A Problem Worth Looking For: Immigration-Related Employer Investigations, Sanctions and Protection Plans

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Considering the present landscape of heightened immigration enforcement and recent changes to immigration law, businesses with a large non-citizen workforce need to take an honest look at their employment-related immigration practices. Failure to do so, particularly given the vitriolic and polarizing environment of the contemporary immigration debate, may unnecessarily expose those businesses to a wide variety of civil and criminal penalties. Even in a situation where a business itself is not responsible for any wrongdoing, an immigration enforcement action, such as an on-site "raid" or an I-9 audit, can cause significant disruption to the business, fear among the workforce, and often-time's negative and unfair press. This article summarizes employer obligations imposed by the Immigration Reform and Control Act[1] (IRCA), workplace investigations carried out by the bureau of Immigration and Customs Enforcement[2] (ICE), the ICE's recent attempts to access Social Security Administration (SSA) earnings data for use in its investigations, and the basic components of an employer sanction protection plan.

Why plan now?

On a national scale, ICE has increased its worksite enforcement actions significantly over the last three years. The number of criminal arrests has increased 390% between 2005 and 2007.[3] Administrative arrests went up by 265% in the same period.[4] In its 2007 annual report, ICE describes a "new era" of enforcement in which worksite enforcement is one of the agency's top priorities.[5] In addition, ICE is giving greater consideration to how an employer responds to "no match" letters from the Social Security Administration (SSA) in determining whether an employer "knowingly" hired or employed persons who are not authorized to work in the United States. In light of the increased attention paid to workplace issues, employers need to be prepared for these inquiries.

Audits and "No Match" Letters Trigger Action

Most worksite enforcement actions are preceded by an I-9 audit. A business without a plan outlining its response to a raid or I-9 audit is more likely to react with disorganization and panic, which could lead to poor decision making, bad press, and costly litigation. For example, when faced with an ICE subpoena to produce I-9 paperwork, an unprepared business may react impulsively and demand that certain employees produce new proof of their eligibility to work or face termination. For a business, this reaction invites equally concerning problems of a different nature.

The same law that requires employers to verify the work authorization of employees generally prohibits an employer from demanding the employee go through the I-9 process after they have already been hired, and from requiring the employee to produce work verification and identity documents that are different from those the employee produced when hired.[6] In such a situation, aggrieved private parties can sue for damages, and the government can seek civil penalties.[7]

Social Security "no-match" letters advise employers that the name and social security number of an employee reported on form W-4 does not match SSA records. Although "no-match" letters specifically state that they should not be considered a statement related to immigration status, DHS considers a "no match" letter as an indication that the subject of the letter may not have valid work authorization. In August 2007, DHS promulgated a rule requiring an employer who receives a "no-match" letter to fire the employee if it cannot resolve the no-match issue within 90 days.[8] The rule also states that it considers an employer's failure to follow the specific steps in the rule to respond to the "no match" letter as evidence the employer "knew" it was employing people who were not work-authorized.[9] The rule drew waves of criticism and ultimately a federal lawsuit that resulted in a district court order enjoining the rule from going into effect.[10] In March of 2008, DHS released a supplemental proposed rule that is substantively the same as the initial rule.[11] The controversy surrounding the rule is ongoing, making it imperative that employers track developments in this area.[12]

The Immigration Reform and Control Act—Asking the Impossible?

After the passage of IRCA, all employers are required to verify that employees hired after November 8, 1986 are authorized to work lawfully in the United States.[13] Employers verify work authorization through the use of the From I-9. For many businesses, the I-9 verification process presents little difficulty for human resources staff and employees. However, for employers in industries that historically hire large numbers of non-citizens employees, the I-9 process can be a daunting task. Although the I-9 process appears simple, it is governed by complex and counterintuitive rules regarding what documents can be accepted, when documents must be re-verified, how long documents must be retained and when employers must accept or refuse proffered documents. Reviewing the variety of documents permitted by Form I-9 is complicated by the fact that the employee can select from an array of documents to prove work authorization and the list of permissible documents changes over time, requiring Human Resource departments to keep abreast of the most current list.[14]

