

THE IRCA – TWENTY YEARS LATER

By Roger Tsai¹

Last year marked the twentieth anniversary of the Immigration Reform and Control Act (IRCA) enacted on November 6, 1986.² Initially enacted to decrease illegal immigration, the Act has been clearly unsuccessful in stopping the tsunami of 12 million undocumented workers now in the U.S. It has created a troubling situation where employers are forced to walk a fine line between scrutinizing documents too little or too much. The amount of paperwork that is generated along with the fear amongst both employers and employees has sapped the public will for stringent enforcement. Enforcement by the legacy INS and ICE has waxed and waned depending on the political winds, and with limited resources committed to worksite enforcement ICE has become desperate to make a public example of employers who are caught.

Through these twenty years, the Immigration and Naturalization Service (INS) and Bureau of Immigration and Customs Enforcement (ICE) have unsuccessfully tried to play catch-up to those who would circumvent the rules. Despite changes made in 1998 to limit the number of acceptable documents, eight years later the INS and ICE have yet to update the I-9 form to reflect those changes. Their response to the widespread problem of document fraud consists of an online verification program that forces undocumented workers to go further underground to assume the identity of others. Despite the challenges in implementing the IRCA, Congress has attempted to create a nuanced law that acknowledges discrimination towards lawful immigrants and the problems that employers face in compliance. Regardless of the criticism, the IRCA remains in effect, and any comprehensive immigration legislation will likely increase the burdens placed on employers.

I. The Recent Raid on Undocumented Workers at Swift

On December 12, 2006, ICE conducted one of its largest raids in history by arresting 1,282 workers at six meat processing plants across the Midwest.³ In February 2006, ICE began investigating Swift when immigrants who were being processed for removal confessed to identity theft and working at the Iowa Swift plant.⁴ ICE had also received anonymous calls from the ICE hotline and referrals from local police.⁵ Due to the arrests, Swift lost 40 percent of its labor force and temporarily suspended operations at all six Swift plants. The raid on the second largest meat packing company in the world was part of an increased effort by ICE to target undocumented workers in low wage industries including restaurants, construction and retail.

A casual observer might ask how Swift could not have suspected that much of their labor force was undocumented. In fact Swift, fearful of being penalized for hiring undocumented workers, had intensely scrutinized the documents of its workers, so much that in 2001, Swift was forced to pay a \$200,000 settlement to the Department of Justice Special Counsel for excessively scrutinizing documents of individuals who looked or sounded “foreign.”⁶ Federal immigration laws prohibit employers from considering foreign appearance, accents, or national origin in their hiring practices. Employers are caught between two federal agencies with opposing interests: ensuring that all workers are authorized for employment and protecting those who are lawfully here from discrimination.

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² 8 U.S.C.A. §§ 1324a, 1324b, and 1324c (2005); 8 C.F.R. §§ 274A, 274B, and 274C (2006).

³ Press Release, U.S. Immigration and Customs and Enforcement, U.S. Uncovers Large-Scale Identity Theft Scheme by Using Illegal Aliens to Gain Employment at Nationwide Meat Processor. (Dec. 13, 2006). (on file with author)

⁴ Sudeep Reddy, *Government Raids of Swift Plants Add to Growing Immigration Debate*, THE DALLAS MORNING NEWS, Dec. 14, 2006.

⁵ *Id.*

⁶ Staff Reports, *Swift Responds to Plant Raids*, THE GREELEY TRIBUNE, Dec. 22, 2006.

II. Employer Responsibilities Under the IRCA

A. The I-9 Form

The IRCA requires all employers to fill out an I-9 form, available at www.uscis.gov, for all employees hired since November 6, 1986 regardless of their immigration status.⁷ The purpose of the I-9 form is to ensure the identity and employment authorization of workers. The form consists of two portions. In the first portion, the employee attests, under penalty of perjury, that he or she is a citizen, lawful permanent resident, or alien authorized to work temporarily.⁸ In the second portion, employers are required to record that they have examined original documents from a specified list verifying the employee's identity and eligibility to work.⁹ Employers must accept the documents if they appear "reasonably genuine" and relate to the person presenting the documents.

The I-9 must be completed within three days of starting work.¹⁰ The I-9 itself is not submitted to the ICE; instead the employer must keep the form on file for three years from the date of hire or one year after the last day of work, whichever is later.¹¹ The I-9 may be stored in its original form, microfilm, microfiche, or electronically.¹² The only exceptions to an employer's I-9 obligation are independent contractors and sporadic domestic workers.¹³ Employers are not required to complete an I-9 for independent contractors, but remain liable if they know that contractors are using unauthorized aliens to perform labor or services.

B. "Knowing" Employment

The IRCA prohibits any person or entity from knowingly hiring or continuing to employ an unauthorized worker.¹⁴ "Knowledge" may be either actual or constructive. Constructive knowledge is defined as 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.¹⁵ A non-exhaustive list of conditions which would establish a rebuttable presumption of constructive knowledge include employers who (1) fail to complete or improperly complete the I-9, (2) have information available to the company that would indicate that the alien is not authorized to work, or (3) act with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into the workforce.¹⁶

Initially, courts interpreted the doctrine of constructive knowledge fairly narrowly. Constructive knowledge was specifically found where employers ignored notices by INS stating that certain employees were not authorized to work.¹⁷ The Ninth Circuit overruled an ALJ's finding of constructive knowledge where the employer had failed to notice that the employee's name was misspelled on his Social Security card and a lack of lamination of

⁷ 8 C.F.R. § 274a.2(b) (2006).

⁸ 8 C.F.R. § 274a.2(b)(1)(i)(A) (2006).

⁹ 8 C.F.R. § 274a.2(b)(1)(i)(B) (2006).

¹⁰ 8 C.F.R. § 274a.2(b)(1)(ii) (2006).

¹¹ 8 C.F.R. § 274a.2(c)(2) (2006).

¹² 8 C.F.R. § 274a.2(b)(2)(ii) (2006).

¹³ 8 C.F.R. § 274a.1(j) (2006).

¹⁴ 8 U.S.C.A. § 1324a(a) (2005).

¹⁵ 8 C.F.R. § 274a.1(l)(1) (2006).

¹⁶ *Id.*

¹⁷ *Mester Mfg. Co. v. INS*, 879 F.2d 561 (9th Cir. 1989); *New El Rey Sausage Co. v. INS*, 925 F.2d 1153 (9th Cir. 1991).

the Social Security card.¹⁸ The Court disagreed with the INS argument that constructive knowledge should be found where the employer failed to notice the delay in presentation of a Social Security card, the lamination of the card, the misspelling of Rodriguez as Rodriquez on the Social Security card, the lack of any reference to the United States of America on the card, and the use of two family names on Rodriguez California drivers license but not on the card. In that case, the Ninth Circuit noted that “to preserve Congress’ intent...the doctrine of constructive knowledge must be sparingly applied.”¹⁹ More recent cases have broadened the interpretation of constructive knowledge to include instances where an employer is in possession of an I-9 which indicated the alien was out of status and failed to reverify.²⁰

Constructive knowledge arising from "reckless and wanton disregard" may have originally been intended for employers who accept employees through recruiters, but this section has been interpreted to include employers who recklessly entrust incompetent employees with hiring or I-9 compliance.²¹ Because whoever completes Section 2 of the I-9 does so on behalf of the employer, any knowledge acquired by the agent may be imputed to the employer, regardless of that agent’s actual authority to hire.²²

C. The Obligation to Reverify

Knowledge acquired by the employer after the initial hire may trigger an obligation to reverify the I-9 documents. The obligation to reverify I-9 documentation is triggered when 1) the temporary employment authorization expires, 2) the employer receives information from a government agency or through other sources that an employee may not be authorized to work, or 3) the employee presents a receipt for the application of an acceptable I-9 document.²³ Expiration of List B identity documents and the Permanent Resident Card would not warrant reverification, as they may be accepted at hire even if they are expired.²⁴

Reverification procedures should mirror initial I-9 procedures. The employee may choose which documents to present. An employer should not specify which documents, nor should it specify that the document provided must be a U.S. Citizenship and Immigration Service (USCIS) document. If any changes are made to the I-9, the employee should initial and date any updated information. Instead of reverifying through an entirely new form, and employer may use Section 3 of the I-9 form. Section 3 may only be used if the original I-9 form was executed within three years of the date of rehire. In all instances an employer may use a new form to reverify as well.

D. Social Security No-Match Letters

Last April, seven managers of IFCO Systems, the largest pallet services company in the country, were arrested on criminal charges for failing to terminate workers after being repeatedly notified that more than half of IFCO’s employees had invalid or mismatched Social Security numbers. Nearly 1,200 illegal workers were rounded up in raids on IFCO’s U.S. facilities. Employers must be aware of how their company responds to No-Match letters, because ICE has informally stated that it considers the percentage of employees who have received a Social Security No-Match and the employer’s failure to respond in determining good faith compliance.

1. When are they issued?

¹⁸ *Collins Foods International Inc. v. INS*, 948 F.2d 549 (9th Cir. 1991).

¹⁹ *Id.* at 555.

²⁰ *INS v. China Wok Restaurant, Inc.*, 1994 WL 269371 (O.C.A.H.O.).

