy of a birth certificate issued by a state, county, municipal authority or outlying possession of the United States bearing an official seal
4. An unexpired Employment Authorization Document that contains a photograph (Form I-766, I-688, I-688A, I-688B)	4. Voter's registration card	4. Native American tribal document
	5. U.S. Military card or draft record	5. U.S. Citizen ID Card (Form I-197)
	6. Military dependent's ID card	6. ID Card for use of Resident Citizen in the United States (Form I-179)
5. An unexpired foreign passport with an unexpired Arrival-Departure Record, Form I-94, bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, if that status authorizes the alien to work for the employer	7. U.S. Coast Guard Merchant Mariner Card	7. Unexpired employment authorization document issued by DHS (other than those listed under List A)
	8. Native American tribal document	
	9. Driver's license issued by a Canadian government authority	
	For persons under age 18 who are unable to present a document listed above:	
	10. School record or report card	
	11. Clinic, doctor or hospital record	
	12. Day-care or nursery school record	