

Immigration 101 for Municipal Employers: An Overview of Federal Employment Verification Requirements and Unfair Immigration-Related Employment Practices

by Brad Young

I. The Basics: The Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a

Since September 11, 2001, security concerns inform every level of local policymaking. At the same time, there are increased reports by civil rights groups of discrimination against individuals perceived to be of foreign descent. Municipal decision-makers need to remain aware of federal laws that protect individuals from discriminatory immigration-related employment practices.

In 1986, Congress passed the Immigration Reform and Control Act (IRCA), which imposed sanctions on employers for hiring or continuing to employ workers not authorized to work in the United States.¹ Fearing that the threat of sanctions might encourage employers to discriminate against individuals who looked or sounded foreign, Congress also added provisions prohibiting discrimination based on citizenship status or national origin.² These requirements apply to public and private employers, regardless of size.³

II. Step by Step: The I-9 Employment Verification Process

IRCA makes it unlawful to hire an alien, knowing that he or she is unauthorized; or to hire *any* individual without complying with IRCA's employment verification provisions (see below).⁴ In addition, United States Citizenship Immigration Services (USCIS) regulations also make it unlawful under IRCA to:

1. Not comply with IRCA's employment eligibility verification requirements for employees hired after November 6, 1986;⁵
2. Continue to employ an employee hired after November 6, 1986, knowing the employee is not authorized to work in the United States;⁶
3. Use contract labor with knowledge that the contractor or the contractor's employee is unauthorized to work in the United States;⁷ or
4. Require a possible hire, recruit, or referral to post an indemnity bond or other security against potential liability arising under IRCA.⁸

The first and most important step of the employment verification process is completion of Form I-9. Generally, the employer must complete this form and keep it on file for *all* employees,

regardless of citizenship or immigration status. There are some exceptions, including: (a) employees hired prior to November 7, 1986, if continuously employed with the same employer since 1986;⁹ (b) employees engaged in “continuing employment”;¹⁰ (c) casual employees providing domestic services in a private home on a sporadic, irregular, or intermittent basis;¹¹ or (d) independent contractors.¹² An employer may not hire an independent contractor or contract labor knowing that the contractor or its employee is an unauthorized alien.¹³

Form I-9 has three parts. Section 1, completed by the employee, requires the employee to verify, under penalty of perjury, authorization to work in the United States. Section 2 requires the employer to verify that she has examined the authorization documents provided by the employee, and on their face they appear to be genuine *and* relate to the individual.¹⁴ Section 3 allows the employer to update an employee’s I-9 form where an employee’s temporary work authorization has expired and the employee has provided proof of current employment eligibility.

To complete Section 2, the employer must examine the documents provided by the employee from the “List of Acceptable Documents” on the back of the form. If the employee provides one of the List A documents, which establish both *identity* and *employment eligibility*, then that document alone is sufficient. Alternatively, the employee may provide a document from List B, establishing *identity*, and a document from List C, establishing *employment eligibility*. Under IRCA’s anti-discrimination provisions, an employer may not specify which document(s) it will accept from the employee, or ask for more or different documents than those listed on the back of the I-9 form.¹⁵ For example, an employer may not ask specifically to see an employee’s “green card.”

Employers need not be experts in document verification. An employer complies with IRCA if she examines the document(s) provided by the employee and determines that “the document appears on its face to be genuine.”¹⁶ The employer also must determine that the document “relates to the individual” – an employee may not present a genuine document that belongs to someone else.¹⁷ Once the employer makes this determination, she should then record the appropriate information regarding the document(s) in Section 2.

An employee may provide an acceptable document for work authorization that has an expiration date. If the date is current, the employer may not refuse to hire because the employer assumes that she will have to hire a replacement as soon as the work authorization expires. Many work authorizations may be renewed or extended. *However*, where a document submitted by an employee has an expiration date, the employer must *reverify* the employee’s authorization, either by completing a new I-9 or by completing Section 3 of the original.

Reverification must occur by the work authorization expiration date.¹⁸ The employee need not present the same type of document to reverify employment authorization that was presented when hired. For example, an employee may initially present an Unexpired Employment Authorization Card

(No. 7 on List A), and later present a Certificate of U.S. Citizenship (No. 2 on List A) for reverification. The employee only need present a new document establishing employment eligibility for reverification purposes – there is no need to present a new identification document.

