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Rocky Mountain Edition *A Littler Mendelson Colorado-specific Newsletter*

# Colorado Employers Faced With the Nation's Strictest Employment Verifications Requirement

*By Franklin A. Nachman and Michael A. Freimann*

Faced with mounting political pressure, the Colorado Legislature convened a special legislative session and passed several new immigration laws. This article outlines two of these laws which require employers to verify the legal status of its employees, and impose fines and loss of state government contracts as penalties for noncompliance.

## Beginning January 1, 2007, HB1017 Imposes Employment Verfication Requirements for New Hires in Colorado

*Requirements in Colorado for New Hires*

Governor Owens signed HB 1017 on July 31, 2006. The law, adds Section 8-2-122 to the Colorado Revised Statutes, and applies to employees hired on or after January 1, 2007. It does not apply to existing employees.

HB 1017 creates affirmation and document retention requirements that expand on the federal Immigration Reform and Control Act (IRCA) and its I-9 requirements. The bill requires employers, within twenty (20) days after hiring a new employee, to:

1. affirm that the employer has examined the legal work status of the newly acquired employee;
2. affirm it has retained copies of the employee's work documents;
3. affirm that the employer has not altered or falsified the new employee's identification documents; and
4. affirm that it has not knowingly hired an unauthorized alien.

Additionally, the new bill requires that the employer keep a written or electronic copy of the affirmation and all documents required under the IRCA for the term of employment for each employee. The law applies to newly hired employees and most likely does not apply to reverification of employees transferred into Colorado.

It is important to note, that like the Fair Labor Standards Act (FLSA), the statute defines "employer" as "a person or entity" who "has control of the payment of wages for such services, or is the officer, agent, or employee of the person or entity having control of the payment of wages." The law, unlike the Colorado Wage Claim Act, Section 8-4-101, *et. seq.* of the Colorado Revised Statutes, contemplates personal liability for violation of its provisions.

The statute does not require employers to submit the required affirmation documents to any state agency. Instead, employers are required to make the documentation available upon request by the Colorado Labor and Employment Department. The Director of that department is authorized to conduct random audits of employers to obtain the documentation.

*Liability and Penalties*

Section 8-2-122(4) provides that an employer, who with "reckless disregard," fails to submit documentation when requested by the Director, or with "reckless disregard," submits false or fraudulent documentation, shall be subject to a fine of not more than $5,000 for the first offense and not more than $25,000 for a second and any subsequent offense. The standard for liability is greater

than ordinary negligence, but lesser than intent to violate the law.

*Compliance Recommendations*

I-9 administrators can integrate the process to ensure compliance under HB 1017 if they regularly sign the 1017 affirmation when they sign the attestation in Section 2 of the Form I-9. The attestation in Section 2 already expressly or implicitly contains the HB 1017 affirmations, except for the affirmation of retention of the I-9 documents.

Additionally, while copying and retaining the I-9 documents is optional under IRCA, it is mandatory under HB 1017. For administrative convenience both the Affirmation and the I-9 Documents should be kept in a consolidated file for HB 1017 compliance.

HB 1017 differs from the IRCA in that it requires retention of the affirmation and I-9 documents only for the term of employment, as opposed to three years from date of hire or one year after termination, whichever is later, by the IRCA. Nevertheless, for administrative convenience, employers may want to retain 1017 documentation for the same period as the I-9 documentation.

## Effective August 9, 2006, HB 1343 Imposes New Requirements on State Contractors

*Contractors from Inside or Outside Colorado Must Comply with 1343*

HB 1343 adds Section 8-17.5-101 and 102 to the Colorado Revise Statutes. It regulates persons who have public contracts for services with a state agency or political subdivision of Colorado. Effective August 9, 2006, HB 1343 makes it illegal for a state agency or political subdivision to enter into or renew a contract for services with a contractor who "knowingly employs or contracts with an illegal alien to perform work under the contract or who knowingly contracts with a subcontractor who knowingly employs illegal aliens." While the statute defines "services" as "[the] furnishing of labor, time and effort by a contractor or subcontractor not involving the delivery of a specific end product other than reports that are merely incidental to the required performance," the Attorney General's office has indicated that it will issue an opinion that the definition is to be broadly construed to include such activity as construction within the definition of services.