²¹ *United States v. Carter*, 1997 WL 602725 (O.C.A.H.O.).

²² *Id.*

²³ 8 CFR § 274a.2(b)(1)(vi) (2006).

²⁴ U.S. Department of Homeland Security, *The I-9 Process in a Nutshell*. Office of Business Liaison. p.7 <http://www.uscis.gov/files/article/EIB102.pdf>.

Social Security No-Match letters are issued when the employee name and Social Security number provided on the W-2 form conflict with the Social Security Administration's (SSA) records. Out of the 240 million W-2 forms submitted, ten percent of those forms contain non-matching Social Security numbers. Last year 150,000 letters were sent to employers who had at least 11 employees with non-matching data and where the non-matching data constituted at least half of one percent of their employees. The SSA also issued 9 million letters to employees reminding them that correcting the information is in their best interest.

The SSA expects the employer to check typos and talk with employees about any discrepancies without demanding a Social Security card. If the discrepancy is unresolved, the employee should be advised to check with their local SSA office. There is no penalty from the SSA for not responding. The IRS may penalize employers \$50 for each W-2 Form filed with an incorrect SSN,²⁵ but to-date has made no efforts to fine employers. Employers will only face fines if they fail to respond to IRS notices that employee SSN information is incorrect, and not Social Security No-Match letters.²⁶

2. How is information shared between the SSA and ICE?

While there has been significant debate concerning information sharing between the SSA and ICE, currently the database of no-match employers is not used to target specific employers. In 1998 and 1999, the INS attempted to use SSA work records to identify unauthorized aliens in Operation Vanguard.²⁷ After significant criticism from workers, farmers, and industry leaders, the SSA limited INS's ability to check employee records to instances where INS had a "reasonable cause to believe that a worker is unauthorized."²⁸

Under IRS Ruling 6103, the SSA and IRS are not permitted to share the information with any other agency. Tax returns and return information are confidential and may not be disclosed by IRS and others having access to the information, with certain specific exceptions, because the confidentiality of tax data is considered crucial to voluntary compliance. ICE may receive the SS No-Match data from the SSA Office of Special Counsel when there is an ongoing investigation, but it is not used to select employers to target for I-9 audits or investigations.

3. How Must an Employer Respond under the Proposed Regulations?

On June 8, 2006, the Department of Homeland Security (DHS) issued a proposed regulation on how employers should respond to a Social Security No-Match Letter.²⁹ The proposed regulation describes "safe-harbor" procedures employers can follow after receiving a letter to avoid a constructive knowledge finding. The proposed regulation broadens constructive knowledge to include when the employer fails to take reasonable steps in response to (1) a Social Security No-Match letter or (2) written notice from the DHS that the employment authorization document submitted for I-9 purposes does not match DHS records.³⁰

Prior to this proposed regulation, the Social Security Administration and the legacy INS had indicated that a No-Match letter alone was not a reliable indicator of employment authorization.³¹ Under the proposed regulations, employers must 1) attempt to resolve the discrepancy within 14 days and 2) reverify employment

²⁵ 26 U.S.C.A. § 6721 (2005).

²⁶ Letter from Thomas Dobbins, Internal Revenue Service. AILA Doc. No. 03100745 (Oct. 7, 2003).

²⁷ Alison Siskin, *Immigration Enforcement Within the United States*. Congressional Research Service. Library of Congress, CRS-45, (April 6, 2006), <http://www.fas.org/sgp/crs/misc/RL33351.pdf>.

²⁸ *Id.*

²⁹ Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 71 Fed. Reg. 34,281 (June 14, 2006)(to be codified at 8 C.F.R. pt. 274a)

³⁰ *Id.*

³¹ Letter from David A. Martin, INS General Counsel, to Bruce R. Larson (Dec. 23, 1997), reproduced in 76 INTERPRETER RELEASES 203 (Feb. 9, 1998).

authorization through the I-9 procedure within 63 days.³² If the employer completes a new I-9 form for the employee, they should use the same procedures as if the employee were newly hired, except that documents presented for both identity and employment must (1) not contain the Social Security number of alien number may be used for employment authorization and (2) must contain a photograph.³³ Despite the fact that the regulation is not finalized, it represents the DHS interpretation of an employer's current obligations under today's immigration laws.³⁴

There has been some disagreement as to whether this expands an employer's obligation to make an inquiry after receiving notice of an undocumented worker. The DHS view of current obligations finds support in *Mester v. INS*, a Ninth Circuit case where an employer was found to have constructive knowledge after notice that three aliens were suspected of green card fraud, but failed to follow up on that information.³⁵ In *Mester*, the Ninth Circuit held that the employer must terminate an unauthorized employee within a "reasonable" time period. Determining a reasonable time period will include factors such as "the certainty of the information provided," and the steps taken by the employer to confirm it.³⁶ Ultimately a two-week delay in firing an undocumented worker after an employer received a Notice of Intent to Fine by the INS was found to constitute continued employment of an undocumented worker.³⁷

E. Good Faith Defense

If an employer has employed an undocumented worker, good faith compliance with I-9 procedures provides a "narrow but complete defense."³⁸ A person or entity that has complied in good faith with the requirements of employment verification has established an affirmative defense against unlawful hiring.³⁹ Completion of the I-9 form raises a rebuttable presumption that the employer has not knowingly hired an unauthorized alien, but the government may rebut the presumption by offering proof that the documents did not appear genuine on their face, the verification was pretextual, or that the employer colluded with the employee in falsifying the documents.⁴⁰ The good faith defense does not apply for employers who fail to make corrections on the I-9 after being given 10 days notice or employers who have a pattern and practice of hiring undocumented workers.⁴¹ Therefore setting proper policies and training employees who administer I-9 documents is critical to demonstrating good faith compliance.

³² Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 71 Fed. Reg. 34,281, 34,282.

³³ *Id.* at 34285.

³⁴ *Id.* at 34282. There has been some disagreement as to whether this expands an employer's obligation to make an inquiry after receiving notice of an undocumented worker. The DHS view of current obligations finds support in *Mester Mfg. Co. v. INS*, 879 F.2d 561 (9th Cir. 1989), where an employer was found to have constructive knowledge after notice that three aliens were suspected of green card fraud, but failed to follow up on that information.

³⁵ *Mester Mfg. Co. v. INS*, 879 F.2d 561.

³⁶ *Id.* at 567.

³⁷ *Id.*

³⁸ *United States v. Walden Station, Inc.*, 8 O.C.A.H.O. no. 1053, 810, at 813 (2000), 2000 WL 773098 (O.C.A.H.O. 2000), *See* Immigration and Nationality Act (hereinafter INA) § 274A(b)(6)(A), 8 U.S.C.A. § 1324a(b)(6)(A) (2005).

³⁹ *Id.*

⁴⁰ H.R. REP. No. 99-682, at 57 (1986) as quoted in *Collins Foods International Inc. v. INS*, 948 F.2d 549 (9th Cir. 1991).

⁴¹ Immigration and Nationality Act § 274A(b)(6)(B)-(C), 8 U.S.C.A. § 1324a(b)(6)(B)-(C) (2005). HIRAIRA Section 411. "Technical or paperwork violations of the employer sanctions provisions are exempted, as long as there has been a "good faith attempt" by an employer to comply with the verification requirement. The exemption will not apply if the employer fails to cure the violations within a ten-day window or if the employer has engaged in pattern and practice violations. This section applies to violations occurring on or after September 30, 1996."

F. Claims of Discrimination on the Basis of National Origin or Citizenship

In ensuring employment authorization, employers with greater than three employees may not discriminate on the basis of national origin or citizenship status except against unauthorized aliens.⁴² The anti-discrimination provisions act to limit overzealous employers from excluding lawful workers who appear foreign. Knowledge that an employee is unauthorized may not be inferred from an employee's foreign appearance or accent.⁴³ Discriminatory practices include copying identity documents for only certain employees, or scrutinizing documents more carefully for workers who look foreign. Pre-screening prospective employees through the I-9 process is also considered a discriminatory practice.

On September 30, 1996, the provisions regarding document abuse were amended to require the intent to discriminate.⁴⁴ Document abuse involves the refusal of documents or the request for more or different documents.⁴⁵ Employers should also avoid requests for specific documents such as the applicant's Social Security card. Any requests for an applicant's Social Security card should be made separately from the I-9 process. Where employers are found to have requested more or different documents than an employee chooses to present from List A or List B and C documents, they may be fined \$100-\$1000 for each individual determined to have suffered such document abuse.⁴⁶ Prior to the 1996 amendment, document abuse was treated as a strict liability offense. Since the amendment, employers who have rejected documents due to their lack of awareness of the receipt rule were not found to have intentionally discriminated.⁴⁷ Lastly, the date of employment authorization expiration should not be considered in the hiring process as that could be deemed to discriminate on the basis of immigration status.⁴⁸

Because the IRCA also prohibits discrimination in employment practices on the basis of citizenship or immigration status, employers must be aware of potential pitfalls in pre-hiring inquiries. The Office of Special Counsel maintains that employers may inquire in an interview or employment application whether or not an applicant is legally authorized to work in the United States.⁴⁹ Depending on the response of the applicant, the employer may not inquire any further.⁵⁰ If the applicant responds affirmatively, the interviewer should not inquire further into the basis of the employment authorization. If the applicant responds in the negative, the employer can inquire into the current immigration status of that individual. Because unauthorized workers are not protected from discrimination under the IRCA, such pre-hiring questions pose minimal risk. If the applicant lacks employment authorization, the employer is allowed to ask whether or not the applicant now or in the future requires sponsorship for employment visa status such as H-1B.⁵¹ Pre-employment questions should focus on employment authorization rather than specific status as a citizen or permanent resident, as those questions could be later interpreted to have been the basis for discriminating on the basis of citizenship.

