



A Legal Overview of Business Ownership for Immigrant Entrepreneurs in Massachusetts

Prepared by the
Community Enterprise Project
of the
Harvard Transactional Law Clinics
in conjunction with the
Immigrant Worker Center Collaborative

Spring 2015



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Overview

This document provides legal information relevant to business ownership by immigrants in Massachusetts. It is intended for use by immigrant entrepreneurs as well as technical assistance providers who work with immigrant entrepreneurs.¹ It also contains general business law information that will be of interest to all entrepreneurs, regardless of immigration status. If you wish to start or maintain a business in another state or country, you should consult an attorney who is licensed to practice law in that state or country.

This document is merely a summary of the legal issues that an immigrant entrepreneur might consider when starting or operating a business. The specifics of your situation and circumstances, including your particular immigration status, will affect how the law applies to you. We therefore strongly encourage you to consult licensed attorneys who have knowledge of immigration and business law before you take any action with respect to the matters discussed in this document.

The information contained in this document is intended to apply to all immigrants, including undocumented immigrants. Even so, **business ownership by undocumented immigrants:**

- **Does not eliminate or reduce the risk of immigration proceedings, including deportation;**
- **Does not confer legal immigration status; and**
- **Does not create a path to U.S. citizenship.**

Furthermore, business ownership generally entails the submission of documentation to local, state, and federal governmental entities, as will be explained in later sections. Operating any business in the United States, regardless of immigration status, also requires the business owner to undertake responsibility for legal compliance of the business. If the business owner is not compliant with any laws, the owner could be exposed to criminal or civil liability and, depending on the immigration status of the owner, the potential for commencement of immigration proceedings. This document does not, and cannot, quantify the specific risks faced by undocumented business owners because (1) the federal government has discretion to initiate immigration proceedings for people who are deportable, (2) all other government officials have discretion as to whether and how to report deportable noncitizens to the federal government, and (3) the way in which this discretion is exercised varies over time and from place to place. Keep in mind, however, that the law affords an opportunity for individuals who are placed in immigration proceedings to defend themselves.

Finally, please remember that laws change frequently. The information detailed in this document is current as of April 20, 2015, and subsequent changes in the law may result in portions of this document becoming inaccurate or otherwise inapplicable to your situation.

Additional Information for Undocumented Entrepreneurs

The employment of undocumented immigrants is illegal. Neither federal immigration law nor Massachusetts law, however, expressly prohibits undocumented immigrants from working for a business that they own, so long as the owner does not fall within certain legal definitions of “employee” that will be discussed throughout this document. Please keep in mind, however, that the laws related to undocumented entrepreneurs are still relatively unsettled, and therefore any undocumented immigrant who chooses to start a business in Massachusetts should do so only after careful consideration of the risks involved.

While federal law prohibits the “employment” of undocumented immigrants, some entrepreneurs, or worker-owners, are not considered employees as defined by the law. **The definition of “employee” varies across the numerous areas of federal and state law in which that term is relevant**, which is why, for example, a person could be considered an employee under tax law but not under immigration law. Understanding when and why a person might be considered an employee under the various laws and how these determinations will affect that person’s ability to own and operate a business is very important and therefore a central focus of this document.

The federal tax forms that businesses must submit to the Internal Revenue Service (“IRS”) do not require that the business owners have legal immigration status or a social security number (“SSN”). Rather, the individual

taxpayer identification number (“ITIN”), which many immigrants may apply for and receive, is accepted in lieu of a SSN. The policies of the Massachusetts tax agency—the Department of Revenue—are identical in this respect. However, unlike the federal government, Massachusetts requires that the SSNs of all newly-hired employees be reported to the Department of Revenue, although some entrepreneurs do not fall within the definition of “employee” for this purpose.

As described in more detail in this document, in order to own a business in compliance with federal and Massachusetts law, **entrepreneurs who are not legally able to be employed in the United States should:**

- **Maintain a substantial ownership stake² in the business for which they work;**
- **Maintain a significant level of control over the business’s activities;**
- **If the business is a corporation, be a director-shareholder and not an officer of that corporation; and**
- **Obtain an ITIN.**

Please read this document in its entirety for important details regarding the above information.

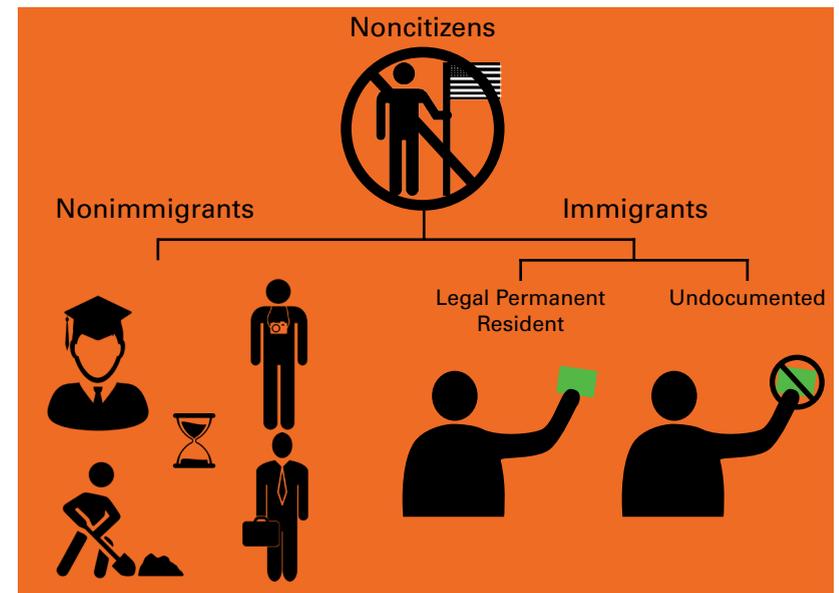
Undocumented immigrants who are deportable remain deportable even if they own a business. Sometimes, though, business ownership may help undocumented immigrants in immigration proceedings, including removal proceedings. Some immigration judges and

Additional Information for Undocumented Entrepreneurs (cont.)

enforcement authorities are willing to consider an undocumented immigrant's business ownership and payment of taxes as a favorable factor in discretionary matters.³ If you would like assistance regarding your particular immigration status, please consult an immigration lawyer.

SECTION 1: Immigration Law Basics

People who reside in the U.S., but who are not U.S. citizens or nationals ("noncitizens"), can be divided into two groups: nonimmigrants and immigrants.⁴ "Nonimmigrants" are noncitizens who are admitted to be present in the United States on a temporary basis as a tourist, student, seasonal agricultural worker, professional worker, or in any of a number of other capacities.⁵ "Immigrants," on the other hand, are further divided into two classes: (1) lawful permanent residents and (2) undocumented immigrants. Lawful permanent residents, or "green card holders," may generally reside and be employed in the U.S. indefinitely; in general, noncitizens obtain this status (1) by having certain family members who are U.S. citizens or lawful permanent residents⁶ or (2) for employment-related reasons.⁷



SECTION 1: Immigration Law Basics (cont.)

