MISSISSIPPI EMPLOYMENT LAW PRACTICE HANDBOOK , **University of Mississippi (2009).**

CHAPTER 21

THE NEW ERA OF IMMIGRATION EMPLOYMENT VERIFICATION AND EMPLOYER SANCTIONS

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INTRODUCTION

Ever since the U.S. Government made immigration enforcement a high-profile priority, immigration employment compliance has become a vital practice in every business environment. Regardless of the company's size, industry or geographical location, many businesses across the country are being targeted for civil or even criminal investigations. In light of the enforcement trend initiated in 2006 by the Bush Administration, more employers across the United States are developing corporate immigration compliance programs to prevent situations that could lead to investigations, government raids and their—potentially—catastrophic consequences.

The purpose of this article is to present an overview of employer's obligations and liabilities concerning the hiring and recruiting of individuals in the United States. It focuses on compliance rules with regards to Form I-9 employment verification, immigration-related anti-discrimination practices, and Social Security Agency "no-match" letters. The article describes the government's current investigative and enforcement techniques, and the criminal charges being used to target businesses that might be employing undocumented immigrants. Finally, we will recommend a list of corporate policies and due diligence practices that may help a company, contractors and subcontractors minimize potential exposure and liabilities.

LEGISLATIVE HISTORY

Federal immigration laws have not changed since enactment more than 20 years ago, but, unfortunately, government enforcement investigation techniques and enforcement practices have. In 1986, Congress passed the Immigration Reform and Control Act (IRCA) [1] which, as amended, requires employers to verify the identity and eligibility of every worker—whether U.S. citizens or not—hired after November 6, 1986. IRCA creates civil and criminal penalties to employers who knowingly hire or continue to employ persons who are not authorized to work in the United States. Those with a pattern and practice of violating the law are subject to criminal sanctions.[2]

[1] Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (partially codified in scattered sections of the INA) (IRCA). See Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 et seq.), INA §274A, 8 USC §1324a.
[2] INA §274A(f)(1), 8 USC §1324a(f)(1).

IRCA made Form I-9 a key enforcement document. Employers must complete this form and verify an employee's employment status within three days of the person's starting work date.

In 1990, the General Accounting Office (GAO) reported that employer confusion over the "multiplicity" of acceptable documents for employment verification contributed to discrimination against authorized workers[3]. Since many employers began requesting more documents than required or rejecting acceptable documents, the Immigration Act of 1990 (IMMACT90) made such requests a violation of IRCA's anti-discrimination provision.[4]

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) [5] also reduced the number of acceptable documents for I-9 purposes, and provided employers with the possibility of a good-faith defense against technical paperwork violations. In 1997, legacy INS interim regulations tried to simplify the verification (Form I-9) process for employers with documents standardization.[6] Form I-9 was revised on June 5, 2007, significantly reducing the amount of acceptable documents that prove identity and employment eligibility.

Last December 17, 2008, DHS published an interim rule that adds a new document to the list of acceptable documents that evidence both identity and employment authorization and makes several technical corrections and updates. It also introduces a requirement that all documents must be unexpired for the Form I-9. On February 23rd, 2009, at the writing of this article, DHS published a final rule on employment verification of foreign citizens in the Armed Forces. This rule adds the Military Identification Card to List A documents that establish employment eligibility and identity for Form I-9, but "only for use by the Armed Forces to verify employment eligibility of aliens lawfully enlisted in the Armed Forces".[7]

The newest version of the I-9 Form with revision date 02/02/09, must be used for those employees hired on or after April 3rd, 2009.[8]

EMPLOYMENT ELIGIBILITY VERIFICATION

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[3] See Immigration Reform: Employer Sanctions and the Question of Discrimination, March 29, 1990, General Accounting Office, GAO/GGD-90-62.
[4] Pub. L. No. 101-649, 104 Stat. 4978.
[5] Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009.
[6] 62 *Fed. Reg*. 51001–02 (Sept. 30, 1997).
[7] 74 FR 7993 (02/23/ 2009)
[8] 74 FR 5899 (02/03/09)

Employer sanctions and I-9 requirements do not apply to employees hired before November 7, 1986, unless employment continuity is broken.[9] On the Employment Eligibility Verification form (Form I-9), a newly hired employee attests to the status that makes him or her eligible to work and presents documents that establish his or her identity and eligibility to work. Employers, recruiters and referrers for a fee (as defined in INA §274(a)(1)(B)(ii) and 9 CFR §274a.2(a)) must examine documents and attest that they appear to be genuine and to relate to the individual.

Definitions

Section 274A(a)(1)[10] of the INA provides, in part, that:

> "*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 . . . with respect to such employment, or (B)(i) to hire for employment in the United States an individual without complying with the requirements of subsection (b)…."*

Employer

The *employer* can be a natural person or an entity. The Statute defines entity as "any legal entity, including but not limited to, a corporation, partnership, joint venture, governmental body, agency, proprietorship, or association."[11] It also includes "an agent or anyone acting directly or indirectly in the interest" of the person or entity "who engages the services or labor of an employee ... for wages or other remuneration." [12] In a mergers or acquisition context, the successor employer who retains part or all of prior employer's staff is responsible for verification requirements.[13]

Employee

The Statute defines *employee* as "an individual who provides services or labor for an employer for wages or other remuneration." It excludes independent contractors or casual hires as defined in INA §§274a.1(j) and 274a.1(h) respectively. The Statute defines *hire* as "the actual commencement of employment of an employee for wages or other remuneration."[14] An employee who is hired via contract, subcontract or exchange

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[9] 8 CFR §§274a.7(b): " … For purposes of this section, an employee who was hired prior to November 7, 1986 shall lose his or her pre-enactment status if the employee:(1) Quits; or (2) Is terminated by the employer; the term termination shall include, but is not limited to, situations in which an employee is subject to seasonal employment; or (3) Is excluded or deported from the United States or departs the United States under a grant of voluntary departure; or (4) Is no longer continuing his or her employment …."

[10] 8 CFR §274a.1(1)

[11] 8 CFR §§274a.1(b)

[12] 8 CFR §§274a.1(g), 1274a.1(g).

[13] *U.S. v. Nevada Lifestyles*, *Inc., d/b/a Commercial Drapery Cleaners*, 3 OCAHO no. 518 (May 10, 1993)

[14] 8 CFR §274a.1(c)

entered into, renegotiated or extended after November 6, 1986, is subject to I-9 verification rules.

