

NEXSEN PRUET, LLC

IMMIGRATION COMPLIANCE 2010

Association of Corporate Counsel

**Melissa Azallion, Esq.
Nexsen Pruet, LLC**

**Deborah Deutschmann, Esq.
Honda of South Carolina Mfg., Inc.**

Agenda

Federal Immigration Law

- Enforcement priorities under Obama Administration
- Immigration Reform & Control Act of 1986 (“IRCA”)
 - “Knowledge” issues
 - ICE audits and investigative techniques
 - Penalties
 - I-9 compliance tips “from the inside”

SC Immigration Law

- SC Illegal Immigration Reform Act
 - Basics of compliance – *who, what, when, where, why, how*
 - *E-Verify* as option
 - Enforcement priorities and penalties
 - LLR audit expectations



ICE Worksite Enforcement Priority (April 30, 2009)

- **Focus:** Criminal prosecution of employers for immigration violations
 - “Employer” = CEO, manager, supervisor, others in business hiring network
- ICE targeted audits on the rise
 - July 2009- 650 U.S. businesses; November 2009 – 1,000 business selected.
- As of June 2010, ICE collected *\$134 million* in fines to be used for further worksite enforcement initiatives

The Current Landscape

- **Agriprocessor/Iowa slaughterhouse – CEO** sentenced to 27 years in prison (June 2010)
 - HR manager, HR asst., supervisors given jail time and probation for immigration-related charges
- **Columbia Farms/SC chicken processing – Paid \$1.5 million**; must change hiring practices to avoid criminal prosecution; ongoing federal monitoring (2009)

The Current Landscape....

- **Pilgrim's Pride** – Paid *\$4.5 million* to avoid criminal prosecution for immigration-related charges
- **IFCO Systems/national pallet manufacturer** - *\$20.7 million* in civil forfeiture and penalties (Ongoing)
 - 11 managers found guilty of criminal violations and await sentencing
 - 5 employees (HR Manager and Senior VP) indicted on May 24, 2010

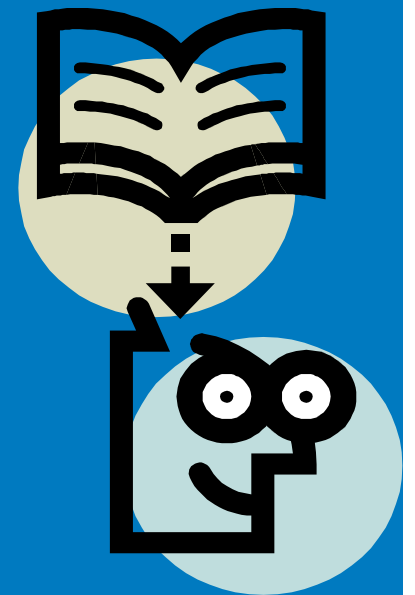
Federal Immigration Law



- Unlawful for employers to knowingly hire or continue to employ unauthorized workers (8 U.S.C. Section 1324a(a)(1)(A))
- Non-compliance punishable by civil and criminal penalties
- ICE must establish “knowledge” by preponderance of evidence

IRCA: “Knowledge”

- **Actual knowledge** – employer knew alien not authorized to work but employed
- **Constructive knowledge** – employer should have known that not authorized to work; can be inferred through notice of certain facts and circumstances which would lead a person, through exercise of reasonable care, to know about a certain condition
 - Reasonable steps taken by employer
 - Totality of the circumstances approach



“Constructive Knowledge” □ Court Interpretations

- Fails to complete or improperly completes I-9 forms
- Has information that would indicate person is not authorized to work
- Acts with *reckless and wanton disregard* for legal consequences of employing unauthorized aliens
- Fails to investigate suspicious circumstances
 - Hiring employee who previously used different name
- Fails to address written notice from DHS or SSA
 - Prior SS mismatch letters
 - Failing to follow up on finding from payroll or benefits company about legal status of employee
- Fails to adhere to E-Verify result

ICE Investigative Techniques

- Use pre- or post-audit
- Confidential sources and cooperating witnesses
 - May be employees (current and former)
 - Beware of disgruntled employees
 - May offer work permits or other leniencies for cooperation
- Undercover agents
- Consensual and non-consensual intercepts
- I-9 audits

ICE Audit □ Anticipating the Process

- ICE agent serves employer with Notice of Inspection and Subpoena
 - Provided 3 business days to respond
- ICE agent sends I-9 forms to ICE auditor for review
 - Use forensics and conduct detailed review of I-9 forms
- ICE sends results to ICE attorney for final processing
- Options:
 - Warning Letter
 - Notice of Suspect Documents
 - Notice of Technical/Procedural Violations
 - Notice of Intent to Fine (NOIF)
- ICE contacts U.S. Attorney's Office if criminal prosecution will ensue

