the Documentation Dilemma

Documenting foreign workers is more difficult than ever. Is there any **SOLUTION** to help employers avoid penalties?

By Cynthia Scanlon

For many employers today, the task of authenticating documentation for their foreign workers is proving to be nearly impossible. Companies are finding themselves caught between the rock of having to verify documentation without official help and the hard place of inviting stiff penalties and even criminal prosecution for failing to do so.

"The system has been broken almost from the outset," says David Whitlock, partner and head of the immigration practice group for Fisher & Phillips LLP. It was created from a 1986 law that required employment eligibility verification of foreign workers through an I-9 form, and has grown in complexity to the point that most employers are caught in a lose–lose scenario. "That law adopted a standard that asks, 'Does the document reasonably appear to be genuine on its face?'" says Whitlock. "But no one made any effort to require employers to verify the validity of the document, nor did the government do a particularly good job of educating employers about which documents are good and which are not. The law simply created a cottage industry for counterfeiters."

In 1990, Congress again revisited the issue and passed the Document Abuse Discrimination Provisions, which now prohibits employers from requiring any document or combination of documents for proof of legal immigration. "So you can't say, 'Show me something from immigration department that says you're allowed to work here,'" says Whitlock. The law also prohibits an employer from requiring more documents than are minimally necessary to comply with the law. "If someone produces a driver's license and a Social Security card, which are incredibly easy to counterfeit, you're

not allowed to ask them for more than that," he says. "And the law also prohibits an employer from refusing a document that reasonably appears to be genuine on its face. If an employer does that, the employer can be sued for discrimination."

According to Whitlock, the central problem with all this is the lack of a national database to verify information, which leaves employers across the nation vulnerable to stiff penalties and even criminal prosecution by the Department of Homeland Security and the U.S. Citizenship and Immigration Services. "Part of the problem is you're dealing with a bunch of different bureaucracies like Social Security, Homeland Security, and the U.S. Citizenship and Immigration Services (USCIS)," he says. "It would be a Herculean task to unify and consolidate all of the data, but at some point it has to be done if we are to have a truly reliable system."

Forgeries Growing

USCIS, in an effort to stem the tide of illegal immigration from Mexico, has developed new high-tech visas. These credit card-sized visas, nicknamed "Micas," contain a photograph and scanned fingerprints of the holder and allow the holder to cross into the United States without other documentation. The holder is also allowed to travel up to 25 miles inside California or Texas and remain for up to 30 days.

In 2005, 11,000 of the visas were stolen, a 15 percent jump from 2004. The immigration department fears the visas are being bought, rented, and sold on the black market. In fact, seven illegal immigrants were recently arrested for forging fraudulent documents in Chicago. The crime ring reportedly netted $2.5 million a year. And in Biloxi, Mississippi, a man pleaded guilty to falsifying documents after an investigation by the U.S. Immigration and Customs Enforcement (ICE) department. ICE agents discovered fraudulent alien registration cards and Social Security cards, and the equipment to manufacture the documents, in the man's residence.

Even if employers are doing everything they can to legally verify documents, that may still not be enough. "Employers are entitled to call in and verify that the Social Security card belongs to the person whose name is on it, but that doesn't mean that that Social Security card belongs to the person in front of you," says Charles Kuck, national vice president of the American Immigration Lawyers Association and managing partner of immigration law firm Kuck Casablanca LLC. "It just means that it belongs to that name." Verifying a driver's license can be just as difficult, since the Department of Motor Vehicles won't divulge personal information for fear of violating privacy laws.

Additionally, if an employer receives a non-match letter from the Social Security department, meaning the Social Security number does not match a worker's information, employers need to verify the information with the Social Security department. Paradoxically, the online Social

Security system, while still flawed, is one of the most accurate of all databases, according to Whitlock.

Unfortunately for employers, the system cannot be accessed for pre-hires. "So you have to put someone on your payroll and they have to work and earn wages before you can check and see if they are allowed to," says Whitlock. "You will have a withholding, tax, and fair labor standards wage obligation for someone you never should have hired to begin with, who lacked authorization to work, and isn't supposed to be earning wages."

And, to compound the problem, the Social Security and immigration databases don't work together. "We are technologically five to 10 years from that point," says Kuck.

