

Mitchell & Sheahan, P.C.

November 2010 Newsletter



Experience, Integrity, Responsiveness and Commitment

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Welcome to the November 2010 edition of the Mitchell & Sheahan Newsletter!

This month's newsletter features an article written by Attorney Peg Sheahan about I-9 Forms, as well as an article by Attorney Bob Mitchell about employee interviews.

We hope you find the articles helpful and informative. As always, feel free to [contact us](#) if you have any questions.

I-9 Forms: A Little Task With A Big Impact

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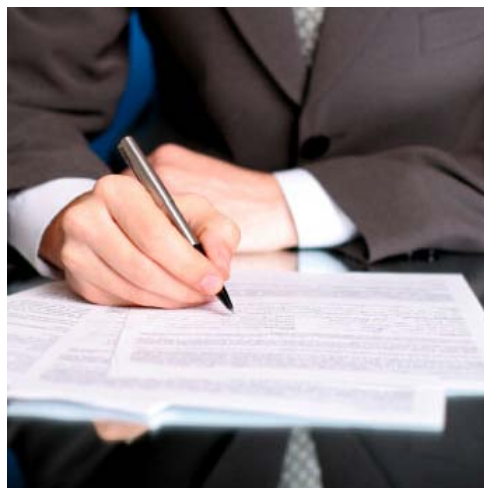
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The process of checking the identity and work authorization status of each new hire has been required of all American employers since 1986. So it is surprising how often this process is neglected, done wrong or inadequately documented. The Department of Homeland Security's enforcement focus on this part of the system is intensifying and the costs of "paperwork problems" can be substantial. Also, the Justice Department is on the lookout for national origin and citizenship discrimination by employers going overboard or short-cutting the process by treating "foreign-looking/sounding" employees more harshly than others. It is time to pay attention to this part of your "on-boarding" process once again.

News Flashes

Abercrombie & Fitch paid a \$1,047,110 fine in September to settle claims resulting from an "ICE (Immigration and Customs Enforcement) Office Homeland Security Investigations" audit of the I-9 process in its Michigan stores that had begun in November 2008. This million dollar plus fine was for process and record failures only.

THERE WAS NO FINDING OF ANY KNOWING EMPLOYMENT OF AN UNAUTHORIZED WORKER.

In October, Catholic Healthcare West signed a settlement agreement with the United States Department of Justice, Civil Rights Division, Office of Special Counsel for Immigration-Related Unfair Employment Practices over I-9 discrimination claims. The Agreement recites that there was "reasonable cause to believe that Respondents required non-U.S. citizen and naturalized U.S. citizen new hires to present more work authorization documents than required by federal law, but permitted native-born U.S. citizens to provide documents of their own choosing." Catholic Healthcare West will offer the Charging Party a job, pay her \$1,000 in back pay and pay a \$257,000 fine. In addition, the employer a multi-hospital enterprise, must complete a system-wide I-9 audit by next August, pay back pay to any discriminatees so identified, create a multi-tiered I-9 process review system and undertake a three year reporting relationship with the U.S. Department of Justice.

These two news items illustrate that simply meeting the goal of not employing unauthorized alien workers is very much the tip of the I-9 iceberg and that some efforts undertaken to meet that goal can backfire on an overzealous employer.

How to Comply

The simplest advice is the best advice in this arena. **Read and follow the form's instructions. Do it for every hire every time no matter how "American" you think they are.** (I've completed the process on my own daughter!)

The I-9 form can be downloaded from the Department of Homeland Security U.S. Customs and Immigration Services website at www.uscis.gov/I-9. The form explains what the I-9 is for (verifying the identity and work authorization status of individuals hired for work in the USA), when it must be completed (within three days after commencement of work), what items the employer must review to sign off that the verification has been completed (choose from three lists of documents: one group that can verify both identity and work authorization, one group that can verify only identity, and one group that can verify only work authorization) with samples and descriptions to illustrate what official documents look like, and what the employee must sign. The form and its instructions also specify that each employee may make her own selection of acceptable documents and may not be required to limit himself to documents of the employer's preference.

The requirement to keep a file of the completed I-9 forms (and, optionally, copies of the documents checked) is very important. Since 2006, DHS ICE has permitted electronic storage of I-9 forms. Regulations that were finalized this July clarify that electronic signature and storage of the forms is permissible. Electronic systems have their pros and cons and employers should not blindly purchase expensive software. It is imperative, however, that the person with responsibility for introducing new employees into your organization be conversant with these requirements.

E-Verify

Another wrinkle in the I-9 process is the introduction of E-Verify. This is an electronic system provided by the federal government which permits an employer to enter information about a prospective employee and receive a preliminary okay or red flag on identification and work authorization documents provided by the individual.

E-Verify started off as a voluntary system and this is the way it still exists for many employers. It has been made mandatory for certain federal government contractors and there is movement towards making the system mandatory for all employers in the foreseeable future. Some states have adopted requirements for participation by employers within their borders.