Undocumented immigrants are not legally permitted to be present or employed without work authorization in the U.S.⁸ Although it is not a crime for an undocumented immigrant to remain present in the U.S.,⁹ it is a civil violation, and an undocumented immigrant can be placed in removal proceedings at any time.¹⁰ Some undocumented immigrants can, however, obtain temporary or permanent relief from deportation under limited circumstances, such as through programs like Deferred Action for Childhood Arrivals (“DACA”), or through other forms of discretionary relief.¹¹

With very limited exceptions,¹² no employer may hire an undocumented immigrant for employment or continue to employ an undocumented immigrant if the employer is aware of the immigrant’s unlawful status.¹³ If an employer does hire an undocumented worker, however, that worker will receive certain protections under workplace laws, including wage and hour and anti-discrimination laws.¹⁴ As earlier mentioned, federal immigration law does not expressly prohibit undocumented immigrants from working for a business that they own, so long as the owner does not fall within the immigration laws’ definition of “employee.” Similarly, Massachusetts law does not expressly bar business ownership by undocumented immigrants. However, it is important to keep in mind that this area of law has not been settled, meaning there is no explicit statute or regulation on the issue, agreement among the federal circuit courts, or Supreme Court decision on the subject.

A more detailed analysis of immigration laws and the various types of immigration status are beyond the scope of this document. For more information, please consult an immigration lawyer.

SECTION 2: Types of Business Organizations

In Massachusetts, entrepreneurs may choose from several different legal business structures; the law does not expressly prohibit immigrants from utilizing any of the forms detailed below. A brief overview of the distinct attributes of each business structure follows.

Running a Business as Yourself: Sole Proprietorships and General Partnerships

Sole Proprietorship

If a person operates a business without submitting any documentation to the government, the business is a sole proprietorship. The main advantages of a sole proprietorship are that it requires no formation documents or costs and all of the profits and authority are automatically designated to the owner. One significant drawback is that the owner of the business is personally responsible for all debts and obligations of the business, as the business and the owner are considered to be the same entity under the law. Insurance may be able to offset some of this risk.

General Partnership

A general partnership is similar to a sole proprietorship, except that two or more people own and run a general partnership together. In other words, if two or more people operate a business without submitting any documentation to the government, the business is a general partnership. Like sole proprietorships, the business and the owners are considered to be the

same entity under the law. While the partners in a general partnership can agree among themselves as to the division of debts and profits, each partner of a general partnership is personally responsible for 100% of the partnership's debts and obligations; insurance may be able to offset some of this risk.

Forming a Business as Separate Legal Entity: LPs, LLPs, LLCs, Corporations, and Worker Cooperatives

The following business structures—limited partnerships, limited liability partnerships, limited liability companies, corporations, and worker cooperatives—are distinct legal entities and therefore provide limited liability for their owners, so long as the owners treat the entity as separate from their personal finances by keeping separate bank accounts, using the entity's name when conducting business, and otherwise complying with the requirements and formalities of operating a legal entity.

Limited Liability

Limited liability means that a business owner's personal financial liability is limited to the owner's investment in the business

Limited Partnership ("LP") and Limited Liability Partnership ("LLP")

LPs and LLPs are types of partnerships that are separate entities and therefore feature limited liability for some of the partners.

In a LP, there are two types of partners: general partners and limited partners. General partners manage

SECTION 2: Types of Business Organizations (cont.)

the business and are personally responsible for the debts and other obligations of the partnership. Limited partners, on the other hand, do not manage the business and have limited liability, which means they are not personally responsible for the debts and other obligations of the partnership. However, limited partners may forfeit this limited liability if they become so engaged in the management of the business that they become general partners.

A LLP does not have different classes of partners. Rather, each of the partners of a LLP enjoys limited liability regardless of whether they manage the business or not.

Both LPs and LLPs treat their worker-owners as partners, which means that the individual partners must pay self-employment tax on their personal tax returns.

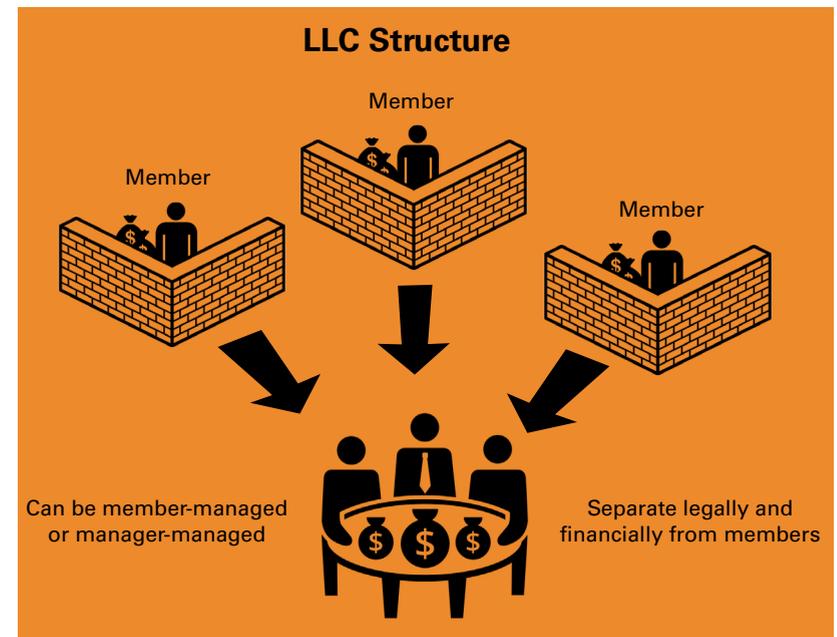
Limited Liability Company ("LLC")

LLCs offer limited liability to their owners with the added benefit of significant flexibility, as they can be set up and managed in many configurations. Management of a LLC may be conducted by all or any portion of the members or by an individual who has been designated as the manager but who is not a member. All of the members and managers of a LLC will have limited liability unless they agree otherwise. Finally, a LLC can choose to be taxed as a corporation (meaning that its income will be taxed at both the

business and individual owner levels) or as a partnership (and therefore taxed only at the owner level). For single-owner LLCs, the entity is automatically disregarded for tax purposes (and therefore taxed only at the owner level).

It is highly recommended, although not required, that a LLC have an operating agreement, which is a document that internally governs how the LLC will be managed. Operating agreements are not submitted to the government.

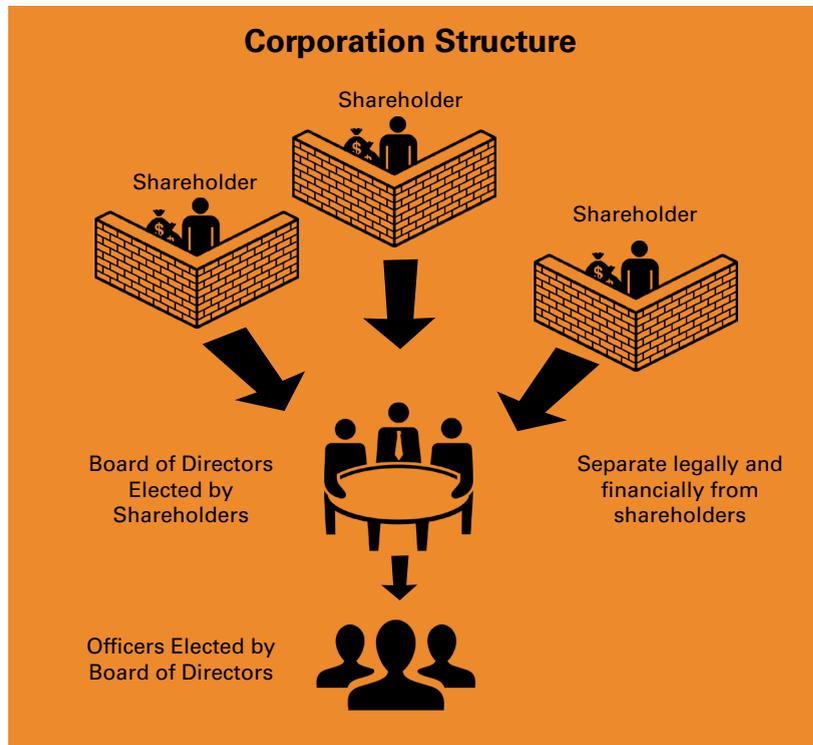
Like in LPs and LLPs, worker-owners in LLCs pay self-employment tax on the individual worker-owners' tax returns.



