

Investigating Employees for Legal Presence

Policy

It is the policy of the corporation that we will not hire or continue to employ any person who is unauthorized to work in the United States. We will take reasonable steps to investigate credible information which indicates that an employee may have provided fraudulent documents to establish either identity or eligibility to work, while at the same time respecting the rights of employees. We will balance the rights of employees against discrimination and/or needless intrusion into personal privacy.

Purpose

The objective of this policy is to provide a uniform procedure to determine **when** to further investigate the employment eligibility of employees, and **how** this investigation will be conducted.

To accomplish the objective, management and supervisors will be trained in the proper response to any information which would cause a reasonable person to question the validity of a document that has been provided by an employee to establish identity or employment eligibility.

This policy balances the obligation of the company to investigate employment eligibility against the rights of employees to be free from discrimination based on citizenship, national origin, or immigration status. It also protects employees against potential privacy violations.

Background

The Immigration and Nationality Act of 1986 prohibits employers from **knowingly** hiring or continuing to employ a person who is not authorized to work in the United States. Employers are required to verify the identity and authorization to work of every newly hired worker. This is accomplished by correctly completing and retaining a Form I-9 for each employee hired after November 6, 1986. By taking this step, the employer establishes a good faith defense against a charge of knowingly hiring an unauthorized person.

In the wake of Congress' failure to enact immigration reform, and in light of the increasing evidence that workers are using fraudulent documents to establish identity and employment eligibility, the Department of Homeland Security (DHS) may seek to prosecute employers who have **constructive knowledge** that a worker is not authorized to work. Constructive knowledge is information that would lead a reasonable person to make a further investigation. It is knowledge that can be inferred through the notice of certain facts and circumstances that should trigger further investigation. An example of constructive knowledge would be the receipt of a document from the Social Security Administration (SSA) stating that the name and social security number that has been reported for a worker does not match the agency's records for that individual.

Constructive knowledge of work ineligibility may be imputed by DHS when an employer receives information about the work eligibility of a worker but refuses to take reasonable steps to investigate further.

In August 2006, the Social Security Administration (SSA) stopped sending "No-Match" letters to employers as a result of a legal dispute between SSA, DHS, and a 3rd party lawsuit. That was resolved in July 2009. It is anticipated that the SSA will resume the "No-Match" notifications to employers in 2010 and provides the basis for this policy and the procedures adopted herein.

A summary of the “No-Match Safe Harbor” rule prepared by the California Farm Bureau Federation is attached to this policy.

Procedure to Evaluate Whether Further Investigation is Warranted

1. General Statement. The company will investigate any credible information that would lead a reasonable person to question the identity or employment eligibility of a worker. **Credible information is a written document from a government entity or other credible source which states that a worker is not authorized to work, or calls into question the accuracy or authenticity of a document provided by the worker to establish identity or employment eligibility.**

Example: A notice from the SSA indicating that the name and social security number reported by the company does not match the name and number that the agency has on file.

NOTE: The company will not engage in further evaluation of employees who are not currently working for the company. If the company receives a statement indicating a potential problem with the employment eligibility of a person who is not currently working for the company, the statement shall be mailed to the former employee at the last known address, and the investigation will be considered complete.

2. Information that is not in writing. If information is provided that is not in writing, the company will request the person who provides the information send the details of the allegation in writing, on appropriate letterhead, and signed by the person providing the information. The request shall include why the information is being requested and state the specific law that entitles the requesting party to have access to the information.
3. Electronic Mail. If a complaint or allegation regarding an employee is received by electronic mail, the person receiving the electronic mail should forward it to the human resources department. The human resources department will respond to the sender with a request that the information be provided by first class mail, on the letterhead of the agency or entity originating the complaint, providing pertinent details and supporting data, and signed by the originator of the complaint. The request shall include why the information is being requested and state the specific law that entitles the requesting party to have access to the information.
4. Evaluating Information. The human resources director will be responsible to evaluate the authenticity or potential accuracy of the information. Information that is deemed to be more likely than not without reasonable basis in fact will be discarded.

Example: The company receives an angry telephone call with racist innuendos about the workforce in general or a specific person. When a request for written information is made, the company receives a hand written note from an individual with broad allegations that are not supported by factual data. Such a letter should be discarded and should not trigger further investigation.

5. Circumstances which Require Further Investigation During the Hiring Process. During the hiring process, employees who are tasked with completing the I-9 for the company may gain constructive knowledge that would warrant further investigation. For example, the employee may present a passport or resident alien card with one name on it, but also display a driver's license with another name or picture that does not reasonably match the employee. Although the law would require that the company accept the passport or resident alien card if it reasonably related to the individual, and the document abuse rules prevent us from viewing the second document, a reasonable person should report the

information to the human resources director to evaluate whether further investigation is warranted.