Among the many documents that a non-citizen may produce to establish work authorization are a lawful permanent resident card (Document I-551), a stamped card indicating admission to the country with permission to work (Document I-94), or a one-year employment authorization document (Document I-765).[15] Certain documents that establish eligibility for the Form I-9 have expiration dates on the face of the card while others do not. In some cases the expiration date is a signal that re-verification is

necessary, on other cards, a future expiration date does not trigger re-verification. For example, the I-751 card must be re-verified by the employer on or before the expiration date listed in the document. In contrast, older versions of the I-551 card have no expiration date and may bear a photo taken many years ago. Newer I-551 card expires 2 or 10 years from date of issue.[16] Both versions of the I-551 may be used to establish employment authorization; however, no re-verification is necessary for either document as long as the I-551 card was unexpired when presented. For businesses that are presented with a variety of documents, the I-9 process can present a confusing morass involving the types of documents they can accept, whether that particular version of the document is valid, and the significance of an apparent expiration date for re-verification purposes. The potential Catch-22 of IRCA is borne out by the tenuous line, which employers must walk in order to comply with the law: employers are required to check documents to verify an employee's eligibility to work while not engaging in conduct that could subject them to suit for "document abuse" or national origin discrimination. At the same time, an employer may face civil penalties for paperwork violations, or charges of "knowingly" hiring or employing unauthorized workers if it does not properly following the I-9 process.[17] However, an employer can be too vigilant when inspecting documents. If the employer overly scrutinizes documents, asks an employee to present additional documents other than those that listed on the Form I-9, or selectively targets certain employees for heightened review of their I-9 documents, it can be liable for "document abuse" under IRCA.[18]

Actual vs. Constructive Knowledge

The I-9 verification requirements are the means by which IRCA enforces a central mandate: that employers do not knowingly hire or continue to employ anyone who lacks work authorization. Significantly, the term "knowing" includes actual and constructive knowledge and is meant to cover a broad range of circumstances:[19]

> (l) 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
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> (i) Fails to complete or improperly completes the Employment Eligibility Verification From, I-9;
>
> (ii) Has information available to it that would indicate that the alien is not authorized to work, such as a Labor Certification and/or an Application for Prospective Employer; or
>
> (iii) 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.

The standard for constructive knowledge is sometimes referred to "willful blindness" and has been consistently tied to the employer's failure to take reasonable steps in response to information received that an employee may not be work authorized.

The simplest evidence of actual knowledge is an admission by an employee to the employer that they do not have valid work-authorization. Typically, these reports are made to co-workers and supervisors who work closely with the workforce. Every business should have a policy that clearly directs an employee on what to do in such a situation.

Conversely, establishing whether an employer has constructive knowledge of hiring or employing unauthorized workers requires consideration of the totality of the circumstances presented in the particular case.[20] Some relevant factors include the following:

- whether the employer is missing I-9 forms for each employee;[21]
- whether the I-9s are completed accurately and if not, whether the employer can demonstrate good faith efforts to comply with the I-9 requirements;[22]
- whether despite having I-9s on each employee, the employer has a large number of unauthorized workers;[23]
- whether the government provided specific or general information to employer about an employee's immigration status and the employer's response to the information;[24]
- whether the employer has a record of ignoring "no match" letters;
- The manner in which the employer inspected the I-9 documents, including review of back and front of the card or comparing the document against government-provided samples.[25]

An employer should not assume that it complies with IRCA simply because they have completed I-9s on all employees or because the employer is certain that the entire workforce is work authorized. An employer that has a perfect Form I-9 completed on each employee but who continues to employ somebody after knowing that the employee lacks work authorization has violated IRCA's prohibition of hiring and employing an unauthorized worker.[26] If an employer has no Form I-9 for any employee, but all employees are authorized to work, the employer has violated IRCA's paperwork obligations.[27]

Social Security Administration No-Match Letters

The SSA routinely sends letters to employers when the information reported to the IRS on form W-4 does not match the records of the SSA.[28] The aggressive effort of DHS to integrate its enforcement actions with SSA's practice of sending out these letters should make employers aware that it cannot ignore the letters without consequence. These letters are commonly referred to as "no match" letters. The SSA has traditionally stayed out of the immigration enforcement business. Instead, the duty of the SSA is to credit individual workers with their social security earnings. The "no-match" letters themselves state that it is not a statement about the employee's immigration status specifically warn employers not to take adverse action against

the subject employee solely because SSA issued the letter.[29] Special Counsel for INS, DHS, and for the Department of Justice Immigration Related Unfair Employment Practices office, concur that a "no-match" letter is not in and of itself sufficient grounds to inquire into, or draw conclusions about, an employee's immigration status.[30] All agencies acknowledge that a mismatch can be caused by a number of things such as a name change, a clerical error in the recording or transmission of information, or by intentional misrepresentation.[31] Nevertheless, DHS now seeks to insert a notice to be mailed out with the "no-match" letters advising employers that the agency will consider the employer's failure to follow particular steps in response to a "no match" letter as evidence that the employer had constructive knowledge that it continues to employ individuals who are not work authorized.