SECTION 2: Types of Business Organizations (cont.)

Corporation

A corporation is a legal entity that is owned by its shareholders. The management of the corporation resides in a board of directors who are typically elected by the shareholders. The board of directors, in turn, appoints officers who run the corporation's day-to-day operations. Though a Massachusetts corporation must have at least one shareholder, one director, and three officers (a president, treasurer, and secretary), one person can fill all of these roles.



In order for its shareholders to enjoy limited liability, a corporation must observe certain corporate formalities—such as holding annual board meetings, having the board formally vote on actions of the corporation that fall outside of the normal course of business, and keeping detailed records of all corporate activities—that are not required of the other entities. One benefit of choosing to form a corporation, though, is the ease of issuing shares of ownership, which can be especially important if a person is seeking outside investment in his business. A disadvantage, however, is that corporate earnings are taxed twice, at both the corporate level and the shareholder level, though careful tax planning can help reduce the negative effects of double taxation (and sometimes even provide certain benefits).

In order to avoid double taxation, some corporations elect to become S-corporations. In an S-corporation, the income, losses, deductions, and credits of the corporation pass through to individual shareholders in proportion to their ownership.¹⁵ A corporation can elect this tax treatment by filing Form 2553 with the IRS, but only if every shareholder consents to the election and only if the corporation and its shareholders can meet certain requirements. Specifically, in order to be an S-corporation, the company must be a domestic corporation with no more than 100 shareholders, the company cannot have more than one class of stock, and every shareholder must be an individual who is either a U.S. citizen or a resident alien.¹⁶ **Although undocumented immigrants are not U.S. citizens,**

SECTION 2: Types of Business Organizations (cont.)

they may qualify as resident aliens under tax law for purposes of being shareholders in an S-corporation. An undocumented immigrant can be considered a resident alien by passing a Substantial Presence Test.¹⁷ Generally speaking, this test requires the individual to have been present in the United States for a certain period of time and to not have a “closer connection” to a foreign country.¹⁸ Because the Substantial Presence Test is complicated, please consult an attorney for more information.

A primary concern for any immigrant who is considering forming an S-corporation will be establishing and maintaining their status as a resident alien. Form 2553 requires all shareholders consenting to the S-corporation election to provide their social security number or ITIN. If any immigrant shareholder is deported or otherwise no longer meets the Substantial Presence Test, the company’s status as an S-corporation may be compromised.¹⁹ Finally, if a shareholder’s spouse is a nonresident alien who has ownership in the shareholder’s stock, then the corporation cannot qualify as an S-corporation.²⁰

Corporations are required to adopt bylaws, which, in addition to the Articles of Organization (discussed in SECTION 3. TYPES OF BUSINESS ORGANIZATIONS: DOCUMENT SUBMISSIONS, below) govern how the corporation is to be managed. Unlike Articles of Organization, bylaws are not filed with the state.

In contrast to worker-owners in a LLC or in the various partnership models, an owner of a corporation who is also an officer of the corporation is considered to be an employee for the purposes of federal and state income taxation. This means that employment taxes for that owner-officer are withheld at the entity level, which may present issues for undocumented business owners and others without authorization to be employed in the United States. Likewise, even owners of a corporation who are not officers of the corporation may still be considered employees for tax law purposes, as the tax structure of a corporation does not accommodate

Even when a business owner is protected by limited liability as an owner of a LP, LLP, LLC, or corporation, the owner nonetheless remains personally responsible for most property damage and personal injury caused by his own actions.

owner-operators to pay self-employment taxes in the same way that the tax structures of partnerships and LLCs do. This can be a problem not only for businesses owned and operated by undocumented workers, but also for any business that may initially struggle to have a cash flow that is sufficient to pay its employees minimum wage and otherwise comply with the various requirements of hiring employees. For more information on the requirements for hiring employees, see SECTION 4. EMPLOYMENT LAW BASICS, below.

SECTION 2: Types of Business Organizations (cont.)

Worker Cooperatives

A worker cooperative is a type of business that is (1) owned by its workers, (2) governed by its workers, and (3) operated for the benefit of its workers.²¹ Although Massachusetts has a specific employee cooperative corporation statute, a Massachusetts cooperative can be operated under any of the entity models discussed above. Such a business may include “cooperative” or “coop” in its name so long as certain earnings apportionment requirements are met.²²

Under federal law, a cooperative is a business which abides by the cooperative principles established under Subchapter T of the Internal Revenue Code, regardless of the type of entity that was formed. Meeting the requirements of Subchapter T permits the cooperative’s owners to enjoy certain tax benefits.²³

Choosing the proper legal structure for your business is an important yet complicated decision. Please consult an attorney for more information about which structure is right for your business.

SECTION 3: Types of Business Organizations - Document Submissions

As a business owner, it is often necessary to submit certain documents, some of which may include identifying information about individuals involved in the business, to relevant government agencies. Some of this information directly pertains to forming or maintaining the business, and other information must be submitted as part of the payment of taxes. This SECTION 3. TYPES OF BUSINESS ORGANIZATIONS: DOCUMENT SUBMISSIONS overviews the business formation process, while information related to paying taxes is provided in SECTION 6. THE ITIN AND EIN, below. As this section explains, the complete and lawful submission of formation and maintenance documents does not require a person to have a SSN or other evidence of lawful immigration status.

Please note that this section only describes the documents required to form the relevant entities. The law may require a business to have other documents, as well, and even if they are not required by law, such documents may be a good idea; for example, corporations are required to have by-laws, limited partnerships are typically governed by limited partnership agreements, and limited liability companies are typically governed by operating agreements. However, because these governing documents are not required to be filed with the government, they will not be discussed here.

SECTION 3: Types of Business Organizations - Document Submissions (cont.)

The documentation requirements of the various business types overviewed in SECTION 2. TYPES OF BUSINESS ORGANIZATIONS, above, are as follows:

Sole Proprietorship and General Partnership

- D/B/A Certificate:
 - Must be submitted to the city government in which the business is located in order to operate a business under a name other than an owner's legal name
 - Requires only basic information, such as owner's name, corporate address, and phone number
 - Will be published on the City of Boston's website (other cities may vary)
 - \$65 filing fee in Boston (other cities may vary)

Remember that sole proprietorships and general partnerships are not separate legal entities from their owners, and therefore the owner or owners of the business receive no inherent liability protection from the actions of the business.

