STRATEGIC DEFENSE PLANS IN AN ERA OF CRIMINAL IMMIGRATION ENFORCEMENT

by Kathleen Campbell Walker[*]

THE EMPLOYER DRAFT

In 1986, Congress passed the Immigration Reform and Control Act of 1986 (IRCA).[1] IRCA was the result of an extremely long debate quite similar to the one we are currently experiencing on how to address illegal immigration. IRCA basically drafted employers as part of the national strategy to reduce illegal immigration by requiring employers to verify the work eligibility and identity of new hires. IRCA grandfathered employees who were hired on or before November 6, 1986.[2]

Efforts to encourage employers to comply with IRCA were minimal at best until the past two years. In addition, penalties imposed against employers under IRCA were typically only civil fines. The maximum criminal penalty for a pattern or practice violation of knowingly hiring undocumented workers is 6 months imprisonment for the entire pattern or practice violation and/or a $3,000 fine per unauthorized worker.[3] The penalties for I-9 paperwork errors may result in civil fines ranging from $110 to $1,100 per employee with respect to whom the error was made.[4] The fines for knowingly hiring or continuing to hire undocumented workers can be as high as $16,000 per unauthorized worker for third or subsequent offenses occurring on or after March 27, 2008.[5] In determining fines, the government must consider five factors:

- Size of the employer;
- Good faith of the employer;
- The seriousness of the violation;
- Whether or not the individual was an unauthorized alien; and
- Any history of previous violations of the employer.[6]

Attachment A to this article is a chart that categorizes substantive and technical I-9 violations from a penalty perspective.

In the current environment post-September 11, 2001, and with the loss of comprehensive immigration reform legislation in June 2007, Immigration and Customs Enforcement (ICE) now utilizes a new employment verification enforcement strategy. This strategy is a part of the Secure Border Initiative (SBI) of the Department of Homeland Security (DHS).[7] Instead of administrative penalties, ICE now focuses on the use of criminal enforcement sta-

---

Articles do not necessarily reflect the views of the American Immigration Lawyers Association.

[*] **Kathleen Campbell Walker** is the immediate past national president of the American Immigration Lawyers Association. She heads the immigration and international trade practice group of Brown McCarroll, L.L.P. from the El Paso office. She is also board-certified in immigration and nationality law by the Texas Board of Legal Specialization (TBLS) and has served as chair of the TBLS exam committee on immigration and nationality law. She has testified for AILA multiple times before the House and Senate on issues regarding border security, US-VISIT, and immigration reform. In addition, she has testified before Texas House and Senate committees on immigration issues. She has been named by *Texas Lawyer* magazine as one of five "go to" lawyers in the state of Texas on immigration law; one of the top 50 women lawyers in Texas, one of the top 50 lawyers in central and west Texas, and a Super Lawyer in the state of Texas by *Texas Monthly* magazine. In addition, she is recognized in Chambers USA, the *International Who's Who of Business Lawyers*, and *Best Lawyers in America* as a leading immigration lawyer.

[1] Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359.

[2] 8 CFR §274a.1(c).

[3] Immigration and Nationality Act (INA) §274A(f)(1); 8 CFR §274a.10 (a).

[4] 8 CFR §274a.10(b)(2) (for offenses occurring on or after Sept. 29, 1999).

[5] 8 CFR §274a.10(b)(1)(ii)(C); 28 CFR §68.52(c)(1)(iii).

[6] 8 CFR §274a.10(b)(2)(i-v).

[7] "Immigration Enforcement Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts," GAO-06-895T at 4 (June 19, 2006).

tutes against employers, which include "knowing" actions such as:

- Bringing aliens[8] into the United States through a place other than a designated port of entry;
- Transporting illegal aliens in order to further their unlawful presence;
- Concealing, harboring, or shielding an illegal alien from detection; and
- Encouraging or inducing an illegal alien to enter or reside in the country.[9]

As of August 2008, ICE had made more than 1,000 criminal arrests related to worksite enforcement investigations. Of the 1,022 criminally arrested, 116 were owners, managers, supervisors, or human resources employees, who face charges including harboring or knowingly hiring illegal aliens. The remaining criminal charges were against employees, who were alleged to have committed criminal actions including aggravated identify theft and social security fraud. In addition, ICE has made more than 3,900 administrative arrests for immigration violations during worksite operations. Please refer to Attachment B, the current Frequently Asked Questions regarding worksite enforcement posted on *www.ice.gov.* In fiscal year 2007, ICE obtained more than $31 million in criminal fines, restitutions, and civil judgments based on their worksite enforcement operations.

In testimony before the Homeland Security Subcommittee of the House Appropriations Committee on April 2, 2009, ICE Director of Investigations, Marcy Forman noted that:

> *In crafting our worksite enforcement strategy, ICE has restructured the worksite administrative fine process to build a more vigorous program. ICE has established and distributed to all field offices guidance about the issuance of administrative fines and standardized criteria for the imposition of such fines. We expect that the increased use of the administrative fine process will result in meaningful penalties for those who engage in the employment of unauthorized workers."*

Thus, going forward we may see fewer worksite raids, but more audits and high administrative fines since the costs are lower for ICE as far as investigative assets and the community impact is less severe.

ICE TARGETS

ICE typically targets industries in which a high percentage of undocumented workers are often hired as well as companies whose activities could pose a security threat to the public (*e.g.* nuclear facilities, electrical plants, airports, etc.). Undocumented workers are over-represented in certain industries such as construction.[10] The most concentrated presence of undocumented workers, according to a 2006 report by the Pew Hispanic Center, was in farming, cleaning, construction, food preparation, production, and transport occupations.[11] In the construction industry, unauthorized workers represented 36 percent of all insulation workers, and 29 percent of all roofers, drywall installers and miscellaneous agricultural workers.[12] For the first quarter of 2008, the unemployment rate for Hispanics in the United States rose to 6.5 percent, which is well above the 4.7 percent rate for all non-Hispanics.[13] The latest trends in the labor market represent a dramatic decline for Latino workers in jobs basically due to the slump in the construction sector. Latino immigrants who entered the United States in 2000 or later from any country lost 69,000 jobs in construction[14] Based on the statements by Secretary Napolitano during difficult economic times in the U.S., it appears that ICE enforcement efforts will be directed against unscrupulous employers and administrative fine audit actions are expected to increase as well as criminal actions against management.

The ICE Criminal Arsenal

With the stakes being a potential ankle bracelet or jail time for executive and management-level employees, it is critical for employers to take a proactive stance to establish a clear strategic defense

[8] Please note that the term "alien" is used in this paper to reflect the statutory language.

[9] INA §274(a).

[10] *See* R. Kochhar, "Latino Labor Report, 2008: Construction Reverses Job Growth for Latinos," Pew Hispanic Center (June 4, 2008).

[11] J. Passel, "The Size and Characteristics of the Unauthorized Migrant Population in the U.S.," at 11, Pew Hispanic Center (Mar. 7, 2006).

[12] *Id.* at 12.

[13] See *supra* note 10.