The employer should complete the I-9 verification process after the employee is “hired.” USCIS regulations define “hire” as the actual commencement of employment for wages or other remuneration.¹⁹ Therefore, the employee should complete Section 1 and present the required documents on his first day of work. The employer has three business days from the date of hire to examine the documents presented by the employee establishing identity and employment eligibility.²⁰

Employers who are required to complete a Form I-9 must retain it for inspection for three years after the date of hire, or one year after the date of termination, whichever is later.²¹ The employer need not, but may, retain copies of the documents submitted by the employee to verify employment eligibility.²² Employers are subject to civil and criminal penalties for a violation of this section.²³

III. Employer Beware: Avoiding Unfair Immigration-Related Employment Practices

In addition to employment verification requirements, IRCA also protects workers from unfair immigration-related employment practices. An unfair immigration-related employment practice is discrimination against any individual with respect to hiring, recruiting or referral for a fee, or firing because of the individual’s *national origin*, or, for a protected individual, because of *citizenship status*.²⁴ A “protected individual” is a United States citizen, alien lawfully admitted for permanent residence or temporary residence, a refugee, or an asylee.²⁵

IRCA’s anti-discrimination provisions do not cover: (a) employers with three or fewer employees;²⁶ or (b) discrimination *required* for a specific position by law, regulation, or executive order, a federal, state, or local government contract, or when the Attorney General determines that United States citizenship is essential for doing business with an agency or department of the federal, state or local government.²⁷ **CAREFUL! *The discrimination must be MANDATED by law for the second exception to apply. A mere good faith belief that non-citizens who work on government property pose a security risk will not protect the employer from liability.***²⁸

There are four types of prohibited actions under IRCA: national origin discrimination, citizenship status discrimination, document abuse, and retaliation and intimidation. First, the anti-discrimination provision of IRCA protects all individuals, with the exception of unauthorized immigrants, from national origin discrimination.²⁹ Note that IRCA does not cover charges of national origin discrimination that are covered by Title VII of the Civil Rights Act of 1964.³⁰ Title VII covers national origin discrimination where the employer has fifteen or more employees.³¹ In practice, this means that IRCA covers national origin discrimination only where the employer has between four and

fourteen employees. Municipalities are *not* immune from suit under this provision based on the sovereign immunity doctrine.³²

Second, IRCA's citizenship-status discrimination provisions prohibit discrimination against protected individuals (citizens, lawful permanent or temporary residents, refugees, and asylees) by all employers with four or more employees.³³ Citizenship-status discrimination arises when an employer with a "citizens-only" hiring policy refuses to hire a non-citizen because of that citizenship, *or* when an employer favors non-protected individuals over protected individuals.³⁴ Thus, an employer also impermissibly discriminates against a U.S. citizen by preferring non-citizen workers.³⁵

Third, IRCA prohibits document abuse. An employer commits document abuse by refusing to accept any document or combination of documents, acceptable by law, when presented by an employee, or by asking for more or different documents than are required by law for verification purposes.³⁶ Employers should avoid asking only for specific documents, such as a driver's license and social security card, when completing the employment verification process.

Finally, an employer may not intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege found under IRCA or because the individual intends to file or has filed a charge or a complaint.³⁷ Such retaliation or intimidation is by law considered discrimination under IRCA.³⁸ Whether an employer has committed unlawful retaliation does not depend on the merits of the underlying claim; an employee may have a valid retaliation claim even where the employee's underlying discrimination claim was not actionable.

An employer who violates this section is subject to various statutory penalties, including, but not limited to, civil fine, back pay and reinstatement, and reasonable attorneys fees.³⁹

IV. Other Statutes That Protect Public Employees

In addition to IRCA, other civil rights statutes may also protect aliens from employment discrimination.