Basic Pilot Program

Many employers who want to stay in compliance have voluntarily signed up for the USCIC's Basic Pilot program, created by Congress in 1997. As of 2004, the program, which was designed to test ways for employers to verify that the employees they hire are authorized to work in the United States, had more than 4,000 members. But with millions of employers, the system is not sophisticated enough to sign everyone up. "The system couldn't come close to handling even double what it currently does," says Kuck. "They don't have the servers."

Whitlock doesn't like the program either, citing estimates of bad data in the 20 to 40 percent range. Employer exposure is another area of concern, he says. "The head of the Basic Pilot program announced that she was going to forward the database of participating employers to ICE for follow-up enforcement," says Whitlock. "So, if you have enrolled in this voluntary program, sooner or later ICE will conduct an audit to make sure you are in compliance. And if they find you are making mistakes, they are likely to fine you. And if they find enough mistakes, they may put you in jail. So why would you want to have anything at all to do with this program?"

Criminal Prosecution

Criminal prosecution for failure to verify documents is a very real possibil-

ity for many employers, especially in the targeted industries of manufacturing, construction, agriculture, hospitality, and food processing. "Beginning in April 2006, the government announced that it intended to use criminal sanctions to go after 'systemic violators,'" says Whitlock. "They still haven't defined what that means. I'm finding more and more clients are facing criminal sanctions and criminal prosecutions, in some cases simply because of their paperwork."

On the other side of the coin, to avoid the threat of discrimination lawsuits, says Whitlock, employers have been accepting any documents that don't look obviously fraudulent. "Employers are damned if they do and damned if they don't," he says. "All of this is premised on a standard that is nebulous and ambiguous. What does 'reasonably genuine on its face' mean?' I have no idea and I've been doing this for 20 years."

A large number of employers, says Whitlock, simply scoff at the system because it is too hard to enforce, figuring their odds of getting caught are low. The penalty for an I-9 infraction ranges from $110 to $1,100, with a maximum penalty of $2,200. "Many employers have looked at this as simply a cost of doing business," he says.

But for some, that cost can be high. The U.S. Department of Homeland Security in particular is cracking down on the hiring of illegal or falsely documented workers — and cracking down hard. Managers at IFCO Systems, a Netherlands-based logistics company with locations in the United States, were arrested on charges of conspiracy to transport and employ illegal aliens for private gain. Nearly 1,200 of IFCO's workers were nabbed in raids after Homeland Security said the company ignored repeated non-match letters from the Department of Social Security. IFCO Systems, in a published statement, said, "As it is IFCO's policy to comply with all federal and state employment provisions, we take the allegations made by U.S. Immigration and Customs Enforcement (ICE) very seriously and are committed to resolving this matter as soon as possible. We are very disturbed by these allegations and have immediately begun a thor-

ough investigation of the facts." The outcome of this case is still pending.

Solutions

Given the set of no-win circumstances that employers seem to be facing in document verification, what should be done? According to Kuck, every employer engaged in hiring foreign workers should do their own internal I-9 audit. "Go through every I-9 you have for your company and make sure you filled it out correctly," he says. "You have a right under the statute to go back and correct erroneously completed I-9s at a later date, as long as you initial and date any corrections you made. We recommend you do those corrections in a different color pen." He adds, "This self-audit goes a long way toward eliminating any fines or legal action against the employer."

Whitlock agrees: "Get your I-9 house in order. Most enforcement will start with an I-9 audit of some kind."

Kuck also advises his clients *not* to keep copies of incriminating documents. "Once you keep a copy of a document," he says, "if Immigration decides to come in later and do an investigation or audit of your company, they can hold up a copy of a document and say, 'You couldn't tell this was fraudulent?' All the employer is doing is keeping documents of evidence against him." If an employer does decide to keep copies of documents, the company must do so for every employee. "So you have an all or nothing policy," says Kuck. "Our belief is that you should have a nothing policy."

As for the establishment of a national verification center, the odds of that happening any time soon do not look good. "It's a difficult undertaking because there are so many different documents," says Whitlock. "And there is resistance to having a national work card, but I think, ultimately, that's where we have to go if we're going to have a secure database that is accurate and accessible."

Kuck hope to sees such a verification system started by Congress in the coming year, but admits, "Congress has not come close to providing the funding necessary to do this." **AREA**