[14] *Id.*

plan to reduce corporate liability and exposure. In order to establish an effective plan, employers must carefully evaluate the current menu of criminal arsenal options being utilized by ICE investigators as well as current company hiring practices, state and local legal developments, and the changing landscape of federal laws implicated in worksite enforcement actions. Currently, ICE is using the following criminal arsenal against employers:

Harboring

A charge of felony harboring in violation of INA §274(a)(1)(A)(iii) carries a penalty of five years for each alien harbored, unless the crime is committed for commercial advantage or private financial gain, in which case, the maximum penalty is 10 years.[15] The elements of typical felony harboring offenses by an employer under the INA are:

- While knowingly or recklessly disregarding that a person has come to, entered, or remains in the United States in violation of law;
- Harbors, conceals, or shields from detection;
- Such person who has come to, entered, remained in the U.S. in violation of law.[16]

In determining what constitutes harboring, the Sixth Circuit held, in the 1928 case *Susnjar v. United States*,[17] that to convict someone of harboring, the government has to prove that the defendant intended to help the person in question evade or avoid detection by law enforcement officials. The *Susnjar* court determined that the "natural" meaning of to "shield" or "conceal" must be applied to harboring offenses. More recently, in *United States v. Belevin-Ramales,* the district court for the Eastern District of Kentucky addressed the government's burden of proof as to a jury instruction regarding the meaning of "harboring" under INA §274.[18] In that case, the government argued that it did not have to prove that the defendant harbored the alien "with the intent" to evade or avoid detection by law enforcement. The judge rejected the government's position and decided that a defendant must have acted with the intent that the alien evade or avoid detection by law enforcement before being found guilty of harboring under the statute.[19]

In *United States v. Rubio-Gonzalez,* the Fifth Circuit allowed a jury charge defining harboring as "any conduct tending to substantially facilitate an alien's remaining in the U.S. illegally."[20] In 2007, the 5th Circuit upheld the conviction of an employer who provided undocumented workers with false identity documents and who failed to submit record-keeping paperwork to the Social Security Administration (SSA) regarding their employment.[21] The court found that such actions could be equated to concealment. In addition, the Ninth Circuit has held that a job applicant's inability to speak English can be deemed a relevant factor as to a defendant's knowledge that a person is in the U.S. illegally in a harboring case.[22]

Note that because of the "reckless disregard" alternative to the knowing requirement described above, the government may use circumstantial evidence to attempt to prove knowledge of an undocumented worker's status. Thus, it is not uncommon to see the following assertions to try prove a harboring violation:

- Hiring workers with no housing.
- Providing housing to workers.
- Failing to investigate SSA no-match letters.
- Hiring workers with new identities, who were previously employed by the employer.
- Hiring workers who cannot speak English, but who claim to be U.S. citizens or legal permanent residents (ridiculous but true).
- Hiring workers with obviously fake work authorization or identity documents.

In *Trollinger v. Tyson Foods,*[23] the court determined that a civil RICO allegation met the harboring standard, because it alleged facts showing that the

[15] INA §274(a)(1)(B)(i) and (ii).

[16] INA §274(a)(1)(A)(iii).

[17] 27 F.2d 223 (6th Cir. 1928).

[18] 458 F. Supp. 2d 409 (E.D. Ky. 2006).

[19] *Id.* at 411.

[20] 674 F. 2d. 1067, 1073 (5th Cir. 1982).

[21] *United States v. Shum*, 496 F.3d 390, 392 (5th Cir. 2007); *cf. United States v. Acosta de Evans*, 531 F.2d 428, 430 (9th Cir. 1976) (holding that harboring means "affording shelter" and does not require proof of the intent to avoid detection).

[22] *United States v. Holley*, 493 F.2d 581, 582–83 (9th Cir. 1974).

[23] U.S. Dist. LEXIS 38882, 2007 WL 1574275 (E.D. Tenn. 2007).

defendants warned undocumented workers about raids and thus shielded them from law enforcement detection. The *Trollinger* case also supports the Sixth Circuit's requirement that to prove the crime of harboring, the government must establish beyond a reasonable doubt that the defendant acted with the intention that an unauthorized worker avoid detection. Recently, in *United States v. Khanani*, the Eleventh Circuit found that the lower court was correct in its refusal to give the defendants' requested jury instruction that "mere employment" in and of itself would not constitute a harboring action.[24] The court found that the jury instruction implicitly acknowledged this defense theory.[25]

In *Zavala v. Wal-Mart Stores*,[26] the court indicated that a Wal-Mart contractor's knowing employment and housing of undocumented workers did not support a harboring allegation that Wal-Mart sheltered such workers to avoid their detection by law enforcement.[27]

The following fact patterns in harboring cases were recently posted on *www.ice.gov*:

- August 7, 2008—Ana Elda Barrios and her husband, Dionel Barrios-Fraire, pleaded guilty to hiring and harboring undocumented workers. Ms. Barrios was a U.S. citizen who entered into a subcontractor agreement with Taylor Made Roofing. The couple aided and abetted each other by unlawfully harboring undocumented workers, transporting them to worksites, providing false documentation, creating fake I-9s, and paying the workers in cash to allow them to remain in the United States. Under federal law, each faced a maximum of five years in federal prison without parole, plus a fine of up to $250,000.
- July 30, 2008—The Chief Financial Officer of a Cincinnati area drywall company, Spectrum Interiors, was sentenced to three years probation, six months of home detention, and 100 hours of community service for harboring undocumented workers for commercial advantage and private financial gain. Ms. Robinson admitted that she and the president of the company knowingly conspired to use labor contracting companies, which provided undocumented workers at their job sites. The president of the company, Jeff Wolnitzek, pleaded guilty beforehand for the hiring of undocumented workers and was sentenced to 8 months in prison. An owner of one of the contracted labor firms agreed to cooperate with ICE before being deported to Mexico and arranged a meeting with Spectrum at which ICE agents recorded his admission to Spectrum of using undocumented workers.
- November 15, 2007—The owner and six managers of a northern Kentucky contractor, Progressive Builders, were sentenced to federal prison for conspiring to harbor undocumented workers. Robert, Jacqueline, and Howard Pratt, all U.S. citizens, pleaded guilty to conspiring to harbor undocumented workers for commercial advantage. Robert Pratt provided framing services for new home construction and used undocumented workers in his business. Mr. Pratt was sentenced to 18 months in prison followed by three years of supervised release. Robert Pratt operated two other companies, Pratt Quality Construction and HJP Construction, through his children (Jacqueline and Howard). Howard was sentenced to 12 months plus one day to be followed by three years of supervised release. Jacqueline was sentenced to three years of probation, including home incarceration for the first six months.

The lessons learned from these cases are that harboring can be found based on a variety of different activities, but normally not employment alone. Harboring can include hiring and continuing to employ someone while knowingly or recklessly disregarding the fact that they are undocumented. Harboring can also include paying a contractor while knowing or recklessly disregarding that the contractor is undocumented and/or that the contractor is employing undocumented worker(s). Further, harboring can be allegedly tied to providing housing to and/or transporting an undocumented worker to work. In all of these instances, the employer may be found guilty of harboring if the employer takes such actions with the intent to help the undocumented worker avoid detection by law enforcement authorities.

[24] 502 F.3d 1281 (11th Cir. 2007).

[25] *Id.* at 1287.

[26] 393 F. Supp. 2d 285, 306 (D.N.J. 2005).

[27] *Id.*

The government may also convict an employer of harboring, if the employer helped or "aided or abetted" in the harboring of an undocumented worker by someone else.[28] In addition, an employer can be found guilty of "conspiring to harbor" an undocumented worker even if the employer is not guilty of actually harboring that person.[29] The maximum criminal penalty per undocumented worker with respect to whom a violation of the "conspiring to harbor" statute applies is 10 years, while the "aiding or abetting" violation is five years.[30]

Money Laundering

Employers are often surprised to find out that the crime of money laundering may be alleged in an employment verification case. This alternative is alleged because of the use of the proceeds of felony immigration offenses. Normally, money laundering includes using proceeds from a "specified unlawful activity" in a financial transaction knowing that the money came from some type of criminal conduct. Money laundering is not limited to the actions of defendants in the business of laundering money for other people knowing that the money came from some criminal action. Money laundering can be extended to include using money derived from a person's specified illegal activity in a financial transaction, if the person knows that the money was from the proceeds of a criminal action.[31]

Money laundering charges require that the financial transaction be conducted in the proceeds of a "specified unlawful activity," which is contained in 18 USC §1956(c)(7) and incorporates most of 18 USC §1961(1). Examples of specified unlawful activities include violations of INA §274(a) including harboring, attempting to harbor, aiding and abetting harboring, and any conspiracy to hire an undocumented worker. The "specified unlawful activity" alternatives do not include the misdemeanor violation contained in INA §274A.[32]

In trying to determine the proceeds of felony harboring or conspiring to harbor or aiding and abetting harboring, the Eleventh Circuit upheld a trial court's determination that the profits or revenue indirectly derived from an undocumented worker's labor from the failure to pay taxes cannot be "proceeds" for money laundering purposes.[33] The court also held that monies received by the employer from the sale of goods or services were not "proceeds" of the labor used to produce the goods.[34] This point though is certainly under development and must be carefully monitored.