Does a Failure to Respond as DHS Asks Equal Constructive Knowledge?

Under a rule DHS promulgated in August 2007, an employer's failure to respond to a "no-match" letter could become the deciding factor for an ICE agent or judge who is deciding whether or not the employer had actual or constructive knowledge of hiring or continuing to employ unauthorized workers.[32] By trying to integrate its own enforcement efforts into the non-immigration related operations of an independent federal agency, ICE broadcasts a significant change in the importance it places upon these letters. If this rule goes into effect, the agency will have a new investigation tool which employers must respect.

The initial DHS rule, and the proposed amendments to the rule released in March 2008 require an employer to resolve the no-match situation within 90 days. The procedures include (1) the employer must check its internal records to determine if the document numbers and types were correctly captured and reported to the IRS, (2) if no employer error is detected, asking the employee about the discrepancy, (3) requesting the employee seek correction at the SSA office if the discrepancy is not explained, (4) completing a new Form I-9 with the new or corrected information presented by the employee, (5) using an SSA electronic verification system to verify the corrected or new information presented all within 90 days. The rule requires the employer to terminate the employee if the above steps are not completed and the issue resolved within 90 days.[33] If the employer follows these procedures, ICE would not consider the fact that the employer received a "no-match" letter as evidence that the employer knowingly hired or employed unauthorized workers. Although the rule suggests that it gives employers who follow it "safe-harbor" from an ICE determination that the employer knowingly employed unauthorized workers, it is only "safe harbor" from considering the fact that a "no-match" letter was received as evidence of constructive knowledge. ICE will still consider anything else it deems relevant when deciding if the employer knowingly hired or continued to employ unauthorized workers.

This attempt to bootstrap immigration enforcement efforts onto SSA data correction procedures caused a firestorm of criticism from labor, business, immigrants and privacy rights advocates who ultimately sued to enjoin implementation of the rule.[34] Opponents of the rule explained how "no-match" letters can be generated by events that have nothing to do with immigration status. In addition, critics explained that following the rule's procedures may expose employers to liability for "document abuse" under IRCA because it requires re-verification of employees at some time other than the date of hire and upon re-verification. Employers were also worried about claims of document abuse. The rule prohibits the employer from accepting any document called into question by a "no-match" letter upon re-verification. However, IRCA threatens penalties for document abuse upon an employer who dictates which documents listed on Form I-9 it will accept to prove an individual's identity and work authorization. To many employers, following the proposed rule is a Faustian bargain.

The Rule Challenged

The lawsuit filed to enjoin implementation of the original rule, *AFL-CIO, et al. v. Chertoff, et al.* raises six claims:

- The rule contravenes the governing statute by unlawfully expanding the definition of "knowing" established by IRCA, undermining Congressional intent to require employment verification only at the time of hire, and not exempting employees hired before November 8, 1986.
- The rule was promulgated in violation of the Regulatory Flexibility Act because the agency did not analyze the economic impact of complying with the rule upon employers;
- The rule is arbitrary and capricious in violation of the Administrative Procedures Act because DHS does not have access to SSA data and cannot possibly know how many people who received the letters are not work authorized;
- The rule is an *ultra vires* agency action on the part of the DHS and the SSA;
- The rule imposes unreasonably strict deadlines and will cause workers to be fired without due process of law;
- The rule impermissibly imposes immigration law obligations upon employees and employers. [35]

On October 10, 2007, the Court issued a preliminary injunction finding that the Plaintiffs raised serious questions as to the first issues listed above and the balance of hardships tipped in the favor of the Plaintiffs.[36] The order was quickly followed by DHS's motion to stay proceedings so it could engage in new rulemaking to address the Court's concerns.[37] On March 21, 2008, DHS released a supplement to the rule that resolved the first two claims listed above but the remaining issues are still unresolved.[38] Whether or not the proposed rule is permitted to go into effect, employers are forewarned that failure to consistently respond to "no-match" letters will be considered evidence in support of a finding that the employer may have knowingly continued to employ individuals who are not work-authorized.

Employers should have a carefully crafted procedure in place to ensure consistent and prompt response to "no-match" letters that does not violate IRCA's document abuse or anti-discrimination provisions. Electronic verification systems touted by the

government as a tool for employers to ensure that its employees are work-authorized may verify work authorization, but not a worker's identity. For example, the Swift Company had been using an electronic verification program called Basic Pilot since 1997, yet 1,300 of its employees were arrested for lacking work authorization when the company was raided in December of 2007.[39] In addition, the most commonly used government electronic verification system, "e-verify" (formerly called Basic Pilot), can only be applied to individuals who are hired *after* the date the employer adopts the verification system and has other significant limitations that our beyond the scope of this article.