Limited Partnership

- Limited Partnership Certificate: Requires the name of the LP, the general character of the LP's business, the address of the business and of the general partners, and other information about the business

Limited Liability Partnership

- LLP Registration:
 - Massachusetts does not provide forms for LLP registration; instead, the partnership must create its own document and submit that document to the Massachusetts Secretary of State with information about the business similar to what is required for a Limited Partnership (in addition to an Employer Identification Number ("EIN"), which we explain in SECTION 6. THE ITIN AND EIN, below)
 - If the LLP is engaged in "professional services"; then its registration document must also affirm that the LLP has complied with any insurance obligations imposed by the profession's state board (for example, malpractice insurance that might be required for doctors or lawyers); the document must also include certification that each partner engaged in providing a professional service is licensed to do so

Limited Liability Company

- Certificate of Organization:
 - Requires the name and address of the business, a description of the business's general character, the name and business address of each manager of the business, and the name and address of each person authorized to execute legal documents on behalf of the business, among other information about the business

SECTION 3: Types of Business Organizations - Document Submissions (cont.)

- o If the LLC is engaged in “professional services”, then its registration document must affirm that the LLC has complied with any insurance obligations imposed by law; the document must also include certification that each partner engaged in providing a professional service is licensed to do so

The formation of a LLC does not necessarily require the submission of the names of all owners and operators of the LLC, depending upon whether it is structured as a manager-managed or member-managed LLC. Consult with an attorney for more information.

Corporation

- Articles of Organization: Requires the name of the business and the names and addresses of the individuals who serve as the initial directors and officers, among other information about the business

The document used to form a corporation requires the names of all of the directors and officers of a corporation to be submitted to the state, though the names of the shareholders/ owners of the corporation are not included in the form.

Cooperative

As described in SECTION 2. TYPES OF BUSINESS ORGANIZATIONS, a business entity can operate as a worker cooperative under Massachusetts law if its earnings are divided among the worker-owners as detailed by the IRS. If the business

Each of these legal entities will require an initial formation document (each listed above) to be filed with the Secretary of State in order to form the entity, as well as annual reports filed each year in order to update the business’s information and show its continued existence and operation. The filing fees required with these formation documents and annual reports varies depending on the entity, though all of these formation documents will be publicly searchable on the Secretary of State’s website.

is formed under the Massachusetts employee cooperative statute, it must comply with the documentation requirements for corporations. If, on the other hand, the cooperative is organized as another business form and adheres to the earnings apportionment requirements of the cooperative statute, then it must comply with the documentation requirements of that particular business form.

SECTION 4: Employment Law Basics

Generally

For the purposes of employment law, the people who work for or with a business can be divided into three general categories: owners, employees, and independent contractors.²⁴ Owners of a business can sometimes also be considered employees of the business; more details are provided in SECTION 5. UNAUTHORIZED EMPLOYMENT AND THE FORM I-9, below, and in the MASSACHUSETTS NEW HIRE REPORTING subsection below.

The law carefully distinguishes employees from independent contractors for purposes of employment law, though **it is important to keep in mind that there are various definitions of “employee” in various areas of law, and employees as defined by employment law may not be employees for purposes of other areas of law discussed in this document.** When a business uses the services of someone who the law considers to be an employee (or the business decides to treat the worker as an employee), the employer must comply with various employment law requirements. These requirements include the payment of minimum wage and overtime pay, withholding of taxes from wages, and the purchase of unemployment insurance, among others.²⁵ Hiring an independent contractor does not trigger these obligations, and consequently, many businesses prefer hiring independent contractors to employees. However, in Massachusetts, **the wage and hour laws presume that workers are employees and it is difficult for a worker to qualify as an independent**

contractor; even a mutual agreement between the employer and the worker to treat the worker as an independent contractor is not enough to overcome this presumption.²⁶

The general rule is that a worker is an independent contractor, rather than an employee, if the employer lacks a certain level of control over the work completed by the worker. Typically, an independent contractor:

- Has control over how the task will be performed; the employer merely tells the worker what task to accomplish;
- Has his own independent business in which he performs the service in question for many different employers;
- Works for the business on a predetermined project;
- Uses his own tools rather than tools provided by the employer; and
- Performs a service for the employer that is outside the scope of what that employer’s business normally does.

An example of an independent contractor relationship is when a restaurant hires a construction company to fix the restaurant’s roof. The construction workers use their own tools to fix the roof, determine how and during what hours they will fix the roof, and perform work (fixing a roof) that the restaurant does not normally do. The construction company fixes roofs for many different businesses and is itself an independent

SECTION 4: Employment Law Basics (cont.)

business. In this example, the construction company is an independent contractor of the restaurant.

Massachusetts New Hire Reporting

Massachusetts businesses that hire employees must notify the Massachusetts Department of Revenue of such hiring, either through a paper form or online.²⁷ The new hire reporting requirement also applies to independent contractors who earn \$600 or more annually from the employer.²⁸ In addition to the employee or independent contractor's name, date of hiring, and address, the worker's SSN must be provided to the Department of Revenue; the form does not appear to permit the ITIN to be submitted in lieu of a SSN.²⁹ Employers are exempt from the new hire reporting requirement if they have "reasonable cause" for not complying with the requirement, though it is unclear what constitutes reasonable cause.³⁰

The new hire reporting program's purpose is to identify individuals who owe child support payments and who fraudulently claim welfare benefits.³¹ In furtherance of that purpose, the state government checks the names and SSNs of reported new hires to make sure that they match.³² The penalty for noncompliance is a maximum of \$25 per failure to report.³³ If the state determines that the employer and worker engaged in a conspiracy to falsely or incompletely satisfy the new hire reporting requirements, the maximum fine per violation is \$500.³⁴

The new hire reporting requirement applies to both employees and independent contractors. However, business owners are exempt from this requirement, so long as the owner is not also an employee under the relevant state laws.³⁵ The definition of "owner" for the new hire reporting requirement appears to be the same as the definition of "owner" for the Form I-9 requirement that is further described in SECTION 5. UNAUTHORIZED EMPLOYMENT AND THE FORM I-9, with one exception: an officer of a corporation is always considered an employee for the purposes of new hire reporting.³⁶ As a result, it appears that a corporation must report all worker-owners to the Massachusetts Department of Revenue. Worker-owners of other entities may fall outside the scope of this reporting requirement, depending on the circumstances.

In summary, a person does not have to report himself as a new hire to the Massachusetts Department of Revenue so long as he is an owner of the business, not an employee or independent contractor of the business, and the business is not a corporation for which he is in the role of an officer or otherwise working for the corporation. The definition of "owner" is discussed in more detail in SECTION 5. UNAUTHORIZED EMPLOYMENT AND THE FORM I-9, below.