Section 1981 of the Civil Rights Act of 1866 (42 U.S.C. § 1981) protects the right of "all persons" within the jurisdiction of the United States in every state and territory to make and enforce contracts, to sue, to be parties, to give evidence, and to enjoy the full and equal benefit of all laws and proceedings for the security of persons and property. This protection has been held to apply to employees of public employers.⁴⁰ Similarly, section 1983 of the Civil Rights Act of 1871 (42 U.S.C. §1983) creates a private right of action for any U.S. citizen "or any other person within the jurisdiction thereof" who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, is deprived of any rights, privileges, or immunities found in the Constitution and federal laws. The Supreme Court has held this statute can give aliens the right to sue governmental

officials for violating constitutional or statutory rights.⁴¹

As mentioned previously, Title VII of the Civil Rights Act of 1964⁴² prohibits employers with fifteen or more employees from refusing to hire, firing, or otherwise discriminating against any person with respect to the compensation, terms, or conditions of employment, on the basis of national origin. The Equal Employment Opportunity Commission (EEOC) has interpreted Title VII's prohibitions against national origin discrimination to encompass fluency-in-English requirements,⁴³ training or education requirements which deny employment opportunities to an individual because of his or her foreign training or education,⁴⁴ or the imposition of English-language-only rules in the workplace.⁴⁵

The Fair Labor Standards Act⁴⁶ regulates working conditions by, among other things, requiring that employers pay employees minimum wage and prohibiting employers from requiring hourly employees to work over-forty-hour weeks without overtime pay. These protections apply to aliens, including undocumented workers.⁴⁷

Last, the National Labor Relations Act (NLRA)⁴⁸ protects aliens from discriminatory unfair labor practices by both employers and unions.⁴⁹ In 2002, the Supreme Court held by a narrow majority that undocumented aliens are not eligible for backpay awards under the NLRA.⁵⁰ The Court held that awarding backpay to undocumented aliens conflicted with congressional policy underlying IRCA, which the Court read narrowly as having the purpose of discouraging unauthorized employment in the United States.⁵¹ It remains to be seen the extent to which this holding will effect the judiciary's future interpretation of other statutes, including FLSA, that have traditionally allowed backpay awards to undocumented workers.

V. Conclusion

Municipal employers must maintain a delicate balance. In addition to security concerns, employers must balance IRCA's employment verification requirements against the need to avoid unfair immigration-related employment practices under IRCA and other laws that protect employees who may be immigrants or work-authorized aliens. The best overall policy is to treat all employees, regardless of immigration or nationality status, fairly and equally.

The contents of this paper are provided for informational and educational purposes only and are not intended to provide legal advice.

¹ See generally 8 U.S.C. § 1324a; Ernest E. Smith, III, *The Immigration Reform and Control Act of 1986: A Commentary and Overview*, 22 TEX. INT'L L.J. 211, 211-12 (1987).

²8 U.S.C. § 1324b; Andrew M. Strojny, *Developments Concerning IRCA's Antidiscrimination Provision – What Is It, What Does It Do, and Does It Have Any Applicability to Work-Related Nonimmigrant Visa Programs?*, 10 GEO.

IMMIGR. L.J. 371, 371 (1996).

³⁸ C.F.R. § 274a.1(b) (defining “entity” which is an employer as “any legal entity, including . . . [a] governmental body”); Robert C. Rice, *Alien Employment Control and Employer Compliance Under the Immigration Reform and Control Act of 1986*, 29 S. TEX. L. REV. 313, 316 (1988).

⁴⁸ U.S.C. § 1324a(a)(1).

⁵⁸ C.F.R. § 274a.2(a).

⁶⁸ C.F.R. § 274a.3.

⁷⁸ C.F.R. § 274a.5.

⁸⁸ C.F.R. § 274a.8.

⁹⁸ C.F.R. § 274a.7(a).

¹⁰⁸ C.F.R. § 274a.2(b)(viii)(A). “Continuing employment” includes, among other things, taking approved paid or unpaid leave on account of study, illness, pregnancy, maternity or paternity leave, lay off for lack of work, or transfer from one unit or corporate office of an employer to another.

¹¹⁸ C.F.R. § 274a.1(h).

¹²⁸ C.F.R. § 274a.1(f),(g).

¹³⁸ C.F.R. § 274a.5.

¹⁴USCIS has issued proposed regulations, not yet in effect, further limiting the number of acceptable documents. Until the new rules go into effect, employers may continue to rely on the current list.