The maximum penalty for a felony money laundering conviction is 10 years for a violation of 18 USC §1957 or 20 years for violating 18 USC §1956. Each transaction is a separate offense constituting money laundering. A money laundering charge can result in an increase in the amount of property that would be forfeitable by the defendant upon conviction. All property involved in a money laundering violation is forfeitable, not just the illegal proceeds that may be laundered.[35]

Fines for felony harboring or conspiracy to harbor are the greater of $250,000 or twice the gain to the defendant.[36] Under 18 USC §1956, money laundering violations may be penalized by the greater of $500,000 or twice the amount of money laundered.[37] An 18 USC §1957 money laundering violation allows the court to impose a fine of up to twice the amount of money laundered.[38]

Forfeiture

Forfeiture may occur based on either a harboring or money laundering charge. Asset forfeiture can provide the government with substantially larger financial penalties than harboring fines and related offense convictions. The government may proceed with civil or criminal asset forfeiture regarding a harboring offense.[39] For conviction of a harboring

[28] INA §274(a)(1)(A)(v)(II).

[29] INA §274(a)(1)(A)(v)(I).

[30] INA §274(a)(1)(B)(i) and (ii).

[31] K. Brinkman, "Criminal Penalties in Workplace Immigration Cases," *AILA's Guide to Worksite Enforcement & Corporate Compliance* 101, 106 (AILA 2008).

[32] *Id.*

[33] *United States v. Khanani*, 502 F.3d 1281, 1296 (11th Cir. 2007).

[34] *Id.*

[35] *See supra* note 30.

[36] *See* 18 USC §3571(b)(3), (d). Organizations may be fined up to $500,000. 18 USC §3571(c).

[37] 18 USC §1956(a).

[38] 18 USC §1957(b)(2).

[39] INA §274(b).

offense, the court must order a forfeiture to the government of:

- Any conveyance used in the commission of the offense;
- Any property, real or personal, that derives from or is traceable to the proceeds obtained directly or indirectly from the commission of the offense; or
- Any property, real or personal that is used to facilitate, or is intended to be used to facilitate, the commission of the offense.[40]

It is important to recognize that the statute allows the forfeiture of proceeds and not just the profits of the offense.[41] Money laundering forfeiture whether it is civil or criminal allows the forfeiture of all property "involved in" the money laundering offense. This definition can be used in a broader sense regarding the forfeiture of all property involved in the money laundering offense—not just to "gross proceeds" or the proceeds of the harboring offense.[42]

Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO)[43]

Employers must also remember a different type of exposure tied to I-9 compliance issues, regarding the use of RICO, which allows private individuals to sue for injuries to their businesses or properties resulting from a pattern of racketeering activity perpetrated through an interstate or foreign enterprise based on criminal violations of the INA committed for financial gain.[44] This cause of action allows for the recovery of actual and treble damages, attorney's fees, and costs. The provisions of the INA which constitute predicate crimes for RICO include the smuggling, transporting, and harboring provisions of INA §274(a)(1)(a)(A) and the felony hiring provisions of INA §274(a)(3)(A).

Recently, Canyon County, a political subdivision of the state of Idaho brought a RICO action against companies and the director of a state migrant council alleging that the companies deliberately hired hundreds of workers, who they knew were not authorized to work in the U.S. The complaint also alleged that the director of the state migrant council harbored undocumented workers by assisting them in applying for public benefits. The county stated that the actions of the companies and the migrant agencies forced the county to pay millions of dollars in health care and law enforcement costs. This RICO complaint was dismissed by the district court and the Ninth Circuit confirmed the dismissal.[45]

Felony Hiring

For civil liability, unlawful hiring under INA §274A(a)(1) can be established through actual or constructive knowledge of a worker's unauthorized status. Constructive knowledge may also be sufficient for a misdemeanor pattern or practice violation under INA §274A(f). The felony hiring provisions of INA §274(a)(3) regarding the hiring of at least 10 individuals during any 12-month period require that the employer possess "actual knowledge" that the "unauthorized alien" was brought into the U.S. in violation of INA §274(a).

Please refer to Attachment C regarding typical ICE forms used concerning enforcement actions.

DOJ GUIDANCE ON PROSECUTING BUSINESS ORGANIZATIONS

In deciding whether to criminally charge an organization, federal prosecutors are now directed to refer to the August 28, 2008 "Filip Guidelines,"[46] which superseded the prior Department of Justice "McNulty Memorandum."[47] Under the Filip Guidelines, which came into effect on August 28, 2008, the basic considerations regarding business criminal prosecutions are the same as stated in the McNulty Memorandum. The main differences between the McNulty Memorandum and the Filip Guidelines are tied to changes in allowing credit for cooperation; waiver by a company of certain attorney-client privilege or work-product protections; prohibitions upon federal prosecutors to

[40] 18 USC §982(a)(6)(A).

[41] *Id.*

[42] *See supra* note 30.

[43] Codified at 18 USC §§1961–68.

[44] *See* 18 USC §1961(1)(F).

[45] *State of Idaho v. Synenta Seeds, Inc.*, 519 F.3d 969 (9th Cir. 2008).

[46] U.S. Department of Justice Memorandum, M. Filip, "Principles of Federal Prosecution of Business Organizations" (Aug. 28, 2008). *See* Attachment E.

[47] U.S. Department of Justice Memorandum, P. McNulty, "Principles of Federal Prosecution of Business Organizations" (Dec. 12, 2006). *See* Attachment D.

request the disclosure of non-factual attorney-client privileged communications and work product; prohibiting federal prosecutors from considering whether a company advances attorney's fees to its employees; prohibiting federal prosecutors from considering joint defense agreements entered into by a company in giving the company credit for cooperation; and prohibiting prosecutors from evaluating punishment of employees in evaluating the company's cooperation with the government.

In an effort to avoid criminal prosecution, a business must have a consistent screening process in the hiring of its employees and a consistent process for audit and review after hiring. Employers can reduce the likelihood of criminal prosecution by taking good faith efforts to ensure that their workforces are employment authorized. The McNulty Memorandum instructs prosecutors to consider such points as:

- The nature and seriousness of the offense, including the risk of harm to the public.
- The pervasiveness of the wrongdoing within the corporation.
- The company's history of similar conduct.
- The company's timely and voluntary disclosure of wrongdoing.
- The existence and adequacy of the company's pre-existing compliance program.
- The company's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with government agencies.
- Collateral consequences, including disproportionate harm to shareholders, pension holders, and employees not proven personally culpable.
- Adequacy of the prosecution of individuals responsible for the company's malfeasance.
- Adequacy of remedies such as civil or regulatory enforcement actions.

Typical suggestions to evidence a company's good faith efforts include:

- A written company policy regarding I-9 requirements.
- Adequate staff training for I-9 compliance.
- Internal auditing regarding immigration compliance efforts.
- Penalties or sanctions for failure to follow written compliance policies regarding immigration.
- Written policy regarding how to respond to information that an employee or a contractor might be an unlawful or undocumented worker.
- Written policy regarding how to respond to information that an employee or contractor may be an unlawful or undocumented worker.
- Conduct regular audits of I-9s and compliance processes.
- Utilize contractual provisions with contractors to require compliance with immigration laws and to provide audit results as well as a termination option for violations.
- Written policy regarding how to respond to no-match letters from SSA or DHS as well as notices from other federal entities.

ICE investigators typically review whether or not employers have been paying federal, state, and local taxes, paying workers in cash, and paying workers not as W-2 employees but instead as 1099 independent contractors.