SECTION 5: Unauthorized Employment and the Form I-9

Federal law forbids businesses from hiring any employee who the business knows lacks authorization to be employed in the United States.³⁷ The government enforces this restriction by requiring all employers to complete a form, called the Form I-9, for every person the business employs.³⁸ Forms I-9 are not submitted to the government; instead, employers must keep the forms for a certain number of years so that government agents can inspect them upon demand.³⁹ On the Form I-9, the employee must provide certain information proving that the employee is authorized to be employed.⁴⁰ The falsification of this information, or the use of someone else's information, is a crime.⁴¹ The employer, in turn, must affirm that the employer has examined the employee documentation, that the documentation appears genuine, and that the employer believes the employee to be authorized for the employment.⁴² The person preparing the Form I-9 on behalf of the employer does not need to provide any information establishing that he has any particular immigration status.⁴³

Failure to comply with the Form I-9 requirements, or knowingly hiring undocumented workers for employment, puts the employer at risk for significant fines and penalties. The fines for a first-time violation can be up to \$3,200 per worker or per violation. Second and third offenses carry even heftier fines, sometimes reaching \$16,000 per worker or per violation. If the government determines that an employer has engaged in a "pattern or practice" of violations, then

the employer will be subject to criminal penalties, including potential jail time.⁴⁴

The owners and managers of a business can be held personally responsible for hiring unauthorized workers

Employers must complete a Form I-9 for all employees.⁴⁵ Independent contractors are not considered employees for purposes of the Form I-9, so employers who hire independent contractors do not have to complete a Form I-9 for their independent contractors.⁴⁶ However, it is still illegal to hire an independent contractor knowing that the worker is unauthorized to perform the work in the United States.⁴⁷

Recent decisions in the Office of the Chief Administrative Hearing Officer ("OCAHO"), an administrative court that handles cases related to the employment of undocumented workers, have determined that Forms I-9 do not need to be completed for owners of a business who also work for that business.⁴⁸ For the purposes of the Form I-9, the court stated that a worker is an owner of a business, and not an employee, if he has a substantial ownership interest in the business and controls all or part of the business.⁴⁹ A key factor to this determination, according to these court decisions, is whether the worker wields a sufficient level of control over the business. The court considers many factors in determining whether a worker exercises a sufficient level of control. According to these court cases, a worker is less likely to be an employee, and

SECTION 5: Unauthorized Employment and the Form I-9 (cont.)

therefore more likely to be exempt from the Form I-9 requirement as an owner, as more of the following factors are met:

- The worker is subject to minimal or no supervision.
- The worker does not report to a supervisor.
- The worker can influence the business's general operations and strategic direction.
- Other individuals involved in the business consider the worker to be an owner instead of an employee.
- The worker cannot easily be hired or fired by the business.
- The worker shares in business profits and losses.⁵⁰

A worker cannot be an owner if he does not own at least part of the business as a shareholder, partner, or the equivalent of a shareholder or partner (such as a member of a LLC), though no court has determined whether a certain threshold percentage of ownership is required. The worker's official or unofficial title in the business is irrelevant.⁵¹ Also, as the examples below demonstrate, **a worker can be exempt from the Form I-9 requirement as an owner regardless of the legal form of the business (sole proprietorship, LLC, corporation, etc.), and a worker's designation under state law or federal tax law as an owner, employee, or independent contractor is irrelevant to the question of whether the federal immigration laws consider the worker to be an owner.**

The following examples, which come from actual OCAHO court cases, are helpful in illustrating the

difference between employees and owners of a business under immigration laws:

- **Mary and Salvador Gonzales: Owners.** Mary and Salvador were the only shareholders of a corporation operated as a construction company in Arizona. They owned 51 and 49 percent of the corporation and were the corporation's Vice President and President, respectively. An OCAHO court ruled in 2014 that they were owners, not employees, of the business for purposes of the Form I-9 requirement. The business was therefore not responsible for ensuring that the Forms I-9 for Mary and Salvador were complete.⁵²
- **Francisco Gutierrez: Owner.** Francisco was a shareholder and the President of a corporation operated as a restaurant in California. He was the only person to exercise significant management control over the business—he did all of the hiring and firing and controlled the business's daily activity and overall direction. An OCAHO court ruled in 2014 that Francisco was an owner, not an employee, of the corporation for purposes of the Form I-9 requirement and that the corporation therefore was not required to retain a Form I-9 for him.⁵³
- **Santiago Moreno: Owner.** Santiago was one of three partners of a repackaging company that was operated as a general partnership in Arizona. Together with the other two partners, he shared equally in the business's profits, losses,

SECTION 5: Unauthorized Employment and the Form I-9 (cont.)

- (cont.) and management. There was no evidence that he was subject to any supervision, discipline, or performance evaluations. He was, however, paid in wages from which employment taxes were withheld. Even though Santiago completed a Form I-9 for himself, and even though that Form I-9 contained a number of violations, an OCAHO court ruled in 2012 that Santiago was an owner rather than an employee. The partnership therefore could not be fined with respect to Santiago's Form I-9 because the partnership did not have to fill out the Form I-9 for him. Notably, the court determined that Santiago was an owner and not an employee for the purposes of the Form I-9, even though he was treated like an employee by the business for tax purposes, since employment taxes were withheld from his wages.⁵⁴
- Samuel Carey: Employee. Samuel worked for a restaurant that was operated as a LLC in New York. Internal company documents, including an internal payroll sheet, identified him as "manager" and "not employee." Beyond those annotations, though, there was no evidence that Samuel had any ownership share in the LLC, had voting or policymaking authority within the LLC, or bore any risk of loss or liability for the business's debts. Accordingly, an OCAHO court ruled in 2014 that the company was legally responsible for failing to properly complete a Form I-9 for him.⁵⁵

Despite these real-life examples from OCAHO cases,

immigration enforcement authorities sometimes demand that business owners complete and produce Forms I-9 for themselves.⁵⁶ Therefore, a business owner who refuses to produce a Form I-9 for himself might be fined for noncompliance, even though, according to these recent court decisions, he was not legally required to produce the Form I-9. In order to not pay the fine, the owner would have to file a successful appeal with OCAHO.

Even if immigration enforcement authorities or OCAHO determines that an undocumented person is a business owner and therefore does not need to complete a Form I-9, remember that this person could still face immigration proceedings if they have violated other immigration laws, such as overstaying a temporary visa⁵⁷ or unlawfully entering and remaining in the United States.⁵⁸

Although the analysis of who must complete a Form I-9 is firmly established in the OCAHO courts, federal courts which have authority over OCAHO have never decided whether undocumented immigrants may own and work for a business in the United States. Moreover, the federal immigration enforcement authorities appear to believe that undocumented immigrants cannot do so, in apparent contrast with the OCAHO court decisions.⁵⁹ Accordingly, there remains a risk that an undocumented immigrant who owns a business could be required to complete a Form I-9. Consult a lawyer for the latest developments in this area of law.

SECTION 6: The ITIN and EIN

This section covers the means to obtain an ITIN and EIN and how the ITIN and EIN can be used for one's business; it will not detail the specific forms needed to pay business or personal income taxes.

Taxpayer Identification Numbers

The IRS and Massachusetts Department of Revenue require taxpayers to identify themselves with identification numbers at both the individual and business entity levels. The IRS and Massachusetts Department of Revenue accept both the SSN and the ITIN from individual taxpayers and the EIN from business entity taxpayers.

Individual Taxpayer Identification Number

Individual taxpayers who do not have and are not eligible to obtain a SSN, such as undocumented immigrants, may apply for an ITIN by submitting Form W-7 ("Application for IRS ITIN") to the IRS.⁶⁰ In addition to completing the form itself, an individual applying for an ITIN must:

1. Either attach a federal income tax return or qualify under an exception to the federal tax filing requirement;⁶¹ and
2. Submit up-to-date documentation proving foreign status and identity, which entails either:
 - a) An original valid passport (or a certified copy from the issuing agency), or

b) At least two of the documents included in the following table, both of which must be current and in original (or certified copy) form and collectively must establish both foreign status and identity:

Supporting Documentation	Can be used to establish:	
	Foreign status	Identity
Passport (the only stand-alone document)	x	x
U.S. Citizenship and Immigration Services (USCIS) photo identification	x	x
Visa issued by U.S. Department of State	x	x
U.S. driver's license		x
U.S. military identification card		x
Foreign driver's license		x
Foreign military identification card	x	x
National identification card (must be current and contain name, photograph, address, date of birth, and expiration date)	x	x
U.S. state identification card		x
Foreign voter's registration card	x	x
Civil birth certificate	x*	x
Medical records (valid only for dependents under age 6)	x*	x
School records (valid only for dependents under age 14 (under age 18 if a student))	x*	x
* Can be used to establish foreign status only if they are foreign documents.		

