IMMIGRANT BUSINESS OWNERSHIP DOCUMENTATION ISSUES

The following points on documentation issues for immigrant business owners are primarily summarized from two documents:

- A Legal Overview of Business Ownership for Immigrant Entrepreneurs in Massachusetts, Harvard Transactional Law Clinics in conjunction with the Immigrant Worker Center Collaborative, Spring 2015. [link]
- Legal Considerations for LLC Structure Review, Sustainable Economies Law Center, April 2016. [link]

See the publications for more in-depth information.

*Note that these documents were published 1-2 years ago. Immigration law and its interpretation is rapidly changing. Consult an attorney for current updates.*

1. Documentation Requirements for Hiring an Employee

Federal immigration law forbids business from hiring an employee known to lack authorization for US employment.

To enforce law, employers must complete an I-9 for each employee.

- An employee must provide documentation to show s/he is authorization to be employed.
  - False documentation by an employee is a crime.
- An employer must affirm that documentation has been examined, is genuine, and that employee is authorized to be employed.
  - Failure to comply results in significant fines to employer; a pattern of violation is grounds for criminal penalties.
- I-9 forms are not submitted, but are kept on file by the employer, and are presented to government agents on demand.

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1 Lynn Pitman, University of Wisconsin Center for Cooperatives, with contributions by Fred Schepartz, Madison Area Technical College Paralegal Program; May 2017.
Workers do NOT have to complete an I-9 form if hired as an independent contractor.

- Immigration law makes it illegal to knowingly hire unauthorized independent contractors.
- Worker status as an independent contractor, instead of employee, is determined by criteria under employment and tax laws.

Workers who also own the business are not required to complete I-9 documentation at this time.

- Federal immigration law does not prohibit undocumented immigrants from working for a business that they own.
- Recent rulings by Office of Chief Administrative Hearing Officer (OCAHO), the administrative court in the Department of Justice, have established this finding.
- OCAHO has jurisdiction over three types of cases related to the amended Immigration and Nationality Act (INA).

But immigration authorities sometimes may demand that owners produce an I-9.

- A worker-owner’s failure to produce I-9 will lead to noncompliance fine, even though recent OCAHO rulings have found that business owners are not legally required to produce an I-9.
- Owner must successfully appeal to OCAHO to avoid fine payment.

I-9 exemption granted for business ownership does not provide protection from immigration proceedings for immigration law violations.

- Violations include overstaying a temporary visa, and unlawfully entering and remaining in US.

Federal courts have not ruled on whether undocumented immigrants may own and work for a business in the US.

- Federal court decision on I-9 requirements could overturn OCAHO administrative court rulings.

The risk remains that an undocumented immigrant owning a business could be required to complete and produce a Form I-9.

Consult a lawyer on the latest developments.

2. Establishing I-9 Exemption through Ownership

Demonstrating ownership status of worker is a critical step in establishing I-9 exemption.

For exemption purposes, a worker’s status as owner instead of employee is based on:

- substantial ownership interest, and
- significant level of control of business.

Ownership interest of worker indicated by:

- Status as shareholder, partner, LLC member, sole proprietor; and
- Shares in business profit and losses.
Level of control by worker as owner, not employee, indicated by:

- Minimal or no supervision;
- Does not report to a supervisor;
- Can influence operations;
- Others in the business consider person an owner, not an employee; and
- Can’t be easily hired or fired.

3. Effect of Business Entity Type on I-9 Exemption for Ownership

Ownership interest is established through business entity formation.

- Sole proprietorship or general partnership requires no state government registration to establish.
  - Owner(s) liable for all debts, since person(s) and business are the same entity under law.
- Other business entity formation requires registration/incorporation at state level.
  - Entities provide limited liability for owners for entity actions.
  - Entities includes LLCs and cooperative corporations.

Ownership interest factors include:

- Sharing in profits, losses and liabilities of organization; and
- Investment in firm.

Worker title is not used to determine ownership interest.

Courts have not determined threshold percentage for ownership.

4. Effect of Business Management and Governance on I-9 Exemption for Ownership

Ownership level of control is determined through business management and governance structures.