THE KNOWLEDGE CONUNDRUM

The word "knowing" is the critical component in the analysis of potential liability in the employer sanctions arena. Section 274A of the INA provides that it is unlawful for a person to hire, recruit, or refer for a fee for employment in the United States, an alien knowing the alien is unauthorized with respect to such employment.[48] In addition, it is unlawful to continue to employ an individual knowing the alien is or has become unauthorized with respect to such employment.[49] It is possible for an entity not serving as the employer for W-2 purposes to be considered liable for "employing" an individual under this statute, if the employer has used a contract, subcontract, or exchange to obtain the labor of an alien in the United States knowing that the alien is unauthorized.[50] In fact, this provision places the contractor

[48] INA §274A(a)(1)(A).

[49] INA §274A(a)(2).

[50] INA §274A(a)(4).

for employment in the place of an employer for penalty purposes.[51] Further, INA §274 which concerns bringing in and harboring certain aliens also uses the term, "knowing" as well as "reckless disregard."[52] The regulation clarifies that the term "knowing," includes having actual or constructive knowledge.[53]

In specific, "constructive knowledge" is defined as knowledge that may fairly be "inferred" through notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about a certain condition.[54] Examples of such situations where the employer may, depending on the totality of relevant circumstances, have constructive knowledge that an employee is unauthorized include, but are not limited to:

- Failure to complete or improperly completing the Employment Eligibility Verification Form I-9;
- Acting with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its workforce or to act on its behalf; and
- Failure to take reasonable steps after receiving information indicating that an employee may be unauthorized, such as –
  - An employee's request that the employer file a labor certification or employment based visa petition on behalf of the employee;
  - Written notice to the employer for the SSA reporting earnings on a Form W-2 where the employee's name and social security number fails to match SSA records; or
  - Written notice to the employer from DHS that the immigration status document or employment authorization document presented or referenced by the employee in completing Form I-9 is assigned to another person, or that there is no agency record that the document has been assigned to any person.

The implementation of language in the regulation regarding the receipt of a no-match letter from the SSA or similar notice from DHS as to status has been enjoined by the U.S. District Court for the Northern District of California. These provisions regarding receipt of a no-match letter causing possible constructive knowledge of an unauthorized worker were proposed as a final rule by DHS on August 15, 2007, with an effective date of September 14, 2007.[55] The injunction against the implementation of the rule was entered by the court on October 10, 2007.[56] DHS appealed the preliminary injunction, but obtained a stay of the litigation while it revised its final rule regarding the concerns outlined by the petitioners in the lawsuit. On March 26, 2008, DHS issued a supplemental proposed rule after reviewing public comments.[57] On October 23, 2008, DHS published its supplemental final rule which essentially reissued the August 2007 rule "without substantive change."[58] However, the rule continues to be blocked by the preliminary injunction until the court either dissolves the injunction or issues a final decision on the rule. The main points of the rule include:

- An employer will be considered to have "promptly notified" an affected employee after the employer completes its internal record checks and has been unable to resolve the discrepancy (to be conducted within 30 days of receipt of the no-match letter or DHS notice), if done within five business days from the end of the 30 day internal review period.
- An employer does not have to wait until the completion of the 30 day internal review period to notify the employee of receipt of the SSA letter or DHS notice. In fact, DHS suggests that "immediately" notifying the employee of receipt of the letter or notice, as applicable, may be the most expeditious way to resolve the issue.
- As to employees hired before November 7, 1986 (grandfathered employees), employers are not subject to the statutory bars against hiring or continuing to employ such individuals without work authorization, and thus, the safe harbor process is not applicable.

[51] *Id.*

[52] INA §274(a)(1)(A)(iii).

[53] 8 CFR §274a.1(*l*)(1).

[54] *Id.*

[55] 72 Fed. Reg. 45611 (Aug. 15, 2007).

[56] Order Granting Motion for Preliminary Injunction, *AFL-CIO v. Chertoff*, No. 07-4472-CRB (N.D. Cal. Aug. 29, 2007).

[57] 73 Fed. Reg. 15944 (Mar. 21, 2008).

[58] 73 Fed. Reg. 63843, 63844 (Oct. 23, 2008).

In the interim, while the litigation continues, employers should be sure to have procedures in place to respond to no-match letters or notices from DHS and to show the company's good faith effort to resolve discrepancies. Please refer to Attachment K for an outline of the "safe harbor" procedures recommended by DHS for employers to follow in the event they receive a SSA letter or DHS notice. In addition, it is important to remember that SSA is still issuing notices to employees regarding discrepancies in their earnings records (known as Decentralized Correspondence or DECOR letters), even though SSA has suspended the issuance of earnings discrepancy letters (known as Educational Correspondence or EDCOR letters) to employers due to the DHS no-match regulation lawsuit.

In 1991, the Ninth Circuit held that an employer was on constructive notice where the employer had been told "whom the INS considered unauthorized and why," but did not obtain independent confirmation of eligibility other than the employee's own representations.[59] In addition, in *Collins Foods International, Inc. v. INS*, the Ninth Circuit found that an employer did not have constructive knowledge even though the employer may have determined that a social security card presented by an employee was fraudulent upon comparison with an example in the INS *Handbook for Employers.*[60] More recently, in another Ninth Circuit decision, *Aramark Facilities Services v. SEIU, 1877,*[61] the court determined that constructive knowledge is to be narrowly construed in the immigration context and requires positive information of a worker's undocumented status.[62] In addition, the court indicated that SSA no-match letters cannot by themselves put the company on constructive notice that a particular employee is undocumented.[63] The court noted that no-match letters can be generated for many reasons including "typographical errors, name changes, compound last names prevalent in many immigrant communities, and any inaccurate or incomplete employer records."[64] The court made reference to the SSA's estimates that approximately 17.8 million of the 430 million entries in its database (NUMIDENT) contained errors, including about 3.3 million entries misclassifying foreign born U.S. citizens as aliens.[65] In addition, in *Aramark* the employer only provided employees three days to correct the discrepancies. The court stated that this time frame was extremely short and that the current proposal by DHS was to provide a 90-day time frame for the employee to address a no-match letter.

It is important to note that in the proposed constructive knowledge definition, DHS provides a "safe-harbor" procedure for employers to follow when they receive a no-match letter or DHS notice as to status. Employers are led to believe that they will have immunity from a constructive knowledge charge based on a no-match letter, if they follow these procedures. However, DHS may still review the actions of the company in the totality of the circumstances to determine the existence of constructive or actual knowledge. Employers should not terminate an employee just because of receipt of a no-match letter. They must wait until the entire review process is complete to enable the employer to ascertain if the employee is not eligible for employment. The same comment holds true when the employers enrolled in E-Verify receive a tentative non-confirmation. A tentative non-confirmation should not on its own serve as a basis to terminate an employee.

Please refer to Attachment L regarding a form letter for employers to provide to employees concerning receipt of a no-match letter regarding their social security number. Constructive knowledge may also be found when an employer recklessly entrusts incompetent employees with I-9 responsibilities.[66]

In the proposed no-match rule commentary, DHS recommends that employers use the Social Security Number Verification System (SSNVS) to verify the validity of social security cards. There is no requirement, however, that employers actually use SSNVS. In fact, the SSA has stated that SSNVS should be used solely to ensure that records of a cur-

[59] *New El Rey Sausage Co. v. INS*, 925 F. 2d 1153, 1154 (9th Cir. 1991).

[60] 948 F. 2d 549 (9th Cir. 1991).

[61] *Aramark Facilities Services v. SEIU Local 1877*, 530 F.3d 817 (9th Cir. 2008).

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *United States v. Carter*, 7 OCAHO 931, OCAHO Case No. 95A00164 (May 9, 1997).

rent or former employee are correct for tax reporting purposes.[67] SSA notes that SSNVS may not be used to screen applicants for employment before they are hired and must be uniformly used for the entire workforce. Thus, SSNVS, should only be used for new hires or to correct records for tax reporting purposes. Note that utilizing the SSNVS can result in a notice which is similar in impact to the receipt of a no-match letter from SSA, if the SSNVS response indicates that there is a discrepancy regarding the employee's social security number (SSN).

