

HR Education Seminar: EEOC Compliance



10 Things You Can Do To Invite An Employee Lawsuit

Presented by:

Amanda S. Kell, SPHR
Human Resources Practice Leader
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And

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Regional Managing Partner
Fisher & Philips LLP

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10 Ways to Invite an Employee Lawsuit

Overview

Employees sue their employers for a variety of reasons. Some are opportunistic and come in the door looking for trouble or to make a relatively quick and easy buck. Others come on board with the best of intentions but somewhere along the way have a change of heart. While we can never for certain know a person's intention when we are interviewing them, as employers we can do things that make us vulnerable to being the defending party of an employee lawsuit. In this paper we have consolidated our discussion with Mr. Brannen and Ms. Kell about the **ten most common mistakes employers make** that have potential to cost their Club tens of thousands of dollars.

In the Fiscal Year 2012, the Equal Employment Opportunity Commission (EEOC) collected **more than \$365 million from employers to be paid to employees** who asserted their rights had in some way been violated. This figure does not include the employers' other costs such as attorney fees, lost productivity, and so forth. This is a **41% increase** from 10 years ago, in fiscal year 2002¹.

Imagine explaining to your members that their Club will pay tens of thousands of dollars due to employment actions you have taken – or, failed to take.

Objectives

- Identify areas of exposure related to employment practices
- Know what steps need to be taken to ensure better hiring decisions and greater compliance
- Feel confident that you know how to respond if an employee brings a complaint to you
- Understand resources available to help you

¹ Source: www.eeoc.gov

Areas Where More EEOC Enforcement Should Be Expected

- Class actions/systemic violations
- Retaliation claims
- ADA (disability) claims
- Credit checks
- Employment testing
- Attendance/leave policies
- GINA

EEOC has made it clear that it is actively looking for cases to pursue that will increase the amount of dollars for monetary settlements and increase the number of people protected. On top of their list to look for employer violations are **Class Actions and Systemic Violations**. These cases will accomplish both agency objectives to increase the dollars awarded and people protected.

EEOC has said that it targets employers who **retaliate** against individuals for asserting their rights under the laws they enforce. The agency is specifically looking closely at the **Americans With Disabilities Act** as recently amended to widely broaden the number of individuals covered.

The EEOC is also looking closely at employer practices related to background screening to ensure related practices do not cause a disparate impact on minorities in the hiring process.

It is anticipated that **leave and attendance policies** will continue to be areas of focus for the federal Department of Labor (DOL) and the EEOC.

Key to avoiding running afoul of any employment-related law, and thereby subjecting yourself to state or federal government scrutiny, is setting up compliant practices and ensuring your management team is well trained in managing employees.

10 Things You Can Do To Invite an Employee Lawsuit -

1. If she can fog a mirror, hire her
2. Don't give them any instructions
3. Pay them all a salary
4. Blow off their harassment complaints
5. Get back at them for complaining
6. Treat everyone differently
7. Fire them when they get sick
8. Let them use your computers for anything
9. Just make up reasons for firing them and do it without any advance warning
10. Ignore the other legal paperwork

Presenters: Short Bios and Contact Information

AMANDA S. KELL, SPHR

Having worked as a trusted Human Resources business partner for over fifteen years, Amanda understands the importance of providing strategic guidance and direction. She believes that, when properly aligned with leadership, Human Resources has the ability to act as a trusted advisor and leader within the organization by recommending and implementing strategic initiatives to support business goals.

Amanda values her time spent as part of a corporate HR department but most enjoys the variety that comes from working with clients of varied sizes and in various industries. She earned her Bachelor of Business Administration degree from Georgia Southern University. She has been SPHR-certified for over 10 years and continues to stay abreast of current trends and topics by attending regular continuing education events.

D. ALBERT "Bert" BRANNEN, Regional Managing Partner, Fisher & Phillips LLP

Bert represents employers exclusively in solving their labor and employment law problems. He has successfully represented clients in proceedings before the NLRB, EEOC, Department of Labor, and other Government agencies. He advises employers how to stay union-free and assists them with the administration, negotiation, mediation and arbitration of collective bargaining agreements. He also counsels employers on how to avoid workplace crises, comply with applicable laws and prevent litigation. Bert is active in the State Bar of Georgia and has served as Chairman of the Bar's Labor and Employment Law Section. He is a past member of the Board for the Georgia Branch of the Associated General Contractors (AGC) and is immediate past Chair of AGC's national Labor & Employment Law Council. He is a member of the Society of Human Resources Management, the Human Resources Leadership Foundation (HRLF), and other professional groups. Bert has taught a class in labor and employment law at Georgia Tech since 2002.