- Worker control and authority as owners should be reflected in structures.
- Factors used to determine whether ownership level of control is being exercised include:
  - Ability of organization to hire or fire a worker;
  - Whether and to what extent there is supervision of worker;
  - Reporting structure;
  - Contracts or agreements that reflect employee treatment;
  - Right and duty to participate in management;
  - Right and duty to act as agent of other partners;
  - Partial ownership of firm assets;
  - Voting rights;
  - Ability to control and operate business;
o Extent to which worker pay is calculated as percentage of firms profits;
o Extent of employment security; and
o Other signs of ownership

_Determination of worker status as employee is also relevant to employment law, tax law, and worker’s compensation requirements._

- Criteria share similarities, but they are weighted and evaluated differently depending on the area of law.
- Employee status under one area of law is not necessarily carry over to another area of the law.
- However, status as owner or employee under either tax or employment law may be a consideration in I-9 exemption case.

_Workers with status as owners under federal tax law must pay full amount of Social Security and Medicare taxes._

- Worker owners are responsible for making tax payments by filing self-employment (SE) taxes quarterly, based on estimated self-employment income.
- In comparison, the employers of workers with employee status pay half of these taxes through FICA payroll tax program.
- IRS enforces payroll tax requirements based on a worker’s employee status.
- Employee status is determined by IRS guidelines about the degree of control and independence a worker has on the job.

_Workers with status as owners under employment law are not subject to wage and working condition requirements under Fair Labor Standards Act (FLSA)._  

- FLSA established to protect employees from employers by setting minimum standards for wages, overtime, and conditions of employment.
- The Department of Labor enforces FLSA requirements based on determination of worker status.
- Employee status is determined by FLSA guidelines about the degree of control and independence a worker has on the job.

5. **Structuring a Business Entity to Support Workers Ownership Status**

_Incorporation of a business occurs under state statute and requirements vary by state._

_Worker-owned cooperatives can be incorporated under Wisconsin’s cooperative statutes._

- Worker members can serve as directors on board to exercise ownership level of control.
  - Compensation paid to officers or shareholders for performing more than minor services are considered wages.
- Employee status for worker-owners may be an issue under tax and employment law.
- Employee status would require I-9 documentation.

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2 See also Worker Co-ops: FAQs about Employment Status [http://www.uwcc.wisc.edu/pdf/WorkerCoop_FAQ_2016.pdf](http://www.uwcc.wisc.edu/pdf/WorkerCoop_FAQ_2016.pdf)
Consult an attorney for guidance.

Limited liability company (LLC) in Wisconsin is a flexible entity type that can be structured for cooperative worker ownership

- Operating agreement describes ownership interests between LLC members, and business management and governance.
- LLC can be organized as a pass-through entity similar to a partnership.
  - LLC profits, losses, and tax liabilities are passed through to worker owners.
  - Worker owners do not receive a paycheck, but could take a draw against future earnings.
  - Worker owner self-management demonstrates control over business.
    - Use of a manager could reflect a lower level of worker control or authority.
    - Less worker control and authority may mean the worker has employee status, which requires I-9 documentation.
- Consult an attorney for guidance.

6. Documentation Requirements

Business entity formation and tax filings require taxpayer identification numbers.

- IRS requires an Employer Identification Number (EIN) for most businesses.
- EIN application requires the name of a responsible party.
- Responsible party on the EIN application must submit a Social Security Number (SSN), an Individual Taxpayer Identification Number (ITIN), or another EIN.
- SSN or ITIN of member owners are also required for K-1 tax forms issued by LLC to members.
- Undocumented immigrants not eligible for a SSN.
- Undocumented immigrants may apply for an ITIN on IRS Form W-7.

Individual tax filings require taxpayer identification numbers.

- SSN or ITIN of owners are required for individual tax returns.
- Undocumented immigrants not eligible for a SSN.
- Undocumented immigrants may apply for an ITIN on IRS Form W-7.

A state may require other licenses and permits, depending on the specific business sector.

- Application requirements may or may not present issues for undocumented immigrants.