

# GROWERTALKS

## Features

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## The New ICE Age

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It's a myth that the only reason why any employer would hire foreign workers is because it's "cheap labor." There's absolutely no incentive for any employer to hire a foreign worker over a U.S.-born worker. It's at least three to four times more expensive to hire a foreign worker over a U.S. worker due to legal fees, government filing fees, advertising costs, and consular fees and transportation costs. Further prevailing wage requirements apply to foreign workers, resulting in the need to pay higher wages to foreign workers.

There are limited options for lower-skilled employment in the U.S. Our immigration system favors highly educated and professional-level positions, leaving a wide gap in our lower-level, unskilled jobs. The most commonly used visa in the industry for lower-skilled laborers is the H-2B visa. This is a temporary/seasonal visa that's available for no more than 10 months per year. We usually see these visas issued from April 1 to November to coincide with the growing season.

One of the chief problems with the H-2B visa is its limited availability. There are a total of 66,000 visas available per year, which are divided between two seasons of the year: April 1 and October 1. For the April 1, 2018 season, the U.S. Department of Labor received applications requesting 142,113 H-2B positions for only 33,000 available visas. This shows the magnitude of the issue for seasonal employers seeking a reliable labor force. Based on the 2018 statistics, 52% of the national need went unfilled.

In this era of ever-increasing enforcement, it's critical to have an understanding of the I-9 hiring process, as well as compliance requirements. U.S. Immigration and Customs Enforcement, the agency charged with administering the I-9 program, is a well-funded machine that takes a no-tolerance approach to I-9 completion and maintenance, and there's the potential for significant employer sanctions and penalties for seemingly minor errors and non-compliance.

The fact that the I-9 Employer Handbook is over 61 pages long gives an indication of how complicated this form can be. The I-9 form is riddled with traps and ambiguity, and given ICE's policy of strict compliance, you need to know how to avoid these traps.

### Tips on completing the I-9 form

1. Be consistent. Establish uniform company policies regarding I-9s. Treat all people the same when announcing a job, accepting applications, interviewing, offering a job, verifying eligibility to work, and in hiring and firing.
2. Complete an I-9 for ALL employees, including U.S. citizens.
3. The employee must complete Section 1 on the first day of employment; the employer completes Section 2 by the

end of the third day.

4. Do not request more documentation than is required to show identity and employment authorization or ask for a particular document to show identity or employment eligibility.

- Do not ask for a particular document to show identity or employment eligibility.
- Do not reject documents that appear to be genuine and belong to the employee.
- Do not treat groups of applicants differently (e.g., based on looking or sounding “foreign”) look at the facts, not at the faces when completing the I-9 form.
- You may complete I-9 early, but not before offer and acceptance.
- Promptly re-verify employment authorization 90 days prior to expiration.
- Promptly destroy records not required to be maintained. After employment ends, keep I-9s for at least three years from the date of employment or for one year after the employment ends, whichever is later. Keep I-9s on file for all current employees.
- Conduct regular self-audits of I-9 files to find discrepancies or errors.
- Keep I-9 records separate from personnel files.
- Keep copies of the documents presented by the employee with the I-9 form (not required, but recommended).
- Avoid “citizen-only” or “permanent resident-only” hiring policies unless required by law, regulation or government contract. In most cases, it is illegal to require job applicants to be U.S. citizens or have a particular immigration status.

## **Significant and increasing penalties**

We’re seeing increased ICE raids and I-9 audits across the country, as well as a steep increase in deportation/enforcement activity. Employers found to be employing undocumented workers can face steep fines for hiring and I-9 violations, as well as criminal charges, including harboring or transporting illegal aliens—up to \$16,000 per violation for unlawful hiring practices, including knowingly hiring an undocumented worker or up to \$1,100 per violation for failing to comply to I-9 requirements.

- Criminal penalties: Pattern or practice of violations; Up to \$3,000 per employee and/or 6 months imprisonment
- Document fraud: Fraud or false statements or misuse of visas, immigration and identity documents

Civil fraud: \$375 to \$6,500 per document

Criminal fraud: Fines, imprisonment up to five years, forfeiture of assets

- Aggravating/mitigating factors: Business size, good faith, seriousness of offense; If unauthorized aliens were employed, history of employer

## **Avoiding discrimination in the hiring process**

It’s dangerously easy to engage in employment/hiring discrimination during the hiring process. There’s very specific phraseology that must be used to solicit the information that you need to verify employment authorization.

U.S. workers are protected from employment discrimination based on national origin and citizenship, as well as other Title VII grounds. This is tricky when recruiting workers in the U.S. Employers, however, need to determine an applicant’s immigration status during the hiring process without potential liability for discrimination. Remember: Look

at the facts, not at the faces!

What you CANNOT Ask:

- Are you a U.S. Citizen?
- What country are you from?
- Do you have a green card?
- Do you have a social security card?
- If you're not a USC, what visa do you hold?

The recommended phraseology to determine work authorization is: "Do you currently have unrestricted work authorization for the U.S. or would you require sponsorship for a working visa?" You can have the employee check the following list:

- I have unrestricted work authorization now and would NOT require sponsorship.
- I have work authorization now, but would need sponsorship in the future.
- I would require sponsorship for a working visa.

## Enforcement

Since November 2014, ICE operated under established "enforcement priorities" implemented by the Obama administration. ICE was directed to allocate its resources to the removal of individuals that: 1) Posed a threat to national security; 2) individuals that have convictions for three or more misdemeanor offenses or other criminal offenses; and 3) aliens issued a final order of deportation.

The Trump administration rescinded the Priority Enforcement Program by Executive Order in January 2017, broadly defining "any" individual present in the U.S. without status as a "criminal alien" subject to removal action.

Most recently, on January 10, 2018, ICE issued a press release setting forth its three-pronged approach to worksite enforcement compliance: 1) Compliance through I-9 inspections, civil fines and referrals for debarment; 2) enforcement through the arrest of employers knowingly employing undocumented workers and the arrest of unauthorized workers for violation of laws associated with working without authorization; and 3) outreach, through the ICE Mutual Agreement between Government and Employers (IMAGE) program, to instill a culture of compliance and accountability.

The reality is that a strong economy has disastrous consequences for seasonal employers. Many employers are faced with a difficult decision: turn away business, cancel/breach contracts, scale back services, cease operations, or turn a blind eye to immigration status. This is a dangerous proposition, given the level of worksite enforcement that we're seeing nationally. **GT**

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