Claims of unlawful discrimination are handled through the Office of Special Counsel for Unfair Employment-Related Discrimination (OSC) for employers with four to fourteen workers or Equal Employment

⁴² INA § 274B(a)(1), 8 U.S.C.A. § 1324b(a)(1) (2005).

⁴³ 8 C.F.R. § 274a.1(1)(2) (2006).

⁴⁴ 8 U.S.C.A. § 1324(a)(6) (2005).

⁴⁵ *Id.*

⁴⁶ 8 U.S.C.A. § 1324b(a)(6) (2005).

⁴⁷ *United States v. Diversified Technology*, 9 O.C.A.H.O. no. 1098, O.C.A.H.O. 01B00059 (2003).

⁴⁸ U.S. Dept. of Justice Office of Special Counsel. *Handbook for Employers*, p. 9, (2006)
http://www.usdoj.gov/crt/osc/pdf/en_guide.pdf

⁴⁹ Eileen Scofield, Newton Chu, Leigh Ganchan, Austin Fragomen, *Employment Verification Systems –Where Are We and Where Are We Going?* AILA IMMIGRATION & NATIONALITY HANDBOOK, p.518. (2006-2007 ed.) See also Office of Special Counsel Opinion Letter on Pre-Employment Inquiries. (Aug. 6, 1998).

⁵⁰ *Id.*

⁵¹ *Id.*

Opportunity Commission (EEOC) for employers with fifteen or more workers.⁵² Employers may be ordered to pay civil monetary penalties of \$250-\$2,000 per individual discriminated against for the first offense, \$2,000-\$5,000 per individual discriminated against for the second offense, and \$3,000-\$10,000 per individual discriminated against for subsequent offenses.⁵³ The variation in the fine imposed will be partly based on whether economic damage was done to the employee. It should also be noted that fines are discretionary, not mandatory.⁵⁴

The OSC recently celebrated its twentieth year of operations and issued an insightful report in November 2006.⁵⁵ From 1997 until 2005, the OSC secured \$1,374,664 in back pay for workers, as well as \$1,578,865 in civil penalties from employers. While those numbers include the \$200,000 that Swift & Co. was forced to pay in 2001, it is a bit misleading to say that OSC has been aggressive in pursuing discrimination charges against employers.⁵⁶ In the last three years, out of 1,038 investigations of employer discrimination, not a single case resulted in an ALJ order or fines.⁵⁷ This is in large part due to a shift in attitude from heavy handed penalties to educating employers through the OSC hotline and encouraging settlements.

G. The Extent of Personal Liability

The IRCA imposes liability on a “person or other entity” who knowingly hires undocumented workers. The Eighth Circuit held that the “person or other entity” language of the IRCA can impose joint liability on both the employer and the agent.⁵⁸ An agent of a company will not escape personal liability when hiring undocumented workers simply because he or she is acting on behalf of the company and not in an individual capacity. In larger companies, executives who have control over hiring policies may arguably be held individually liable should the company hire unauthorized aliens.

III. Recent Developments in IRCA

A. Changes to the I-9 Form

The I-9 form has changed relatively little over the years. On June 21, 2005, the DHS rebranded the I-9 Form and eliminated outdated references to the former Immigration and Naturalization Service (INS). Currently, the 1991 version, as well the 2005, is acceptable for IRCA compliance. Despite these minor changes, the required lists of documentation on the reverse side of the I-9 have not been updated. On November 12, 2006, the DHS announced a 60-day comment period on the I-9 form itself. At the end of this process, DHS expects to introduce a new form.

In an effort to comply with the Illegal Immigration Reform and Alien Responsibility Act of 1996, the INS issued an interim rule effective September 30, 1997 which has yet to be superseded by a final rule. The interim rule removes the following documents from the list of acceptable identity and work authorization documents: Certificate of U.S. Citizenship (List A #2), Certificate of Naturalization (List A #3), Unexpired Reentry Permit (List A #8), and

⁵² *Memorandum of Understanding Between The Equal Employment Opportunity Commission and The Office of Special Counsel for Immigration Related Unfair Employment Practices* (Dec. 18, 1997), <http://www.eeoc.gov/policy/docs/oscmou.html>.

⁵³ 8 U.S.C.A. § 1324b(g)(2).

⁵⁴ Upon an administrative law judge’s finding of a violation based on the preponderance of the evidence, he or she “also may require” a civil penalty. *Id.*

⁵⁵ U.S. Department of Justice, Office of Special Counsel for Unfair Employment-Related Discrimination. *OSC Update* (Nov. 2006), http://www.usdoj.gov/crt/osc/pdf/oscupdate_nov_06.pdf.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Steiben v. INS*, 932 F. 2d 1225, 1228 (8th Cir. 1991).

the Unexpired Refugee Travel Document (List A #9).⁵⁹ Note that many of the removed documents lack photo identification or sufficient security features.

The Unexpired Employment Authorization Document I-688B (List A #10) is no longer being issued as of October 1, 2006, although it remains acceptable as an I-9 document.⁶⁰ The Employment Authorization Document I-688B was issued by local Field Offices and contained outdated security features, and has been phased out by the Employment Authorization Card I-766. The INS began issuing the Employment Authorization Card I-766 in 1997 and contains more advanced security features such as a fingerprint and a bar code containing biometric data.

On February 2, 1998, the INS issued its proposed regulations that significantly reduced the number of acceptable documents and required that all documents be unexpired. The proposed regulations also introduced a reverification I-9A form. The INS has yet to issue a final rule either adopting or rejecting the proposed changes; therefore, the interim rule which eliminated four documents remains in force.

B. Shift from Civil Fines to Criminal Prosecution

Since 1986, employer compliance with the Immigration Reform and Control Act focused primarily on civil fines and a possible maximum penalty of six months and \$3,000 fine for pattern and practice of unlawful hiring.⁶¹ Penalties for violations of the I-9 form paperwork violations can result in a civil fine ranging from \$110 to \$1,100 per employee involved.⁶² In setting the proposed fine, the government must weigh five statutory factors: 1) the size of the employer, 2) the good faith of the employer, 3) the seriousness of the violation, 4) any history of previous violations, and 5) any actual involvement of unauthorized aliens. The severity of violation takes into account whether the forms simply contained errors, if important sections or attestations were incomplete, or if the requisite form and documents were retained at all.⁶³

In the late 1990s, the INS was having significant difficulties in pursuing civil fines against companies. Often the fine amounts were so low that employers considered them as the cost of doing business, and corporate entities would simply fold making it impossible to collect the fine. Recently, the federal government has shifted its focus from imposing civil penalties to criminal prosecution in order to punish employers who knowingly employ workers without work authorization.⁶⁴ In April 2006, ICE announced a new interior enforcement strategy as part of the Secure Border Initiative.⁶⁵ Under the strategy, ICE planned to target employers who knowingly employ unauthorized workers by bringing criminal charges against them.⁶⁶

⁵⁹ 62 Fed. Reg. 51001-51006 (Sept. 30, 2001) in accordance with Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 412. *The certificate of naturalization, the certificate of citizenship, and foreign passports are eliminated from the documents used for work verification. Also, a birth certificate as a document specifically identified for employment authorization is removed. This section takes effect upon designation of the Attorney General, but not later than September 30, 1997.*

⁶⁰ Aytes Memo on the Elimination of Form I-688B, Employment Authorization Document. August 18, 2006. <http://www.ilw.com/immigdaily/news/2006,0913-aytes.pdf>

⁶¹ INA § 274A(f)(1) (2006) , 8 U.S.C.A. § 1324a(f)(1) (2005); 8 C.F.R. 274a.10(a) (2006).

⁶² 8 C.F.R. § 274a.10(b)(2), as amended in 64 Fed. Reg. 47,099-47,101, (Aug. 30, 1999).

⁶³ *United States v. Hudson Delivery Service, Inc.*, 1997 WL 572126 (O.C.A.H.O.) (1997).

⁶⁴ Statement from Julie Myers, Assistant Secretary of DHS and Head of ICE. “*The most effective way [to enforce worksite regulations] is to bolster our criminal investigations against employers hiring illegal immigrants. For many employers, fines had become just another “cost of doing business.” More robust criminal cases against unprincipled employers are a much more effective deterrent than fines.*” USA TODAY. April 25, 2006.

⁶⁵ GAO Statement from Richard Stana. *Immigration Enforcement, Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*. GAO-06-895T. p. 4. (June 19, 2006).