Recent ICE Enforcement Activity

In recent years, ICE has made worksite enforcement a priority across the country reflected in increased budget allocations, a marked increase in high-profile worksite enforcement actions and a greater number of criminal charges being lodged against employers and employees arising out a worksite enforcement action. The enforcement environment can be felt in Idaho and neighboring states. In April 2008, the first worksite enforcement action to take place in at least five years was carried out at Specialty Wood Inc. in Homedale, Idaho.[40] In February 2008, ICE raided Universal Industrial Sale Inc. in Lindon Utah. In June of 2007, ICE carried out a raid of Fresh Del Monte Produce in Portland, Oregon. On December 6, 2007, ICE conducted a raid of multiple Swift Company facilities in six states.[41]

The Boise ICE enforcement efforts also include I-9 audits, seeking out individuals with prior removal orders, identifying those convicted of criminal offenses and ad-hoc interrogations. In September of 2007, ICE officers went door to door to homes in Blaine County looking for people with old removal/deportation orders and criminal convictions.[42] In November 2007, ICE stopped and questioned people at bus stops and supermarkets in Twin Falls and other Eastern Idaho cities.[43] For some time, clients have reported being stopped and asked for their immigration documents at road side "check-points" in Jerome County.[44] Aside from the Blaine County actions which were directed at particular people at particular addresses, ICE officers simply stopped and question individuals they suspect of being in the country unlawfully during other operations.[45] The basis of the officer's "reasonable suspicion" to stop individuals and subsequently detain them nearly always raises Fourth Amendment, Fifth Amendment and privacy concerns.[46]

The increase in enforcement actions in Idaho follows a national trend. On a national level, the number of criminal charges against business owners, executives and employees arising out of worksite enforcement actions has exploded.[47] Between 2005 and 2006, the number of criminal arrests arising out of worksite enforcement actions increased by over 400% and administrative arrests increased by over 200%.[48] The number of criminal and administrative arrests increased between 2006 and 2007, but at much smaller margins.[49] The most common criminal charges against employers arising out of worksite enforcement actions is for harboring individuals present without government authorization.[50] Universal Industrial Sales, Inc. of Utah and its human resources director were each indicted on charges of harboring undocumented individuals.[51] The human resources director was also indicted for encouraging or inducing undocumented individuals to remain in the United States unlawfully.[52] Last year the ICE budget was increased by 6.3% to $3.9 billion and included earmarks specifically for worksite enforcement.[53]

Employers are well advised to evaluate their immigration related employment practices and policies in light of this charged enforcement environment.

Employer Protection Plan Basics

An assessment of your client's readiness to withstand an I-9 audit or immigration raid and its potential exposure to civil sanctions or criminal charges begins with a single question: What tangible evidence can your business client point to as evidence of its efforts to comply with IRCA?

The success of an worksite enforcement action success depends in large part upon the element of surprise. Employers that regularly evaluate their immigration-related employment practices will be in the best position to note errors, correct inappropriate practices and build a record of good faith compliance with IRCA through business policies and demonstrated enforcement of immigration-related polices. Thoughtful policies will also minimize exposure to lawsuits for engaging in document abuse or national origin discriminating against certain types of employees. At a minimum, an employer with a significant non-citizen workforce should:

1. Conduct regular training on Form I-9 completion, document inspection, re-verification and purging for all Human Resources staff.
2. Conduct audits of Form I-9s for accuracy and timeliness on a regular basis so errors are promptly identified and corrected.
3. Maintain employee Form I-9 file separate from employee personnel file and an up-to-date current and terminated employee list for every employee for disclosure to ICE in the event of a Form I-9 audit.
4. Create a tickle system to alert Human Resources when an employee's work authorization will expire.
5. Create a written policy for responding to Social Security "no-match" letters which includes standard letters for notifying employees of the "no-match" situation with non-accusatory language that establishes a reasonable timeline for resolving the discrepancy.
6. Apply all policies uniformly and consistently.
7. Ensure that employer handbooks state the employer's commitment to follow all immigration-related employment laws and enforce policies consistent with that commitment.
8. Ensure that sub-contractors and temporary staffing agencies warrant that they comply with all immigration-related employment laws in its hiring and staffing. Consider adding an indemnification clause to all contracts with such entities and or requiring the subcontractor submit to an independent audit of their immigration-related employment practices.
9. Carefully investigate the immigration-employment practices of any business your client seeks to acquire

to ensure that your client is buying a host of immigration-related problems.