Bert is "AV" rated by Martindale-Hubbell. He received his B.S. with honors from Georgia Tech and his M.B.A. and J.D. *cum laude* from the University of Georgia. He has been selected by his peers as one of *The Best Lawyers in America* and has been included in *Best Lawyers® Annual Guide to Labor & Employment Law*. He has repeatedly been named a "Super Lawyer for Labor & Employment Law" for the State of Georgia and has been selected as one of *Georgia Trend Magazine's* "Legal Elite."



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We look forward to continuing to serve you and your club, please call or email us for more information or to set up a one on one meeting. You can also get more information about our ClubPay Services by visiting www.clubpayroll.com.



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Today's Topics

- Litigation trends
- Today's government enforcement strategies
- 10 ways to guarantee your employees will sue you
 - also called ***What NOT To Do***
- Questions & Answers



Today's Topics

- Employment-related lawsuits up \approx **400%** in 20 years
- Most common target for lawsuits: private employers **w/15-100 employees**
- In federal court:
 - **67%** chance the award will exceed **\$100,000**
 - average compensatory damages is almost **\$500,000**



Areas Where More EEOC Enforcement Should Be Expected

- Class actions/systemic violations
- Retaliation claims
- ADAAA (disability) claims
- Credit checks
- Employment testing
- Attendance/leave policies
- GINA





10 Things You Can Do To Invite an Employee Lawsuit – *What NOT To DO*



1

**If She Can Fog a Mirror,
Hire Her**

Pre-Employment Tools

- Compliant and customized employment application form
- Interviews
- In-person interview
- Background check
- Drug test
- Offer letters
- Introductory Period



Employment Application

- Customized for your Club
- Relevant information only
- Employment history – details
- Disclaimer and at-will statement



Interviews

- Phone screening
- In-person interviews
- Open-ended questions
- Listen more than you talk!



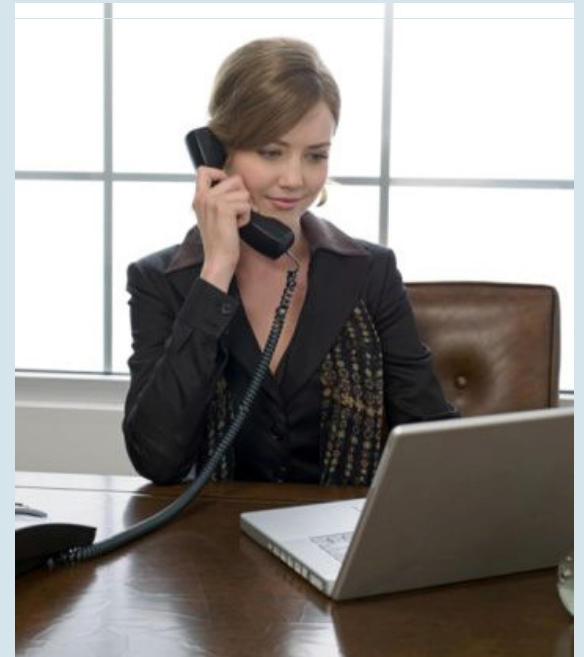
Background Checks

- Laws regulate background searches
- FCRA applies to more than “credit”
 - **Criminal, education, driving, etc.**
- Disclosure and authorization form
- Notice of adverse action planned
- Documentation



Reference Checks

- Contact former employers
- Speak directly with immediate supervisor
- If met with “neutral reference” policy, ask if applicant is eligible for rehire
- Document your efforts



Drug Testing

Abusers are:

- 3x as costly to medical plan
- 5x as likely to be injured
- 1/3 less productive
- Absent twice as often



Potential savings on workers' compensation premium

Introductory Period

- Easier to weed out
- Easier to explain
- Less risk of legal action
- Less feeling of entitlement
- **BUT NOT A “FREE PASS”**





2

**Don't Give Them Any
Instructions**

Employee “Instructions”

- New employee orientation
- Employee handbook
- Dedicated training
- Individualized communications



