

INS Form I-9

While the United States government may lie to us or twist the facts on a myriad of issues, the purported “requirement” of the INS Form I-9 for general private sector employment is a particularly abrasive and loathsome case. The INS Form I-9 (if it were enforceable here in the states of the Union) would create a *de facto* system of mandatory federal ID in order to get a job. That is not to be tolerated.

As you likely know, Original Intent exists to promote, educate, and revitalize the concept of individual liberty in America. The goal is to make each and every American vividly aware of his/her inalienable rights so that the government can no longer use tricks, subtle deception, and outright lies to control and dominate Citizens.

The phrase “inalienable rights” comes directly from the Declaration of Independence, which is the first organic law of the United States of America. This is not merely Original Intent’s position, it is also the position adopted by Congress, and expressed through the U.S. Government Printing Office when it states that the Declaration of Independence is the first organic law of the United States of America in its printing of the United States Code.

According to the Declaration of Independence, these inalienable rights [also referred to at times as “fundamental rights”] are endowed in us by “the Creator” [God]. It is a well-settled point of Constitutional law that the government has no legal authority to alter, modify, or abolish inalienable rights.

What has the US Supreme Court said about inalienable rights in general?

“These inherent rights have never been more happily expressed than in the Declaration of Independence, the evangel of liberty to the people: ‘We hold these truths to be self evident’ – words so plain that their truth is recognized upon their mere statement – ‘that all men are endowed’ – not by the edicts of Emperors or the decrees of Parliament, or acts of Congress, but by their Creator with certain inalienable rights – that is, rights which cannot be bartered away, or given away, or taken away...and to secure these – not grant them but secure them – ‘governments are instituted among men’...”
Butchers’ Union Co. V. Crescent City Co., 111 U.S. 746, 756 (1884)

Is working an inalienable right for a citizen of the Union? Let’s find out what the US Supreme Court has said on this specific subject.

“Included in the right of personal liberty and the right of private property – partaking of the nature of each – is the right to make contracts for the

acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money and other forms of property.”

Coppage v. Kansas, 236 U.S. 1 (1915)

“...The term [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life... The established doctrine is that this liberty may not be interfered with under the guise of protecting public interest by legislative action...”

Meyer v. Nebraska, 262 U.S. 390, 399 (1923)

“Among these unalienable rights, as proclaimed in the Declaration of Independence, is the right of men to pursue their happiness, by which is meant, the right to pursue any lawful business of vocation, any manner not inconsistent with the equal rights of others...The property which every man has is his own labor, as it is the original foundation of all other property so it is the most sacred and inviolable...”

Butcher's Union Co., v. Crescent City Co., 111 U.S. 746, 756 (1884)

Inviolability – The attribute of being secured against violation. Safe from trespass or assault.

Black's Law Dictionary, 6th Ed.

As can be clearly seen, there is no question that working in an occupation which does not infringe on the rights of others is one of the inalienable rights memorialized in the Declaration of Independence and therefore is a right with which the government may never interfere.

Given these facts, how is it that the government claims to have created a law that requires an American to fill out federal paperwork, and sign it under penalty of perjury, in order to work? Please note that we said the government **claims** to have created such a law. This is because the government frequently misrepresents its authorities and powers to the American public. As we get further into the issue, you will decide for yourself whether the law that deals with the Form I-9 has anything to do with you.

By What Authority?

The law concerning “work eligibility” (which is what the I-9 is used for) is contained in Title 8 of the United States Code. Title 8 is named “Aliens and Nationality”. The regulations that address the I-9 issue are found in Title 8 of the Code of Federal Regulations, which is also named “Aliens and Nationality”.

The interesting thing about Title 8 of the Code, and its associated regulations, is that they deal exclusively with aliens, border controls, and issues of naturalization. The only authority that Title 8 possesses in reference to a native-born American Citizen would be if a Citizen were to violate a federal immigration law. In other words, in big broad terms, if a Citizen does not assist an alien in illegally entering this country, or does not unlawfully interfere with an INS officer or employee in the commission of his official duties, then nothing in Title 8 has any affect upon such a Citizen.

So where does the authority for “work eligibility” forms come from? When the United States grants an alien entrance to this country, the alien is either permitted to work, or not. [What goes into that decision does not concern us here.] In other words, conditions are placed on an alien’s entry; conditions to which he agrees in writing, or he is not allowed to enter the country.