It is also important to note that there is no statutory or regulatory requirement that a job applicant possess or provide a SSN at the time of application or at the time of commencement of employment. The Internal Revenue Service (IRS) *Employer's Tax Guide* states that not all new employees will have applied for social security numbers when employment begins.[68] The guide notes that if the employee has requested an SSN and has not received it, the employer may write "SSN applied for" or "000-00-0000," if filing electronically, in the SSN space. Once the SSN is received, the employer should file a copy A of Form W-2C to correct the wage statement so that it reflects the employee's correct SSN.

Employers must solicit an employee's SSN at the time of hire for tax purposes.[69] If an employee does not have a number, IRS regulations require that the employee apply for one within seven days of commencing employment.[70] An IRS form W-4 can be used as the employer's initial request for the employee's SSN. It is important to separate the solicitation of an employee's SSN from the I-9 process, since an employer may not require an employee to provide his SSN for section 1 of the I-9 (unless the employer is enrolled in E-Verify). This suggestion also applies regarding employment application forms. It is important to remember that it is possible for the solicitation of the SSN to be seen as an inappropriate mandate of an SSN for proof of work authorization under the I-9 regulations. The request for the SSN should be done for payroll purposes, not during the I-9 process.

THE CONTRACTOR'S DILEMMA

In 2005, Wal-Mart Stores, Inc. agreed to make a payment of $11 million dollars to the Treasury Forfeiture Fund for the purpose of promoting future ICE law enforcement programs and activities. Please refer to Attachment F, the Wal-Mart Consent Decree and Order, which resulted from ICE enforcement actions conducted from 1998 through 2003 against floor cleaning contractors who were knowingly hiring, recruiting, and employing unauthorized aliens in violation of INA §274A. This enforcement action resulted in the apprehension of 245 undocumented workers in October 2003, who were employed by independent contractors at Wal-Mart Stores in 21 states. As part of the consent decree, Wal-Mart was directed to establish compliance programs to verify that independent contractors were taking "reasonable steps" to comply with immigration law in their employment practices and to cooperate truthfully with any investigation. Wal-Mart was directed to train all of its store managers and future store managers regarding their legal obligations to prevent the knowing hiring, recruitment, and/or continued employment of unauthorized workers while also complying with pertinent anti-discrimination laws.

In response to this consent decree, Wal-Mart created one of the most conservative and aggressive compliance approaches regarding both direct and indirect employees. Typical Wal-Mart practices include:

- Provision that the contractor is responsible for employment verification and compliance with immigration laws. The general contractor is also required to confirm that it has the same language in its contracts with subcontractors.
- Contract provisions indemnifying the general contractor from any penalties or liabilities due to violations of the subcontractor.
- Provision in the contractor's agreement providing for possible termination of the agreement due to immigration violations by a subcontractor.
- Requirement that a contractor have properly completed I-9s for each employee who will perform work on any project concerning Wal-Mart.

---

[67] SSA, Business Services Online, Social Security Number Verification Service (SSNVS) Handbook, available at *www.ssa.gov/employer/ssnvs_handbk.htm*.

[68] *See* IRS Publication 15, Circular E, *Employer's Tax Guide.*

[69] 26 CFR §31.6011(b)-2(c)(2).

[70] 26 CFR §31.6011(b)-2(a)(2).

- Requirement that the contractor maintain photocopies of all supporting employment eligibility and identity documentation for all employees.
- Requirement that the contractor provide copies of the I-9 forms and supporting eligibility identity documentation for each employee to Wal-Mart. We discourage this alternative because of the additional provision of potential constructive knowledge to the company.
- Requirement that the contractor provide a certification letter indicating that it has complied with the verification requirements required by the agreement.
- Requirement that the contractor cooperate in the event that an audit is requested by the general contractor or the government of the contractor's I-9s. This requirement creates issues regarding the privacy obligations of the subcontractor as well the contractor.
- Other actions taken in an attempt to insulate a general contractor from liability are:
  - Requiring the contractor to designate a third party I-9 auditor and providing a report regarding the audit results.
  - Requiring that the contractor participate in a government verification program such as E-Verify, IMAGE, or SSNVS.
  - Requiring that no subcontractor employee may enter the site unless they have a badge, which is issued to the employee after verifying work eligibility and identity under INA §274A.
  - Allowing the owner or general contractor to terminate the subcontractor's services and remove its employees from the worksite based on non-compliance with any of the contractual requirements.

Employers walk a fine line regarding possibly increasing their own liability based on the amount of access required in their contracts as to I-9 documentation and procedures. We do not recommend that the employer actually review the I-9s of its contracted parties, but instead place the burden upon the contracted party to represent to the contractor that all government compliance requirements have been met.

THE DEFENSE PLAN

A Houston History

In preparing for a potential subpoena from a U.S. District Court regarding INA §274A violations, it is instructive to take a look at the recent U.S. District Court of the Southern District of Texas cases involving Action Rags, USA and Shipley Do-Nut Flour and Supply Company. Please refer to the following attachments.

- Attachment G—Application and Affidavit for Search Warrant regarding Action Rags, USA.
- Attachment H—Plea agreement filed regarding Shipley Do-Nut Flour and Supply Company.

In the Action Rags case, a criminal complaint charged the owners and managers of Action Rags, an exporter of used clothing, with conspiracy to harbor illegal aliens, inducing illegal aliens to come to the U.S., and engaging in a pattern or practice of hiring illegal aliens. In the search warrant filed by ICE, the warrant included an extensive list of records to be seized. The records included: employee records, payroll records, IRS forms, insurance paperwork, company board meeting minutes and memoranda, the contents of a safe on the premises, as well as data capable of being interpreted by a computer. The request for employee records included: I-9 forms, W-4 forms, deduction of wage forms, payroll information, payroll files of all employees or contractors, ledgers of payments to employees, SSA employer correction request letters (no-match letters), SSA requests for employee information letters, identification badges issued to all workers, performance evaluations, and charts of accounts. The payroll record request included: wire transfers, currency transaction requests, credit card statements, credit card receipts as well as check registers, etc.

A review of the application and affidavit for the search warrant in Action Rags, makes it apparent that ICE conducted its investigation by including a review of the company's website as well as obtaining information through an informant. In this instance, there was a Treasury Enforcement Communication Systems II (TECS II) check which revealed a DHS tip line entry against the business. In addition, there were allegations that the company paid employees in cash and that the employees began working at the company with no employment documents. ICE agents utilized an undercover person to attempt to obtain em-

ployment at the company without documents. This source was also allegedly directed by management to go to work after completing an application for employment but never completing an I-9 form. In addition, there was allegedly collusion by management to arrange for employees to obtain fake documentation to show work authorization.

In the Shipley Do-Nut case, the company agreed to give up the right to be indicted by a grand jury and pled guilty to conspiring to hire undocumented workers in violation of INA §274A. The company agreed to the following:

- To revise its immigration compliance program and to ensure that the company has procedures and personnel in place to be in compliance with federal immigration laws.
- To settle discrepancies between SSNs provided by the company or company employees on I-9 forms to the government and SSNs noted in the SSA EDCOR letters within 60 days of receiving the letter.
- To hold I-9 compliance workshops for all company employees who take part in the hiring of new employees or other administrative functions. The Shipley company was advised that its punishment range for a violation of INA §274A was a fine of up to $500,000 and a maximum term of probation of up to 5 years.

In the criminal investigation, it was noted that three current and former managers of the company were verbally abusing the civil plaintiffs and other undocumented workers at the company. In addition, one of the managers was charging undocumented workers for "free" housing that the company had provided and was receiving massages from workers. In addition, Lawrence Shipley III, the company owner, conceded that workers performed various tasks at his ranch located outside of Houston on at least a dozen occasions at his direction. During the investigation, ICE identified 27 employees as undocumented. The managers and supervisors of the company were not provided any formal training regarding properly completing I-9 forms. When ICE agents reviewed the I-9 forms, they found over 100 serious violations on 96 forms. In addition, current and former employees of the company advised ICE that they had obtained fraudulent work authorization documents from a flea market located in Houston. On at least one occasion, one of the managers had provided a false SSN to an undocumented worker, which was one number different from his own SSN. Twenty-seven undocumented workers were also living at company-provided housing near the warehouse. Further, ICE found approximately 42 no-match letters sent by the SSA in the workers' files placing the company on notice that the workers possibly did not have valid SSNs. In addition, similar no-match letters were sent to the company advising it of SSN discrepancies. Shipley Do-Nuts requested that the government accept a payment of $1,334,000 for forfeiture in lieu of company properties.