⁶⁶ *Id.*

ICE investigators have particularly focused on employers who are involved in human trafficking, smuggling, and harboring. It is a felony to knowingly (1) bring an illegal alien into the United States (2) transport an illegal alien in order to further their unlawful presence (3) conceal, harbor, or shield an illegal alien from detection, or (4) encourage or induce an alien to illegally enter the country.⁶⁷ Congress expressly amended the statute to eliminate prior express exclusion of employers in the harboring statute.⁶⁸ While several courts have found that unauthorized employment alone is insufficient for a harboring conviction, additional acts such as facilitating a change in identity, willfully misrepresenting facts on the I-9,⁶⁹ assisting with the procurement of false documents, providing housing, and warning aliens about impending inspections will constitute harboring.⁷⁰ If the harboring was “done for the purpose of commercial advantage or private financial gain,” the maximum prison term increases from five to ten years.⁷¹ Employers who pay aliens low wages and fail to withhold taxes have been subject to the higher prison term.⁷²

If an employer is not convicted of harboring, another provision specifically addresses employers. Any person who during any 12 month period knowingly hires for employment at least 10 individuals, with actual knowledge that the individuals are aliens, shall be fined under Title 18 or imprisoned for not more than five years, or both.⁷³

C. Emerging Issues with Electronic Storage

On Oct. 30, 2004, Congress passed legislation giving employers the option of completing the I-9 form electronically.⁷⁴ On June 15, 2006, DHS issued regulations giving employers guidance on how I-9 forms may be written and stored electronically. The standards for electronic retention are fairly flexible and technology neutral.⁷⁵ Any system employed must include an audit trail, or timestamp whenever any I-9 is accessed or altered.⁷⁶ Other requirements include backup and recovery of records to protect against information loss and a retrieval system that allows searching based on fields.

The program must be able to attach an electronic signature to the completed I-9 at the time of the creation of the records, create and preserve a record certifying the identity of the person producing the signature, and provide a printed confirmation of the I-9 to the employer.⁷⁷ If the electronic signature does not meet the requirements stated, the I-9 form will be considered improperly completed in violation of INA § 274A(a)(1)(B).⁷⁸ While electronic storage creates the opportunity for a streamlined I-9 process and increased accuracy when fields are skipped or improperly entered, employers must take care in adhering to the regulatory standards when implementing the electronic storage.

D. Verifying Employment Authorization

⁶⁷ 8 U.S.C.A. § 1324(a) (2005).

⁶⁸ INA § 274(a) (2006), 8 U.S.C.A. § 1324(a) (2005).

⁶⁹ *United States v. Kim*, 193 F.3d 567 (2nd Cir. 1999).

⁷⁰ *Id.*

⁷¹ 8 U.S.C.A. § 1324(a)(1)(B)(i) (2005).

⁷² *United States v. Zheng*, 306 F.3d 1080 (11th Cir. 2002).

⁷³ 8 U.S.C.A. § 1324(a)(3)(A) (2005).

⁷⁴ Electronic Signature and Storage of Form I-9, Employment Eligibility Verification. 71 Fed. Reg. 34510 (June 15, 2006) (to be codified at 8 C.F.R. 274a.2)

⁷⁵ *Id.*

⁷⁶ 8 C.F.R. § 274a.2(e)(8), (2006).

⁷⁷ 8 C.F.R. § 274a.2(e), (g) (2006).

⁷⁸ 8 C.F.R. § 274a.2(h)(2) (2006).

With widespread document fraud and the requirement that employers accept documents that reasonably appear genuine, employers are faced with difficult choices in challenging a worker's employment authorization. Despite an employer's best attempts at verifying documents, only the issuing agency will know for certain whether or not documents are genuine and match the individual. Due to these enormous challenges, Congress authorized the INS to create a pilot verification system that would allow employers to ensure employment authorization.

1) The Basic Pilot Program

The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 authorized the DHS to create an online verification system that allows registered employers to quickly verify employment eligibility.⁷⁹ While Basic Pilot was only initially available in five states, since December 1, 2004 the program has been an option for employers nationwide.⁸⁰ Currently approximately 14,000 employers participate in the Basic Pilot Program. Because the Basic Pilot is a voluntary program, participation is further evidence of good faith compliance with the Immigration Reform and Control Act.⁸¹ DHS Secretary Michael Chertoff has stated that good faith participation in Basic Pilot will protect employers from civil and criminal penalties regarding the hiring of undocumented workers.⁸²

a) Using Basic Pilot

In order to participate in the Basic Pilot Program, an employer must sign a Memorandum of Understanding (MOU).⁸³ Under the MOU terms, the employer must verify all new hires within the enrolled hiring site.⁸⁴ The Basic Pilot cannot be used on prospective employees, employees who need to be reverified, or existing employees.⁸⁵ Therefore, Basic Pilot will not help an employer verify work authorization of existing employees. Employers who participate in the Basic Pilot must still complete the I-9 Employment Verification form and must only accept List B documents that contain a photograph.⁸⁶ Employers must submit the employee's information to Basic Pilot within

⁷⁹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Pub. L. No. 104-208, 110 Stat. 3009, Sept. 30, 1996.

⁸⁰ The passage of the Basic Pilot Program Extension and Expansion Act of 2003 as enacted in Pub. L. No. 108-456 expanded the program from the initial 5 states to all 50 states and required implementation no later than December 1, 2004.

⁸¹ Basic Employment Verification Pilot - Memorandum of Understanding. p. 3. "A *rebuttable presumption* is established by 402(b) of IIRAIRA that the Employer has not violated section 274A(a)(1)(A) of the INA with respect to the hiring of any individual if it obtains confirmation of the identity and employment eligibility of the individual in compliance with the terms and conditions of Basic Pilot." <https://www.vis-dhs.com/employerregistration/EEVPLegalNoticeBP.aspx> (hereinafter Basic Pilot MOU)

⁸² Press Release, Dept. of Homeland Security Secretary Michael Chertoff, (Dec. 13, 2006) "As a consequence of participating in Basic Pilot, if you participate in that in good faith, then you are not going to be charged criminally or be held civilly liable."

⁸³ Since February 2006, only electronic registration of Basic Pilot is available.

⁸⁴ *ILW I-9 Telephonic Seminar*. (Feb. 22, 2006), Gerri Ratliff, Chief of the U.S. Citizenship and Immigration Services Verification Division. Limiting the registration of Basic Pilot to hiring sites will prevent multi-national employers from having to use Basic Pilot on all new hires worldwide. Hiring sites are defined as locations at which the company processes new hires.

⁸⁵ Basic Pilot MOU, *supra* note 81, at p. 4; "Employer agrees not to use the Basic Pilot procedures for reverification, or for employees hired before the date this MOU is in effect." The limited scope of Basic Pilot to only new hires is a reflection of the IRCA's requirements to verify employment authorization of new hires. Certainly the scope of Basic Pilot in the future could extend to existing employees as proposed in the 2005 U.S. House Bill 4437.

⁸⁶ *Id.* p. 3.

three days of the employee's hire date.⁸⁷ The submission of information may only be done online, as there are no phone or faxed based alternatives. An employer may also choose to authorize a third party to process their employees through the Basic Pilot program.

Once the new hire's basic information has been submitted, most employers receive verification within 24 hours. While the U.S. Citizenship and Immigration Service administers the Basic Pilot program, both the SSA and the Department of Homeland Security provide their databases to process the queries. If the new hire is a citizen, the name and Social Security number will be submitted to the SSA. If the new hire is a non-citizen, then the name, Social Security number, and A (alien) number will be submitted to the DHS. If neither the SSA nor DHS can confirm work authorization within 24 hours, the employer receives a tentative non-confirmation response.

During this tentative non-confirmation period, an employer may not terminate employment⁸⁸ and should check the accuracy of the information for misspellings. If an employee does not contest or resolve the non-confirmation finding within 8 days, Basic Pilot issues a final non-confirmation notice, and employers are required to either immediately terminate the employee or notify DHS that they continue to employ the worker.⁸⁹ If the employee does contest the tentative non-confirmation, the employer will refer the employee to either the local SSA or DHS office.⁹⁰ At that point, the employee has 10 days to resolve the issue with the local agency; otherwise a final non-confirmation will be issued.⁹¹ If the employer continues to employ the worker after a final non-confirmation notice, a rebuttable presumption is created that the employer has knowingly employed an unauthorized alien.⁹² If the employer fails to notify DHS through the Basic Pilot system of the continued employment, the employer will face fines ranging from \$500-\$1000.⁹³ The Basic Pilot Program raises concerns as to what constitutes constructive notice of an unauthorized worker, and whether a non-confirmed worker can continue to work if they provide additional non-SSN related employment authorization documents.

b) Timeliness and Accuracy of Basic Pilot

Of the queries submitted to Basic Pilot, 92 percent are handled by the SSA and only 8 percent are passed along to DHS, which is responsible for verification for non-citizens.⁹⁴ Out of the 92 percent of queries handled by the SSA, 13 percent require a second verification, and employers are issued a tentative or final non-confirmation.⁹⁵

Of the 8 percent of inquiries submitted to Basic Pilot and routed to DHS, 7 percent are confirmed by the DHS automated verification check. In 1 percent of the DHS queries a tentative non-confirmation was issued and a secondary verification was required.⁹⁶ Secondary verifications are performed by 38 USCIS Immigration Status

⁸⁷ Government Accountability Office, IMMIGRATION ENFORCEMENT: PRELIMINARY OBSERVATIONS ON EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS, p.5. (June 21, 2005), <http://www.gao.gov/new.items/d06895t.pdf> (hereinafter GAO Worksite Report).

