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What Employers Need to Know about Expired "Green" Cards

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The Immigration and Nationality Act ("INA"), which applies to all employers, includes provisions addressing employment eligibility, employment verification and non-discrimination. Under the INA, employers may hire only persons who may legally work in the United States (i.e., U.S. citizens and U.S. nationals, and aliens authorized to work in the United States).

Virtually every employer is familiar with the Form I-9 process, whereby employers verify the identity and employment eligibility of persons who are hired for employment. Employers must complete I-9 forms for every employee hired and maintain those forms for at least three (3) years, or one (1) year after employment ends, whichever is longer. One of the documents that newly hired employees may use to establish their identities and their employment eligibility in the United States is a Permanent Resident Card or Alien Registration Receipt Card (Form I-551), commonly

this topic?

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referred to as a "green card." (While years ago these cards were green, today permanent resident cards resemble driver licenses and contain a photo and a fingerprint of the holder.) Permanent Resident Cards are issued by the U.S. Citizenship and Immigration Services ("USCIS"), part of the Department of Homeland Security. Foreigners who hold Permanent Resident Cards are legal residents of the United States and are eligible for employment. The term of the card is ten (10) years and is renewable.

So what happens when you have an employee who either presents an expired green card at the time of hire or when you have an employee whose green card expires during the term of his or her employment?

Interestingly, the instructions on the *current* Form I-9 for Employment Eligibility Verification are ambiguous as to whether an expired Form I-551 Permanent Resident Card is evidence of authorization to accept employment. These instructions state that the following documents are acceptable to "establish both identity and employment eligibility" ("List A"):

1. U.S. Passport (unexpired or expired);
2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551);
3. An unexpired foreign passport with a temporary I-551 stamp;
4. An unexpired Employment Authorization Document that contains a photograph (Form I-766, I-688, I-688A, I-688B); and
5. An unexpired foreign passport with an unexpired Arrival-Departure Record, Form I-94, bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, if that status authorizes the alien to work for the employer.

Note that the only document in the above list that does not specify whether expiration affects acceptability or not is the Permanent Resident Card.

Despite the ambiguity in the I-9 instructions, an employer should require that a newly hired employee present an *unexpired* Permanent Resident Card for completion of the Form I-9. In fact, the USCIS has submitted for publication in the Federal Register an Interim Final Rule [1] entitled "Documents Acceptable for Employment Eligibility Verification" which will serve to remove this ambiguity. That interim rule will amend the regulations governing these acceptable documents to streamline the Form I-9 process. Under the anticipated new rule, employers will not be able to accept any expired documents to verify employment authorization on the Form I-9. For added clarity, the new rule will remove the terms "expired" and "unexpired" in the lists of acceptable documents, and will instead impose a general requirement that all

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documents must be unexpired to be acceptable for the Form I-9.

So what of the employee whose once-valid Permanent Resident Card expires during the term of his or her employment? The governing regulations for verification of employment eligibility make it clear that an expired I-551 card *is* evidence of employment authorization. 8 C.F.R. § 274a.12(a)(1). The regulation states that the list of "classes of alien authorized to accept employment" includes: "An alien who is a lawful permanent resident ... as evidenced by Form I-551 issued by the Service. An expiration date on the Form I-551 reflects only that the card must be renewed, not that the bearer's work authorization has expired." ***Importantly, this will not change under the anticipated Interim Final Rule.*** Thus, an employer ***should not*** re-verify employment eligibility when an employee's Permanent Resident Card expires. Again, the ***card's*** expiration does not mean that the employee can no longer lawfully work in the United States. Moreover, an employer should also not take any adverse action against an employee whose Permanent Resident Card expires, such as terminate the employee due to the expiration, or place the employee on leave until he or she can renew the Permanent Resident Card. Not only would such actions violate the express language of the regulations governing these cards, it places the employer in danger of being sued under state or federal laws for discrimination based on race and/or national origin.

In any event, employers should make sure that they implement their own eligibility verification processes consistently. Every employee, regardless of his or her residency status or perceived residency status should be required to complete the I-9 verification process. Further, all employers should ensure that all responsible personnel are adequately trained in connection with lawful employment eligibility verification.

Employers with any further questions about Permanent Resident Cards or the Form I-9 process generally should contact legal counsel.

[1] While the interim rule was set to be implemented in early February, 2009, the USCIS recently announced that it would delay its implementation for 60 days, or until April 3, 2009, for further consideration and public comment.

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