The Assessment

Based on the review of the Shipley and Action Rags cases and the level of documentation requested by ICE in its subpoena, it is critical for companies to consider and thoroughly analyze what their hiring processes and payroll documentation records reflect. In making this assessment, company management should consider the following elements:

- A flow chart of the entire hiring process including when documentation is reviewed and work eligibility and identity is assessed.
- An audit of I-9 processes and procedures which should include:
  - An audit of all I-9s subject to the retention requirement of the longer of one year from the date of termination or three years from date of hire. Please refer to Attachment J regarding a sample audit report.
  - Creation or review of an I-9 compliance manual for the company.
  - Existence of procedures to reply to no-match letters or notices from DHS, DOL, IRS, or SSA.
  - Establish training programs for those completing I-9 forms and responding to no-match letters.
  - Establish a standard procedure for receipt by the company of any and all communications regarding compliance-related matters.
  - After an audit, make allowable corrections and be careful to avoid any allegations of fraud in the correction of I-9 forms.
  - Evaluate policies regarding retention of supporting documents (note that in E-Verify registered companies the alternatives will be different).

- Establish a procedure regarding responses to law enforcement inquiries at the location. Do not act to obstruct justice.
- Provide training to management regarding the importance of I-9 compliance and company policies regarding worksite raids.
- Review EEO-1 diversity reports.
- Review personnel files to make sure that I-9 documentation is kept separately.
- Provide a memorandum to employees requesting the reporting of any anomalies or violations of law to an anonymous number, if necessary.
- Review discrepancies between hire dates reflected on payroll, labor, and employment records and I-9 documentation and create a memorandum explaining such discrepancies to be placed in an I-9 compliance folder. Based on the result, consider modifications of procedures as needed to comply with employment verification regulations.
- Conduct interviews with management regarding hiring practices.
- Review contracts with third parties to consider placement of immigration law compliance provisions as well as an indemnity for immigration violations and an ability to terminate the contract based on INA§274A violations.
- Conduct regular financial auditing to ensure compliance with all wage payment and payroll tax requirements.
- Mandate training compliance of all officers, managers, and employees on a recurring basis.
- Provide in personnel manual the threat of disciplinary sanctions including discharge of managers and employees found to knowingly violate company policies.
- Conduct periodic third party audits to ensure compliance at all levels.
- Review applicable state laws concerning requirements from an I-9 perspective. Some states may require use of E-Verify or another electronic verification method.

Compliance Options

Every business must evaluate business risks and options to decrease such risks, but with criminal enforcement being the approach *du jour* in I-9 compliance, many companies are reevaluating their level of attention to the I-9 process within their corporate operations. In an effort to reduce exposure, companies may consider the following steps:

- Conducting regular I-9 audits by an outside group.
- Contracting with an outside group to prepare I-9s.
- Purchase an I-9 software compliance program for implementation at company sites.
- Utilize the SSNVS for new hires.
- Register company sites for E-Verify. In some cases, this is a state mandate and is not optional (*e.g.* Arizona).
- Enroll in the ICE IMAGE program.

Each one of these alternatives has its own specific set of pros and cons. For example, companies deciding to contract out their I-9 compliance requirements are still exposed to penalties where the contracted party fails to conduct the process properly. Companies utilizing the SSNVS system cannot rely on a negative SSNVS result as proof positive of the employee's unauthorized status. The same holds true for even final non-confirmation notices from E-Verify. However, no program will fully insulate an employer from an allegation of actual or constructive knowledge that it is knowingly employing undocumented workers after reviewing the totality of the circumstances.

E-VERIFY

In determining its obligations regarding employment verification, employers must methodically consider the laws of each state in which they have operations and may need to consider city ordinances as well. In March 2007, the Mission Viejo City Council adopted an ordinance requiring contractors who are awarded a city contract in excess of $15,000 to show enrollment in the DHS Basic Pilot Program, now called E-Verify.

Attachment I is a chart regarding various employment verification laws by state. Arizona requires all employers to use E-Verify for employees hired after December 31, 2007. Mississippi requires all employers with 250 employees in the state to register to use E-Verify by July 1, 2008 with a phased-in timeline for smaller employers. Other states focus

solely on government contractors and require their participation in E-Verify or SSNVS.

The E-Verify system became available in 1996 and was called the Basic Pilot Program. The system does not involve any financial cost to the employer. To participate, the employer must register on-line and agree to the terms of the E-Verify Memorandum of Understanding (MOU). Employers must carefully consider the disadvantages of enrolling in E-Verify. The MOU provides that DHS reserves the right to conduct I-9 compliance inspections during the course of E-Verify use and to conduct any other enforcement activity authorized by law. In addition, the employer agrees to allow DHS and SSA as well as their agents to make periodic visits to the employer for the purpose of reviewing E-Verify related records [*i.e.*, I-9s, SSA transaction records (no-match letters) and DHS verification records], which were created during the employer's participation in the E-Verify program. Further, the MOU provides that for the purpose of evaluating E-Verify, the employer agrees to allow DHS and SSA to interview it regarding its experience with E-Verify and to interview employees hired during E-Verify use concerning their experience, and to make employment and E-Verify records available to DHS and SSA. It appears that these provisions could allow DHS and SSA to circumvent any current I-9 regulatory requirements for subpoenas, search warrants, or even a three-day notice requirement to review records, and substantially expands the types of documentation to be reviewed by the government.

In addition, in September 2007, Westat issued its report entitled, "Findings of the Web Based Pilot Evaluation."[71] This report makes repeated findings about employers who failed to follow E-Verify rules and employees who presented fraudulent documents that were not detected using the system. The Westat report suggests to DHS that the agency should review the following indicators through E-Verify:

- A high rate of duplicate SSNs as well as "A" numbers submitted by an employer in one work location.
- A high overall rate of duplicate SSNs and "A" numbers used in disparate locations in a limited period of time.
- An unusually low percentage of employees not clearing the system the first time through.
- A variety of indicators that show otherwise improper usage of the systems such as pre-screening or re-verification.
- Other indicators showing failures to comply with technical requirements mandated by the use of the system, such as failures to enter follow-up resolution data.

The statutory basis for E-Verify was scheduled to expire in November 2008. On September 30, 2008, President Bush signed into law a continuing resolution which extended funding for the E-Verify program until March 6, 2009. In addition, certain immigration benefits have now been attached to E-Verify registration by employers. For example, the new regulation allowing certain students to extend optional practical training work authorization is tied to the employer's registering in E-Verify.[72] It is anticipated that future immigration benefits may similarly require E-Verify enrollment.

In the meantime, bills such as the New Employee Verification Act of 2008 (NEVA), which was introduced by Rep. Sam Johnson, Rep. Kevin Brady, and Rep. Paul Ryan of Texas propose creating a new mandatory Electronic Employment Verification System (EEVS) that would require all 7 million employers to query federal databases to check employment eligibility.[73] NEVA fails to address the most controversial provisions of another employment verification bill introduced by Reps. Heath Shuler and Tom Tancredo called the Secure America through Verification and Enforcement Act of 2007 (SAVE).[74] These points are:

- Reliance on the flawed SSA database;
- Economic damage by mandating the use of the verification system before a path to legal status exists for the 7 million undocumented workers in the United States; and
- Significant additional administration burdens placed on an already overburdened SSA.

[71] *www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf.*

[72] 73 Fed. Reg. 18944 (Apr. 8, 2008).

[73] H.R. 5515, 110th Cong. (2008).

[74] H.R. 4088, 110th Cong. (2007).