"Unauthorized Alien"

INA Section 274a.1(a)[15] defines "unauthorized" worker with respect to employment at a particular time, that the foreign national is not at that time either:

1. Lawfully admitted for permanent residence, or
2. Authorized to be so employed by the INA or by the Attorney General;

Knowledge

The "*knowing*" requirement for a violation of the statute includes *actual* and *constructive* knowledge. "Knowledge" holds the key to potential immigration law problems. An employer can be in violation of INA §274A(a)(2), 8 USC §1324a(a)(2)[16] by having "*constructive*" rather than "*actual*" knowledge that an employee is unauthorized to work. The definition of "knowing" is found at INA §274a.1(l)(1):

> *"The term* ***knowing*** *includes not only* ***actual knowledge*** *but also* ***knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition****." Constructive knowledge may include, but is not limited to, situations where an employer:*
>
> *1- Fails to complete or improperly completes the Employment Eligibility Verification Form, I-9;* [17]
>
> *2- Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer;* [18] *or*
>
> *3- Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.* [19]

Knowledge cannot be inferred, however, from an employee's foreign appearance or accent.[20]

Employers suspicious that some employees "might" have an immigration issue ignore the potential dramatic consequences of this violation. Many employers may not

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[15] 8 CFR§274a.1(a)

[16] INA §274A(a)(2), 8 USC §§1324a(a)(2): 274A(a)(2) Continuing employment. It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States **knowing** the alien is (or has become) an unauthorized alien with respect to such employment.

[17] INA §274a.1(l)(1)(i), 8 CFR §274a.1(l)(i)

[18] INA §274a.1(l)(1)(ii), 8 CFR §274a.1(l)(ii)

[19] INA §274a.1(l)(1)(iii), 8 CFR §274a.1(l)(iii)

[20] INA §274a.1(l)(2), 8 CFR §274a.1(l)(2)

realize that it is a felony punishable by up to 5 years' imprisonment[21] for "any person" who, during a 12-month period, knowingly hires for employment at least 10 individuals with "*actual knowledge*" that they are not authorized to work and were brought to the United States in violation of 18 USC §1324.[22] To disregard knowledge of a worker's immigration status is an erroneous policy that can have catastrophic results.[23]

Independent Contractors

Federal law does not hold a general contractor liable when a subcontractor hires illegal employees to perform the contracted labor, if the following conditions are met:

1. Subcontractor meets the definition of "*independent contractor*", and
2. Contractor does not have *actual or constructive knowledge* that the sub-contractor is hiring unauthorized workers.

Whether an individual or entity is an independent contractor is determined based on *various factors*.[24] In general, independent contractors include individuals or entities that carry on independent businesses, contract to do a piece of work according to their own means and methods, and are subject to control only regarding the results.[25]

Among the factors enumerated by 8 CFR §274a.1(j) to be considered by the Immigration and Customs Enforcement Agency (ICE) in making a case-by-case determination are:

1. Whether the contractor supplies the tools or materials,
2. Whether it makes services available to the general public,
3. Whether it works for a number of clients at the same time, and
4. Whether it directs the order or sequence in which the work is to be done and determines the hours during which the work is to be done.

Each case should be analyzed to determine the amount of control the employer exercises over the workers for them to be considered employees for I-9 verification purposes. However, if a general contractor "uses a contract, subcontract, or exchange" to avoid the I-9 requirements, or a general contractor that *knows* [26] its independent contractor (subcontractor) uses unauthorized workers with respect to the contracted labor, would be subject to the same liability as a direct employer who violates the employment verification rules.

Although, *in most cases*, an employer would have no direct obligation to check the immigration documents of its subcontractors' employees, in recent years, ICE has arrested hundreds of alleged unauthorized workers of third-party contractors, and

[21] INA §274(a)(3)(A), 18 USC §1324 (a)(3)(A)
[22] INA §274(a)(3)(A), 8 USC §1324(a)(3)(A)
[23] *See* "Employer Sanctions" *supra* p. 20 to 23.
[24] INA §274a.1 (j), 8 CFR §274a.1(j). The use of labor or services of an independent contractor are subject to the restrictions in section 274A (a)(4) of the Act and 274a.5.
[25] *Id.*
[26] *See infra Walmart Case.*

prosecuted the subcontractors hiring them. As an example, Wal-Mart, like many organizations, generally uses third-party contractors to clean its stores. In October 2003, ICE arrested 250 workers at 21 Wal-Mart stores. On March 18, 2005, Wal-Mart reached an $11 million settlement with ICE to settle allegations that it "*knowingly used illegal workers as contactors to provide janitorial services*."[27] It also agreed over the following 18 months to verify that the independent contractors it uses are taking reasonable steps to comply with immigration laws.[28] Since then, Wal-Mart developed a model of corporate compliance program called "Best Business Practices" for independent contractors.[29]

Outsourcing and Leasing Companies

Professional Employer Organizations (PEOs) have been increasingly popular with many small and new corporations that benefit from outsourcing some human resource obligations. According to the *Handbook of Employers,* Form I-9 should not be completed for "employees providing labor who are employed by a contractor providing contract services (*e.g.*, employee leasing or temporary agencies)." However, outsourcing and leasing companies should be treated like independent contractors, whereas the amount of control and direction an employer has over the contracted company, and not payment of salary, is key element in determining who is required to verify under I-9 rules. [30]

Outsourcing companies are often used by employers to handle administrative issues such as health benefits, payroll, etc. In a leasing scenario, generally, a company employee is transferred to the payroll of the leasing firm ("Lessor"), which then turns around and leases back all or most of the employees to the former employer ("Client"). Under this agreement, the risk of being deemed a co-employer for immigration purposes has been discussed in the context of foreign employees and H-1B visa petitions. When both companies exercise a degree of control over the employee, it is advisable that both the leasing firm and the company execute a contract designating which party will serve as the employer for all immigration and corporate compliance purposes.[31]

The Form I-9 Process

Employment verification procedures are commonly referred to as the I-9 process or I-9 requirements. The I-9 process is comprised of three steps:

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[27] *See infra definition of "constructive knowledge".*

[28] *United States v. Wal-Mart Stores Inc*., No. 05-052 (M.D. Pa. 2005).

[29] Among other things, Wal-Mart requires an independent contractor to certify that it is in compliance with employment verification laws. A "Wal-Mart Audit" requires its contactor to appoint an auditor (an immigration attorney) whose "legal opinion" concludes that it is following I-9 regulations and procedures.

[30] *See also* INA §1274a.5 **Use of labor through contract**. Any person or entity who uses a contract, subcontract, or exchange entered into, renegotiated, or extended after November 6, 1986, to obtain the labor or services of an alien in the United States knowing that the alien is an unauthorized alien with respect to performing such labor or services, shall be considered to have hired the alien for employment in the United States in violation of INA §274A(a)(1)(A).

[31] Wehrer, Susan and Paparelli, Angelo: "*From the Beginning: Agile Immigration Advocacy for New Businesses".* 2 Immigration & Nationality Law Handbook 11 (2002-03 ed.)