Liability Issues

- Civil penalties are imposed for *knowingly/intentionally* hiring an unauthorized alien; higher penalties for engaging in *pattern/practice* violations
- Principals/owners and managers/agents of the employer can be held *criminally liable* for engaging in fraud, harboring, misrepresentation, misuse of documents and/or identity theft as well as related criminal charges

Criminal Focus

- Major emphasis on criminal activity:
 - Unlawful employment (misdemeanor)
 - Identity theft/“aiding and abetting” ID theft
 - Fraud and misuse of immigration documents
 - Money laundering
 - Harboring illegal aliens
- ICE has moved past the misdemeanor stage
 - In past ICE stressed misdemeanor offense for *hiring* unauthorized aliens
 - ICE charging felony harboring with much greater frequency

Civil Penalties

- I-9 paperwork violations
 - Not less than \$110 or more than \$1,100 per employee
 - Good faith exception for paperwork violations
 - Available for technical or procedural failures
 - Unless employer fails to correct in 10-day period
 - Unless there is a pattern or practice of violations
 - Understand “technical/procedural” vs. “substantive” violations
- I-9 substantive violations
 - Civil penalties for offenses occurring on/after 3/27/08
 - 1st offense: \$375-\$3,200 for each unauthorized worker
 - 2nd offense: \$3,200-\$6,500 for each unauthorized worker
 - Thereafter: \$4,300-\$16,000 for each unauthorized worker
- Criminal penalties for “pattern or practice” violations
 - \$3,000 per unauthorized alien and/or 6 months imprisonment



I-9 Compliance Tips

Debbie Deutschmann

Understanding the I-9 Process

- **Anatomy of form**
 - Section 1 completed by employee at time of hire□ no later than date employee starts
 - Section 2 completed by employer within 3 “business days” of employee’s first day of work based on review of original documents
 - Section 3 completed by employer for:
 - Expiring status or documents before expiration date
 - Reverifying employee rehired within 3 years of initial date of hire

New I-9 Form

- Latest version “Rev. 8/07/09”
 - Use for all current hires
- Current version of M-274 Handbook for Employers “Rev. 7/31/09”

OMB No. 1615-0047, Expires 08/31/12
Form I-9, Employment Eligibility Verification

Department of Homeland Security
U.S. Citizenship and Immigration Services

Read instructions carefully before completing this form. The instructions must be available during completion of this form.

ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work-authorized individuals. Employers CANNOT specify which document(s) they will accept from an employee. The refusal to hire an individual because the documents have a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Verification (To be completed and signed by employee at the time employment begins.)

Print Name: Last	First	Middle Initial	Maiden Name
Address (Street Name and Number)		Apt. #	Date of Birth (month/day/year)
City		State	Zip Code
		Social Security #	

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

I attest, under penalty of perjury, that I am (check one of the following):

A citizen of the United States

A noncitizen national of the United States (see instructions)

A lawful permanent resident (Alien #) _____

An alien authorized to work (Alien # or Admission #) _____ and (expiration date, if applicable - month/day/year) _____

Date (month/day/year)

Employer's Signature _____

Preparer and/or Translator Certification (To be completed and signed if Section 1 is prepared by a person other than the employee.) I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.

Preparer's/Translator's Signature _____ Print Name _____

Address (Street Name and Number, City, State, Zip Code) _____ Date (month/day/year) _____

Section 2. Employer Review and Verification (To be completed and signed by employer. Examine one document from List A OR examine one document from List B and one from List C, as listed on the reverse of this form, and record the title, number, and expiration date, if any, of the document(s).)

Document Title:	List A	OR	List B	AND	List C
Issuing authority:					
Document #:					
Expiration Date (if any):					
Document #:					
Expiration Date (if any):					

CERTIFICATION: I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on (month/day/year) _____ and that to the best of my knowledge the employee is authorized to work in the United States. (State employment agencies may omit the date the employee began employment.)

Signature of Employer or Authorized Representative _____ Print Name _____ Title _____

Business or Organization Name and Address (Street Name and Number, City, State, Zip Code) _____ Date (month/day/year) _____

Section 3. Updating and Reverification (To be completed and signed by employer.)

A. New Name (if applicable) _____ B. Date of Return (month/day/year) (if applicable) _____

C. If employee's previous grant of work authorization has expired, provide the information below for the document that establishes current employment authorization.