The statute prohibits state agencies from entering into or renewing contract agreements with contractors who knowingly employ illegal aliens. The legislation requires that each public contract include provisions that the prospective contractor shall not knowingly employ or contract with an illegal alien to perform work under the contract; and will not enter into a contract with a subcontractor that fails to certify to the contractor that the subcontractor shall not knowingly employ or contract with an illegal alien to perform work under the contract. Furthermore, the law requires such a contract for services to include a provision requiring the contractor to verify the status of its employees working under the contract. A state contractor must certify that it has verified the legal status of all new hires using the federal government's Basic Pilot Program.

If the contractor discovers that a subcontractor is knowingly employing an illegal alien, the contractor must alert the contracting Colorado state agency/political subdivision within 3 days. The contractor is also required to terminate the subcontract within three days of receiving the notice required by law, unless during that time period the subcontractor provides information to establish that it has not knowingly employed an illegal alien.

Like HB 1017, the statute authorizes the Department of Labor to investigate whether a contractor is complying with the provisions of the public contract, including on-site inspections and requests and review of documentation. The law also authorizes the Department to receive complaints of suspected violations, and contemplates promulgating procedures for investigation of such complaints.

*HB 1343 Does Not Apply to Contracts Existing Before August 9, 2006.*

Although effective on August 9, 2006, HB 1343 imposes only prospective responsibilities. The obligations are imposed only in new or renewed agreements. Further, if a government contractor fails to make the required certification, Colorado state agencies and political subdivisions are prohibited from entering into or renewing a public contract with the contractor. The state agency or political subdivision may also terminate an existing agreement for breach of contract in the event of a violation of any contract provision. If the contract is terminated, the contractor shall be liable for actual and consequential damages that the state agency/political subdivision suffers as a result of the termination. In the event of a violation and termination, the state agency must notify the Office of the Secretary of State who publishes a list of terminated contractors on its website for two years, absent a court ruling that the contractor did not violate the statutory requirements.

*General Overview of the Basic Pilot Program*

The Basic Pilot Program uses an automated system to verify the employment status of all newly hired employees. Specifically, it accesses the Social Security Administration (SSA) and Department of Homeland Security (DHS) databases.

To participate in the Program, an employer (or a qualified representative agent) must sign a Memorandum of Understanding (MOU) with the DHS and SSA. The employer agrees to: (1) display notices supplied by DHS in a prominent place clearly visible to prospective employees; (2) provide to the SSA and DHS the names, titles, addresses, and telephone numbers of the employer representatives; (3) become familiar and comply with the Basic Pilot Manual (training material provided by the Program); (4) require that all employer representatives performing employment verification queries complete the Basic Pilot Web-Based Tutorial; and (5) comply with established Form I-9 procedures.

An initial inquiry mandates that an employer provide the following information for all newly hired workers within three days of hire: employee's last name, first name, social security number, date of birth, hire date, citizenship status, alien or I-94 number if required, document type, and document expiration date, if required. An employer will enter the data into a form accessible on the DHS website and transmit it to DHS. DHS in turn, forwards the information to SSA, which will verify the validity of the worker's Social Security number, name, date of birth, and citizenship. The SSA will confirm the date on noncitizens,

then refers its findings to DHS to verify work authorization according to that agency's immigration records.

If neither the DHS or SSA can confirm work authorization within 24 hours, the employer receives a tentative non-confirmation response. The employer is supposed to check the accuracy of the information it submitted and either re-enter the information to DHS or ask the employee to resolve the issue with SSA or DHS. If the worker does not contest or resolve the non-confirmation finding within 10 days, the Program issues a final non-confirmation notice, and an employer is required either to terminate the employee immediately or notify DHS that it is continuing to employ the person. Employers can continue to employ the employee during the 10 day period, during which the employee is allowed to correct the data or contest the finding.

## Conclusion

While enacted with great fanfare and touted as the strictest and toughest laws in the country, it remains to be seen how effective these new laws will be. They create additional burdens on employers above and beyond I-9 compliance, with substantial penalties for noncompliance. What remains to be seen is the effect of any new federal immigration legislation, which until now, has been stalled in Congress, and to what extent, if any, these laws may be preempted by existing federal legislation.

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