⁸⁸ IIRAIRA Title IV, Subtitle A § 403, (1996).

⁸⁹ GAO Worksite Report, *supra* note 87.

⁹⁰ Basic Pilot MOU, *supra* note 81, at p. 4.

⁹¹ *Id.*

⁹² IIRAIRA Title IV, Subtitle A § 403(a)(4)(C)(iii) (1996)

⁹³ IIRAIRA Title IV, Subtitle A § 403(a)(4)(C)(ii). (1996) An employer will have violated INA 274A(a)(1)(B) and subject to the fines stipulated in INA 274A(e)(5).

⁹⁴ GAO Worksite Report, *supra* note 87, at p.11.

⁹⁵ REPORT FROM OFFICE OF INSPECTOR GENERAL, SOCIAL SECURITY ADMINISTRATION, CONGRESSIONAL RESPONSE REPORT: EMPLOYER FEEDBACK ON THE SOCIAL SECURITY ADMINISTRATION'S VERIFICATION PROGRAMS. Appendix C-2 (Dec. 2006) . <http://www.ssa.gov/oig/ADOBEPDF/A-03-06-26106.pdf> (hereinafter SSA Basic Pilot Report)

⁹⁶ GAO Worksite Report, *supra* note 87, at p.11.

Verifiers who manually verify the employment authorization.⁹⁷ The majority of secondary verifications by USCIS are typically resolved within 24 hours, but some queries may take up to two weeks.⁹⁸ Previous studies indicated that Basic Pilot may have growing pains as more and more employers registered, particularly in the secondary verification. In the 2008 White House fiscal budget, an additional \$30 million was set aside to support and expand the Basic Pilot program.⁹⁹

DHS has made efforts to shorten the time required to update the system data on changes in immigration status.¹⁰⁰ Previously data on new immigrants was often unavailable for 6 to 9 months.¹⁰¹ Now that information is typically available for verification within 10 to 12 days of arrival in the United States.¹⁰²

In a December 2006 report by the Office of Inspector General for the SSA, 49 of 50 employers using Basic Pilot rated their experience as good or better.¹⁰³ Ten percent of employers surveyed experienced minor problems including: (1) periodic lack of access to the Basic Pilot system; (2) password problems; and (3) lack of a timely system response from DHS.¹⁰⁴ For example, a user in the food processing industry stated that DHS had taken more than 14 days to confirm the work authorization of an employee. The user notified DHS about the delay and the issue was timely resolved.

c) Weaknesses in Basic Pilot

Basic Pilot cannot detect when workers are using another person's real name and Social Security number.¹⁰⁵ As long as an unauthorized worker presents documents containing valid information, the Basic Pilot program will verify the employee as work authorized.¹⁰⁶ USCIS is currently exploring ways to reduce fraud by providing eligibility information with a digital photograph associated of the employee.¹⁰⁷ Despite the additional effort required for Basic Pilot, participation will not immunize the employer from I-9 compliance audits, nor would it preclude the possibility of a raid. Swift & Co. had tried unsuccessfully to head off the raids after company records were subpoenaed by ICE last spring.¹⁰⁸ In early December, company lawyers were denied a court injunction against the raids.

⁹⁷ *Id.* p. 13.

⁹⁸ *Id.*

⁹⁹ Press Release, White House, 2008 White House Budget Fact Sheet.
<http://www.whitehouse.gov/infocus/budget/BudgetFY2008.pdf>.

¹⁰⁰ *ILW I-9 Telephonic Seminar*. Gerri Ratliff, Chief of the U.S. Citizenship and Immigration Services (U.S.CIS) Verification Division. A new study by West Stat is expected to be released in the coming months citing that 92% of Basic Pilot inquiries receive immediate confirmation.

¹⁰¹ U.S. Dept. of Homeland Security, *Report to Congress on the Basic Pilot Program* (June 2004),
<http://www.aila.org/content/default.aspx?bc=1016%7C6715%7C16871%7C18523%7C11260>.

¹⁰² *Id.*

¹⁰³ SSA Basic Pilot Report, *supra* note 95.

¹⁰⁴ *Id.*

¹⁰⁵ GAO Worksite Report, *supra* note 87, at p.11.

¹⁰⁶ *Id.*

¹⁰⁷ *ILW I-9 Telephonic Seminar*. (Feb. 22, 2007) Gerri Ratliff, Chief of the U.S. Citizenship and Immigration Services (U.S.CIS) Verification Division. U.S.CIS will be introducing a Biometric Check Pilot in March 2007 that would allow employers to verify identities by displaying the identity photo of either the permanent resident card, visa, or passport.

¹⁰⁸ Marc Cooper, *Lockdown in Greeley*, THE NATION. Feb. 26, 2007,
<http://www.thenation.com/doc/20070226/cooper>.

Employers who are concerned about verification data being used as a means of targeting employers for I-9 audits may have reason to worry. In 2005, employers made over 900,000 queries into the Basic Pilot program, and the Government Accountability Office has recognized that this data could potentially be used for worksite enforcement.¹⁰⁹ While ICE has no direct role in monitoring the use of Basic Pilot,¹¹⁰ they have requested and received Pilot Program data from the USCIS on specific employers who participate in the program and are under investigation.¹¹¹

ICE officials have also stated that the program data could help target employers who do not follow program requirements. For instance, if the same Social Security number is submitted repeatedly through Basic Pilot, concerns may be raised about whether employees at that site are fraudulently using Social Security numbers and whether unscrupulous employers are blindly accepting them. This usage by ICE may be considered unlawful because the information is not being used not to determine whether an individual is an unauthorized alien, but to target other employees who may be associated with the same employer.¹¹²

d) The Future of Basic Pilot

Employers should take note that both comprehensive immigration bills passed in the House¹¹³ and the Senate¹¹⁴ included passages that would have made the Basic Pilot Program mandatory for employers. States who are frustrated with the federal government's inability to stop undocumented hiring have taken matters into their own hands. In 2006, Colorado enacted two laws which will affect employers who do business with the state and all employers in the state.

The first law authorizes the Colorado Department of Labor and Employment (CDLE) to conduct audits of all employers in Colorado. Beginning on January 1, 2007 all employers in Colorado will be required to retain the I-9 form and copies of the identity and employment authorization documents.¹¹⁵ Unlike IRCA, the state law has no good faith defense, and requires employers to "verify" the information and documents of the employee. The CDLE has interpreted "verify" to reach beyond visual inspection of I-9 documentation, and requires "examining the legal work status of each newly-hired employee."¹¹⁶ The CDLE states that employers may "verify" by using Basic Pilot or Social Security Number Verification Service (SSNVS).¹¹⁷ The Colorado law also differs from the IRCA by penalizing employers who have either failed to submit or submitted fraudulent documents in reckless disregard.¹¹⁸

¹⁰⁹ Government Accountability Office, *IMMIGRATION ENFORCEMENT: BENEFITS AND LIMITATIONS OF USING EARNINGS DATA TO IDENTIFY UNAUTHORIZED WORK.* p.10, (July 11, 2006), <http://www.gao.gov/new.items/d06814r.pdf>.

¹¹⁰ U.S. CIS maintains the Basic Pilot Program.

¹¹¹ GAO Worksite Report, *supra* note 87, at p.10.

¹¹² INA § 274A(d)(2)(c) (2006), 8 U.S.C.A. § 1324a(d)(2)(C) (2005). "Any personal information utilized by the system may not be made available to Government agencies, employers, and other persons except to the extent necessary to verify that an individual is not an unauthorized alien."

¹¹³ Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).

¹¹⁴ S. 2611. 109th Cong. (2005).

¹¹⁵ COLO. REV. STAT. § 8-2-122 (2) (2007).

¹¹⁶ Colorado Dept. of Labor FAQ's. p. 3. AILA Doc. 07011073. (Jan. 10, 2007)

¹¹⁷ The CDLE interpretation of verification may be incorrect, because under IRCA verification system has essentially referred to the I-9 and not Basic Pilot or SSNVS. Also the SSA has explicitly stated that SSNVS should not be used for employment authorization verification but solely to ensure correct wage reporting.

¹¹⁸ COLO. REV. STAT. § 8-2-122 (4) (2007).

In addition to the I-9, a one page “Affirmation of Legal Work Status”¹¹⁹ must be completed by the employer for each employee within 20 days of hire, and must be retained with the I-9.¹²⁰ Employers who fail to comply with this law face fines of \$5,000 upon the first offense, and \$25,000 on the second or any subsequent offense.¹²¹ This first law may be challenged on the basis that Congress has specifically preempted states from taking action in imposing civil and criminal sanctions against employers.¹²²

The second Colorado law effective August 7, 2006 requires employers who have public contracts for services¹²³ with the state, city, or county to participate in Basic Pilot.¹²⁴ Because state regulations have not been issued concerning the law, it is unclear whether the law includes employees working on the state contract regardless of whether they work in Colorado.¹²⁵ Employers who have public contracts must verify that subcontractors also comply with Basic Pilot. Where a publicly contracted employer has actual knowledge that a subcontractor has hired an undocumented worker, the employer has a duty to inform the contracting state agency within three days.¹²⁶ While there are no civil or criminal penalties for non-compliance, an employer found to be in breach will be held liable for actual and consequential damages for breach of contract.¹²⁷ A public list of non-complying employers will be maintained by the Secretary of State for two years.

