

**THE GOLDSTEIN LAW FIRM, A.P.C.**

*Established 1977*

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**IMPORTANT ISSUE OF CONCERN FOR YOUR BUSINESS**

## **SPECIAL EDITION:**

**“How to respond when you receive undocumented worker inquiries from State and Federal Agencies”**



## **“How to respond when you receive undocumented worker inquiries from State and Federal Agencies”**

Since the 1980s there has been a steady increase in the number of inquiry letters sent by various State and Federal agencies to employers informing them that for one reason or another certain individuals they employ may be undocumented. The U.S. Department of Labor, the Department of Homeland Security which includes Immigration and Customs Enforcement (“ICE”), California Department of Industrial Relations which includes the Labor Commissioner, the U.S. Internal Revenue Service (“IRS”), and the California Franchise Tax Board are all examples of state and federal agencies that have contacted employers over the years regarding employment of undocumented workers. Also, under ObamaCare, state run exchanges created under federal legislation require employers to disclose their employees’ personal information, such as Social Security Numbers, as a condition of receiving price quotes and coverage which may have the effect of inadvertently disclosing the undocumented status of their employees.

In several matters that I have handled over the years, by the time the clients first contacted me regarding the government’s initial letters, the employer had already responded on their own, the government had conducted an extensive audit of their employment records, and an initial determination was made by the government that they had violated the law and now owed a significant amount of money in penalties and fines. **Do not let this happen to you!**

As an employer, not only do you have a legal obligation to investigate and respond to all letters of inquiry, but failing to do so may bring severe financial and legal consequences to your business. In addition, if you know or subsequently discover that an employee is

undocumented you may have to terminate their employment in the event you do not receive legal documentation of the employee's continued ability to work in the United States.

The question then becomes how do you respond to these inquiries without violating the employee's rights of privacy, without violating federal immigration law, and without admitting fault on your part if you did not know or failed to discover that the employee was undocumented. In this article, we will explore how you should handle government inquiries into your employees' immigration status and what actions you should take to protect yourself from the imposition of criminal and civil fines and penalties by the government for any alleged hiring and retention of undocumented workers.

### **STEP #1: TAKE ALL GOVERNMENT INQUIRIES SERIOUSLY**

The *first* mistake many employers make when receiving an inquiry letter from a state or federal government agency is to ignore, minimize, or fail to take any action. The *second* mistake many employers make is when they fail to follow the steps outlined below in this Article. Therefore, it is very important that you do not delay in immediately contacting counsel and taking all necessary action to protect your business and employees from being the target of a government investigation.

### **STEP #2: PRIOR TO RESPONDING – HAVE LEGAL COUNSEL INVESTIGATE AND CONDUCT A FULL COMPLIANCE AUDIT**

Now that you have received an inquiry letter from a state or federal agency, the first action you should take is to send by e-mail or facsimile a copy of the letter to counsel. This should be followed up

with a telephone conference call with counsel after counsel has reviewed the specific allegations contained in the inquiry letter. At this point, the firm will notify the government that we have been retained to investigate the claims contained in its inquiry and that the department should have no further direct communications or contact with our client, but instead contact only the firm.

After you have forwarded a copy of the inquiry letter to counsel, and have discussed the specific allegations regarding such with counsel, it is time to take the next step in protecting yourself against being the target of a government investigation into your hiring and retention practices. You should have your Human Resources Department assemble and prepare for review by counsel all employment records, including the ones that were identified in the government's initial inquiry letter, for a period of five (5) years prior to the date of the identified employee(s) hiring by the company. When the personnel documents are assembled, counsel will travel on-site as part of its investigation into the government's allegations and in order to conduct a full compliance audit which will provide you with a strong defense to any allegations that your company did not take the inquiry seriously and failed to adequately cooperate with an ongoing government investigation.

Finally, we are often asked the question: "Why can't the company simply do its own investigation of employment records and respond to the government?"