¹⁵⁸ U.S.C. § 1324b(a)(6).

¹⁶⁸ U.S.C. § 1324a(b)(1).

¹⁷⁸ C.F.R. § 274a.2(b)(ii)(A).

¹⁸⁸ C.F.R. § 274a.2(b)(vii).

¹⁹⁸ C.F.R. § 274a.1(c).

²⁰⁸ C.F.R. § 274a.2(b)(ii).

²¹⁸ U.S.C. § 1324a(b)(3).

²²⁸ U.S.C. § 1324a(b)(4).

²³8 U.S.C. §§ 1324a(e)(4), (5); 1324(f),(g).

²⁴8 U.S.C. § 1324b(a)(1).

²⁵8 U.S.C. § 1324b(a)(3).

²⁶8 U.S.C. § 1324b(a)(2)(A).

²⁷8 U.S.C. § 1324b(a)(2)(C); *Elhahomar v. City & County of Honolulu*, 1 OCAHO 246 (Oct. 4, 1990) (city and county not liable for unfair immigration-related employment practice because action premised on state law that falls under exception to IRCA's anti-discrimination prohibitions); *see also Tovar v. United States Postal Serv.*, 3 F.3d 1271, 1282 (9th Cir. 1992) (USPS did not violate IRCA by refusing to hire temporary resident alien based on USPS regulation that prohibited employment of such aliens).

²⁸*Id.*

²⁹8 U.S.C. § 1324b(a)(1).

³⁰8 U.S.C. § 1324b(2)(B).

³¹*See Brown v. Baltimore Pub. Schs.*, 3 OCAHO 480 (June 4, 1992) (administrative law court charged with hearing national origin discrimination charges brought under IRCA lacked jurisdiction where defendant school district employed more than fifteen employees).

³²*See Iwuchukwu v. City of Grand Prairie*, 6 OCAHO 915 (Feb. 25, 1997) (home-rule municipality subject to federal discrimination laws); *see also Smiley v. City of Philadelphia, Dep't of Licenses & Inspections*, 1997 OCAHO WL 1048384 (Apr. 14, 1997) (city not immune from suit under sovereign immunity doctrine).

³³8 U.S.C. § 1324b(a)(1).

³⁴*See Strojny, supra*, at 383-84.

³⁵*United States v. Gen. Dynamics Corp.*, 3 OCAHO 517 (May 6, 1993).

³⁶8 U.S.C. § 1342b(a)(6).

³⁷8 U.S.C. § 1324b(a)(5).

³⁸*Id.*

³⁹8 U.S.C. § 1342b(g)(2), (h).

⁴⁰*Espinoza v. Hillwood Square Mut. Ass'n*, 522 F.Supp. 559, 564 (E.D. Va. 1981); *but see Bhandari v. First Nat'l Bank of Commerce*, 829 F.2d 1343, 1351-2 (5th Cir. 1987) (recognizing application of statute to alienage discrimination by public entities but refusing to extend to all private entities).

⁴¹See *Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 603-5 (1975) (rejecting Puerto Rico statute that banned all aliens from obtaining civil engineering licenses).

⁴²42 U.S.C. §§ 2000e *et seq.*

⁴³29 C.F.R. § 1606.6(b)(1).

⁴⁴29 C.F.R. § 1606.6(b)(2).

⁴⁵29 C.F.R. § 1606.7.

⁴⁶29 U.S.C. §§ 201 *et seq.*

⁴⁷*Patel v. Quality Inn South*, 846 F.2d 700, 706 (11th Cir. 1988); *see also*, Op. Tex. Att’y Gen. JM-962 (1988); *but see Alvarado Guevara v. INS*, 902 F.2d 394, 396 (5th Cir. 1990) (alien detainees held by INS not within group of employees Congress sought to protect when enacting FLSA).

⁴⁸29 U.S.C. §§ 158 *et. seq.*

⁴⁹*See, e.g., NLRB v. Internat’l Longshoremen’s Ass’n, Local No. 1581, AFL-CIO*, 489 F.2d 635 (5th Cir. 1974).

⁵⁰*Hoffman Plastic Compounds, Inc. v. NLRB*, 122 S.Ct. 1275 (2002).

⁵¹*Id.*