Document Title:	Document #:	Expiration Date (if any):
-----------------	-------------	---------------------------

I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Signature of Employer or Authorized Representative _____ Date (month/day/year) _____

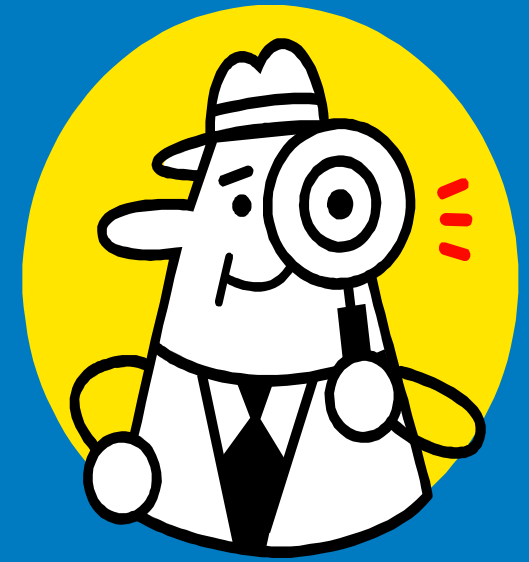
Form I-9 (Rev. 08/07/09) Y Page 4

Retention

- **Requirements**
 - Full duration of employment
 - Later of 3 years after date of hire or 1 year after termination
- **Tips**
 - Keep separate from personnel files
 - Purge at appropriate time
 - Tickler system to keep up with expiration dates

Internal Audits

- **Good faith efforts like self audits and routine managerial training are very helpful**
 - Proactive vs. reactive
 - Good faith defense in audit
- **Have supervisors randomly check selected I-9 forms and make corrections, if necessary**
 - Quality not quantity



Internal Audits

- Review all or sampling of I-9 forms on periodic basis
- Recommend corrections when needed
 - Corrections can be made on I-9 form as long as clearly marked
 - Employer can complete new I-9 form and retain existing form
- Do not permit backdating
- Prepare explanatory memo where helpful

Non-discrimination Requirement

- Employers **CANNOT**:
 - Request more or different documents
 - Specify which documents they will accept
 - Refuse to honor documents that reasonably appear genuine on their face
 - Refuse to accept a document or hire an individual because a document has a future expiration date
- Employers **MUST** treat all employees the same when completing I-9 forms



South Carolina Illegal Immigration Reform Act

South Carolina Illegal Immigration Reform Act

- Effective June 4, 2008
- *Comprehensive* law covering many different topics
 - Taxes, benefits, immigration services and employment verification provisions
- Employment verification requirements phased in beginning January 1, 2009



Employment Verification

Who Must Comply?

Employment Verification Rules

- Applies to ALL employers in SC
- **3 categories of employers:**
 - Public employers (Title 8, Chapter 14 of SC Code of Laws)
 - Contractors, subcontractors, and sub-subcontractors doing business with public employer (Section 8-14-20)
 - Private employers (Sections 41-8-20 and 41-8-30)

Key Definitions

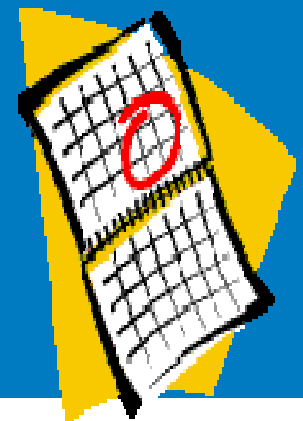
- **Public Employer** – “Every department, agency, or instrumentality, or political subdivision of the State”
 - Examples: State of SC, Charleston County School District
- **Contractor** - Any person doing business with a public employer involving a services contract for the physical performance of manual labor with annual value exceeding \$25,000 (\$15,000 if public employer is a political subdivision of the State)
 - Examples: Construction, manufacturing

Employment Verification Rules

When To Comply?

Employment Verification - Compliance Clock

- **January 1, 2009**
 - All public employers
 - Contractors working with public employer w/ 500 + e'ees
- **July 1, 2009**
 - Contractors working with public employer w/ between 100 and 499 e'ees
 - Private employers with more than 100 employees
- **July 1, 2010**
 - All other employers



Employment Verification

How to Comply

Employment Verification - *Public Employer*

- **MUST** register and participate in E-Verify program
- May not enter into “services contract” unless contractor agrees to comply with Act
- Must obtain written statement (contract language) from contractor certifying compliance with Act’s requirements

Employment Verification - *Contractors and Private Employers*

- Applies only to **NEW EMPLOYEES HIRED AFTER** effective compliance date (July 1, 2009 or July 1, 2010)
- *2 options:*
 - Use E-Verify, OR
 - Confirm that individual possesses (or qualifies for) driver's license or identification card from acceptable state (SC, NC, GA, FL among others are OK)
- See www.llr.state.sc.us for list of acceptable states

E-Verify Considerations

- For more information, see www.dhs.gov/E-Verify
- Web-based, free and voluntary
 - Checks DHS, DOS and SSA databases
 - **General rule:** New hires only; Exception: Federal Contractors
 - June 13, 2010 – E-Verify *redesign*