On April 2, 2009, Michael Aytes, Acting Deputy Director of USCIS, testified before the House Committee on Appropriations, Subcommittee on Homeland Security, regarding "Priorities Enforcing Immigration Law." In his testimony, Mr. Aytes noted that over 117,000 employers were enrolled in E-Verify. In fiscal year 2010, USCIS plans to:

- Add new data sources to the automated initial check to reduce mismatches.
- Improve the ability of the system to automatically verify international students and exchange visitors by incorporating SEVIS data.
- Provide automated system updates for any new hire with Temporary Protected Status (TPS), who has an expired Employment Authorization Document (EAD), but is within an automatic extension time period.
- Attempt to add state-based Department of Motor Vehicle (DMV) data to incorporate driver's license photos. To date, no state has yet agreed to do so.

USCIS already entered in to Memorandum of Understanding (MOU) with the Department of State (DOS) to incorporate passport data to reduce mismatches as to naturalized and derivative citizens who present a U.S. passport during the I-9 process.

One thing is certain, with all of the enforcement focus and the continued belief that enforcement first will pave the path for possible comprehensive reform later, it is expected that these employment verification requirements and related enforcement actions will not go away anytime soon.

ICE IMAGE PROGRAM

On September 9, 2008, ICE issued a notice announcing 37 new partners in their IMAGE program. The IMAGE (ICE Mutual Agreement Between Government and Employers) program was commenced in 2007 with the goal of assisting employers in providing a more secure and stable workforce and to enhance fraudulent document awareness. Employers are encouraged to participate in IMAGE and to obtain IMAGE certification. There are currently several different standards of IMAGE enrollment. The basic requirements for IMAGE are as follows:

- Complete self-assessment questionnaire.
- Enroll in E-Verify.
- Enroll in SSNVS.
- Adhere to IMAGE best employment practices.
- Undergo an I-9 audit conducted by ICE.
- Review and sign an initial IMAGE partnership agreement with ICE.

An associate IMAGE membership allows employers to join the program, but permits two years to complete all requirements for full IMAGE membership. A trade association membership allows the trade association to become an endorsee partner indicating that they support the program. Currently, ICE has a very small number of participants in this program for good reason: the exposure to the employer is high and the protections are low. In addition, the IMAGE program provides a clear window into the expectations of ICE concerning best hiring practices for employers. The ICE list of best employment practices for employers is:

- Use the E-Verify employment verification program for all hiring.
- Establish an internal training program with annual updates on how to manage the completion of the I-9 form, to detect the fraudulent use of documents, and how to use E-Verify.
- Permit the I-9 E-Verify process to be conducted only by individuals who have received E-Verify training and include a secondary review as part of each employee's verification to minimize the potential for a single individual to corrupt the process.
- Arrange for annual I-9 audits by an external firm or a trained employee not otherwise involved in the I-9 and electronic verification process.
- Establish a self-reporting procedure for reporting to ICE any violations or discovered deficiencies.
- Establish a protocol for responding to no-match letters received from the SSA.
- Establish a tip line for employees to report activity relating to the employment of unauthorized workers and a protocol for responding to employee tips.
- Establish and maintain safeguards against use of the employment verification process for unlawful discrimination.

- Establish a protocol for assessing the adherence to the best practices guidelines by the company's contractors and subcontractors.
- Submit an annual report to ICE to track results and to assess the effect of participation in the IMAGE program.

The provision regarding the protocol for contractors and subcontractors is extremely important to remember as it relates to IMAGE enrollment. Basically, the employer is expected to require its contractors and subcontractors to comply with E-Verify.

According to Ms. Marcy Forman, the ICE Director of the Office of Investigations in her April 2, 2009 testimony described hereinabove, since 2006, ICE has enrolled 46 IMAGE members, associates, and endorsees of the program. For fiscal year 2008, ICE outreach coordinators in the 26 field offices of ICE made IMAGE presentations to more than 8,300 businesses.

FEDERAL ACQUISITION REGULATION AND E-VERIFY MANDATE FOR CONTRACTORS

On June 9, 2008 President Bush issued an executive order amending Executive Order 12989 issued on February 13, 1996 directing executive departments and agencies that enter into contracts to require as a condition, that the contractor agree to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment eligibility of:

- All persons hired during the contract term by the contractor to perform employment duties within the United States, and
- All persons assigned by the contractor to perform work within the United States on the federal contract.

On the same day, DHS designated E-Verify as the employment eligibility system to be required for federal contractors. This designation was followed with the posting of a proposed rule in the Federal Register by the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration implementing the E-Verify system requirement through the Federal Acquisition Regulation (FAR).[75] Comments on the proposed rule were requested to be submitted on or before August 11, 2008. Some of the main problems with this proposed rule were:

- Federal law does not allow employers to re-verify the employment eligibility of existing work authorized employees. The current proposed rule mandates that federal contractors re-verify existing employees who are assigned to a federal contract which would violate INA §274a.
- The President cannot unilaterally change the E-Verify law. The executive branch does not have the authority to change the employment verification statute to mandate the use of E-Verify.
- Congress deliberately made E-Verify a voluntary program.
- INA §274A(d) requires DHS to notify Congress of any proposed changes in the use of E-Verify and the proposed rule constitutes a change in the I-9 verification requirement.

Making E-Verify mandatory will stretch thin resources within SSA since E-Verify accesses both SSA and DHS records. As of January 2008, over 750,000 social security cases were awaiting decisions on disability claims with an average wait time per case of 499 days. In addition, over 50 percent of people who call local SSA field offices with inquiries receive a busy signal. Further, the 2007 Westat evaluation of E-Verify found substantial employer abuse of the program with about 47 percent of all employers using E-Verify improperly to run workers' information through the system before making an employment decision.

The proposed rule also requires E-Verify queries for any employee who works on a covered contract or subcontract, not just those newly hired for that purpose. The definition of "assigned employee" is any employee "directly performing work, in the U.S. under a [covered] contract."[76] For many contractors, this definition will be extremely difficult to apply. DHS Secretary Chertoff indicated in his "State of Immigration" address on June 9, 2008 that the E-Verify requirement for federal government contrac-

[75] 73 Fed. Reg. 33374 (proposed June 12, 2008) (to be codified at 48 CFR pts. 2, 12, 22 and 52).

[76] 73 Fed. Reg. 33374 at 33380 (proposed June 12, 2008) (to be codified at 48 CFR pt. 22).

tors would be "up and running later this year." Based on the proposed rule, the FAR E-Verify requirement applies as follows:

Contractors not yet enrolled in E-Verify must:

- Enroll in E-Verify within 30 calendar days of the contract award; and
- Use E-Verify within 30 calendar days of enrollment to verify employment authorization of all employees "assigned" to the contract at the time of enrollment (hired after November 6, 1986) as well as new hires assigned to the contract. Note that this would require employees for whom an I-9 is already completed to be "re-verified" through E-Verify.

Contractors already enrolled in E-Verify must:

- E-Verify within 30 calendar days of contract award all employees assigned to the contract at the time of the contract award (hired after November 6, 1986); and
- E-Verify all new hires and all existing hires assigned to the contract after the contract award (hired after November 6, 1986) within 3 business days of the date of hire or date of assignment.
- Subcontractors that provide services or construction. There is a flow down provision applying to subcontracts that are for commercial or non-commercial services or construction, which exceed $3,000 in value and include work performed in the United States.

Exemptions:

- Contracts for commercially available off the shelf items (COTS) or items that would be COTS items, but for minor modifications.[77]
- Contracts under the micro-purchase threshold.[78]
- Contracts that do not include any work in the United States (including the U.S. territories of American Samoa and the Commonwealth of the Northern Mariana Islands, and work on U.S. embassies or military bases in foreign countries).
- Subcontractors that provide supplies, not construction services.
- Solicitations issued and contracts awarded before the effective date of the final rule, except that contracting officers are directed to seek amendments to existing indefinite-delivery/indefinite-quantity contracts to include the E-Verify requirement for future orders if the remaining period of performance extends at least six months after the effective date of the final rule and the amount of work or number of orders expected under the remaining performance period is substantial.