⁶²(Source: Instructions for Form W-7 (Rev. December 2014))

SECTION 6: The ITIN and EIN (cont.)

Like the federal government, Massachusetts accepts ITINs in lieu of SSNs from individual taxpayers.⁶³

The IRS is prohibited from sharing taxpayer information with other federal and state agencies, with certain exceptions, such as court-ordered disclosures and Department of Justice criminal investigations.⁶⁴ Massachusetts imposes similar confidentiality restrictions on the state's Department of Revenue.⁶⁵ Therefore, it is unlikely—although still possible—that immigration enforcement authorities would learn of an undocumented immigrant's status because of tax forms submitted by the undocumented immigrant to federal or Massachusetts tax collection agencies.

Employer Identification Number

For federal and Massachusetts tax purposes, any businesses that have employees must obtain an EIN. Even if they do not have employees, corporations and most LLCs must obtain an EIN, and banks typically require an EIN in order for a business to open a bank account. In order to obtain an EIN, a business may submit Form SS-4 ("Application for Employer Identification Number") to the IRS or apply by phone or online. Apart from the basic information required by Form SS-4, a corporate applicant must provide the name and taxpayer identification number of its "responsible party." A responsible party is a person or entity that has sufficient control over the conduct of the corporate entity.⁶⁶ The taxpayer identification

number of the corporate applicant's responsible party may be a SSN, ITIN, or EIN.⁶⁷

Federal and Massachusetts Tax Forms

The ITIN or EIN is acceptable in lieu of the SSN on federal and Massachusetts tax forms. Because of the complexity and evolving nature of the federal and state tax statutes, however, you should consult an accountant or tax lawyer to confirm the specific forms that need to be filed by you and your business.

SECTION 7: Licenses and Permits

Businesses operating in certain industries may be required to obtain various licenses and permits from Massachusetts and applicable municipalities before beginning operation. While we have included information regarding the major license and permit application processes for three common industries below, many other industries also have license and permit requirements that should be thoroughly investigated by business owners. General information regarding such requirements can be found on the Mass.Gov website, located at:

<http://www.mass.gov/portal/business/regulations-licenses-permits/>

Construction

The Massachusetts Building Code requires that the construction of all one- or two-family dwellings and all buildings containing less than 35,000 cubic feet of enclosed space must be done under the supervision of a person with a Construction Supervisor License (“CSL”). To obtain a CSL, an applicant first must verify sufficient work experience in building construction or design, evidenced by either tax forms or letters of attestation from an individual with whom the applicant has worked. An applicant then must take a CSL exam, complete the Score Report form he receives at the exam, and mail it with a license fee to the Massachusetts Board of Building Regulations and Standards, which will issue the CSL within approximately thirty days. Some cities and towns

may have construction licensing requirements in addition to Massachusetts’s CSL requirements. Additional information regarding other construction-related licenses, such as architecture and engineering licenses, can be found on the Massachusetts Office of Consumer Affairs and Business Regulation website, located at:

<http://www.mass.gov/ocabr/licensee/license-types/construction.html>

The Massachusetts Building Code also requires that a building permit be obtained in connection with the construction, repair, renovation, or demolition of a building. The Massachusetts Department of Public Safety (“DPS”) provides two standard forms of Building Permit Applications: one for one- or two-family dwellings and another for all other buildings. Both forms request general site information, a description of the proposed work, an estimate of the various construction costs, and information regarding the CSL holder, including the contractor’s license information and insurance certificate.⁶⁸ Applicants must complete and attach to the application a Workers’ Compensation Insurance Affidavit, requiring confirmation of whether the applicant is an employer required to provide workers’ compensation insurance and, if so, policy and job site information. None of the information required by these forms—including the Workers’ Compensation Information Affidavit—presents unique issues to undocumented immigrants.⁶⁹

SECTION 7: Licenses and Permits (cont.)

While the standard Building Permit Applications provided by the DPS incorporates the Building Code requirements, local municipalities may add to or use a variation of these forms. Applicants should confirm with the municipality to which the application will be submitted whether the DPS form is acceptable. Applicants also should consult with their local licensing agency to learn about any other permit requirements, since the permit application process varies depending on whether the proposed work includes structural changes or changes to building occupancy. Contact information for various departments of Massachusetts cities can be found on the Secretary of State's website, located at:

<http://www.sec.state.ma.us/cis/cistel/telidx.htm>

Additional requirements, including requirements related to immigration or citizenship status, may apply to contractors who work on federal, state, or city government projects. We therefore encourage immigrants to carefully research any such requirements before bidding on or accepting a government contract.

Restaurants

While licenses to operate a restaurant in Massachusetts are required by state law, restaurant businesses must obtain the licenses from local governments. In the City of Boston, for example, there are varying licensing requirements for restaurants, depending on whether

the restaurant will have outdoor seating, whether the restaurant will serve alcohol, and whether the license application pertains to an address that currently has a restaurant approved by the City's Licensing Board. Generally, applicants must file license applications with the Licensing Board, accompanied by a Personal Information Form and Criminal Offender Record Investigation ("CORI") Form for each person with a financial interest in the business. Although the Personal Information Form calls for a SSN, it is unclear whether one is required in order for the applicant to obtain a license; notably, license application documents in some other cities and industries do not require SSNs. The Worcester License Commission, for example, requests a SSN on its restaurant license applications but accepts an ITIN in lieu of a SSN, solely in order to verify with the Massachusetts Department of Revenue that the applicant has met tax filing and payment obligations. Be advised, however, that in order to obtain a liquor license, some or all of the business owners must be U.S. citizens, depending on the structure of the business.⁷⁰

In addition to restaurant-specific licenses, restaurant businesses must obtain a variety of permits from applicable city departments before they can begin operation. The most common permits include a Certificate of Occupancy and Certificate of Inspection from an inspectional services department, a food service health permit from a health department, and an assembly permit from a fire department. While some of the permit applications in the City of

SECTION 7: Licenses and Permits (cont.)

Boston request a federal identification number for the purpose of confirming that the applicant has satisfied all state tax filing and payment obligations, other Massachusetts cities may have more expansive or narrower requirements.

Consult with the licensing and permitting authorities in the city in which your business is located to learn more about their respective application processes, as well as the possibility of providing an ITIN to satisfy any SSN-related requirements. Contact information for the various municipal departments in cities throughout Massachusetts can be found on the Secretary of State's website, located at:

<http://www.sec.state.ma.us/cis/cistel/telidx.htm>

Childcare

Certain owners of childcare-related businesses in Massachusetts will need to obtain licenses from the Massachusetts Department of Early Education and Care ("EEC") before they are able to begin providing childcare services.⁷¹ Specifically, anyone seeking to care for children in their home on a regular basis to whom they are not related needs to obtain a Family Child Care License.⁷² Alternatively, if an individual would like to care for ten or fewer unrelated children on a regular basis in a space that is not his home, he will need to obtain a Small Group and School Age Child Care License. Finally, anyone who would like to care for

more than ten children on a regular basis in a space that is not his home must obtain a Large Group and School Age Child Care License.⁷³

As a necessary first step of the licensing process, a potential applicant will need to attend a Potential Provider Meeting at an EEC Regional Office. There, potential applicants will meet with EEC licensing staff and discuss the details of the specific type of childcare to be provided, as well as an overview of the licensing process. Potential applicants will receive application materials at the meeting and, in the case of a Small or Large Group and School Age Child Care License, also will be assigned an EEC licensor to assist them in the application and licensing process.