New Employee Orientation

- Avoid promises
- Explain problem resolution, no harassment & other procedures
- Review benefits and policies
- **Set performance expectations**



Employee Handbook

- Set expectations from the beginning
- Have high standards
- Hold employees to your standards consistently
- Ensure you have a thorough and compliant employee handbook



Common Policy Mistakes

- Not giving employee copy of policy
- Failing to get proof of receipt
- Not retaining proof of receipt
- Not following the policy
- Not being consistent
- Not updating the policy as practices or applicable legislation changes
- Not getting help from an HR professional or a labor and employment attorney



Practical Reasons to Train

Because employment-related claims:

- Harm employee morale
- Harm your reputation in the community
- Disrupt your business
- Distract leadership and staff
- Cost lots of money



Legal Reasons to Train



- Ignorance is not a defense
- Training and “preventive measures” can be defenses

Legal Reasons to Train

New York non-profit denied summary judgment in harassment case where agency failed to train managers.

- ***Hill v. The Children's Village***

\$1 million in punitive damages upheld based on lack of training

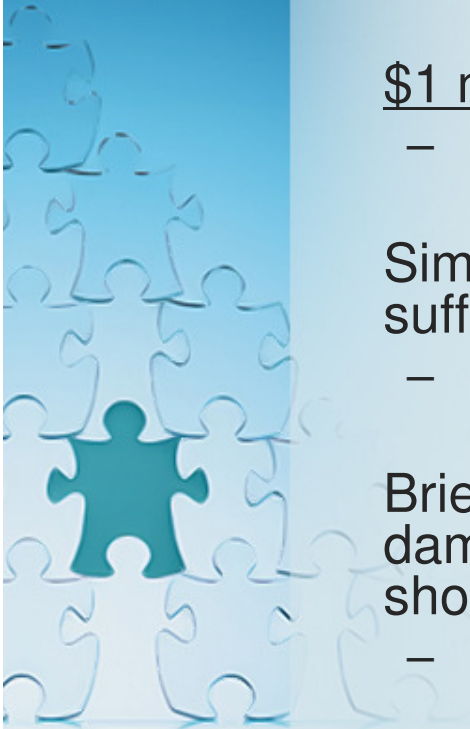
- ***Swinton v. Potomac***

Simply mentioning harassment in employee meetings is not sufficient

- ***Harrison v. Eddy Potash***

Brief coverage of harassment is not sufficient (\$150,000 punitive damages award upheld where employer posted policy and showed employees a ten minute video with handouts)

- ***Wagner v. Dillards***





3

Pay Them All A Salary

DOL's Enforcement Strategy

- Failure to compensate for mandatory training time
- Improperly classifying employees as exempt from overtime
- Making illegal deductions from employees' wages
- Failing to compensate employees for "off the clock" work
- Failing to maintain the required record keeping



Basic FLSA Requirements

Unless exempt:

- Record of hours worked
- Minimum wage
- Overtime



White Collar Exemptions

- Executive
- Administrative
- Professional
- Outside sales
- Computer
- Highly-paid employees





4

Blow Off Harassment Complaints

Affirmative Defense

Federal law provides an “affirmative defense” for employers who take steps to prevent and respond to harassment.

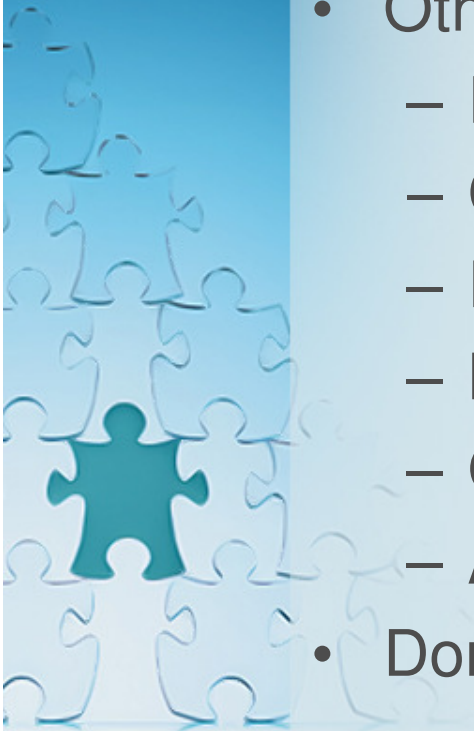
***Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998)**

***Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998)**



Scope of Laws: Providing Protection

- Not just about sex
- Other protected categories
 - Race
 - Color
 - Religion
 - National origin
 - Genetic traits
 - Ancestry
 - Veteran status
 - Pregnancy
 - Age
 - Disability
 - Citizenship status
- Don't forget about state laws



Potential Harassers

- Co-employee
- Non-employee/third party
- **Supervisor or manager**



Legal Standard Co-Employee & Third Party

“Club knew or should have known”



Legal Standard Supervisor

Club may be “strictly liable”
because the supervisor is the Club



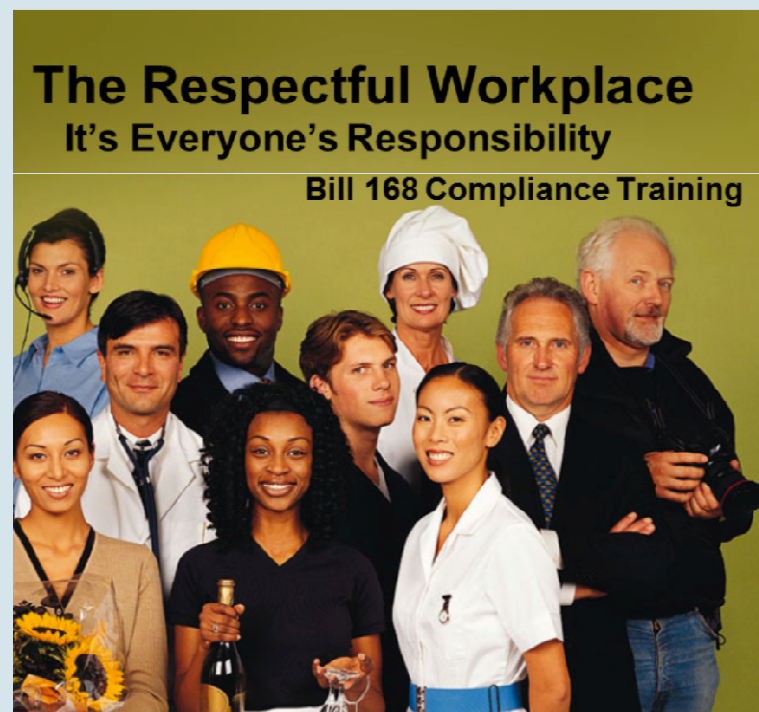
Individual Liability

- Title VII
 - None
 - Employers only
- State common law claims
 - Numerous
 - Can also be brought against employer



Avoiding Claims

1. Preventive action
2. Prompt corrective action
3. The proper culture



Reasonable Preventive Actions

- Communicate & distribute policy
- Train employees about policy and procedure
- Observe and listen to employees
- Show management commitment
- Report all suspected potential violations



Prompt Corrective Action

- “Sound the alarm”
- Investigate
- Take prompt corrective action
- Tell complainant generally about corrective action
- Follow up with complainant
- Ensure conduct stopped



The Proper Culture

Employee's failure to alert Club is part of your defense, but lack of notice is OK if:

- Reasonable fear of retaliation
- No complaint procedure
- Company complaint procedure “gutted”





5


**Get Back At Them For
Complaining**

EEOC Retaliation Charges FY 2012

- 38.1% of all EEOC Charges (37,836)
- More charges than for race, national origin, religion, color, age, or equal pay combined!
- One of the fastest growing areas
- MANY laws prohibit retaliation



Laws Prohibiting Retaliation

- 
- ADA
 - ADEA
 - ERISA
 - FLSA
 - FMLA
 - FCRA
 - NLRA
 - OSHA
 - Rehabilitation Act
 - Title VII
 - USERRA
 - Bankruptcy Act
 - Clean Air Act
 - Energy Reorganization Act
 - False Claims Act
 - Jury Service & Selection Act
 - Surface Transportation Act
 - Water Pollution Control Act
 - **Other state & federal laws**



6

**Treat Everyone
Differently**



7

**Fire Them
When They Get Sick**

Laws Protecting the Sick/Disabled

- ADA
- FMLA
- ERISA
- HIPAA
- GINA
- State & Local laws



ADA v. FMLA

ADA

- “Reasonable” time off
- Must be “disabled”
- Employee only
- No tenure requirement
- All employees
- No benefits protection
- No paperwork requirement

