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(916) 782-8555

BUILT FOR EMPLOYERS

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Accepting AB 60 Licenses for Form I-9 Purposes

By: Susannah L. Ashton

The Federal Immigration Nationality Act and Form I-9 Requirements

The Immigration Nationality Act (INA) makes it illegal for employers to knowingly hire persons who are not legally present in the United States. Employers who do so are subject to fines and possible imprisonment.

In order to ensure that all employees are legally present in the United States, and thus eligible for employment, they are required to submit a Form I-9 to verify their identity and authorization for employment. When submitting such form, employees are required to provide either one document from List A (e.g., passport) or 2 documents: a List B verifying identity (e.g., driver's license) and a List C verifying employment eligibility (e.g., social security card). If an employee is unable to provide both a List B and a List C document, he or she is not considered eligible to work in the United States.

California AB 60 Licenses

On January 1, 2015, the California Department of Motor Vehicles began issuing a new type of driver's license to applicants who cannot submit satisfactory proof of legal presence in the United States, but who otherwise meet all qualifications for the issuance of a driver's license. Such a license, termed an "AB 60" driver's license contains a mark stating "Not for Federal Identification." This designation means that an AB 60 License is not compliant with the REAL ID Act in some way. However, the REAL ID Act states that this designation should not raise inferences or assumptions regarding an individual's citizenship or immigration status, and further, State law precludes discrimination against a person holding an AB 60 License.

United States Guidance on AB 60 Licenses as Acceptable List B Documents

On May 19, 2015, the United States Citizenship and Immigration Services (USCIS) recently issued guidance on the applicability of AB 60 Licenses for Form I-9 purposes. On June 4, 2015, various grower associations and legal representatives in the field, along with The Saqui Law Group, issued an Industry Announcement providing guidance to employers in handling AB 60 Licenses.

Q: Is a state-issued license with the notation "NOT ACCEPTABLE FOR OFFICIAL FEDERAL PURPOSES," such as the AB 60 License, an acceptable Form I-9 List B document?

A: An AB 60 Driver's License with the words "FEDERAL LIMITS APPLY" or "NOT ACCEPTABLE FOR OFFICIAL FEDERAL PURPOSES" is an acceptable List B document for identification purposes if:

- It contains a photograph or other identifying information such as name, DOB, sex, height, color of eyes, address
- and
- Employers must also examine a List C document establishing employment authorization.

Q: What is a "knowing hire" violation?

A: An employer who has knowingly hired unauthorized workers is subject to monetary penalties of up to \$16,000 per violation.

A "knowing hire" violation can be based on actual or constructive knowledge of an employee's unauthorized status. Constructive notice means that an individual knew, or should have known, of a specific fact.

Q: Does acceptance of an AB 60 License constitute a "knowing hire violation"?

A: Acceptance of an AB 60 License does not, in and of itself, support a conclusion that an employer had knowledge of an employee's unauthorized status.

Whether an employer is considered to have actual or constructive knowledge that an employee lacks employment authorization is determined on a case-by-case basis and depends upon all of the facts and variables specific to the individual case.

The omission from the USCIS' guidance of any statement that an employer must take any affirmative steps other than accept such a license as a List B identity document in the Form I-9 process indicates the federal government does not expect an employer to inquire into why an employee claiming employment eligibility has such a license.

However, inquiry notice arises when an employer would have obtained actual knowledge had he or she taken reasonable steps to resolve any apparent discrepancy between an employee's List B identity document and List C employment authorization document.

Q: Can an employer refuse to accept an AB 60 License or ask for a different form of documentation?

A: No. Employers must accept an AB 60 License since it satisfies Form I-9 requirements. Only documents that do not appear to be genuine or relate to the specific employee may be rejected. Failure to accept an AB 60 License may constitute illegal discrimination under the INA.

Q: If an existing employee presents an AB 60 License that bears identifying information that is different than what currently appears on their Form I-9, must an employer alter the information on Form I-9 to comport with the information on the AB 60 License?

A: While such a request may seem innocuous, it actually does three things: (1) puts the employer on notice that the current Form I-9 information was falsely given; (2) imports actual knowledge to the employer that the AB 60 License was obtained because of the employee's "illegal" status, thus removing all grey areas; and (3) requires the employer violate federal law.

Unfortunately, the USCIS did not provided guidance on this matter. Thus, if this event arises, employers should primarily agree to change any necessary information as long as the employee can provide the requisite secondary forms of documentation required by Form I-9. However, it is likely that this scenario removes the grey areas and puts the employer on constructive notice that the employee is not legally authorized to work in the US. The employer thus risks violating federal law by continuing to employ such person.

Counsel to Management: In light of USCIS's guidance and Industry Announcement, if an employer is given an AB 60 License as a List B document, they should comply with the following:

- Employers must accept AB 60 Licenses as List B documents.
- Employers should not accept photocopies or duplicates for Form I-9 purposes, but only original documents.
- Employers must also examine a List C document establishing employment authorization.
- If an employer has any reason to doubt the veracity of a List B or List C document, that employer must take reasonable, affirmative steps to resolve any potential discrepancy.

Sacramento

- 1420 Rocky Ridge Drive, Suite 260
- Roseville, CA 95661
- Tel: (916) 782-8555
- Fax: (916) 782-8565

Central Coast Office

- 60 Garden Court, Suite 100
- Monterey, CA 93940
- Tel: (831) 443-7100
- Fax: (831) 443-8585