1. Completion of Section 1 by the employee at the time of hire;
2. Completion of Section 2 by employers, recruiters and referrers for a fee. In this section, the employer certifies that the documents presented by the employee *reasonably* appear to be genuine and relate to the employee.
3. Completion of Section 3 or re-verification, by the employer. When an employee's work authorization expires, the employer must re-verify his or her employment eligibility.

Identity and Employment Verification Documents

The Statute provides for three categories of documents to establish both identity and employment eligibility:

(1) List A documents: those that establish both *identity* and *employment eligibility*
(2) List B documents: those that establish *identity* only, and
(3) List C documents: those that establish *employment eligibility* only

To establish work authorization, a worker must present either one List A document, or alternatively, one List B and one List C document. Employers (and recruiters and referrers for a fee) must examine documents and attest that they reasonably appear to be genuine and relate to the individual.

List A: Documents Establishing Both Identity and Employment Eligibility
The current version (revised 02/02/2009) of the Form I-9 [32] list six types of "List A" documents that establish both identity and work authorization:

1. Unexpired U.S. passport or U.S. Passport Card;
2. Permanent Resident Card or Alien Registration Card (Form I-551);
3. Unexpired foreign passport with a temporary I-551 stamp [33] or pre-printed temporary I-551 notations that the DOS affixes on machine-readable immigrant visas (MRIVs)[34];

[32] The *Handbook for Employers,* revised on November 01, 2007, eliminated five of the ten List A documents: Certificate of U.S. Citizenship (Form N-560 or N-561); Certificate of Naturalization (Form N-550 or N-570), Alien Registration Receipt Card or Permanent Resident Card, Form I-551 ; An unexpired foreign passport with a temporary I-551 stamp Unexpired Reentry Permit (Form I-327) and Unexpired Refugee Travel Document (Form I-571). As of 02/02/2009, the DHS's website indicates that the *Handbook for Employers, Instructions for Completing the Form I-9 (M-274)* will be updated to reflect the 02/02/2009 version changes and will be available on the USCIS website in the near future.

[33] In 2004, the State Department began to issue a machine-readable immigrant visa foil (MRIV) containing the annotation "Upon endorsement serves as temporary evidence of lawful permanent residence for 1 year." USCIS has clarified that once this visa is endorsed with an admission stamp by the port of entry inspector, the endorsed MRIV is treated as the equivalent of an I-551 stamp and, coupled with an unexpired foreign passport, serves as a valid List A document up until one year from the date of endorsement.

[34] The new DHS interim rule of December 17, 2008, modifies the reference in List A to temporary I-551 stamps on unexpired foreign passports to include pre-printed temporary I-551 notation on MRIVs. The pre-printed temporary I-551 notation is triggered after the bearer is admitted to the United States as an Lawful Permanent Resident.

4. Unexpired Employment Authorization Document issued by U.S. Citizenship and Immigration Services (USCIS) that contains a photograph (Form I-766[35])
5. In the case of a nonimmigrant alien authorized to work for a specific employer, an unexpired foreign passport with Form I-94 bearing the same name as the passport and indicating an endorsement of the alien's nonimmigrant status, where the period of employment has not expired, and the proposed employment is not in conflict with any restrictions identified on the I-94. Also accepted is Form I-94A, ``Arrival-Departure Record." almost identical to the Form I-94 except that all fields are computer-generated rather than being annotated by hand.
6. Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI.[36]

List B: Documents That Establish Identity Only

The Form I-9 (REV 02/02/09 or REV 08/07/09) lists several types of "List B" documents that are sufficient to establish identity. Currently, the following documents are acceptable for establishing identity:

1. State driver's license issued by the United States or outlying possession of the United States provided is contains photograph or identification information such as name, date of birth, gender, height, eye color, and address;
2. Identification card issued by federal, state, or local authorities as long as it contains photograph or identification information such as name, date of birth, gender, height, eye color, and address;
3. School identification card with photograph;
4. Voter's registration card;
5. U.S. military card or draft record;
6. Military dependent's identification card;
7. U.S. Coast Guard Merchant Mariner Card;
8. Native American tribal document;
9. Canadian driver's license; and
10. For individuals under age 18 who are unable to produce an identity document, a school record or report card, clinic doctor or hospital record, or day care or nursery school records.

List C: Documents That Establish Employment Authorization Only

The following seven acceptable "List C" documents establish work authorization only:

[35] Form I-766, the most recent version of Employment Eligibility Document, was added to List A as of November 7, 2007. The December 17, 2008 interim rules eliminated Form I-688, ``Temporary Resident Card," and Forms I-688A and I-688B, ``Employment Authorization Cards," since such documents are no longer issued.

[36] This List A was introduced by the DHS December 17, 2008 interim rule.

1. U.S. Social Security account number card [37] other than one stating the face that the issuance of the card does not authorize employment in the U.S.[38];
2. Certification of Birth Abroad issued by the Department of State (Form FS-545)
3. Certification of Report of Birth issued by the Department of State (Form DS-1350)
4. Original or Certified copy of birth certificate issued by a state, county, municipal authority or outlying U.S. possession bearing an official seal;
5. A Native American tribal document;
6. A U.S. Citizen ID Card (Form I-197);
7. An ID Card for Resident Citizen in U.S. (Form I-179); and
8. Unexpired employment authorization document issued by the Department of Homeland Security

As previously stated, employers are required to complete Form I-9 with a revision date of February 2, 2009, only for those newly hired employees as of April 3rd, 2009 [39]. On August 27, 2009, the USCIS announced that the Office of Management and Budget had extended its approval of Form I-9 to August 31, 2012. Consequently, USCIS has amended the form to reflect a new revision date of August 7, 2009. Employers may use the Form I-9 with the revision date of either August 7, 2009 or February 2, 2009. With regards to the social security card, employers are reminded in the *Handbook for Employers* that "*Providing a Social Security number on the Form I-9 is voluntary for all employees unless you are an employer participating in the USCIS E-Verify Program, which requires an employee's Social Security number for employment eligibility verification. You may not, however, ask an employee to provide you a specific document with his or her Social Security number on it, to avoid unlawful discrimination."*

Employer Attestation

INA §274A(a)(1) requires any person or entity hiring, recruiting, or referring an individual for employment in the United States to attest under penalty of perjury on Section 2 of Form I-9 that it has examined an employee's documentation and has verified his or her identity and eligibility to work in the United States. The employer must, "within three business days of hire," examine employee's documents and provide verification on Form I-9.[40] If employee cannot produce documents within three days he or she can have up to the 90th day of hire to submit a receipt for application of replacement documents.[41]

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[37] The DHS December 17, 2008 interim rule replaced the reference to the List C document, ``Social Security number card,'' with the statutory term ``Social Security account number card.''