FMLA

- 12 wks. off in a 12 month period
- Serious health conditions
- Employee & family
- 12 months tenure required
- 1,250 hours required
- Benefits must continue
- Lots of paperwork



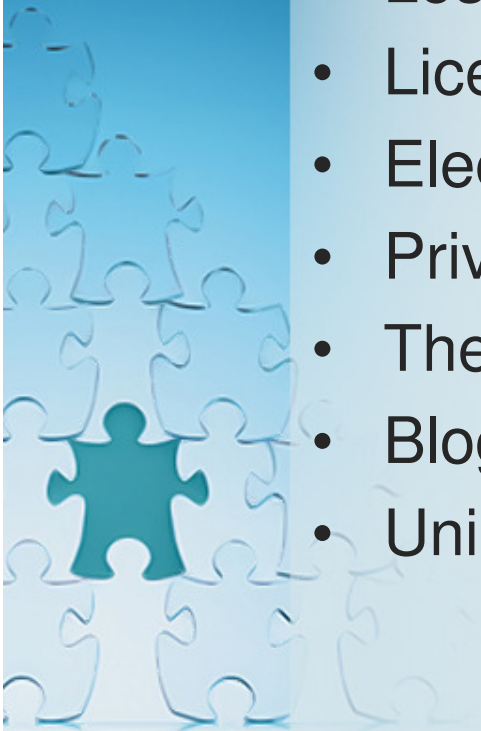


8

**Let Them Use Your
Computers for Anything**

Problems with Unregulated Computer Use

- Harassment, discrimination & retaliation
- Loss of Intellectual property & trade secrets
- Licensing issues
- Electronic fraud/forgery
- Privacy claims
- Theft
- Blogging
- Union organizing





9

**Just Make Up Reasons For
Firing Them &
Do It Without Any
Advance Warning!**

Lying Causes Problems!

The Supreme Court says an employer can't get summary judgment if it gives conflicting reasons for a discharge, even if one of them is true and non-discriminatory.

St. Mary's Honor Center v. Hicks



Rule Violations

- Is there a rule?
- Notice of the rule?
- Uniform enforcement of the rule?
- Documented?
- Will discipline be a surprise?



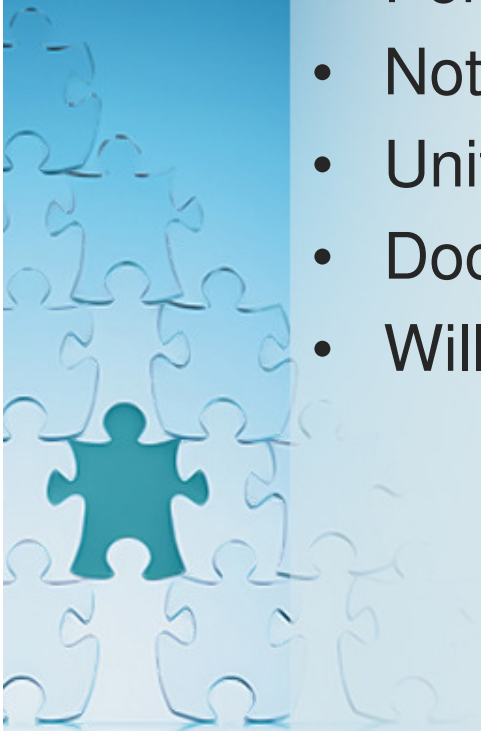
Poor Performance

The Basics:

- Performance standard?
- Notice of the standard?
- Uniform enforcement?
- Documented?
- Will discipline be a surprise?

