

Balancing Employer Obligations to Verify Employee Information

Under the Immigration Reform and Control Act (IRCA), employers must verify the identity and employment authorization of each person hired after November 6, 1986. This verification process is documented by completing and retaining USCIS Form I-9, Employment Eligibility Verification, for each employee who is required to complete the form. This can be a complicated form to complete and it is important for employers to follow the guidelines published by USCIS, which can be found at: <https://www.uscis.gov/i-9-central/handbook-employers-m-274>. Generally, when completing an I-9 or when re-verifying, employers may not specify which documents (from the full acceptable list) an employee should provide, and may not request different documents than what the employee presents (if the documents presented appear to be genuine and meet the rules regarding acceptable documents), and employers may not reject reasonably genuine-looking documents.

Many employers have been subjected to audit notices from Immigration and Customs Enforcement (ICE). According to ICE's website, it has increased its I-9 audits by more than 300% since President Trump signed the "Buy American and Hire American" Executive Order two years ago, on April 18, 2017. We recommend that employers secure legal counsel if they receive such a notice. ICE has broad subpoena powers and the ability to impose civil and criminal penalties on employers who fail to comply with their obligations to complete and maintain Forms I-9.

In March of 2019, the Social Security Administration (SSA) resumed its practice of sending "no match" letters to employers when the names on W-2 (or other IRS forms) do not match the social security numbers. As it notes on its website, it is encouraging employers to correct such errors and to file the Form W-2c with any corrections necessary. See the SSA employer information at <https://www.ssa.gov/employer/notices.html>. A no match letter does not automatically mean that an employee is not authorized to work in the US or that the employer will also receive a notice of audit from ICE. The SSA sets different verification requirements and it is important to realize that deviating from the obligations to correct W-2 mistakes with

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the SSA may create discrimination liability under other laws protecting employees (including workers not authorized to work in the US).

Immigrant and Employee Rights Section (IER) investigates discriminatory treatment during the Form I-9 and E-Verify processes. Employers may not discriminate, based on citizenship status or national origin, nor because of an accent. IER would also have jurisdiction to investigate discriminatory treatment if an employer is attempting to resolve an SSA no match notice.

For more information, you may contact Rebecca J. Bernhard at Dorsey & Whitney LLP, 612-492-6186 or bernhard.rebecca@dorsey.com.