6. Other Circumstances which Trigger Further Investigation. The company reserves the right to further investigate any employee. This could be due to some other information that the human resources director evaluates as information that would cause a reasonable person to make further inquiry, or the company may decide to initiate random checks of employees due to, for example, reports from a government agency that suggest a large number of employees in the area are using fraudulent documents.

Procedure to Follow if Further Investigation is Determined

Once the human resources director has determined that a further investigation of an employee is required, the company will follow the procedures as outlined in the DHS No-Match Safe Harbor regulation.

Step 1. The company will review name and social security number that it has reported with the information that has been provided by the employee. Company personnel will check for obvious errors such as transposed digits in the SSN, or other administrative errors. If there are discrepancies between information provided by the employee and reported by the company, they should be corrected and the investigation is complete. This will be accomplished within 30 days of the start of the investigation.

Step 2. Assuming that the information reported by the company is the same as was provided by the employee, the next step is an interview with the employee. During this interview, the human resources director or designated person will explain the situation to the employee and confirm that the name and SSN in the company's records are correct. If they are, the human resources director or designee will ask the employee if he or she is eligible to work. If the employee admits that he or she is not, the employee must be terminated and the investigation is ended. If the employee contends that he/she is eligible to work, the next step is to ask the employee to resolve the problem with the agency that issued the document in question.

Step 3. The employee shall be given 60 days to correct the problem which led to the investigation and return with a statement from the issuing agency verifying the accuracy of the document. A follow up appointment shall be scheduled 60 days later.

Step 4. The human resources director or designee will meet with the employee to evaluate the information provided. If the employee has been unable to correct the problem, a new I-9 must be completed, and the employee will not be permitted to use any document that caused the investigation, or any document containing a disputed social security number. A document with a photograph must be provided as a List A document (establishes identity and work authorization) or a List B document (establishes identity only).

Sample Letter to Employee - Re: SSN No-match

[Date of letter:]

Re: Social Security Number:

Dear [Employee's Name:]

We have received notification from: [Check appropriate box]

- Social Security Administration
- Internal Revenue Service
- Employment Security (Unemployment)
- Department of Social & Health Services
- A person claiming to have the same SSN that we have on file for you
- Other _____
that your Social Security number (SSN) shown above may not relate to you.

The entity or person noted above is asking us to: [Check appropriate box]

- Garnish your wages
- Resolve the discrepancy
- Discontinue using the SSN
- Other _____

This letter is our notification to you of this issue.

To resolve this problem, please show me your SSN card to verify that the name and SSN we have on file for you is correct. If the name or SSN we have on file for you is not your name or SSN, then give us your name or SSN so we can correct our records. If the name and SSN we have for you are your true name and SSN, then contact the entity or person noted above to resolve the conflict.

Please note: Once you have resolved this apparent discrepancy, you must report to us the resolution. If you provide us with a new name or SSN, we will verify that new information with Social Security Administration (SSA).

It is possible but rare that a person would be assigned a new or different SSN. Where an employee notifies the Company of a change in the employee's SSN, the Company will verify the change with the SSA. If the SSA advises the Company that the new SSN is invalid or does not otherwise match the SSA's records, the employee's record will not be changed. **Unless the employee can provide other credible evidence supporting its legitimacy, the Company will deem the requested change as an act of attempted fraud, and the employee will be discharged.**

Sincerely,

[Company representative's name and title:]

I acknowledge I received this notice.

Employee's Signature: _____

Date: _____

Sample Letter to Employee – Expired Employment Authorization Documents

[Date of letter:]

Re: Expired Documents which establish Employment Authorization

Dear [Employee's Name:]

We have determined that the document or documents you presented for your I-9 Employment Eligibility Verification have expired. As you are aware, the Form I-9 helps employers to verify individuals who are authorized to work in the United States.

When an employee's employment authorization expires, we must reverify his or her employment authorization. The employee must present a document that shows either an extension of his or her initial employment authorization, or a new employment authorization.

If the employee cannot provide proof of current employment authorization, we cannot continue to employ that person.

This letter is our notification to you of this issue.

To resolve this problem, please show us a document from the list of acceptable documents on Form I-9 that you are authorized to work in the United States.

Please note: You have until _____ (30 days from the date of this letter) to provide us with a document that verifies your work authorization.

Unless the employee can provide a work authorization, the employee will be discharged.

Sincerely,

[Company representative's name and title:]

I acknowledge I received this notice.

Employee's Signature: _____

Date: _____