E-Verify Access Methods

- **Employer**
 - Allows company to electronically verify employment eligibility of newly hired employees
 - Employer can register some locations but not others
- **Corporate Administrator**
 - Use when multiple offices or locations and want to centralize administration
 - CANNOT perform E-Verify queries unless registered as “Employer”
- **Designated Agent**

E-Verify Enrollment Issues

- Employer executes Memorandum of Understanding (MOU) with DHS and SSA
 - Who will review and sign?
- User name, password and E-Verify web address emailed within 24 to 48 hours
- Read user manual and complete web-based tutorial/online training

E-Verify Posters

- Download, print and post E-Verify participation poster and Office of Special Counsel anti-discrimination poster
 - Conspicuous locations where applicants will see (job board, reception window, website)
 - Electronic and hard copy

E-Verify Benefits

- Verification usually “within seconds”
- Presumption that employer has not knowingly hired unauthorized workers if only retains employees who DHS “confirms”
- Safe harbor under SC Illegal Immigration Reform Act
- Auditors seem to like E-Verify

E-Verify Drawbacks

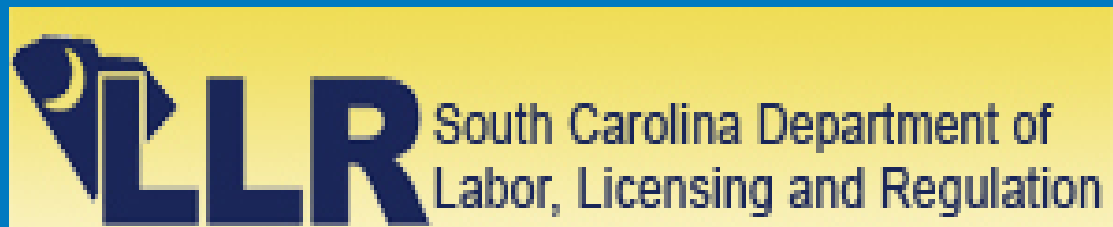
- Training and re-training personnel
- Integrity of database as result of identity theft/fraud
- Broad audit authority per MOU
- Potential links between E-Verify/TNC and ICE audits

South Carolina Department of Labor, Licensing & Regulation

SC Enforcement Issues

Enforcement Authority

- **LLR's Office of Immigrant Worker Compliance investigates employers for alleged violations**
 - Receipt of written and signed complaint or
 - Investigation initiated by agency for good cause
- **Agency has also developed statewide random auditing program to inspect private employers**



Enforcement Issues

- SCLLR has hired 10 additional auditors to conduct small business audits
- 110,000 small businesses in SC
 - Completed approximately 2,200 large employer audits in 2009
- Increase in complaint process and noncompliance activity

Enforcement Authority

- **All private employers in SC imputed employment license**
 - Permits employer to hire employees
 - May not employ in SC unless license is in effect
 - Remains in effect as long as compliant with SCIIIRA
- **Presumed to be in compliance if good faith use of E-Verify**

Penalties

- **41-8-20 - Failure to properly verify**
 - Monetary penalties range from \$100 to \$1,000 per violation
 - For “first occurrence,” employer has 72 hours from notification of violation to remedy and incur no penalty
 - For “subsequent occurrence,” employer can remedy violation if no other violation within previous 5 years

Penalties

- **41-8-30 – Knowingly/intentionally violate law**
 - Suspension or revocation of “imputed license” to employ workers
 - 1st occurrence: 10-30 day license suspension
 - 2nd occurrence: 30-60 day license suspension
 - 3rd and subsequent occurrences: license revoked and may petition for provisional license and/or reinstatement

Penalties

- **Reinstatement**
 - **Demonstrate terminated unauthorized alien**
 - **Pay reinstatement fee equal to cost of investigation/enforcement action up to \$1,000**
 - **If employer engages in business or hires new employee while suspended:**
 - **License shall be revoked**
 - **Not reinstated for 5 years**

LLR Audit Experience

- **Advance notice**
 - Receive letter and “Affirmation of Legal Worker Status” form
- **Audit Process**
 - Documents requested
 - Auditor interactions
- **Right to interview employees**
- **Follow up steps by LLR**

Immigration Checklist

- Encourage 'compliance culture' at your company concerning federal and state immigration issues
- Support periodic immigration compliance training for key personnel
- Conduct annual audit/self assessment of federal and state immigration compliance issues
- Evaluate E-Verify as option

Immigration Checklist

- Ensure good binder system
 - Keep separate I-9 and SC compliance binders
 - No I-9 forms in state binder; only E-Verify receipt or DL/ID information
- Designate appropriate audit liaison and review process for dealing with auditor

Questions

Melissa Azallion, Nexsen Pruet, LLC

(877) 278-6757; MAzallion@nexsenpruet.com

Deborah Deutschmann, Honda

(843) 346-6161; deborah_deutschmann@ham.honda.com