Beginning July 1, 2007,¹²⁸ Georgia passed State Bill 529 and will also require employers who have public contracts to use Basic Pilot.¹²⁹ It is likely that more states will take action, as nine states have introduced similar legislation.¹³⁰ Many of these proposals contain employer verification requirements and additional penalties for employers who hire unauthorized workers.

2. IMAGE Program

¹¹⁹ Affirmation of Legal Work Status, Colorado Department of Employment and Labor, www.coworkforce.com/ice/AffirmationOfLegalWorkStatus.pdf.

¹²⁰ *Id.* See also Colorado Dept. of Labor FAQ’s, (Jan. 10, 2007) (available as AILA Doc. 07011073)

¹²¹ COLO. REV. STAT. § 8-2-122 (4) (2007).

¹²² INA § 274A(h)(2), 8 U.S.C.A. § 1324a(h)(2) (2005). The provisions of this section preempt any state or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens. See also Congressional Research Service. *Memo on Legal Analysis of Proposed City of Hazleton Illegal Immigration Relief Act Ordinance*. Jun. 29, 2006. <http://www.prdef.org/Civil/Hazleton/hazleton%20legal%20documents/Hazleton%20Memo.pdf>.

¹²³ *ILW I-9 Telephonic Seminar*. (Nov. 22, 2006). The Colorado Dept. of Labor has interpreted “services” to include capital construction, installation of equipment, ongoing software and computer maintenance. Services would not include pure purchases, hotel or building lease services, or catering.

¹²⁴ COLO. REV. STAT. § 8-17.5-101 (2007) (available as AILA Doc. 07010860).

¹²⁵ Colorado Dept. of Labor FAQ’s. (Jan. 10, 2007) (available as AILA Doc. 07011073), The Colorado DLE has interpreted HB 1343 to apply to out-of-state employers and employees, so long as they are performing a service under a public contract.

¹²⁶ COLO. REV. STAT. § 8-17.5-102(2)(b)(III) (2007).

¹²⁷ COLO. REV. STAT. § 8-17.5-102(3) (2007).

¹²⁸ Effective July 1, 2007 for employers with 500+ employees, effective July 1, 2008 for employers with 100+ employees and July 1, 2009 for employers with less than 100 employees.

¹²⁹ GA. CODE ANN. § 13-10-91 (2007) (available at http://www.legis.state.ga.us/legis/2005_06/pdf/sb529.pdf).

¹³⁰ Jenkins & Gilchrist, *Colorado Immigration Statute*, (Sept. 21, 2006), <http://www.jenkins.com/Image/Jenkins/Articles/Client%20Alert%20-%20Colorado%20Immigration%20Statute%20-%20Sept.pdf>.

The ICE Mutual Agreement between Government and Employers (IMAGE) program was recently introduced in July 2006 as a cooperative best practices program for employers.¹³¹ Under the program, ICE reviews an employer's hiring practices and policies and recommends ways to correct compliance issues. The program requires nine best practices including participation in Basic Pilot as well as a mandatory ICE audit of current I-9 forms.¹³² Other best practices include 1) semi-annual external audits, 2) establishing internal training on I-9's and fraudulent use of documents, 3) creating a No-Match letter protocol, 4) establishing a self-reporting procedure for any violation, 5) assessing compliance of sub-contractors, 6) creating a tip line, and 7) ensuring practices are not discriminatory.¹³³

Once an employer has registered and implemented ICE's best hiring practices, they will be deemed "IMAGE certified." As of the writing of this article, according to ICE, there were only "dozens" of companies that have taken steps toward enrollment.¹³⁴ No regulations or statutes have been issued on IMAGE, but ICE intends to release regulations on IMAGE in the coming months. ICE states on its website "that participation may be considered a mitigating factor in the determination of civil fine amounts should they be levied."¹³⁵ Informally ICE has stated that companies who undergo a civil audit as part of IMAGE will be given a two year waiver of any additional audits.

Perhaps one of the largest benefits to participating in IMAGE is decreased risk of raids, and if undocumented workers are found through ICE audits, an employer may be given more time to dismiss and transition to new workers. ICE has stated that it "will attempt to minimize disruption of business operations resulting from a company's self-disclosure of possible violations."¹³⁶ The Swift & Co. raids demonstrated that civil and criminal fines may not be the most critical liability that an employer may face. Simply a day of lost production cost Swift & Co. an estimated \$20 million dollars and another \$10 million to quickly find replacement workers. Ultimately this may drive Swift & Co., the second largest meat packing company in the world and a company that has been in existence for 150 years, out of business.¹³⁷

3. Social Security Number Verification Service

The Social Security Administration provides an online and phone¹³⁸ based Social Security number verification program.¹³⁹ The online SSNVS began in December 2004 and allows registered employers to verify ten

¹³¹ Press Release, DHS Highlights Best Practices for Maintaining Legal Workforces (July 26, 2006) (available at https://www.dhs.gov/xnews/releases/press_release_0966.shtm).

¹³² U.S. Immigration and Customs Enforcement. ICE Mutual Agreement between Government and Employers. <http://www.ice.gov/partners/opaimage/>.

¹³³ Tony Weigel. *Thinking Twice About Partnering with ICE – An Analysis of ICE's "Best Hiring Practices" and IMAGE*. IMMIGRATION LAW WEEKLY. <http://www.ilw.com/articles/2007,0130-weigel.shtm>.

¹³⁴ Darryl Fears, Krissah Williams, *In Exchange for Records, Fewer Immigration Raids*, WASHINGTON POST, Jan. 29, 2007. at A03.

¹³⁵ U.S. Immigration and Customs Enforcement. ICE Mutual Agreement between Government and Employers. <http://www.ice.gov/partners/opaimage/>.

¹³⁶ *Id.*

¹³⁷ Sandy Shore. *Swift Exploring Possible Sale*. FORBES, Jan. 24, 2007. <http://www.forbes.com/feeds/ap/2007/01/24/ap3358043.html>.

¹³⁸ Phone based verification can be accessed at 1-800-772-6270.

¹³⁹ Social Security Act § 232, 42 U.S.C.A. 432 (2005), authorizes SSA to collect wage and tax information and to supply it to the IRS. The Privacy Act, 5 U.S.C.A. 552a(b)(3) (2005), provides the authority to disclose personal information without consent in certain "routine" use situations. SSA's disclosure regulations mirror this Privacy Act criteria. See 20 C.F.R. § 401.25 and 20 C.F.R. § 401.110 (2006). Finally, the "Blue Book" explains the routine uses the SSA will employ under the Privacy Act authority, <http://www.socialsecurity.gov/foia/bluebook/600058.htm>.

names and Social Security numbers online and receive results immediately.¹⁴⁰ The online SSNVS system also allows employers to upload batch files of up to 250,000 names and Social Security Numbers and usually receive results the next government business day. The primary purpose of SSNVS is to ensure accurate wage reporting on W-2 Wage and Tax Statements. The W-2 provided by the employer must match SSA's records in order for the employee's wage and tax data to be properly posted to their Earnings Record.¹⁴¹

Unlike the Basic Pilot program, SSNVS can be used on new hires as well as current employees. SSNVS is not intended to determine employment authorization, and employers should not take punitive action against employees on the basis of a No-Match. If an employer elects to use the system, arguably an employer must comply with the No-Match Proposed Regulations issued by the DHS, requiring an employer to attempt to reconcile the records within 14 days, and then refill an I-9 within 63 after notice.¹⁴² An employer may not use the system on job applicants and is subject to Privacy Act sanctions for the misuse of the system.

IV. Employee Issues

A. Real ID Act and Driving Privilege Cards

The REAL ID Act, having passed the House and Senate without hearings or testimony, will have a significant impact on the ability of many lawful immigrants to obtain proper employment authorization.¹⁴³ REAL ID requires that after May 11, 2008, all states must require drivers license applicants to provide 1) proof of a Social Security number or verification that the person is ineligible for one and 2) proof that the applicant is legally present in the U.S. The state must then verify each of the documents with the issuing agency.¹⁴⁴ If a state fails to require these documents, then the state-issued identification card would not be accepted as valid identification by the federal government. Many states are passing joint resolutions opposing REAL ID.¹⁴⁵ Other states have made it increasingly difficult for immigrants to obtain drivers licenses.

On March 8, 2005, Utah enacted a law to limit the ability of immigrants to obtain drivers licenses.¹⁴⁶ Because drivers licenses are the most popular form of identification for I-9 purposes, the new law will significantly impact the ability of lawful immigrants to demonstrate employment eligibility. Prior to the passage of S.B. 227, applicants were only required to show documentation of identity and residence in the state which did not include immigration status. S.B. 227 now requires an applicant to show U.S. citizenship, permanent residency, refugee, asylee, or parolee status in order to obtain a drivers license that may serve as identification. Other lawful temporary residents and unlawful aliens will receive a "driving privilege card."¹⁴⁷ Driving privilege cards for permanent residents are valid for five years, and one year for those unable to prove legal presence that are able to meet the identification standards set in the Bill. More importantly, the temporary license is not valid for federal identification or official purposes such as I-9 verification.¹⁴⁸

¹⁴⁰ 69 Fed. Reg. 71,865 (Dec. 10, 2004).