[38] 20 C.F.R. §422.104(b) *Annotation for a nonwork purpose*. If we assign you a social security number as an alien for a nonwork purpose, we will indicate in our records that you are not authorized to work. We will also mark your social security card with a legend such as "NOT VALID FOR EMPLOYMENT." If earnings are reported to us on your number, we will inform the Department of Homeland Security of the reported earnings.

[39] 74 FR 5899 (2/3/09)

[40] If hire is for less than three days then verification must be done at the time of the hire.

[41] INA §274a.2(b)(1)(vi), 8 C.F.R. §274a.2(b)(1)(vi)

Reverification

Employers are required to reverify Form I-9 when an employment authorization document bears a future expiration date. Reverification is performed in Section 3 of Form I-9, and does not apply to U.S. citizens or lawful permanent residents.

Reverification is also required when an employer rehires an individual within three years of the initial hire date, and the previous work authorization has expired even though he or she is eligible to work in a different capacity. In this case, the company representative can use Section 3 to record the date of rehire, document title, number, and expiration date of any documents presented. If Section 3 already has been used, the employer can issue a new I-9 form and complete Section 3.

Retention and inspection of I-9 Forms

Unlike tax forms, for example, I-9 forms are not filed with the U.S. Government. Instead, employers are required to maintain I-9 records in their own files for 3 years after the date of hire or 1 year after the date the employee's employment is terminated, whichever is later. [42] This means that Form I-9 should be retained for all current employees, as well as terminated employees whose records remain within the retention period. Any person or entity required to retain Form I-9 must be given three days notice prior to an ICE inspection of the Forms I-9.[43] At the time of inspection, Forms I-9 must be made available in their original paper, electronic form, a paper copy of the electronic form, or on microfilm or microfiche at the location where the request for production was made. [44] If these forms are kept at another location, the person or entity must inform ICE of the location where they are kept, and make arrangements for the inspection. Any refusal or delay in presentation of the Form I-9 for inspection is a violation of the retention requirements. No Subpoena or warrant is required for I-9 inspections, but the use of such enforcement tools is not precluded. [45]

Electronic Storage

Over time, many employers—particularly big corporations—have faced growing difficulties managing this I-9 retention and storage obligations. To address this problem, Congress enacted legislation permitting the electronic storage of I-9 forms. Section 274a.2(e) permits electronic retention of Form I-9, and sets specific standards for electronic generation or storage system including:

[42] INA §274a.2(b)(2)(i), 8 CFR § 274a.2(b)(2)(i).
[43] INA §274a.2(b)(2)(ii), 8 CFR § 274a.2(b)(2)(ii)
[44] *Id*.
[45] *Id.*

- Reasonable controls to ensure the integrity, accuracy and reliability of the electronic generation or storage system;[46]
- Reasonable controls designed to prevent and detect the unauthorized or accidental alterations of an electronically completed or stored Form I-9, including the electronic signature if used;[47]
- An inspection and quality assurance program evidenced by regular evaluations of the electronic generation or storage system,[48]
- A retrieval system that includes an indexing system that permits searches by any data element;[49] and
- The ability to reproduce legible and readable hardcopies.

All documents reproduced by the electronic retention system must exhibit a high degree of legibility and readability when displayed on a video display terminal or when printed on paper, microfilm, or microfiche.[50]

I-9 Procedure and "Good Faith Compliance"

INA §274A(a)(3) provides that a person or entity that establishes good faith compliance with the I-9 process regarding the hiring, recruiting, or referral for employment, has a *rebuttable affirmative defense* that the person or entity has made a technical or procedural error with respect to such hiring, recruiting, or referral.[51]

INA §274A(b)(6) is an exception to a good faith defense if errors are not corrected within 10 business days after the notice, or if the employer was engaged in a pattern or practice of violations.[52]

The employer's standard in reviewing the documents is a *reasonableness standard.*[53] After reviewing the employee's documents, the employer completes Section 2 of Form I-9 and attests that the documents reasonably appeared to him or her, "*upon reasonable inspection to be genuine and to relate to the employee....*"[54] The employer is not attesting to the legitimacy of the documents (or the person) but whether the documents the employee presents reasonably appear to be genuine, relate to the individual, and authorize employment. It is important to note that employers may be open to allegations of discrimination if a document that reasonably appears to be genuine is refused.

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[46] 274a.2(e)(1)(i), C.F.R. §274a.2(e)(1)(i)
[47] INA §274a.2(e)(1)(ii), C.F.R. §274a.2(e)(1)(ii)
[48] INA §274a.2(e)(1)(iii), 8 C.F.R. §274a.2(e)(1)(iii)
[49] INA §274a.2(e)(1)(iv), 8 C.F.R. §274a.2(e)(1)(iv)
[50] 274a.2(e)(2), 8 C.F.R. §274a.2(e)(2)
[51] INA §274A(a)(3), 8 U.S.C. §1324a(a)(3); 8 C.F.R. §274a.4, 1274a.
[52] INA §274A(b)(6)(B) and INA §274A(b)(6)(C).
[53] The law holds employers to a **"reasonably prudent person"** standard to determine whether the documents an employee presents reasonably appear to be genuine, relate to the individual, and authorize employment.
[54] Employer Information Bulletin 103, Office of Business Liaison, DHS, I-9 Document Review (Sept. 25, 2003), reprinted in 80 No. 43 Interpreter Releases 1554, 1562–63 (Nov. 10, 2003)

SOCIAL SECURITY AGENCY "NO-MATCH LETTERS"

By law, employers are required to submit Wage and Earnings Reports (W-2 Forms) to the Internal Revenue Service (IRS). The Social Security Administration (SSA) verifies the accuracy of this information and, if an invalid Social Security Number (SSN) is provided, then the employer may receive a letter stating that the name and SSN of the employee do not match their records. This is called a "no-match" letter.[55]

There are many legitimate reasons for a "no-match", including spelling mistakes, inversion of date order in date of birth, name changes due to marriage, divorce, and other reasons, like cultural differences in name order.