Plus:

- Notice of a problem
- Explanation
- Assistance
- Time to improve





10

**Ignore The Other
Legal Paperwork**

Other Legal Paperwork

- I-9 forms (and e-Verify)
- Garnishments
- Unemployment compensation
- References



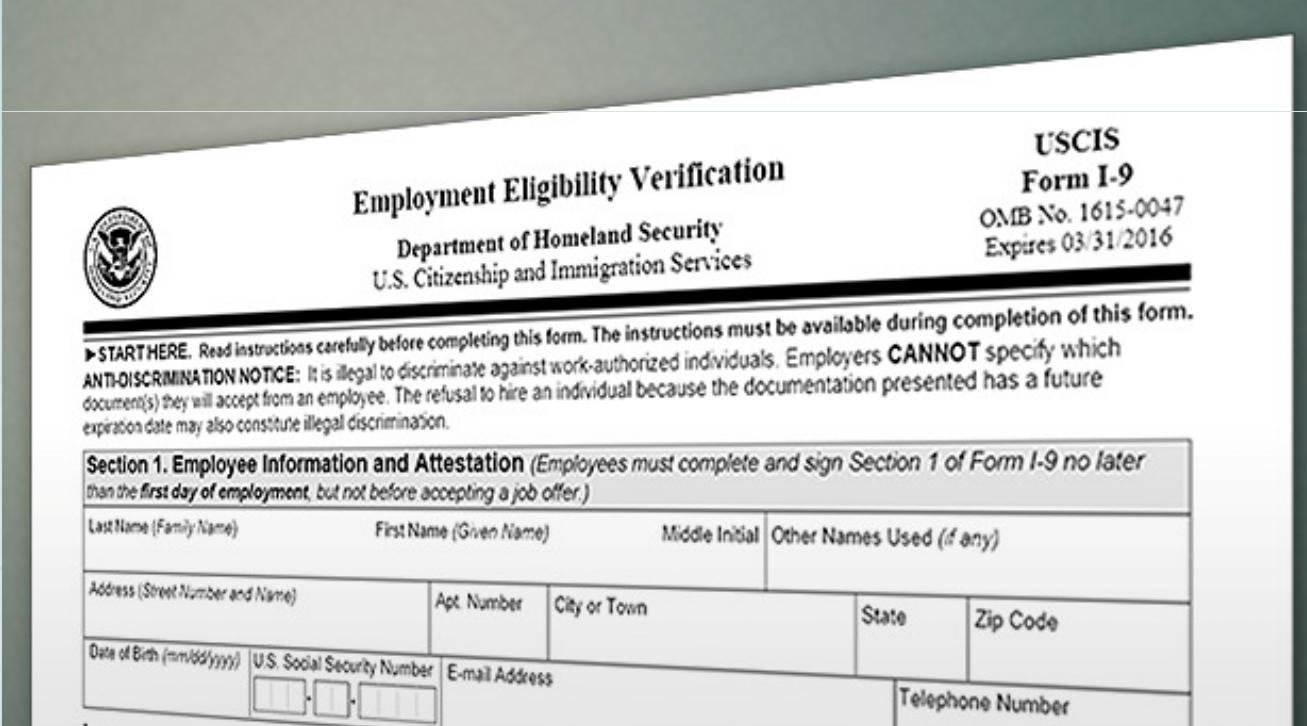

IRCA Basics

- Verification
- Record retention
- Prohibited acts
- Penalties



IRCA Basics: Verification

- **All employers are covered**, regardless of the number of employees



USCIS
Form I-9
OMB No. 1615-0047
Expires 03/31/2016

Employment Eligibility Verification
Department of Homeland Security
U.S. Citizenship and Immigration Services

► **START HERE.** Read instructions carefully before completing this form. The instructions must be available during completion of this form.