In addition to the license application, applicants must submit extensive documentation to the EEC for review, including a medical statement regarding immunization history, evidence of completion of certain childcare-related training, and evidence of current certification in basic first aid and CPR for infants and children. Furthermore, all applicants and childcare staff members (and in the case of a Family Child Care License, each household member over the age of fifteen and each individual regularly on the premises of the home) must submit to background checks—specifically, a CORI and a check of the Department of Children & Families Central Registry and Registry of Alleged Perpetrators for abuse or neglect of a child. Finally, applicants must submit to a site visit by an EEC

SECTION 7: Licenses and Permits (cont.)

representative; Small and Large Group and School Age Child Care License applicants also must have building safety inspections and lead paint testing conducted.

None of the license applications or the Consent for Background Check requires a SSN or otherwise poses unique barriers to undocumented immigrants. More information regarding the childcare licensing process and a more comprehensive survey of related requirements can be obtained on the EEC's website here:

<http://www.mass.gov/edu/birth-grade-12/early-education-and-care/licensing/>



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Endnotes

- ¹ While we believe that this document addresses the primary legal questions regarding immigrant entrepreneurship in Massachusetts, other questions remain unanswered. For example, the state's act of granting certain professional or commercial licenses to undocumented immigrants may be in violation of 8 U.S.C. §1621(a) (2012). Additionally, this document does not address whether undocumented immigrants may legally obtain workers compensation and other types of insurance. We encourage lawyers and other legal professionals to research these issues.
- ² Current case law does not address whether someone who owns only an insubstantial percentage of a business would be considered an owner of that business for Form I-9 purposes.
- ³ See *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002). Anecdotal evidence from practitioners also supports this claim.
- ⁴ Immigration and Nationality Act ("INA"), 8 U.S.C. §1101(a)(15) et. seq. Please note that other areas of law, such as tax law, classify non-citizens differently than immigration law does. For that reason, a person who is an undocumented immigrant may qualify as a resident alien for tax purposes. While the specifics of tax treatment for resident and non-resident aliens is largely outside the scope of this document, a useful overview of important tax considerations for immigrant entrepreneurs can be found here: <http://www.irs.gov/Individuals/International-Taxpayers/Introduction-to-Residency-Under-U.S.-Tax-Law>
- ⁵ 8 U.S.C. § 1101(a)(15)(2012).
- ⁶ See 8 U.S.C. § 1153(a) (2012).
- ⁷ See 8 U.S.C. § 1153(b)(2012).
- ⁸ 8 U.S.C. §§ 1324a(a), 1227(a)(1)(B) (2012).
- ⁹ *Arizona v. USA*, 132 S.Ct. 2492, 2505 (2012).
- ¹⁰ 8 U.S.C. § 1227(a)(1)(B) (2012).
- ¹¹ 8 U.S.C. § 1229b(b) (2012).
- ¹² One such exception is "casual employment by individuals who provide domestic service in a private home that is sporadic, irregular or intermittent." Aliens and Nationality, 8 C.F.R. §274a.1(h) (2009). Please consult an immigration lawyer for details.
- ¹³ 8 U.S.C. §§ 1324a(a)(1) (2012).
- ¹⁴ See, e.g., *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).
- ¹⁵ See 26 U.S.C. 1366 (2012).
- ¹⁶ 26 U.S.C. 1361(b) (2012).
- ¹⁷ See 26 U.S.C. 7701(b).
- ¹⁸ 26 U.S.C. § 7701(b)(1)(A) (2012); Introduction to Residency Under U.S. Tax Law, IRS, <http://www.irs.gov/Individuals/International-Taxpayers/Introduction-to-Residency-Under-U.S.-Tax-Law> (last visited June 18, 2015).
- ¹⁹ 26 U.S.C. 1362(d)(2) (2012).
- ²⁰ 26 C.F.R. 1.1361-1(g) (2015).
- ²¹ "Think Outside the Boss: How to Create a Worker-Owned Business"; East Bay Community Law Center, Green-Collar Communities Clinic, Sustainable Economies Law Center; 5th Ed.; November 2014.
- ²² Mass. Gen. Laws 157, §8 (West, 2015).
- ²³ See generally 26 U.S.C. Ch.1 [Subchapter T]; Co-opLaw.Org; a SELC e-resource library, Worker Cooperatives and Tax (Subchapter T), accessed online April 17, 2015.
- ²⁴ Under federal and Massachusetts law, for-profit businesses cannot have volunteers; for that reason, we will not discuss volunteers in this document. Also, for purposes of brevity, laws related to interns will not be discussed in this document.
- ²⁵ A payroll service can provide many of these services on behalf of the employer.
- ²⁶ See *Athol Daily News v. Bd. of Review of the Div. of Employment & Training*, 786 N.E. 2d 365, 369-370 (Mass. 2003).
- ²⁷ MASS. GEN. LAWS 62E, §2 (West, 2015).
- ²⁸ 830 MASS. CODE REGS. 62E.2.1(2) (LexisNexis, 2015).
- ²⁹ 830 MASS. CODE REGS. 62E.2.1(6)(a) (LexisNexis, 2015).
- ³⁰ Mass. Gen. Laws 62E, § 9 (West, 2015). It is possible that an employee or independent contractor's lack of a SSN could constitute reasonable cause, since some noncitizens who are authorized to be employed in the United States (including asylees and DACA recipients) are unable to obtain a SSN, but this theory is untested.
- ³¹ *New Hire Reporting: How it Works*, Massachusetts Department of Revenue, <http://www.mass.gov/dor/child-support/employers/new-hire/reporting/how-it-works.html> (last visited Apr. 15, 2015).
- ³² *New Hire Reporting: FAQ's*, Massachusetts Department of Revenue, <http://www.mass.gov/dor/child-support/employers/new-hire-reporting/new-hire-reporting-fags.html> (last visited Apr. 15, 2015); *Overview of National Directory of New Hires*, Office of Child Support Enforcement, <http://www.acf.hhs.gov/programs/css/resource/overview-of-national-directory-of-new-hires> (last visited Apr. 15, 2015).
- ³³ Mass. Gen. Laws 62E, § 9 (West, 2015).
- ³⁴ M.G.L. 62E § 9.
- ³⁵ See *Id.* at § 1.
- ³⁶ Mass. Gen. Laws 62E §1 defines "employee" as "an individual employed by an employer subject either to chapter 151A or to chapter 62B" of the Massachusetts General Laws. Under 151A, which governs unemployment insurance, partners who vote in and manage a partnership are not employees, but "[A] corporate shareholder may be an employee... provided other conditions are met." See *Herder v. Division of Unemployment Assistance*, 977 N.E.2d 571, 573-74 (Mass. App.Ct. 2012). On the other hand, chapter 62B, which governs withholding of taxes on wages, adopts the definition of an employee from Internal Revenue Code §3401(c) (governing the collection of income tax at source on wages), as do the regulations implementing the Massachusetts new hire reporting requirement (see Mass. Gen. Laws 62E). Under these Internal Revenue Code provisions, only two classes of workers are employees: officers of corporations, and workers who satisfy the common law employee test, which hinges on control. See *Central Motorplex, Inc. v. C.I.R.*, T.C. Memo. 2014-207 (U.S. Tax Court 2014). In summary, 151A seems to exempt most manager-owners, with the exception of certain corporate shareholders (which the case law does not define) from the employee category. M.G.L. 62B and the related regulations, 830 C.M.R. 62B.2.1, exclude

Endnotes (cont.)

all workers who are owners under the common law test from the definition of “employee,” with the exception of corporate officers-shareholders, who are considered employees of the corporation. M.G.L. 62E §1, therefore, probably exempts from the new hire reporting requirement those owners who are neither employees under the common law test nor corporate officers.