When an attorney conducts the investigation, the Attorney-Client Privilege and Attorney Work product doctrine apply. In addition, the problem with internal corporate reviews, audits, and responses is that the government will assume that since you did it "internally" you are acting to protect your own interests against disclosure and discovering the truth rather than have an investigation and audit conducted by a

neutral and non-interested outside third-party. This is exactly why we explain to our clients that having us conduct an independent and impartial investigation and audit of your employment records could lend credibility to your investigation and response to the government agency, and also could mean the difference between having significant monetary penalties and fines imposed against your company or the case simply being closed with no action taken by the government.

**STEP #3: PROVIDE ALLEGED UNDOCUMENTED EMPLOYEES AN OPPORTUNITY TO CLARIFY OR CORRECT ERRONEOUS DOCUMENTATION**

During the investigation and audit it may become clear that certain individuals may have either deliberately, inadvertently, or by mistake, accident, or no fault of their own provided you with eligibility documents that do not match their real Social Security Number or they are utilizing the Social Security Number of someone else. In these situations, counsel will interview the employee and provide them with a reasonable period of time, not to exceed two (2) weeks, to provide an explanation and/or to produce additional documentation to clarify the issue.

If the time period provided to the employee lapses with no response received and/or with a failure to correct the problem, then as discussed in Step #5 it may be necessary to take action against the employee(s) including but not limited to terminating his/her employment with the company for failure to satisfy legal eligibility requirements.

**STEP #4: COUNSEL WILL DRAFT BOTH AN INTERNAL REPORT OF ITS INVESTIGATION AND AUDIT AS WELL AS RESPONDING TO THE GOVERNMENT ON YOUR BEHALF**

Upon completion of counsel's independent investigation and audit, a report will be issued to the employer regarding the following: (1) the results of the investigation and audit; (2) what further actions, if any, should be taken by the employer (including potential changes in company policy and procedure); (3) what specific action has been taken and should be taken going forward regarding the employment of any individual(s) who may not be eligible for continued employment; and (4) discussions regarding the company's legal strategy in responding to the government's inquiry. All of counsel's legal analysis and conclusions are protected under the Attorney-Client privilege and Attorney Work product doctrine.

After receiving a copy of the final report, a telephone or in-person conference should be set up to go over the final report and its recommendations. During this meeting, we will also discuss the firm's response on behalf of the company to the government's inquiry which will include, where applicable, a request for the government to close its files on the matter without further action.

Once the company's response is submitted to the government, the firm will continue to monitor the situation for any further action. Hopefully, with the exception of the action that may be required against employees who are not eligible for employment as discussed below in Section #5, this should be the end of the matter.

**STEP #5: TAKE ALL NECESSARY ACTIONS, INCLUDING IF NECESSARY TERMINATION OF UNDOCUMENTED EMPLOYEE(S)**

When you are confronted with the reality that an employee simply cannot legally work in the United States, it is necessary and expected that you terminate that employee from the job. Even if the

employee is a reliable, hardworking, and overall good worker, the fact remains that he/she is simply not eligible to work at your company under the law.

Consequently, you will need to explain to the employee the basis for your termination decision noting that you have provided the employee with every opportunity to comply with your counsel's request for proper proof of eligibility to work and that the employee has refused and/or failed to do so.

Moreover, in certain exceptional cases, you may make allowances, although not required, for providing some severance to any employee that has made significant contributions to your business.

However, while you do not have to continue to employ an undocumented worker, you should be mindful that these employees may still file claims and actions against you in court and before administrative tribunals seeking to hold you liable just as though they were a non-undocumented employee. Therefore, as necessary, it may be prudent to negotiate severance with some employees equal to a certain amount of salary or wages for every year of service to the company combined with the employee's agreement to execute a Mutual Release & Settlement Agreement. This ensures that once an employee is terminated you do not have to continue to look over your shoulder wondering if at some point in the future you may be the target of a letter from a law firm representing this former employee demanding that you pay significant monetary damages or face defending an expensive lawsuit or administrative action.

If you or any employer you know has received a state or federal government inquiry letter, or are interested in learning more about how you can protect yourself, please do not delay in contacting our firm by telephone or e-mail.

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