The safety of a federal government database review is appealing. Early adapter glitches, however, have shown the system to be far from trouble-free. Participation requires designation of a particular person or persons who will be the users for the employer and training module participation by those designees. The system can deliver "false negatives" and in recognition of that fact, rejected individuals must get notice of the negative E-Verify report and a period of time within which to correct any errors in the system's information about identity or status. In this period, an employer cannot employ the individual, but also cannot make the job unavailable for the employee to assume when any mistake is cleared up. So, for example, the employer could not give the job on an unconditional basis to another qualified person. E-Verify has also exhibited some capacity problems, which would be more problematic if the volume of utilization increases with a universal mandate that all American employers use it.

Conclusion

The requirement to verify the identity and work authorization status of each hire is honored more in the breach than the observance in some quarters. However, this is a dangerous area to neglect or to manage loosely.

Employee Interviews



Robert B. Mitchell

Over the last few months, I have discussed three parts of the hiring process: (1) the need for a contract with every employee; (2) background checks; and (3) the employment application. This month I want to address the employee interview. This should be the final stage in the process of determining whom you want to hire. It is critical, because it is here that the potential employee moves from paper to a flesh and bone person. At the interview, you can gauge whether that paper person, who presumably appears to meet your needs, fairly represents the real candidate's chemistry, organizational fit and drive (or lack thereof). The interview is your last chance to sort out the good from the bad and to find out who the real person is behind the ingratiating mask every applicant wears. Who is she; what does he want; and will she fit into your operation? Will he make the contribution to your business that you hope? These are the core questions that you want answered by the time the applicant leaves the interview. Unfortunately, an employer shooting from the hip is all too common during the interview process. This is particularly true of small and medium-sized businesses that do not carry a dedicated Human Resources function. How many employment interviews have been handled by an applicant's last minute shuffling around between offices to face ill-considered, generally meaningless and sometimes illegal or damaging questions from uninterested and preoccupied interrogators? The answer

is: Too many. Avoiding this result is not difficult, but it does take forethought and planning for the interview.

1. Figure out what you want to know and how you are going to find it out.

Start by sitting down with all those in the company who will have a stake in the person about to get hired. Get a handle on what it is exactly you are looking for after reviewing the paper applications and any available additional information about the candidate or candidates. Decide who is going to be conducting the interview or interviews. Draw up a list of job-related points that you want to explore with the candidate - an agenda for the interviews. Make sure that everyone understands his or her role. Make sure each applicant being interviewed for the same position is asked to provide the same information about himself.

2. Alert your interviewers to the limits of their authority.

The last thing in the world that you want is the shop foreman or third assistant accounting clerk responding to an applicant question about job security with a blithe assurance that, "so long as you do your job, you have nothing to worry about, you will have a position here. This is a family style company and we know how to take care of our own." Words like this have come back to haunt many employers who, of course, had no intention of assuring only "for cause" termination.

All interviewers should know what their own roles are. Unless it is the employer's intention that they explain the terms and conditions under which the successful applicant would be working, the interviewers should stay away from these issues. If questions are asked about such points, the interviewer should refer the applicant to the person with that bit of knowledge and the authority to discuss it. Issues addressing compensation, job security, the Company's benefits programs and work rules should be subjects for discussion only by those having the Company's approval to bind it. Usually, this should be the last person to speak to the applicant.

3. Teach your interviewers inquiries to avoid.

Another common pitfall in the unprepared interview process is the well-intentioned, but misguided foray into the blatantly illegal. Inquiries like, "What are your plans

for a family" asked of a woman; or perhaps, "when did you graduate from high school" which can pin down the candidate's age, are not helpful to the Company's legal health.

Anyone who is going to be involved in the interviewing process should be given at least a basic grounding in what can and cannot properly be asked of a candidate. He or she should understand what the legal limits are. Questions related to age, race, ethnicity, religious belief, marital status, specific to gender or sexual orientation or union affiliations are just a few of those that are off-limits. Whether such inquiries are direct or implied, the legal injury to the company can be the same and can be severe. The basic rule of thumb is that all questions should be grounded in the business; they should be job-related. They should not delve into areas of personal concern to the applicant. At the conclusion of the interviews for any major position, sit down, review any notes taken during the interviews, bring the interviewers together to discuss their experience with the applicants and make certain that everyone's comments relate to the job, not to the applicant's protected class characteristics. If the process turns out to have been *too* imperfectly performed, think about re-interviewing one or more of the candidates to do it right. Once the favored candidate seems to have emerged, sleep on the decision overnight.

Conclusion

If after thinking it over, the employer wants to extend a job offer, this should be done in writing. Have the new employee execute a formal employment agreement or even countersign the offering letter as I discussed in our June newsletter. Make sure that the contract or offering letter addresses at least the three points that I mentioned in June: (1) confirm that the employment is at-will; (2) negate any previous promises that might have been communicated to the employee by anyone acting or seeming to act on the company's behalf; and (3) require that any amendment of the terms and conditions of employment be in a further signed writing.

This closes the circle on our discussion of some basic hiring issues. It was not meant to be comprehensive, but we hope that it provides some guidance to our small and medium-sized clients.



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