Since SSA processes W-2 information as an agent of the IRS, "no-match" information is considered tax information protected under the Internal Revenue Code (IRC). Thus, SSA cannot share this information with other Federal agencies, including ICE.[56] The letter to the employer does not, standing alone, provide notice to the employer that his employee was working without authorization.[57] However, *subsequent action (or inaction) by the employer* after receiving the letter, as well as the letter itself, will be considered in determining the employer had "*constructive knowledge*" that the employee was working without authorization.[58]

In the past, employers were often advised by their attorneys not to worry about immigration implications of a no-match letter. [59] As alluded to above, the Administration's worksite enforcement investigations have dramatically increased, and in particular, one misunderstood development merits close attention. U.S. employers should take no-match letters more seriously. On August 15th, 2007, DHS issued "Safe Harbor Procedures for Employers Who Receive a No-Match Letter"[60] (DHS Final Rule), which took effect last September 14, 2007. Through the Final Rule, DHS reiterates that employers remain accountable for the employees they hire. In October, the U.S. District Court for the Northern District of California issued a procedural injunction for not

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[55] 20 C.F.R. § 422.120(a)

[56] Internal Revenue Code, §6103

[57] Memo, Martin, Gen. Counsel INS (Dec. 23, 1997), reprinted in 75 No. 6 Interpreter Releases 203 (Feb. 9, 1998).

[58] Memo, Virtue, Gen. Counsel INS (Apr. 12, 1999), posted on AILA InfoNet at Doc. No. 01061431.

[59] The Year 2006 model letter informed employers that there were three common reasons why an employer's records may not match the SSA's: (1) the individual's name may have changed due to marriage or divorce; (2) SSA or the employer may have made clerical errors in the spelling of the name or the number, or (3) the employee may have provided an incomplete or incorrect name or number. The letter also emphasized that "[it] does not imply that you or your employee intentionally gave the government wrong information about the employee's name or Social Security number. Nor does it, by itself, make any statement about an employee's immigration status.". Model No-Match Social Security Letter available at: http://www.ssa.gov/legislation/FINAL%20TY2006%20EDCOR%20Code%20V%2008202007.htm

[60] *See* DHS Final Rule (DHS Docket No. 2006-0004), enacted at 8 C.F.R. §274(a) ("DHS Final Rule").

offering a public comment period for the program. The following month, the court stayed proceedings in order to allow DHS to correct and reissue the regulation. [61]

On March 21st, 2008, DHS renewed its immigration enforcement drive by *slightly* altering the DHS August 2007 Final Rule. The agency announced a "supplemental proposed rule" concerning the actions required of employers who receive "no-match" letters from the SSA[62]. The proposal makes no substantive changes to the plan that Federal Judge Charles Breyer estimated it would have "severe irreparable harm to innocent workers and employers."[63] October 28, 2008, marks the effective date of the August 2007 Final Rule and Supplemental Proposed Rule published 03/26/08[64].

Critics have noted that the SSA's inspector general announced that the database used to collect suspicious numbers contains erroneous records on 17.8 million people, 70 percent of whom are native-born U.S. citizens.[65]

DHS Final Rule Regarding "No-Match" Letters

The DHS Final Rule expands the definition of "*constructive knowledge*" to include the failure to take reasonable steps to address three situations:

1. An employee's request for the employer's sponsorship of the employee for a labor certification or visa petition;
2. Receipt of a no-match letter from the SSA; and

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[61] On October 10, 2007, Judge Charles Breyer of the U.S. District Court for the Northern District of California, granted plaintiffs' motion for preliminary injunction preventing implementation of the DHS rule on SSA No-Match letters, in a suit brought by the American Federation of Labor (AFL) at al. v. Michael Chertoff (*AFL-CIO, ACLU and NILC. AFL-CIO v. Chertoff,* No. 07-4472). The decision examines the legality of the ICE "no-match regulation" and concludes that DHS had failed to follow proper procedures for issuing a new rule that would have forced employers to fire workers if their Social Security numbers could not be verified within 90 days. The judge estimated that if allowed to take effect, the rule could lead to the firing of many thousands of legally authorized workers, resulting in "irreparable harm to innocent workers and employers." The decision also bars the Social Security Administration from sending out about 141,000 no-match letters, covering more than eight million employees, which include notices from the Homeland Security Department explaining the new rule.

[62] 72 FR 45611 (8/15/07). *See* DHS Final Rule (DHS Docket ICEB No. 2006-0004), enacted at 8 C.F.R. §274(a): *Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Initial Regulatory Flexibility Analysis.* (DHS Final Rule Supplemental Proposal)

[63] The President of the American Immigration Lawyers Association issued the following statement in response the DHS announcement: "*One predictable result of implementation of this rule will be unwarranted firings due to database errors and predictable delays in obtaining documentation of status or database corrections. The SSA has emphatically and consistently stated that there are many reasons for a no-match record to be generated other than a lack of work authorization. Some of these reasons include: spelling errors, incomplete names, inversion of date order, valid name changes pursuant to divorce or marriage, as well as cultural differences in name order. The Administration should suspend the "no-match" effort until the database achieves acceptable levels of accuracy and until employers and employees have efficient mechanisms to correct data errors and to obtain status confirmation."*

[64] 73 FR 63843 (10/26/2008)

[65] Spencer S. Hsu, "*U.S. Tweaks Proposal On Illegal Workers"* Washington Post. Saturday, March 22, 2008

3. Receipt of a notice from DHS (usually after an I-9 audit) that the employee's employment authorization documents presented in connection with completion of the I-9 form do not match DHS records.

The DHS Final Rule gives an employer prima facie constructive knowledge of a potential immigration problem. The Final Rule establishes that by following the ICE "Safe Harbor" guidelines uniformly[66] and promptly,[67] employers who are in receipt of a SSA "no-match" letter gain "safe harbor" against allegations of *constructive knowledge* based upon receipt of such letter.

In particular, these guidelines outline steps that the employer must follow in order to resolve the discrepancy described in the SSA "no-match" letter or the DHS discrepancy letter.[68] Once an employer is in receipt of a SSA "no-match" letter, it has up to 93 days from the date of receipt to resolve the SSA records discrepancy. If the employer cannot verify the employee's work eligibility through completion of a new Form I-9, the employer must decide whether to terminate the employee or face the risk in any subsequent DHS enforcement action of being determined to have constructive knowledge and being penalized for the continuing employment of an unauthorized worker.[69] Note that this unchanged Final Rule still leaves the employer facing possible wrongful termination or discrimination charges.[70]

Worth mentioning is the fact that an employer's compliance with the ICE "Safe Harbor" guidelines will not clean constructive knowledge acquired from other sources.[71]

EMPLOYMENT VERIFICATION PROGRAMS: E-VERIFY

Section 401 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law 104-208 (Sept. 30, 1996), established three pilot programs for employment eligibility confirmation: the Basic Pilot Program; the Citizen Attestation Pilot Program; and the Machine-Readable Document Pilot Program. The Commissioners

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[66] *See* DHS Supplemental Proposal to August 2007 Final Rule at page 25: "[…the August 2007 Final Rule uniformly and without regard to perceived national origin or citizenship status will not be found to have engaged in unlawful discrimination."

[67] *Id.* at p. 30: "DHS believes that this obligation for prompt notice would ordinarily be satisfied if the employer contacts the employee within five business days after the employer has completed its internal records review."