However, let’s be frank, the government can pass no law that makes you legally accountable for enforcing immigration law, which includes checking the status of people who apply to you for a job. The enforcement of immigration laws is the sole responsibility of the government. It is not your responsibility, nor can they make it yours by passing a statute. The government can no more compel you to enforce immigration law than it can pass a law requiring you to come to the local federal building and sweep their floors! So what gives?

There are several factors that come into play when unwinding the sophistry of 8 USC 1324a, and its regulations at 8 CFR 274a.

To Whom It Properly Applies

The first and most notable fact that leaps off the page is the odd phraseology that is used to express who is doing an unlawful act by hiring aliens unauthorized for employment.

8 USC 1324a(a)(1) – It is unlawful for a person or **other** entity...

Note that it says, “...a person or **other** entity”. Why does it not simply say, “...a person or entity”? Why include the word “other”?

Lest you think we’re just being silly nitpickers, here’s one of the fundamental canons [rules] of statutory construction:

Effect must be given to every word of a statute and that no part of a provision will be read as superfluous.

According to the canons of statutory construction, we would be in error not to investigate the significance of the word “other”, as used in the statute.

As a first step in this process, let us determine what “entity” means.

8 USC 1324a(a)(7) – For purposes of this section, the term "entity" includes an entity in any branch of the Federal Government.

Of course only the government uses the same word to describe the term being defined! Nevertheless, what the government is referring to in the definition above is every element of the federal government, down to an individual federal officer or employee. We will remind you that “includes”, when used in federal statutes is generally a term of “limited expansion”. “Limited expansion” means that things that are reasonably within the boundaries of the definition that Congress is attempting to establish (by the words of the definition) can be added, even if not specifically enumerated. In other words, in the definition above, a corporation created by Congress can be “included” because it fits within the theme of the definition, but a private business cannot because there is no similarity whatsoever between a “branch of the Federal Government” and a private firm.

So now we know that the definition should read something like this:

It is unlawful for a person or other element of the federal government...

In this grammatical application, “other” is analogous to “further”, “additional”, or “similar”. In a legal sense it means “other such like”, which refers back to “person”. Phrased another way, it means the elements that come after the word “other” are in the same or similar class as what is being generally described by the word(s) that comes before “other”. Stated another way, the terms “person” and “entities”, as used here, have a similar or synonymous meaning.

Having established this much, it is still our duty to determine the statutory meaning of “person” applicable to the provision we’re addressing (if such statutory definition exists). At 8 USC 1101 we find:

(b) As used in subchapters I and II of this chapter... (3) The term "person" means an individual or an organization.

So we now know that §1324a must use the definition of “person” shown above. The definition pivots on 2 words – “individual” and “organization”.

It is important to understand that in *mala prohibita*¹ [regulatory] law, legal terms such as “person”, “natural person” and “individual” all have an underlying connotation of **“the man (or class of man) under a duty...”** In other words, “person”, “natural person” and “individual” do not mean “everyone”, but specific people who are under a duty to perform, or not perform a particular act concerning a specific area of law. Accordingly, in this instance, the “individual” who is a component of “person” must be someone who is inherently subject to the authority of Congress in immigration matters. Guess what? That’s not you!

[Ed. Note – The term “person or other entity” in §1324a does embrace an agricultural association, agricultural employer, or farm labor contractor (as defined in section 1802 of Title 29 of the United States Code) due to a nexus with the federal government. Original Intent has chosen not to present that information because that provision does not address the vast majority of the American work force.]

Let’s take a look at “organization” (another component of “person” in 1324a).

Organization – As a term used in commercial law, includes a corporation, government, or government subdivision or agency...”
Black’s Law Dictionary, 6th Ed

Now, given the phrase, “...or **other** entity” [remembering that “entity” means the U.S. government], which part of the above definition do you think the legislative draftsmen meant when they chose the word “organization”?

So let’s review for a moment. The opening phrase of §1324a states:

It is unlawful for a person or other entity...

If we take all that we have learned about “person” and the “other entity”, how might we expand the phrase so that the average man wouldn’t have to jump through all the hoops you’ve just jumped through to understand what is really being said? We think it would look something like this:

It is unlawful for any government corporation, government officer or employee, or any other governmental entity in any branch of government, to...

