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EMPLOYMENT VERIFICATION PRESENTS CHALLENGES IN THE AFTERMATH OF 9-11

By Barton A. Bixenstine

Ever since passage of the Immigration Reform and Control Act of 1986 (IRCA), it has been a violation of federal law for any employer (even of one employee) to knowingly employ an alien not authorized to work in the U.S., or to hire anyone (citizen or alien) without keeping special records that verify the employment status of all employees. Employers generally must require every new hire, even U.S. citizens, to complete a Form I-9, titled the "Employment Eligibility Verification Form," published by the U.S. Immigration and Naturalization Service (INS).

The I-9 process requires employers to maintain a difficult balance made even more difficult in the aftermath of 9-11. On the one hand, IRCA requires employers to insist that all new hires present documentation to verify their identity and work eligibility. On the other hand, the I-9 Form requirements are designed to prevent unnecessary or discriminatory inquiry into the employee's nationality, and IRCA generally prohibits employers from discriminating against non-citizens.

To fulfill its I-9 obligations under IRCA, employers must require new hires to supply documents to establish their identity and their employment

eligibility. On the one hand, the employer must insist on original documents, except that certified copies of birth certificates are acceptable. On the other hand, if the new hire presents qualifying documentation that reasonably appears genuine and relates to the person presenting it, the employer must accept it—it cannot discriminate against non-citizens by insisting on any particular form of documentation or on additional documentation requirements for proof of identity or employment authorization beyond those established by IRCA.



More generally, IRCA prohibits employers with four or more employees from discriminating on the basis of citizenship status, which occurs when adverse employment decisions are made based upon an individual's real or perceived citizenship or immigration status. Examples of citizenship status discrimination include employers who hire only U.S. citizens or U.S. citizens and green card holders, employers who refuse to hire asylees or refugees because their employment authorization documents contain expiration dates, and employers who prefer to employ unauthorized workers or temporary visa holders

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INDIVIDUAL SUPERVISORS MAY BE LIABLE FOR VIOLATION OF DISCRIMINATION LAWS

By Linda C. Ashar

Q: One of my company's supervisors recently asked me if she could be held liable if an employee should bring a suit claiming discrimination. What should I tell her?

A: Ohio discrimination laws make it unlawful for an employer to discriminate in hiring, firing, and terms and conditions of employment on the basis of race, color, religion, ethnicity, national origin, gender, disability (handicap) or age. According to the Supreme Court of Ohio, the concept of "employer" includes not only the entity which employs a person, but also individuals who make (or

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sign off on) the employment decisions affecting an employee. In short, if a supervisor's action (or inaction) adversely affects an employee, both the supervisor and the employer may be held liable.

As a result of the Supreme Court's decision, you can expect that future discrimination suits will be brought against not only the employer company, but also individual defendants ranging from corporate officers to line supervisors. The costs of defending such multi-defendant suits most likely will increase, and may mean a company will need to hire different law firms to represent different employees who have been sued. If the employer has a policy indemnifying the named supervisors or an agreement requiring the employer to defend and pay damages assessed against an employee, then it may be possible to consolidate the various legal defenses so that they can be handled by

one law firm. However, the interests of the employer and the supervisor(s) may not be the same.

For example, the supervisor may claim to have been acting pursuant to an "unwritten policy" of the employer, a position which the employer denies, but which makes it liable. Conversely, the employer may have a claim against the supervisor. In either case, the individual supervisor must be represented by separate counsel.

Q: Does my company's liability insurance for employee lawsuits cover my supervisors?

A: It's not likely that such coverage extends to individual supervisors. Unless the supervisors have an indemnification agreement with the employ-

er, they will be required to hire and pay their own lawyer(s), unless they have their own insurance coverage (which is unlikely).

Q: What should I do?

A: Employers (including officers, managers and supervisors) should do the following:

- Review insurance coverage and determine what actions are covered and excluded;
- Conduct periodic training of all management employees to educate them on company policies and procedures, the restrictions imposed by employment laws, and management techniques to lawfully address employee issues;
- Review and improve their documentation of employment-related decisions;
- Review whether, and to what extent, individual managers and supervisors are, or should be, indemnified for employment decisions; and
- Define the chain of commands and clarify through written job descriptions the scope of authority of each management position.

If a supervisor's action (or inaction) adversely affects an employee, both the supervisor and the employer may be held liable.



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rather than U.S. citizens and other workers with employment authorization.

Employers that fail to comply with the I-9 rules can be fined anywhere from \$200 to \$1,000 per violation, depending upon the severity of the offense. The range of penalties for discrimination are between \$275 and \$2,200 for

each victim for the first offense, \$2,200 to \$5,500 for the second offense, and \$3,300 to \$11,000 for the third offense.

The I-9 Form requirements are designed to prevent unnecessary or discriminatory inquiry into the employee's nationality, and IRCA generally prohibits employers from discriminating against non-citizens.

This article was prepared by Barton A. Bixenstine, an attorney associated with the Cleveland law firm, Ulmer & Berne L.L.P.

Web site resource for small businesses:

To learn about programs offered by the U.S. Dept. of Labor's Office of Small Business, go to <http://www.dol.gov/osbp>.