10. Create an action plan for responding to an I-9 audit and for responding to a work site enforcement action.

Conclusion

While there is no single action that an employer can do to guarantee that it will not be found to have knowingly hired or continued to employ a person who is not work authorized, by adopting the recommendations within this article, a business can build a defense to any alleged violation of IRCA. By implementing procedures to reduce the likelihood of Form I-9 errors and instituting a systematic response to "no-match" letters, an employer is in a better position to respond to enforcement actions and survive any allegation of wrong-doing. A solid employer immigration compliance plan will enable an employer to immediately respond to a Form I-9 audit or worksite enforcement action with confidence and will ensure that the employer has a concrete record of its good faith efforts to comply with all immigration-related employment laws, and minimize the risk of ICE enforcement actions and penalties. It is never too late for the employer to create and implement a compliance program. However, a company that finds and corrects its immigration-related employment problems now will have a stronger defensive position against any government action and may avoid an agency enforcement action all together.

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Endnotes

[1] The Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603 Stat. 100-3359 (codified in various sections of the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq.

[2] The Immigration and Customs Enforcement (ICE) bureau is part of the Department of Homeland Security (DHS). The Homeland Security Act of 2002 (HSA), Pub. L. 107-296, 116 Stat. 2135 (Nov. 25, 2002) abolished the Immigration and Nationality Service (INS) and transferred its responsibilities to three bureaus within the Department of Homeland Security (DHS). The Immigration and Customs Enforcement (ICE) bureau is responsible for the detention and removal of non-citizens including worksite enforcement actions. See 8 U.S.C. § 1103.

[3] ICE Annual Report 2007, 2006, 2005 available at www.ice.gov/doclib/about/ice07ar_final.pdf (last visited 3/21/08).

[4] *Id.*

[5] The increased focus on worksite enforcement including increased budget allocations, arrests and civil penalties recovered are reported in the 2007 ICE Annual Report available at www.ice.gov/doclib/about/ice07ar_final.pdf (last visited 3/21/08). In a news release discussing the February 2007 raid in Utah, ICE warns businesses that "...ICE is targeting unscrupulous employers by seeking criminal prosecutions and forfeiture of businesses' assets." News Release, ICE Investigation leads to multiple arrests at Lindon, Utah, business," Feb. 7, 2008 available at http://www.ice.gov/pi/news/newsreleases (last visited 3/19/08).

[6] 8 U.S.C. § 1324a(b), INA § 274A (verification requirement; requiring employers accept documents that appear "reasonably genuine" and appear to "relate to" the person presenting them); INA § 274B(a); 8 U.S.C. § 1324b (national origin/citizenship status discrimination and document abuse prohibited).

[7] INA § 274A(e), 8 U.S.C. § 1324a(e) (complaints can be filed by individuals, entities or a DHS official for alleged employment of persons who are not work-authorized); INA § 274B(b), 8 U.S.C. § 1324b(b) (any person or a DHS official who claims they were adversely affected by an unfair immigration-related employment practice can file charge). An alternate remedy for national origin discrimination may be available under Title VII of the Civil Rights Act of 1964, though no overlapping claims are permitted. Id.

[8] "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter." See 72 Fed. Reg. 45611 (Aug. 15, 2007).

[9] *Id.*

[10] *AFL-CIO, et al. v. Chertoff, et al.* No. 07-CV-4472 CRB (N.D. Cal. 2007), Order, Granting Preliminary Injunction, Oct. 10, 2007, Dkt. #135; Order Granting Defendant's Motion to Stay Proceeding Pending New Rulemaking, Nov. 11, 2007, Dkt. #142.

[11] "Safe-Harbor Procedures for Employers Who Receive a No-Match
Letter: Clarification; Initial Regulatory Flexibility Analysis." 73 Fed. Reg. 15944 (March 26, 2008).

[12] The status of the new rule is still pending as of the date of this article. The National Immigration Law Center (www.nilc.org) and the National Employment Law Project's Immigrant Worker Project (www.nelp.org) have all been closely following this issue and are likely to have current information on the subject.

[13] INA § 274A (b)(1), 8 U.S.C. § 1324a(b), 8 C.F.R. § 274a.2.

[14] For example, the new Form I-9 form issued in 2007 eliminates five list A documents, adds one list A document, and does not require the employee provide a social security number in Section 1 unless the employee participates in an electronic verification system. The new form must be in use by employers on December 27, 2007. Fact Sheet, "USCIS Revises Employment Eligibility Verification Form I-9," Nov. 7, 2007. Available at www.uscis.gov (last visited 11/2007).