Knowing what you now know about definitions, as well as the fact that Congress cannot legislate you or me into the immigration law enforcement business, doesn’t this suddenly make the whole scheme of §1324a fall into place? We think so.

¹ Acts or omissions which are made criminal by statute but which, of themselves, are not criminal. *Black’s Law Dictionary*, 6th Ed.

“Hire” Means “Knowingly”

As we’ve established, 8 USC 1324a does not apply to private firms in the states of the Union. However, it doesn’t hurt to understand that there are additional layers of protection from having to be involved in the I-9 nonsense.

One fact of which most American firms are unaware is that it is not illegal to hire a person who may turn out to be an alien unauthorized to work. Even if one were to believe that §1324a applies to his firm, the prohibition is only against hiring someone whom you **know** is an alien unauthorized to work!

8 USC 1324a - (1) In general – It is unlawful for a person or other entity – (A) to hire, or to recruit or refer for a fee, for employment in the United States an alien **knowing** the alien is an unauthorized alien...

At this juncture one might reasonably ask why one would ever ask a worker to fill out an I-9. It would certainly appear to result in more trouble than it’s worth. The answer to why large corporations use the I-9 is this:

8 USC 1324a(a)(3) Defense – A person or entity that establishes that it has complied in good faith with the requirements of subsection (b) of this section [by which they mean completing an I-9] with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an **affirmative defense** that the person or entity has not violated paragraph (1)(A) with respect to such hiring, recruiting, or referral.

So what is an “affirmative defense” you ask?

Affirmative defense – In pleading, matter asserted by defendant which, assuming the complaint to be true, constitutes a defense to it.
Black’s Law Dictionary, 6th Ed.

Did you get that? If a “person or other entity” demands that its employees complete a Form I-9, but an unauthorized alien is discovered working there, the statute says that the employer can use the I-9 as a legal defense against the allegation, while essentially admitting that they **did knowingly** hire an unauthorized alien! Only the government could concoct this type of smarmy legal trickery – and only lawyers would suggest their clients buy into it.

It should be noted that with or without an I-9, the government still has the burden of proof to show that the accused **knowingly** hired an alien unauthorized for employment. That’s a pretty tough burden to meet in the vast majority of cases.

The Double Edged Sword

So far we've been talking about §1324a and the hiring of aliens unauthorized for employment. It is appropriate at this time to take a look at some of the language in the regulations which really frosts the cake:

8 CFR 274a.1(k)(2) – Knowledge that an employee is unauthorized may **not** be inferred from an employee's foreign appearance or accent. [italic emphasis on original]

Let's see if we understand the lay of the land here. The government doesn't want folks to hire aliens who aren't authorized by the INS to work in this country. However, (leaving aside upon whom the law properly operates) the alleged illegal act **isn't** hiring an alien who's unauthorized to work, but only hiring an alien who you **know** at the time you hire him (or continue to employ him) is unauthorized to work. BUT, the regulations specifically say that an employer may not infer that the potential worker is an alien unauthorized to work because of his foreign appearance or accent. Lovely! Do you see why this type of legislation could only be binding upon the government's hiring and employment practices?

Hearings For Violations

If there was any question that this law operates exclusively upon officers and employees of the government, this next item should end all doubt.

8 USC 1324a(e)(3) Hearing –

- (A) Before imposing an order described in paragraph (4), (5), or (6) against a person or entity under this subsection for a violation of subsection (a) or (g)(1) of this section, the Attorney General shall provide the person or entity with notice and, upon request made within a reasonable time (of not less than 30 days, as established by the Attorney General) of the date of the notice, a hearing respecting the violation.
- (B) Conduct of hearing any hearing so requested shall be conducted before an administrative law judge. The hearing shall be conducted in accordance with the requirements of section 554 of title 5.

What this section tells us is that the US Attorney General, without any authority other than Congress creating this statute, can impose an "order" upon an employer who violates this statute. Paragraphs 4, 5, and 6 tell us that such orders can restrict our future behavior and may even include monetary punishment.