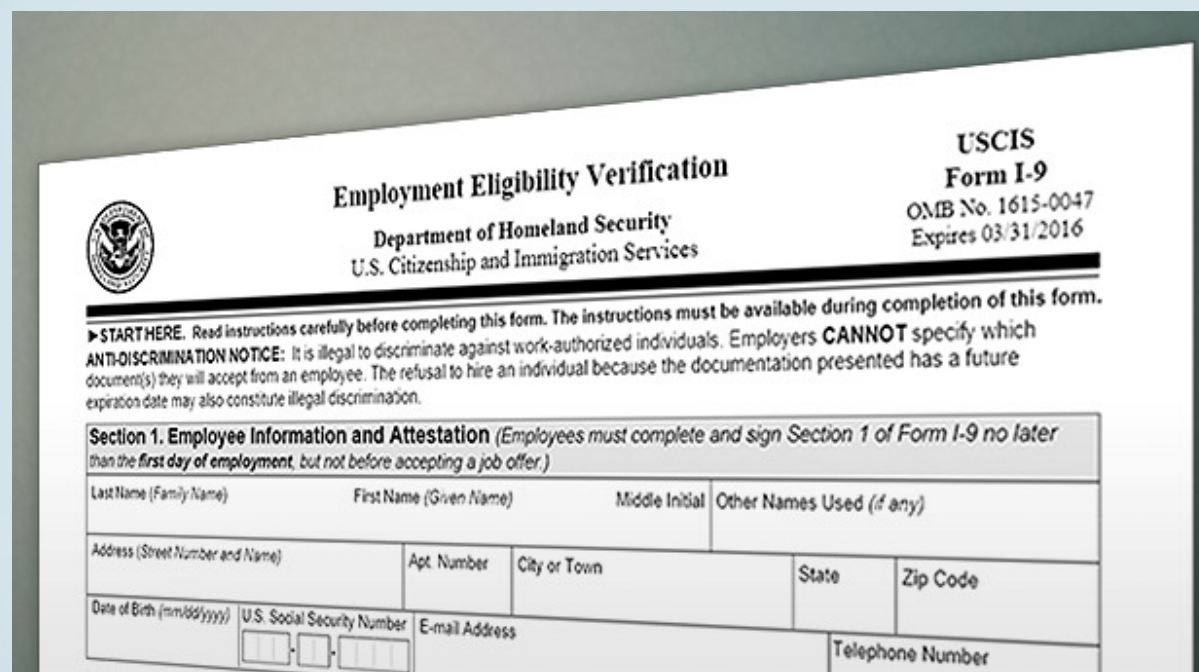
ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work-authorized individuals. Employers **CANNOT** specify which document(s) they will accept from an employee. The refusal to hire an individual because the documentation presented has a future expiration date may also constitute illegal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

Section 1. Employee Information and Attestation (Employees must complete and sign Section 1 of Form I-9 no later than the first day of employment, but not before accepting a job offer.)

Last Name (Family Name)		First Name (Given Name)		Middle Initial	Other Names Used (if any)		
Address (Street Number and Name)			Apt. Number	City or Town		State	Zip Code
Date of Birth (mm/dd/yyyy)	U.S. Social Security Number		E-mail Address			Telephone Number	

IRCA Basics: Record Retention

- Retain I-9 forms for 3 years from the date work begins **and** 1 year after termination
- **Employers must have an I-9 for every current employee hired after November 6, 1986**



USCIS
Form I-9
OMB No. 1615-0047
Expires 03/31/2016

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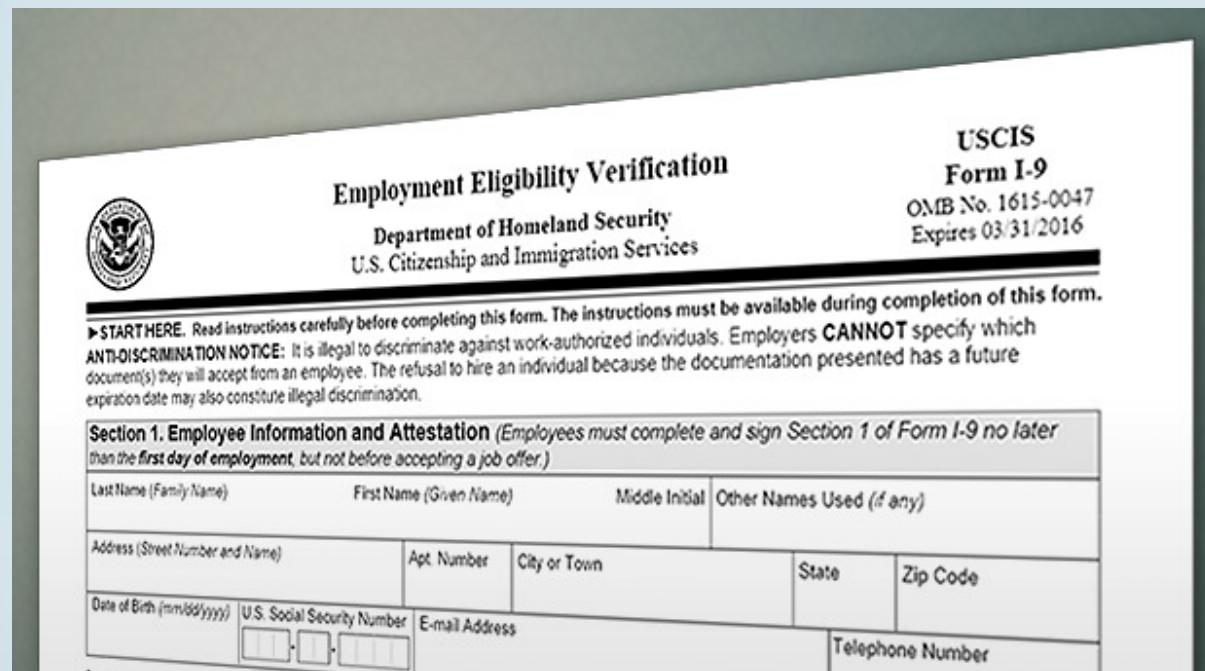
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IRCA Basics: Record Retention