[68] *See* DHS Final Rule

[69] The DHS Final Rule describes with specificity what steps employers should take upon receipt of a no-match letter: 1) verifying within 30 days that the mismatch was not the result of a record-keeping error on the employer's part; 2) requesting that the employee confirm the accuracy of employment records; 3) asking the employee to resolve the issue with SSA; 4) if these steps lead to resolution of the problem, follow instructions on the no-match letter itself to correct information with SSA, and retain a record of the verification with SSA; and 5) where the information could not be corrected, complete a new I-9 form without using the questionable Social Security number and instead using documentation presented by the employee that conforms with the I-9 document.

[70] *See supra* p. 20

[71] *See infra* p. 4, 5 and 13

of the Immigration and Naturalization Service (INS) and the SSA began conducting the Basic Pilot Program in November 1997.

The Basic Pilot program involves verification checks of the SSA and USCIS databases, using an automated system to verify the employment authorization of all newly hired employees by using SSNs and alien registration numbers. Last year, the Basic Pilot Program was renamed "E-verify" (EEV) by USCIS.

The "refurbished" Basic Pilot program, E-Verify, is *offered* to employers to electronically compare employee information taken from the Form I-9 against the SSA and DHS database and to determine whether an employee is authorized to work in the United States. Note that the I-9 verification procedures are separated from the largely voluntary E-Verify program[72]. In recent months, however, at least seven states have enacted legislation mandating employers to use E-Verify for all new hires.[73] This tendency is very controversial, since multiple studies have found that E-Verify includes information inaccuracies, privacy lapses, and employers misuse of the program.[74] E-Verify has also encountered criticism both for false negatives (persons who are authorized to work but who nonetheless receive a tentative non-confirmation from the system) and for false positives (unauthorized aliens who receive a confirmation because they have borrowed or stolen the identity of an authorized worker). Other sources consider that a mandatory E-Verify system also leads to identity fraud and intentional discrimination practices.[75]

The E-Verify mandatory trend has recently expanded to federal contacting as well. A final rule announced by the Department of Defense on November 14, 2008, requires federal contractors and subcontractors begin using E-Verify as of January 15th, 2009 [76]. On January 29, 2009, the USCIS announced a delay on the implementation until May 21, 2009. The new rule implements Executive Order 12989, as amended by President George W. Bush on June 6, 2008, directing federal agencies to require that federal contractors agree to electronically verify the employment eligibility of their employees.

EMPLOYER SANCTIONS & IMMIGRATION ENFORCEMENT TRENDS

For most of the past 20 years, federal employment verification laws had not been rigorously enforced. Legacy INS assessed civil fines on noncompliant employers, which for many of them, was viewed as a cost of doing business. The turning point was on April

[72] This program was initially conceived to be voluntary.
[73] *See supra* p. 19
[74] **Immigration Policy Center**: "***Basic Pilot/E-Verify: Not a Magic Bullet***". Sept. 17, 2007 (rev. Sept. 27, 2007); **Congressional Response Repor**t: "*Accuracy of the Social Security Administration's Numident File*" (Office of the Inspector General, Social Security Administration, Dec 2006); **Government Accountability Office (GAO) Report:** *"Employment Verification, Challenges Exist in Implementing a Mandatory EEV" (June 7, 2007).*
[75] *Id.*
[76] 73 FR 67651 (11/14/08)

20, 2006, when DHS unveiled its own "comprehensive immigration reform strategy" and made employment immigration enforcement a top priority. Since then, ICE has seen an explosion in worksite enforcement activity. Law enforcement officers have being marshaled to identify, detain and prosecute immigration law violators via hostile investigations and raids.

Procedure

Any individual or entity may file written, signed complaint respecting potential violations of INA §274A. ICE is authorized to conduct investigations to determine whether employers have violated the prohibitions against knowingly employing unauthorized employees and failing to properly complete, present or retain Form I-9. If ICE determines that violations have occurred, it may issue a Warning Notice, a Technical or Procedural Failures Letter notifying the employer of technical or procedural failures in need of correction, or a Notice of Intent to Fine (NIF). In cases where a NIF is issued, employers may request a hearing within 30 days of service of the NIF to contest the NIF before an Administrative Law Judge of the Office of the Chief Administrative Hearing Officer (OCAHO), Executive Office for Immigration Review, U.S. Department of Justice. Hearing requests must be in writing and filed with the ICE office designated in the NIF. If a hearing is not requested within the 30-day period, ICE will issue a Final Order to cease and desist and to pay a civil money penalty. Once a Final Order is issued, the penalty cannot be appealed. If a hearing is requested, ICE will file a complaint with OCAHO to begin the administrative hearing process which may end in settlement, dismissal, or a Final Order for civil money penalties. [77]

Civil Penalties

With respect to offenses occurring on or after March 27, 2008, relating to *hiring, recruiting, and referring for a fee* an unauthorized worker (violations of INA § 274(a)(1)(A) or (a)(2)), an employer may face a civil penalty in an amount of:

- Not less than $375 and not more than $3,200 for **each** unauthorized individual, for first offense,
- Not less than $3,200 and not more than $6,500 for **each** unauthorized individual, for a second offense, or
- Not less than $4,300 and not more than $16,000 for **each** unauthorized individual, for a third offense.[78]

With respect to I-9 paperwork violations (INA § 274(a)(1)(B)), for offenses occurring on or after March 27, 2008, an employer may be required to pay a civil penalty of no less than $110 and not more than $1,100 for **each** individual with respect to whom such violation occurred.[79]

[77] INA § 274A(e)(3), 8 U.S.C. §1324a(e)(2)(C) and INA § 274A(e)(7), 8 U.S.C. §1324a(e)(7)
[78] INA § 274A(e)(4)(A), 8 U.S.C. §1324a(e)(4)(A)
[79] INA § 274A(e)(5), 8 USC § 1324a(e)(5).

Some of the factors considered in determining the amount of the penalty are: the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized employee, and the history of previous violations.[80]

Criminal Penalties

Employers convicted of having engaged in a pattern or practice violation may be fined up to $3,000 per unauthorized employee may face up to six months of imprisonment.[81]

Administrative and Criminal Arrests

Administrative arrests are for civil violations of the INA, such as being illegally present in the United States. Only a noncitizen can be the subject of an administrative arrest, which constitutes an initial step in the process of removing an alien from the United States. Criminal arrests include arrests for illegal hiring, identity theft, alien harboring, money laundering, and other criminal violations. Both citizens and noncitizens can be the subject of criminal arrests.