Can the US Attorney (all by his lonesome) impose a fine upon an American citizen who's running his own business in a state of the Union without taking that citizen

to court and having a jury find him guilty of a crime? Not a chance in hell! One might reasonably ask, "To whom can the Attorney General do that"? The Attorney General can unilaterally impose fines on the following persons:

- ~~///~~ Government officers and employees
- ~~///~~ Government departments or agencies
- ~~///~~ Government owned corporations
- ~~///~~ Corporations contracting with the United States government
- ~~///~~ All businesses in U.S. possessions or territories

Evidence that this is merely an "internal administrative" procedure can be seen on subsection (B), which states, "*Conduct of hearing any hearing...shall be conducted before an administrative law judge.*"

An interesting facet of being heard by an administrative law judge is that such a hearing presumes you are subject to federal regulatory control! Is the average private firm, operating within a state of the Union, subject to the regulatory control of the INS? Absolutely not – but the "*persons and other entities*" shown above are!

Penalties

If a "*person or other entity*" is properly within the regulatory reach of the INS, certain actions can give rise to criminal prosecutions. It should be noted that criminal prosecutions under an Act of Congress can only be sustained in limited circumstances:

- ~~///~~ The business is located on federal land
- ~~///~~ The business is located within a U.S. possession or territory
- ~~///~~ The violator is an officer or employee of the U.S. government
- ~~///~~ The violator is a corporation wholly or partially owned by the U.S. government.
- ~~///~~ The violator is a corporation created by Congress.
- ~~///~~ The violator was using the Form I-9 in a fraudulent manner.

Please note that a private sector firm in a state of the Union is not within the government's reach in this matter if they steer clear of using the Form I-9.

Some people may make the observation that private firms within a state of the Union have been prosecuted for an offense under §1324a. That is true, but it is the responsibility of the private firm to assert their Constitutional exclusion and to challenge the Department of Justice's jurisdiction. Acquiescence to an authority not actually possessed by a government agent creates the presumption of legitimate authority.

Even if a person was affected by the statute, the criminal element is very narrow and specific.

1324a(f)(1) – Criminal penalty – Any person or entity which engages in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) of this section shall be fined...

And I bet you thought “**pattern or practice**” was just a couple of plain old words! To the contrary, “*pattern or practice*” is a “legal term” that means exactly what the definition provided for us in the regulations says it means!

8 CFR 274a.1(k) – The term *pattern* or *practice* means regular, repeated, and intentional activities, but does not include isolated, sporadic, or accidental acts.

Can a person be prosecuted criminally for failing to use I-9 forms? Nope; the criminal provision has nothing to do with the use or non-use of a Form I-9. The criminal elements are engaging in actions that are **regular** (as in “common place”), **repeated**, and **intentional**.

Summary

Let’s review what we’ve discovered.

- 1) The DOJ and the INS only have Title 8 authority over;
 - a) entry into the country by aliens
 - b) status of the alien once in this country
 - c) the naturalization process
 - d) the actions of the U.S. government in carrying out each of the aforementioned duties.
- 2) Congress has no authority to make any person in the private sector, within a state of the Union, responsible for the enforcement of U.S. immigration law.
- 3) Congress is free to create laws that govern how the U.S. government will handle the employment of aliens in the federal work force.
- 4) Congress is free to create laws that govern how the governments of federal possessions or territories will handle the employment of aliens in their government work force.

- 5) Congressional Acts that address how the U.S. and its possessions and territories handle government employment may include requirements for the production of documents by anyone applying for governmental employment, whether aliens or citizens.
- 6) The Form I-9 is the form that the Department of Justice has designated for use by the U.S. government and the governments of the possessions and territories to verify that applicants for government jobs are eligible for governmental employment.
- 7) Even when §1324a is operative, the standard for wrongdoing is **knowingly** hiring an alien unauthorized for employment.
- 8) If accused of wrongdoing, the Form I-9 can be used to “get off the hook” while essentially admitting that the accused did knowingly hire an alien unauthorized for employment. This is called an “affirmative defense”.
- 9) All accusations of wrongdoing must be made against those persons who are subject to the regulatory control of the Department of Justice in reference to immigration matters. By 8 USC §1324a (and its regulations) Congress has brought all three branches of the U.S. government under DOJ regulatory control in reference to hiring alien employees.
- 10) Criminal actions for violation of §1324a apply to the same persons as the I-9 requirement, but the government must prove that the accused engaged in hiring unauthorized alien on a regular, repeated, and intentional basis.
- 11) No presumption of an applicant or employee being an alien unauthorized for employment can be inferred by a foreign appearance or accent.
- 12) No private firm, in a state of the Union, which is not obligated to follow §1324a by the terms of a contract with the state of federal government, is required to use any federal forms when hiring workers.