¹⁴¹ *Id.*

¹⁴² 8 C.F.R. § 274a.1(l)(1)(iii)(B) (2006); Employers must respond if they receive "written notice from the Social Security Administration" that the records submitted do not match SSA records.

¹⁴³ Emergency Supplemental Appropriations, Legislative History. House Conference Report. Public Law 109-13. Title II. § 202(c)(3)(B) (May 11, 2005).

¹⁴⁴ *Id.*

¹⁴⁵ On Jan. 25, 2007, Maine passed a joint resolution. Georgia, Massachusetts, Montana, and Washington state may soon follow. 84 INTERPRETER'S RELEASES 352. (2007)

¹⁴⁶ UTAH CODE ANN. § 53-3-207 (2006).

¹⁴⁷ UTAH CODE ANN. § 53-3-207 (6)(a) (2006).

¹⁴⁸ *Id.*

Coupled with S.B. 227, Utah also enacted H.B. 223, effective July 1, 2005. H.B. 223 allows individuals with an SSN, ITIN, or proof of ineligibility for Social Security number to receive a drivers license if they can show lawful status consistent with Title II, Section 202(c) (2)(B) of the REAL ID Act. Therefore, temporary lawful residents may technically receive a drivers license, but they must go through the process of obtaining an ITIN or receiving a letter from the SSA showing ineligibility for a Social Security card. Applicants who have an ITIN instead of an SSN must present documents from the IRS or the SSA, or a letter from the IRS to verify their ITIN.

Utah's approach¹⁴⁹ in determining drivers license eligibility based upon a Social Security number is incongruent with the REAL ID Act which requires temporary drivers licenses for aliens with nonimmigrant visa status. H.B. 223 conflicts with the REAL ID Act as it allows an F-1 nonimmigrant student to obtain a drivers license if he is able to demonstrate that he does not qualify for a Social Security number, contrary to the REAL ID Act¹⁵⁰ which declares that States may only issue a temporary identification card to a valid unexpired nonimmigrant visa holder such as international students. Ultimately both the REAL ID Act and the Utah's new driving privilege cards will create significant hurdles for lawful immigrants attempting to prove work authorization.

B. Misrepresentations of Citizenship Status on the I-9

There are two primary concerns when a non-citizen completes Section 1. An individual must attest under the penalty of perjury that the individual is a citizen or national, permanent resident, or alien authorized to be employed.¹⁵¹ If the non-citizen marks citizen/national in Section 1, (1) they may have made a claim to U.S. citizenship for a benefit under the INA and are therefore inadmissible¹⁵² or (2) they may have made a false statement as to a material fact on a document required under the INA, or knowingly present an application or document that "fails to contain any reasonable basis in law or fact."¹⁵³

(1) Claim to U.S. Citizenship

It is unclear whether or not checking the citizenship/national box qualifies as a false statement of U.S. citizenship to obtain "a benefit" under the INA. In an unpublished decision, the Board of Immigration Appeals found that merely checking the "citizen or national" box on I-9 form is insufficient, without more, to support a false claim to citizenship charge.¹⁵⁴ Due to the ambiguity of the I-9 form, the BIA found no clear and convincing evidence demonstrating that the worker intended to represent himself as a U.S. citizen rather than a national of the U.S and decided that removal under INA Section 212(a)(6)(C)(ii) was not justified.¹⁵⁵

All U.S. citizens are also nationals of the United States,¹⁵⁶ but instances of national status without U.S. citizenship are limited.¹⁵⁷ U.S. nationality, but not citizenship, is bestowed on persons born in or having ties with "an outlying possession of the United States."¹⁵⁸ Those outlying possessions include American Samoa and Swains

¹⁴⁹ *Id.*

¹⁵⁰ REAL ID Act, Title II § 202(c)(2)(C) (2005).

¹⁵¹ INA § 274A(b)(2), 8 U.S.C.A. § 1324a(b)(2) (2005).

¹⁵² INA § 212(a)(6)(C)(ii), 8 U.S.C.A. § 1182 (a)(6)(C)(ii) (2005).

¹⁵³ 18 U.S.C.A. § 1546 (2005).

¹⁵⁴ *In re: Oduor*, A75 904 456. March 15, 2005 (on file with author).

¹⁵⁵ *Id.*

¹⁵⁶ INA § 101(a)(22). 8 U.S.C.A, § 1101(a)(22) (2005).

¹⁵⁷ Eileen Scofield, Newton Chu, Leigh Ganchan, Austin Fragomen, *Employment Verification Systems –Where Are We and Where Are We Going?* AILA IMMIGRATION & NATIONALITY HANDBOOK, p.511. (2006-2007 ed.).

¹⁵⁸ INA § 308, 8 U.S.C.A. § 1408 (2005).

Island.¹⁵⁹ The number of applicants for non-citizen national certificates has been so low, that the Department of State never created such a certificate. Instead, proof of national status would be indicated on a passport.¹⁶⁰

(2) False Statement

Prior to the passage of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), incorrectly marking U.S. citizen/national in Section 1 was not regarded as a violation of INA Section 274(c).¹⁶¹ IIRIRA makes it a crime to knowingly make a false statement as to a material fact in any application or document required under the INA, or to knowingly present any such application or document that contains a false statement or that “fails to contain any reasonable basis in law or fact.”¹⁶² The Eighth Circuit has found an alien was ineligible for adjustment because at the time that the box was marked, there was no reasonable basis in fact or law to a claim for either national or citizenship status.¹⁶³

Another basis for disqualification for adjustment of status lies in INA § 245(c). An alien, other than an immediate relative or specified special immigrant who accepts or continues unauthorized employment, is disqualified from adjustment of status.¹⁶⁴

V. Conclusion

With the Congressional debates on an immigration reform bill, worksite enforcement will continue to intensify in 2007. President Bush has requested in the 2007 budget \$41.7 million in new funds and 171 additional agents to increase worksite enforcement and prosecutions.¹⁶⁵ As with the Immigration Reform and Control Act of 1986, which legalized millions of workers while imposing new obligations on employers, any new immigration reform bill will likely impose a higher standard of due diligence required of employers.¹⁶⁶ With the government’s renewed enforcement efforts, simple precautionary measures such as internal audits and strict compliance with I-9 related regulations are now more important than ever.

¹⁵⁹ INA § 101(a)(29), 8 U.S.C.A. § 1101(a)(29) (2005).

¹⁶⁰ 8 U.S.C.A. § 1452(b)(1) (2005).

¹⁶¹ *United States v. Remileh*, 5 O.C.A.H.O. 724. No. 94C00139. Reported in 72 INTERPRETER RELEASES 319 (Mar. 6, 1995)

¹⁶² 18 U.S.C.A. § 1546 (2005) as amended by § 214 of IIRIRA.

¹⁶³ *Ateka v. Ashcroft*, 384 F. 3d 954. (8th Cir. 2004).

¹⁶⁴ INA § 245(c) (2006), 8 U.S.C.A. § 1255 (2005). If an immediate relative, *See* INA § 201(b), 8 U.S.C.A. § 1151(b) (2005).

¹⁶⁵ Press Release, White House, Just the Facts: President Bush’s Strong Worksite Enforcement Efforts. (June 19, 2006) (available at <http://www.whitehouse.gov/news/releases/2006/06/20060619-13.html>.)

¹⁶⁶ New legislation may include increased civil and criminal penalties as well as mandatory participation in Basic Pilot as proposed in the 2005 Senate and House immigration bills.

FREQUENTLY ASKED QUESTIONS FROM EMPLOYERS

1. Should an employer accept documents which have names swapped (John Doe and Doe John)?

Within the I-9 process, the employer must ensure that identity and employment authorization documents relate to the individual and are reasonably genuine.¹⁶⁷ In deciding whether the documents relate to the individual, the employer may choose to exercise reasonable business judgment in rejecting the document. Reasonable business judgment would include rejecting documents where the name on the identity document did not match the employment authorization document.

If the employer chooses not to accept the documents, the new hire may (1) select a different document to establish identity or employment authorization, or (2) he may choose to obtain a new document with a name that does match. If the employee applies for a new document (i.e. drivers license) within three business days of hire, he should present the receipt of the application for the document to the employer. The employer should record the receipt document in lieu of the actual document. The employee must present the actual document (drivers license) to the employer for inspection within 90 days of hire.¹⁶⁸

In exercising reasonable business judgment, the employer should uniformly apply the same standard. The DOJ Office of Special Counsel will not find this to be the basis of discrimination on the basis of ethnicity or nationality, if the policy not to accept swapped documents is applied consistently. If the employer chooses not to accept two documents, one with the name John Smith, and the other document with Smith John, then it should reject all documents where the last name and first name are reversed.

2. Should employers make copies of the employment authorization and identity documents?

The IRCA does not require employers to make copies of the supporting documentation.¹⁶⁹ However if employers choose to make copies, they must do so for all new hires regardless of citizenship or national origin. If copies are made they should be retained with the I-9.¹⁷⁰ Employers should be mindful that copies of supporting documentation could reveal errors in recording the document information in Section 2 of the I-9. On the other hand, employers would have greater ease in conducting internal audits to ensure that documents were recorded properly and indicating when reverification is necessary. If an employer chooses to stop copying I-9 supporting documentation, then a company-wide memo should be sent out to mark the end of the copying and ensure uniform compliance.

