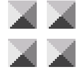

Ballard Spahr Andrews & Ingersoll, LLP

MEMORANDUM

To: Joe Sigg
Arizona Farm Bureau

From: Julie A. Pace
Heidi Nunn-Gilman

Date: February 12, 2008

Re: Rehired and Seasonal Employees & I-9 Compliance

This memorandum provides a summary of the rules and regulations regarding I-9 compliance involving rehired or seasonal employees. Generally, rehired employees are required to complete at least some portion of the I-9, depending on the time gap between the completion of the original I-9 and the date or rehire. On the other hand, certain groups of employees, such as seasonal employees are not considered rehired employees when they return to active employment with their employer, and thus, do not have to complete any portion of an I-9. We have also included some information on how E-Verify would fit into the scheme of rehired and seasonal employees. Please read below for further details.

I. I-9 REQUIREMENTS FOR REHIRED EMPLOYEES

Generally speaking, an employer is in a "rehire" situation with an employee if the employee begins to work for the employer after having previously being discharged by the employer (i.e., the employer processed the employee's discharge paperwork).

With the recent November 2007 release of a new version of the Form I-9, the Department of Homeland Security recently changed its regulations regarding when an employer must redo an I-9 for a rehired employee. If the employee's original I-9 is a version dated before June 5, 2007, the rehired employee must complete a new I-9, regardless of the amount of time between the date of the original I-9 and the date of the rehire.

If you rehire an employee and it has been less than three years from the date of the original I-9, you do not have to complete a new I-9 if the employee's original I-9 is the version dated June 5, 2007 or a subsequent version. Instead of completing a new form, the employer is required to examine the old I-9 to determine whether the I-9 relates to the employee and the employee is still authorized to work. If both are true, the employer uses Section 3 of the I-9 to update the rehire date. If when examining the document the employer notices that the employee's work authorization has lapsed, the employer needs the employee to present a current

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work eligibility document and update the information using Section 3. *See* 8 C.F.R. §§ 274a.2(c)(1)(i)-(ii).

If an employee is discharged and then rehired more than once, then Section 3 of the original I-9 will already be completed. The Department of Homeland Security has stated that an employer need complete only Section 3 of a new I-9 form and staple it to the original I-9, rather than completing an entirely new I-9, as long as the original I-9 is less than three years old is the 2007 version (or newer). You may also want to complete the employee's name in Section 1 or ensure the complete name is listed in Section 3, to help match up the original I-9 with the I-9s with only Section 3 completed in case they become separated. It is important to remember that if it has been more than three years from the date of the original Form I-9, a new I-9 is always required for a rehired employee.

II. NO I-9 REQUIREMENTS FOR SITUATIONS WHERE EMPLOYEES ARE NOT CONSIDERED "REHIRED"

Not every situation in which an employee works for an employer, does not actively works for an employer for an amount of time, and then returns to work for an employer is classified as a rehire situation under the law. The federal regulations consider the following situations not to be rehire situations for employees because the

> individual is continuing in his of her employment and has a reasonable expectation of employment at all times:
>
> (1) An individual takes approved paid or unpaid leave on account of study, illness or disability of a family member, illness or pregnancy, maternity or paternity leave, vacation, union business, or other temporary leave approved by the employer;
> (2) An individual is promoted, demoted, or gets a pay raise;
> (3) **An individual is temporarily laid off for lack of work;**
> (4) An individual is on strike or in a labor dispute;
> (5) An individual is reinstated after disciplinary suspension for wrongful termination, found unjustified by any court, arbitrator, or administrative body, or otherwise resolved through reinstatement or settlement;
> (6) An individual transfers from one distinct unit of an employer to another distinct unit of the same employer; the employer may transfer the individual's Form I-9 to the receiving unit;
> (7) An individual continues his or her employment with a related, successor, or reorganized employer, provided that the employer obtains and maintains from the previous employer records and Forms I-9 where applicable. . . . .
> (8) **An individual is engaged in seasonal employment.**

8 C.F.R. §§ 274a.2(b)(1)(viii)(A)(1)-(8) (emphasis added). To demonstrate that an employee falls under one of these exceptions, an employer must show that the employee expected to return

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to work and that the employee's expectation was reasonable. 8 C.F.R. § 274a.2(b)(1)(viii)(B). Also, an employer cannot qualify for any of these exceptions if the employee was discharged for reasons such as workplace violence, no-show, personality conflicts, etc.

If the employee stops actively working for an employer for one of the reasons discussed above (e.g., "temporarily laid of for lack of work" or "engaged in seasonal employment"), the law will recognize that individual as "continuing in his or her employment," and not as a rehired employee. Therefore, the employee is not required to complete neither a new I-9 nor Section 3 of the original I-9. But keep in mind that if an employee remains "active" in your system—and thus, never discharged—you will need to update the employee's I-9 if and when their work authorization information needs to be updated.

III. E-VERIFY AND REHIRED EMPLOYEES

Under the Legal Arizona Workers Act, Arizona employers are required to use E-Verify (previously known as Basic Pilot) to verify the employment eligibility for all newly hired employees. When thinking about how the Form I-9 fits in with E-Verify, a good rule of thumb is that if you are required to complete a new I-9, you are required to run a new E-Verify query. For newly hired employees (that have never been employed by you before), an I-9 is absolutely required, and thus, you would need to run an E-Verify query.

Things get a little trickier if you're rehiring an employee that you have previously employed. Thus, here is a bullet-point run-down of several "rehire"-type situations and whether or not the employee's return to employment requires an E-Verify query:

- Employer rehires employer, and it has been more than three years since the employee completed the original I-9 = **complete a new I-9 and run an E-Verify query**

- Employer rehires employee, it has been less than three years since the employee completed the original I-9, and the employee's original I-9 is a version dated before June 5, 2007 = **complete a new I-9 and run an E-Verify query**

- Employer rehires employee, it has been less than three years since the employee completed the original I-9, and the employee's original I-9 is a version dated June 5, 2007 (or a subsequent version) = **just complete section 3 of the I-9 and do not run an E-Verify query**

- Employee comes back following one of the eight enumerated reasons listed above (e.g., seasonal employee), so employee is not considered "rehired" = **do not complete any portion of an I-9 and do not run an E-Verify query**

IV. CONCLUSION

If you have any further questions regarding the immigration compliance procedures for rehired employees, please do not hesitate to contact us.

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