- ³⁷ 8 U.S.C. §§ 1324a(a)(1) (2012).
- ³⁸ 8 U.S.C. §§ 1324a(b) (2012).
- ³⁹ 8 U.S.C. §§ 1324a(b)(3) (2012).
- ⁴⁰ 8 U.S.C. §§ 1324a(b)(1) (2012); IRS Form I-9.
- ⁴¹ 18 U.S.C. §1028A(a)(1) (2012).
- ⁴² 8 U.S.C. §§ 1324(a)(b)(1)(A) (2012); IRS Form I-9.
- ⁴³ Form I-9.
- ⁴⁴ *Penalties*, U.S. Citizenship and Immigration Services, <http://www.uscis.gov/i-9-central/penalties> (last visited April 2, 2015).
- ⁴⁵ 8 U.S.C. §§ 1324a(b) 2012; Form I-9.
- ⁴⁶ Aliens and Nationality, 8 C.F.R. § 274a.1(f) (2014); *USA v. Lorenzo Robles*, 2 OCAHO 309, 1991 WL 531738 (Mar. 29 1991) (Mar. 29, 1991).
- ⁴⁷ 8 U.S.C. §§ 1324a(a)(4) (2012).
- ⁴⁸ See, e.g., *USA v. Speedy Gonzalez Construction, Inc.*, 11 OCAHO 1228, 2014 WL 5419578 (Sept. 19, 2014). Admittedly, whether a Form I-9 must be completed for a particular worker and whether that worker is in violation of the employer sanctions of INA §274A(a)(1) are two separate questions. However, the relevant language which governs these two provisions is identical. Compare INA §274A(a)(1) with INA §274A(b). Therefore, a worker who does not fall within the definition of “employee” for Form I-9 purposes likely does not fall within the definition of “employee” for the purposes of employer sanctions.
- ⁴⁹ See, e.g., *id.*
- ⁵⁰ See *Clackamas Gastroenterology Associates, PC. v. Wells*, 538 U.S. 440, 449-450 (2003).
- ⁵¹ See *USA v. Two for Seven, LLC*, 10 OCAHO 1208, 2014 WL 278900 (Jan. 15, 2014).
- ⁵² See *Speedy Gonzalez*, 11 OCAHO at 1228.
- ⁵³ See *USA v. Jalisco’s Bar and Grill, Inc.*, 11 OCAHO 1124 (O.C.A.H.O. 2014).
- ⁵⁴ See *USA v. Santiago’s Repacking, Inc.*, 10 OCAHO 1153, 2012 WL 8018168 (Aug. 24, 2012).
- ⁵⁵ See *Two for Seven*, 11 OCAHO at 1208.
- ⁵⁶ See *Do the Owners of a Company Have to Complete a Form I-9*, U.S. Citizenship and Immigration Services, <http://www.uscis.gov/i-9-central/i-9-central-questions-answers/faq/do-owners-comopany-have-complete-form-i-9-what-if-one-companys-owners-refuses-complete-form-i-9> (last visited Apr. 16, 2015); Bruce Buchanan & Suskind Susser, *Speedy Gonzalez Subject to Fines for Immigration Violations*, ILW.COM Blogs (Nov. 12, 2015), <http://blogs.ilw.com/entry.php?8325-Speedy-Gonzalez-Subject-to-Fines-for-Immigration-Violations>.
- ⁵⁷ 8 U.S.C. § 1227(a)(1)(B) (2012).
- ⁵⁸ 8 U.S.C. §§ 1182(a)(6)(A)(1) (2012).

- ⁵⁹ See *I am self-employed and don’t need to complete the Form I-9. Do I need to be authorized to work in the United States to be self-employed?*, U.S. Customs and Immigration Services, <http://www.uscis.gov/i-9-central/i-9-central-questions-answers/faq/i-am-self-employed-and-dont-need-complete-form-i-9-do-i-need-be-authorized-work-united-states-be-self-employed> (last visited April 16, 2015).
- ⁶⁰ Form W-7 has a box for selecting “resident alien.” However, it is unclear how frequently the IRS reviews applications to confirm that the taxpayer is in fact a resident alien. An immigrant entrepreneur should confirm that they have received an ITIN as a resident alien before attempting to form an S-corporation.
- ⁶¹ *Instructions for Form W-7 (Rev. December 2014)* at 2, 7-9.
- ⁶² *Instructions for Form W-7 (Rev. December 2014)* at 2-3.
- ⁶³ The IRS generally identifies the ITIN as belonging to a nonresident alien. 26 CFR 301.6109-1(g)(iii). If the IRS determines that the person is not a nonresident alien, the ITIN will be identified as belonging to a resident alien. *Id.* This presents a potential problem for an undocumented immigrant, as it may be difficult to provide residency and the person may not want to risk having their status reviewed by the IRS (though privacy laws may provide protection). If the ITIN is assumed to belong to a nonresident alien, then forming an S-corporation may be less desirable, though this is not a factor in forming other entities. Whether the ITIN is granted as belonging to a resident or non-resident alien will impact the recipient’s tax treatment. Resident aliens receive similar tax treatment to U.S. citizens, but non-resident aliens are taxed as foreign citizens. The different tax treatment becomes more pronounced if the taxpayer has non-US sources of income. See IRS, *Taxation of Nonresident Aliens* <http://www.irs.gov/Individuals/International-Taxpayers/Taxation-of-Nonresident-Aliens> (last visited April 16, 2015).
- ⁶⁴ See 26 U.S.C. § 6103 (2012).
- ⁶⁵ See 830 Mass. Code Regs. 62C.21.1 (LexisNexis 2015).
- ⁶⁶ *Instructions for Form SS-4 (Rev. January 2011)* at 3.
- ⁶⁷ *Id.*
- ⁶⁸ See *What Permit Do I Need?*, City of Boston, <http://www.cityofboston.gov/isd/building/permits.asp> (last visited June 16, 2015).
- ⁶⁹ Whether or not undocumented immigrant employers are able to obtain workers’ compensation insurance protection depends on the requirements of the given insurance provider.
- ⁷⁰ See “Pouring” Licenses Under Section 12, Alcohol Beverage Control Commission Most Frequently Asked Questions, http://www.mass.gov/abcc/pdf/faqfinal_2013.pdf (last visited June 16, 2015).
- ⁷¹ See *Family, Larger & Small Group, and School-Age Child Care Licensing*, Executive Office of Education, <http://www.mass.gov/edu/birth-grade-12/early-education-and-care/licensing/family-larger-and-small-group-and-school-age/> (last visited June 16, 2015).
- ⁷² *Id.*
- ⁷³ *Id.*