3. When can the Verification Systems be used?

The Basic Pilot system may only be used on current hires within three days of hire. Workers who were hired before the employer entered into the Memorandum of Understanding may not be verified against the system, nor may prospective employees be screened through the system.

The Social Security Number Verification System may be used on current employees as well as new hires. Registered employees also enter into an agreement with the SSA as to the proper use and disclosure of the information.

4. How do the two verification systems differ?

Basic Pilot is administered by the U.S. Citizenship and Immigration Service (USCIS), and it is intended to verify employment authorization. The Social Security Number Verification System is only intended to verify Social

¹⁶⁷ 8 C.F.R. § 274a.2(b)(1)(v) (2006).

¹⁶⁸ 8 C.F.R. § 274a.2(b)(1)(vi) (2006).

¹⁶⁹ 8 C.F.R. § 274a.2(b)(3) (2006).

¹⁷⁰ *Id.*

Security information to provide accurate W-2 statements. A No Match through SSNVS alone should not prompt an employer to take punitive action against an employee. Both the Basic Pilot and the SSNVS use data provided by the Social Security Administration, but Basic Pilot goes a step further by checking the immigration status of non-citizens.

5. May an employer continue to employ a worker who has notified them that their past I-9 documentation was invalid and that they now have valid documents?

It depends on whether the employer has a policy to terminate employees who have lied or committed fraud in the hiring process. If the employer has such a policy in place, it may choose to terminate the employee, but must do so consistently in similar situations.¹⁷¹ The employer may also elect to continue to employ the worker once new I-9 documents are recorded, as the employer did not knowingly employ an unauthorized alien.

6. Can a worker without a Social Security number be hired?

Employers often raise the issue of how to pay workers who do not have a Social Security Card. Neither the Internal Revenue Code or the Immigration Reform and Control Act require that an employee possess a Social Security number to begin work. They simply require that an application for a Social Security Number (SS-5) be made within seven days of commencing employment for taxable wages.¹⁷² An employer may request to see a Social Security card on the first day of work.¹⁷³ However this request should be made separately from the I-9 process, because a request to see a specific document may constitute document abuse.¹⁷⁴

In lieu of a Social Security card the employee may provide a receipt acknowledging that an application for an account number has been received¹⁷⁵ or a signed statement from the employee stating the employee's full name, present address, date and place of birth, father's full name, mother's full name before marriage, the employee's gender, and the date and place the employee filed a SS-5 Form Application.¹⁷⁶

If the employee has applied for a card, but has not received the card, then 000-00-000 may be entered into the payroll software to generate a paycheck. When the employee receives his/her Social Security card, he/she must present the document.¹⁷⁷ A Form W-2c (Corrected Wage and Tax Statement) may be filed to show the employee's correct Social Security number.¹⁷⁸

Typically the SSA takes about a week or two to process an SS-5 application, although sometimes there may be delays lasting several months.

7. Should an employer conduct an I-9 internal audit?

Conducting annual internal audits is advisable for employers for several reasons. Often I-9's have been administered by a variety of managers and employees who may have limited training on how to complete them. Most importantly, an audit will provide an indication of good faith compliance with the IRCA which will be the

¹⁷¹ *Garcia-Contreras v. Cascade Fruit Company*, 9 O.C.A.H.O. 1090, 2003 WL 634576. (2003) O.C.A.H.O. did not find discrimination where the employee had given Cascade a falsified documentation in 1994, but in 2000 attained legal documentation and status but was fired for violating the dishonesty policy.

¹⁷² 26 C.F.R. § 31.6011(b)(2) (2006).

¹⁷³ 26 C.F.R. § 31.6011(c) (2006).

¹⁷⁴ 8 U.S.C.A. § 1324b(a)(6) (2005).

¹⁷⁵ 26 C.F.R. § 31.6011(b)(2)(b)(iii) (2006).

¹⁷⁶ 26 C.F.R. § 31.6011(b)(2)(b)(iv) (2006).

¹⁷⁷ 26 C.F.R. § 31.6011(b)-2(b)(2) (2006).

¹⁷⁸ *Social Security W-2 Reporting Instructions & Information Answer. ID 377*. July 31, 2006.

primary defense in case of a civil fine or criminal prosecution case. Other indications of good faith compliance would include annual training for the employer agents who consistently handle I-9's as well as standard policies for reverification and I-9 processes. Internal audits allow employers the opportunity to review the I-9 forms at their own pace as opposed to the ten day notice that is provided before an ICE audit.

During the I-9 audit, at no point should employers discard or white out previous mistakes on previous I-9 forms. Any corrections or additions made should be initialed and dated. The primary focus of any internal audit should be on ensuring that all current and recent employees have a completed I-9 form. This can easily be done by comparing payroll records against I-9 records. Copies of identity documents which have been retained should match the recorded information. If an employee has indicated temporary work authorization in Section 1, the employer should reverify when appropriate.

8. Must an employer verify the employment authorization of independent contractors or laborers provided by an independent contractor?

No. Independent contractors are one of the three categories of workers exempt from I-9 verification : 1) grandfathered employees hired before November 7, 1986, 2) independent contractors, and 3) casual domestic workers who perform sporadic, irregular or intermittent service in private homes. While employers are not required to complete I-9 forms for independent contractors or laborers provided by contractors, employers may not use independent contractors in order to circumvent immigration laws and utilize undocumented workers.¹⁷⁹ Employers may still be held liable if they have constructive knowledge of such unauthorized employment. Constructive knowledge includes knowledge that a reasonable and prudent employer should know. Just as employers have a duty to investigate further if documents appear suspicious on their face, employers have a duty to investigate further if laborers provided by independent contractors are subjected to substandard working conditions or wages.

An argument has been made that if a company requires a contractor to complete I-9s and has the ability to inspect I-9s, then the company may have established sufficient controls over the contractor that would create direct liability for any undocumented workers hired by the contractor.¹⁸⁰

9. What should an employer do if 1) a worker provides the List A Permanent Resident Card or another non- SSN List A document, 2) receives a Social Security No-Match Letter, 3) and the worker continues to assert that the SSN provided is valid?

In the context of the DHS proposed regulations on No-Match letters, employers are placed in a difficult position as any new I-9 filled out in compliance with the SS No-Match Safe Harbor provision would simply be the same as the previous year's form. This area remains a grey area that has not been resolved by DHS. Because the Social Security No-Match Letter is issued sometimes years after the W-2 is submitted, an employer may feel like he or she is on a merry go round where they receive annual No-Match Letters only to ask the employee to re-confirm, and to refill out an I-9 with no changes. Despite the conflict, employers should continue to document their efforts to followup with the employee after a Social Security No-Match Letter is received, and reverify the I-9 form within a reasonable period of time.

10. What liabilities may a successor corporation inherit?

Generally, in cases involving a corporate reorganization, merger, or sale of stock or assets, no new I-9 form is necessary as long as the employer obtains and maintains the previous employer's I-9s.¹⁸¹ A successor employer is

¹⁷⁹ 8 U.S.C.A. § 1324a(a)(1) (2005).

¹⁸⁰ John A Pearce, *The Dangerous Intersection of Independent Contractor Law and the Immigration Reform and Control Act: The Impact of the Wal-Mart Settlement*. 12 BENDER'S IMMIGR. BULL. 9 (Jan. 1, 2007).

¹⁸¹ 8 C.F.R. § 274a.2(b)(1)(viii)(7) (2006); *An individual continues his or her employment with a related, successor, or reorganized employer, provided that the employer obtains and maintains from the previous employer records and Forms I-9 where applicable.* . .

exempt by regulation from completing I-9 forms where the predecessor employer has fulfilled that obligation.¹⁸² An employer who has acquired a business and retains the predecessor's employees is neither expected to dispose of I-9s previously executed by its predecessor in interest nor required to execute all new I-9s. However if the succeeding company chooses to retain the old I-9 forms rather than completing new ones, the succeeding company will be liable for any omissions and defects in the original I-9's.¹⁸³ Ultimately, the successor employer may choose to complete new I-9's for all employees to ensure proper completion.

11. Must a recruiter for a fee complete an I-9?

The recruiter must ensure that an I-9 is completed within three days of hire, not three days of referral, but recruiter may designate the employer as an agent responsible for completing the I-9.¹⁸⁴ If an agent is designated, the recruiter only needs to keep a copy of the I-9 form. A temporary agency that directly pays the worker would fall under the category of an employer as opposed to a recruiter and would be required to complete an I-9.

Numbers for I-9 Help

Basic Pilot Program Help

1-888-464-4218

Social Security Administration

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¹⁸² 8 C.F.R. § 274a.2(b)(1)(viii)(7) (2006).; *An individual continues his or her employment with a related, successor, or reorganized employer, provided that the employer obtains and maintains from the previous employer records and Forms I-9 where applicable. . .*

¹⁸³ *U.S. vs. Nevada Lifestyles Inc.*, 3 O.C.A.H.O. 518 (1993).

¹⁸⁴ 8 CFR § 274a.2(b)(1)(iv) (2006).