- Keep I-9 forms in separate files, so ICE does not obtain access to personnel files in an audit
- Keep current employee forms separate from terminated employee forms



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IRCA Basics: Prohibited Acts

- Hiring an illegal
- Not verifying identity/work authorization
- Continuing to employ an illegal
- Requiring specific documents
- Requiring more or different documents than are minimally required
- Refusing to accept documents tendered that appear to be genuine



IRCA Basics: Penalties

- Harboring, smuggling, concealing, or transporting illegals:

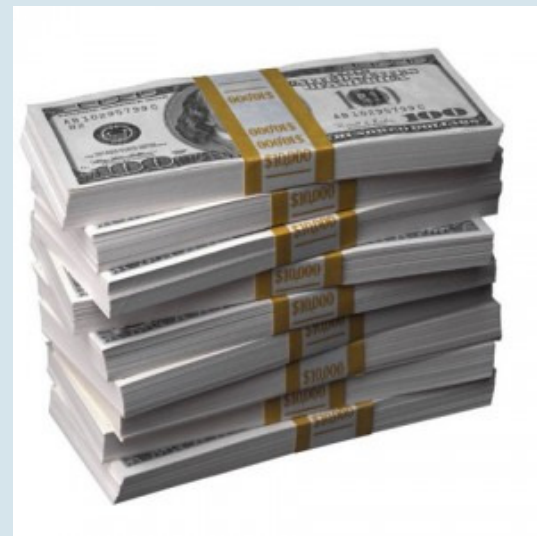
10 years in jail and \$250,000

- Illegal Employment

up to \$11,000 for each person

- Document abuse or violation of I-9 requirements

up to \$1,100 for each person



Facts To Provide DOL For Every Discharge

- Last day of work
- Reason for separation
- Date & details of the final incident
- Effects on the employer (if applicable)
- History of warnings
- Was worker told job was in jeopardy



Facts To Provide DOL Rule Violation Discharge

- Details of the incident
- Any witnesses
- Any documents
- Worker's "story"
- Proof that rule was violated



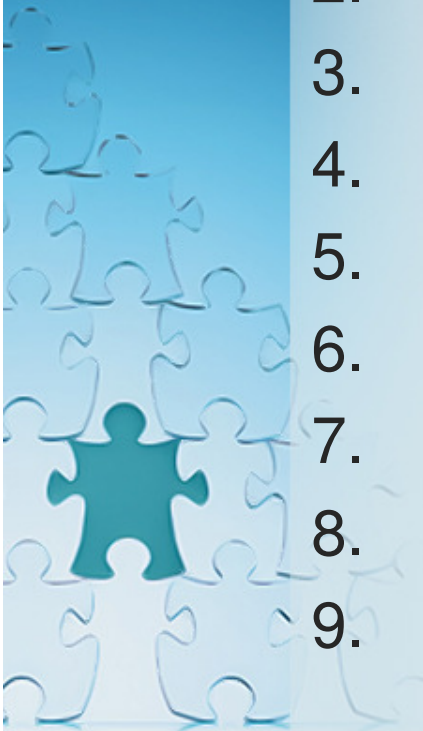
Facts To Provide DOL Rule Violation Discharge

- Are rules written?
- Is there a progressive discipline program?
- What rule violated?
- Was worker aware of the rule?
- How was worker advised of the rule?
- Was worker previously warned?



10 Step Program In Review

1. If she can fog a mirror, hire her
2. Don't give them any instructions
3. Pay them all a salary
4. Blow off their harassment complaints
5. Get back at them for complaining
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Questions?



Thank You!

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