Current Worksite Enforcement Trends: Criminal Prosecution and Fines

The Government has become extremely creative in the process of indicting employers and their employees. ICE is bringing serious RICO[82] charges for INA §274 employment violations. At a corporate level, tough criminal charges are being bought against a broad array of persons: business owners, HR specialists and corporate executives. It is important to note that the prosecutorial discretion rests in the Department of Justice's U.S. Attorneys and not with ICE. Prosecution charges arising from hiring unauthorized workers include:

- Possession of fraudulent immigration documents.
- Conspiracy to defraud the United States.
- Harboring, encouraging and inducing, and transporting illegal aliens for the purpose of commercial advantage and financial gain.
- Harboring illegal aliens for profit and money laundering.
- Conspiracy to harbor, encourage, induce, and transport illegal aliens for the purpose of commercial advantage and financial gain.
- Aiding and abetting the harboring of illegal aliens.
- Encouraging and inducing illegal aliens to reside in the United States.

[80] INA § 274A(e)(4)(A), 8 USC § 1324a(e)(4)(A).
[81] INA § 274A(f), 8 USC § 1324a(f)
[82] The Racketeer Influenced and Corrupt Organizations Act (RICO), created by Congress in 1961, was amended in 1996 to allow claims based on violations of the INA.

These RICO charges carry monetary fines[83], forfeiture and/or up to a ten-year term of imprisonment, with the exception of the aiding and abetting charge, which has a five-year maximum term of imprisonment. RICO also provides for a private right of action when taken by a "person injured in his business or property by reason of a violation of section 1962 of [Title 18]."[84] The claims rely on theories of economic harm to current or former employees or commercial competitors of companies that employ undocumented workers. Plaintiffs generally allege that employers have kept labor costs low and have depressed the wages of legitimate workers by unlawfully hiring "illegal workers" in violation of the INA.[85] The immigration related offenses of 8 USC §§1324, 1327, and 1328, [86] in order to be RICO predicated offenses, must have been committed for gain.[87]

Accordingly, ICE pleads that "under our national worksite enforcement strategy, [this agency] is bringing to justice corporate managers who harbor illegal aliens for their workforce *in order to gain an unfair business advantage over their competition.*"[88] During 2007, worksite enforcement investigations and the total arrests arising from them reached a level that was more than ten times greater than in 2002, the last full year of operations for USCIS. ICE made 863 criminal arrests and 4,077 administrative arrests, compared to 25 criminal arrests and 487 administrative arrests in 2002. In fiscal year 2007, ICE also dramatically increased more than $30 million in criminal fines, restitutions, and civil judgments in worksite enforcement cases over previous years.[89] In FY 2008, ICE made more than 5,100 administrative arrests 1,100 criminal arrests tied to worksite enforcement investigations. One of the worksite investigations that received most media coverage during 2008, was the ICE raid of August 26th on Howard Industries, Inc., an electric transformer manufacturing facility located in Laurel, Mississippi. Approximately 595 undocumented workers were arrested by ICE special agents. In 2008, for the first time, ICE also debarred seven companies from federal contracting because each had been found to be unlawfully employing persons without employment authorization.

As far as agency expansion, in 2007, ICE grew its workforce by nearly 10 percent through the hiring of an additional 1,600 employees in a full range of positions, including over 450 new deportation officers and more than 700 new immigration enforcement agents. The FY 2008 budget request for DHS was $46.4 billion in funding, which was an increase of 8 percent over the FY 2007 level. The FY 2009 budget request for the DHS

[83] Maximum fines could be the greater of $250,000 or 2 years of financial gain.
[84] 18 USC §1964(c)
[85] *See, e.g., Commercial Cleaning Serv. v. Colin*, 271 F.3d 374 (2d. Cir. 2001). *Trollinger v. Tyson Foods, Inc*, No. 4:20-CV-23, 2007 U.S. Dist. LEXIS 38882 (E.D. Tenn. May 29, 2007)
[86] 8 U.S.C. §1324: Bringing in and Harboring Certain Aliens, 8 U.S.C. §1327: Aiding or Assisting Certain Aliens to Enter, 8 U.S.C. §1328: Importation of Alien for Immoral Purpose.
[87] See Williams v. Mohawk Industries, Inc., 411 F.3d 1252 (11th Cir. 2005)
[88] ICE News Release, February 28, 2008. In 2006, ICE agents conducted a raid and arrested seven current and former managers and detained nearly 1,200 undocumented workers working at over 40 IFCO plants nation wide. In 2007, seven IFCO managers pleaded guilty to felony and misdemeanor charges related to the unlawful employment of undocumented workers.
[89] ICE Fiscal Year 2007 Annual Report

was $50.5 billion in funding, which is an increase of 6.8 percent over the 2008 fiscal year level. A total funding of $100 million was requested for E-Verify, an increase of $46 million for costs associated with enforcement activities, $57 million for ICE automation and modernization of information technology systems and an increase of $442.4 million to hire, train and equip 2,200 new Border Patrol Agents. The additional agents represent the fiscal 2009 increment of the Bush Administration's goal of adding 6,000 new Border Patrol Agents by the end of the first quarter of fiscal year 2009[90].

The enforcement trend continues to intensify and expand. During 2007-2008 a growing number of states and municipalities crossed federal preemption lines on the issue of immigration law. Arizona, Colorado, Georgia, Minnesota (Executive Order), Oklahoma, Tennessee, and very recently, Mississippi[91], have enacted laws addressing the issue of hiring undocumented workers by mandating the use of E-Verify. Enforcement practices were also been extended to municipal, county and state agencies nationwide that sign a memoranda of agreement (MOAs) with ICE to participate in immigration officer functions according to INA §287(g).

On January 30, 2009, the newly appointed DHS Secretary, Janet Napolitano, announced a wide-ranging action directive on immigration and border security to review and assess the plans and policies regarding legal immigration benefit backlogs, immigration detention centers and electronic employee verification. The directive's purpose is to improve previous detention standards (less-restrictive models of detention, segregate ordinary detainees from those with a serious criminal record) and ameliorate E-Verify system[92]. We are hopeful that, although the employment enforcement actions may not decrease, while implementing them, the Obama Administration adopts strategies that preserve the privacy, civil rights, and civil liberties of those U.S. citizens and noncitizens as well.

