



IMMIGRANT BUSINESS OWNERSHIP DOCUMENTATION ISSUES¹

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. <http://today.law.harvard.edu/clinic-develops-first-of-its-kind-guide-for-immigrant-entrepreneurs/>
- *Legal Considerations for LLC Structure Review*, Sustainable Economies Law Center, April 2016. http://www.co-oplaw.org/governance-operations/employment-law/cooperatives-undocumented-members/#Best_Practices_for_LLC_Cooperatives_with_Undocumented_Workers

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.

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;

- Extent to which worker pay is calculated as percentage of firms profits;
- Extent of employment security; and
- Other signs of ownership

Determination of worker status as employee is also relevant to employment law, tax law, and worker's compensation requirements.²

- 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.

² See also Worker Co-ops: FAQs about Employment Status http://www.uwcc.wisc.edu/pdf/WorkerCoop_FAQ_2016.pdf

- Consult an attorney for guidance.

Limited liability company (LLC) in Wisconsin is 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 paycheck, but could take draw against future earnings.
 - Worker owner self-management demonstrates control over business.
 - Use of a manager could reflect lower level of worker control or authority.
 - Less worker control and authority may mean 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.
 - Acceptable documentation that is required for Form W-7: <https://www.irs.gov/pub/irs-pdf/iw7.pdf>

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.
 - Acceptable documentation that is required for Form W-7: <https://www.irs.gov/pub/irs-pdf/iw7.pdf>

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.