ANTI-DISCRIMINATION PROVISIONS

In addition to I-9 compliance, the employer should also be aware of immigration-related discrimination issues. Employers cannot require or specify which documents an individual should present to comply with verification.[93] When an employer requests more or specific documents than those required to verify identity and employment eligibility, or rejects reasonably genuine-looking documents, the employer is in violation of immigration related anti-discrimination provisions. Various federal statutes convene on this issue. Title 8 USC §1981 and Title VII apply to non-citizens, and prohibit discrimination on the basis of national origin and IRCA prohibits discrimination on the

[90] Fact Sheet: "U.S. Department of Homeland Security Announces 6.8 Percent Increase in Fiscal Year 2009 Budget Request" (Press Release 2/4/08)
[91] The "Mississippi Employment Protection Act" was signed into law on March 18, 2008.
[92] DHS Press Release (01/30/2009): "Secretary Napolitano issues Immigration and Border Security action directive." http://www.dhs.gov/ynews/releases/pr_1233353528835.shtm
[93] 8 C.F.R. §274a.2(b)(1)(v)

basis of national origin or citizenship in hiring and firing employees.[94] IRCA violations are known by the legal acronym, UIREP (Unfair Immigration-Related Employment Practices).

Employers should be aware of a distinction from the anti-discriminatory provisions of Title VII anti-discrimination and immigration related anti-discrimination provisions. Under the INA, the prohibition against discrimination applies only to employers with four or more employees. INA protects work authorized individuals from employment discrimination based on their citizenship status and/or national origin. National origin discrimination complaints against employers with fifteen or more employees fall under the jurisdiction of the Equal Employment Opportunity Commission pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq. The Office of Special Counsel at the Civil Rights Division o f the U.S. Department of Justice (OSC) is responsible for receiving and investigating INA discrimination charges and, when appropriate, filing complaints with specially designated administrative law judges. Claimants must now show that the employer had a discriminatory intent. [95]

As a standard practice, the employer may *offer every employee the choice* of presenting any one (1) document from List A of the I-9 handbook, or two (2) documents, one from List B and one form List C. The employer must then accept any valid document presented by the employee that reasonably appears to be genuine. Employers should treat all individuals equally, during the job offer, interview, hiring and firing processes.

In the SSA "no-match" letter context, the DHS August 2007 Final Rule states that employers who adopt the "safe-harbor" guidelines must apply them uniformly to all of their employees who appear on employer no-match letters. Failure to do so may violate the anti-discrimination provisions of the INA. Furthermore, employers who follow these "safe-harbor" procedures uniformly and without regard to perceived national origin or citizenship status will not be found to have engaged in unlawful discrimination.[96]

IMPORTANCE OF A CORPORATE IMMIGRATION COMPLIANCE PROGRAM

We anticipate that the workforce enforcement trend will not only intensify, but employers should expect new, more rigid regulations increasing civil and criminal

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[94] INA § Sec. 274B, 8 U.S.C. 1324b. Unfair Immigration-Related Employment Practices. IRCA discrimination prohibition does not apply to a person or other entity that employs three or fewer employees. Therefore, with respect to national origin discrimination, section 274B applies to employers of four to 14 employees.

[95] INA §274B(a)(6), 8 U.S.C. §1324b(a)(6). Section 421 of IIRIRA amended INA §274B(a)(6) to require intent to discriminate. *See* Robison Fruit Ranch, Inc. v. U.S., 147 F.3d 798 (9th Cir. 1998) for discriminatory intent.

[96] *See* DHS Supplemental Proposal to August 2007 Final Rule p. 26: "*DHS recognizes the jurisdiction of DOJ over enforcement of the anti-discrimination provisions in section 274B of the INA (8 U.S.C. 1324b). As stated in the preamble to the August 2007 Final Rule, "DOJ – through its Office of Special Counsel for Immigration- Related Unfair Employment Practices – is responsible for enforcing the antidiscrimination provisions of section 274B of the INA, 8 U.S.C. 1324b." 72 FR 45,614."*

liability. Since the current government approach has resulted to a great degree in delegating to the employers the enforcement of who may lawfully work, developing a corporate immigration compliance program is of outmost importance.

An effective compliance program should set out the kind of measures that an employer should implement to minimize potential exposure and civil and criminal liabilities. Furthermore, by instituting a tailor-made immigration compliance program, a company can save hundreds of thousands of dollars in civil fines and litigation costs, not to mention jail time resulting of criminal conviction. The following are some recommendations for employers:

1- Conduct "self-audits" that mirror ICE audits with the assistance of an outside independent source (*i.e.*, an attorney) to assess the existing program and identify problems.
2- Institute immigration compliance policies and protocols that integrate the I-9 process, SSA no-match letters, subcontractor relationships, discrimination and termination. The protocol should be applicable to all employment candidates and employees without regard of the nationality.
3- Incorporate the ICE Safe Harbor regulations to their corporate compliance protocol.
4- Immigration due diligence with regards to mergers and acquisitions: the new employer will be legally liable for the I-9 compliance of the newly acquired workforce. A complete in-house I-9 audit is recommended in order to evaluate the target company's compliance with employer I-9 procedures.[97] New or acquiring company is advised not to "buy" the old company's I-9s.
5- Contractors should be *required* to furnish the general contractor with I-9 forms for the company to audit, when contractor has *actual or constructive knowledge* that subcontractor has hired in the past, or is hiring illegal workers to execute the contract.

CONCLUSIONS

For the last three years, the American political debate over undocumented immigration has been focusing on "enforcement only" strategies that, without a comprehensive immigration reform, will continue to affect thousands of U.S. employers.

Why are employers and their employees being targeted? The dysfunction of our immigration laws and Congress's inability to achieve an effective reform are, in principle, the root of the problem. The current archaic immigration law provides an ineffective and inadequate legal avenue for employers willing to hire less-skilled workers, who are key to industries like agriculture, construction, service and hospitality. There is an obvious divide between current policy and the reality of economic and

[97] CFR §274a.2(b)(1)(viii). States that a continuing employer is not required to complete an I-9 on behalf of a newly acquired employee as a result of a corporate reorganization, merger or acquisition. However, since the I-9 liability accrues, new employer should complete a new I-9 for most of its workforce after they have been properly transferred to the new entity.

demographic forces. Policy makers underestimate the market demand for immigrant workers.

Contrary to public belief, there is no blanket work authorization upon admission to the United States. IRCA made available a mere 5,000 visas for workers in the so called "low-skilled" category. Most employers seeking services from this labor category would comply to legal hiring and recruitment practices but for the limited (near non-existent) availability of visas. Undocumented workers have, therefore, supplied the demand for this labor.

IRCA's employer sanctions are ineffective and insufficient. Supporters of immigration enforcement are increasingly pressuring state and local governments to step in what is perceived as federal inaction in this area. Although there is a need for more effective enforcement of labor and employment rights to eliminate exploitation of immigrant workers, "national security" should not be construed as an excuse to criminalize and prosecute undocumented workers and their employers. [98]

Reforming our broken immigration system will require a "comprehensive approach" that creates effective worksite enforcement mechanisms and a new worker visa system that realistically meets U.S. labor demands.

[98] Many of us believe, that the American public is also ill-bent on the enforcement side of immigration due to political ambitions and loud xenophobic groups.