Waiver

- In exceptional circumstances, a head of the contracting activity has the nondelegable authority to waive the requirement to include the FAR clause.

Disclosure Requirement

- Contractor will be required to consent to the release of information relating to compliance with its verification responsibilities to contracting officers or other officials authorized to review the employer's compliance with federal contracting requirements.

Possible Penalties for Compliance

- Termination of contract for failure to perform based on noncompliance with revised MOU.
- Debarment. On September 12, 2008, ICE issued a news release stating that it had notified seven companies that they will be considered for debarment from federal contracting because of em-

[77] FAR 2.101(3)(ii) defines "commercial items" as: "any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and … has been offered for sale, lease, or license to the general public."

[78] Under FAR 2.101, micro-purchase threshold means $3,000, except:

> (1) for acquisitions of construction subject to the Davis-Bacon Act, $2,000; (2) for acquisition of services subject to the Service Contract Act, $2,500; and (3) for acquisitions of supplies or services that, as determined by *continued*

> the head of the agency, are to be used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack, as described in 13,201(g)(1), except for construction subject to the Davis-Bacon Act (41 USC 428a)—(i) $15,000 in the case of any contract to be awarded and performed, or (ii) purchase to be made, inside the United States, and (ii) $25,000 in the case of any contract to be awarded and performed, or purchase to be made, outside the United States.

ploying unauthorized workers. This notice appears to be the first use of the debarment provisions under 48 CFR §9.406-2(b)(2) of the FAR. On the same date, ICE issued a Fact Sheet entitled, "Immigration and Nationality (INA) Debarment Questions and Answers."

This debarment provision was inserted originally by Executive Order 12989 on February 13, 1996. For civil violations, debarments are for one year and may be extended for additional on year increments if continuing violations are found by the Secretary of Homeland Security or the Attorney General. For criminal violations, debarments are for a term specified by the debarring agency as indicated in the listing. *See* FAR 9.406-4. Debarment is considered for convections related to violations of the INA and the issuance of a final order for a civil fine, which reflects unlawful hiring or continuing to hire unauthorized workers. When contractors are debarred, the name of the contractor and related information is placed in the Excluded Parties Listing Systems (EPLS) by ICE. The General Services Administration maintains the EPLS and the list can be found at *www.epls.gov*. For major corporations, the scope of debarment is limited to the company's organization units engaging in the unlawful hiring of unauthorized workers.

This use of the debarment provision was a harbinger of future actions under the FAR regulations. Most recently, on April 2, 2009 before the Subcommittee on Homeland Security of the House Appropriations Committee, Marcy Forman, Director, Office of Investigations for ICE, noted that since July of 2008 that 11 companies and nine individuals had been debarred.

On November 14, 2008, the final rule regarding the FAR modifications to E-Verify was published.[79] A summary of the content follows.

Applies to Solicitations Issued and Contracts Awarded After January 15, 2009 (NOTE delayed until May 21, 2009)[80]

Departments and agencies are instructed in the regulations to amend on a bilateral basis existing indefinite delivery/indefinite quantity (IDIQ) contracts to include the E-Verify clause for future orders, if the remaining period of performance extends at least six months after January 15, 2009 (now May 21, 2009). Thus, the question remains if the date of the new bilateral agreement would serve as the "contract award" date to use in meeting the FAR E-Verify timeline requirements or if it is triggered by the date of placement of an order under the amended bilateral contract. A head of a contracting activity may waive the requirement to include the E-Verify clause in exceptional circumstances.

What Contracts Are Exempt from the Rule?

The rule exempts the following prime contracts:

- Contracts that include only COTS items and items that would be COTS items but for minor modifications to a COTS;
- Contracts for less than the simplified acquisition threshold ($100,000);
- Contracts with performance terms of less than 120 days; and
- Contracts where all work is performed outside the United States.

What Are the Changes Adopted in the Final Rule from the Publication of the Proposed Rule?

- ***Significantly Extended Time Lines***. The final rule amends the proposed rule to allow federal contractors participating in the E-Verify program for the first time a longer period—90 calendar days from enrollment instead of 30 days—to begin using the system for new and existing employees. The final rule also provides a longer period after the initial E-Verify enrollment period—30 calendar days instead of 3 business days—for contractors to start verifying existing employees who have not previously gone through the E-Verify system when they are newly assigned to a covered federal contract. Contractors already enrolled in the E-Verify program as federal contractors will have the same extended time frame to start verification of employees assigned to the contract, but the time limits will be measured from the contract award date instead of from the contractor's E-Verify enrollment date. As to new hires, a contractor that has already been enrolled as a federal contractor in E-Verify for 90 calendar days or more as of the date of the contract award will have the standard three business

[79] 73 Fed. Reg. 67651.

[80] *See* Information for Federal Contractors at *www.uscis.gov*.

days from the date of hire to initiate the verification of new hires. Those contractors enrolled in the program for less than 90 calendar days at the time of the contract award will have 90 calendar days from the date of enrollment as a federal contractor to initiate the verification of new hires.

- ***Covered Prime Contract Value Threshold***. The final rule now requires the insertion of the E-Verify clause for prime contracts above the simplified acquisition threshold of $100,000 rather than the micro-purchase threshold of $3,000.
- ***Contract Term***. The final rule indicates that the E-Verify clause is not required in prime contracts with performance terms of less than 120 days.
- ***Institutions of Higher Education***. The final rule modifies the contract clause so institutions of higher education need only verify employees assigned to a covered federal contract.
- ***State and Local Governments and Federally Recognized Indian Tribes***. Under the final rule, state and local governments and federally recognized Indian tribes need only verify employees assigned to a covered federal contract.
- ***Sureties***. Under the final rule, sureties performing under a takeover agreement entered into with a federal agency pursuant to a performance bond need only verify employees assigned to the covered federal contract.
- ***Security Clearances and HSPD-12 Credentials***. The final rule exempts employees who hold an active security clearance of confidential, secret, or top secret clearance requirements. It also exempts employees for whom background investigations have been completed and credentials issued pursuant to the Homeland Security Presidential Directive (HSPD)–12, (policy for a common identification standard for federal employees and contractors, which the President issued on August 27, 2004).
- ***All Existing Employees Option***. The final rule provides contractors the option of verifying all employees of the contractor, including any existing employees not currently assigned to a government contract. The contractor who chooses to exercise this option must notify DHS and must initiate verifications of the contractor's entire work force within 180 days of the notice to DHS. This provision is obviously different from the IRCA provisions on this subject. It is also important to note that this option is limited to all existing employees hired after November 6, 1986. It does not apply to grandfathered employees hired on or before November 6, 1986.
- ***The Expanded COTS-Related Exemptions.***
  - The final rule does not apply to prime contracts for agricultural products shipped as bulk cargo that would otherwise have been categorized as COTS items.
  - The final rule does not apply to certain services associated with the provision of COTS items that would be COTS items but for minor modifications.
- ***Contracting Activity Waivers***. Requests may be made for head of contracting activities to waive E-Verify requirements in a contract award either temporarily or for the period of performance.
- ***Definitions.***
  - *Employees Assigned to the Contract*. The final rule clarifies that employees who normally perform support work, such as general company administration or indirect or overhead functions, and do not perform any substantial duties applicable to an individual contract, are not considered to be directly performing work under the contract and thus not subject to the E-Verify requirement.
  - *Subcontract and Subcontractor*. Adds definitions derived from FAR 44.101.

What Subcontractors of the Prime Contractor Must Comply with FAR as to E-Verify?

Prime contractors are directed to include the E-Verify requirement for each subcontract for:

- Commercial or noncommercial services (except for commercial services that are part of a purchase of a COTS item (or for an item that would be a COTS item but for minor modifications), performed by the COTS provider and normally performed for that COTS item); or
- Construction;
- Has a value of more than $3,000; and
- Includes work performed in the United States.

In the final rule, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) indicated that the flow-down

provisions for subcontracts are limited by the proposed rule only to subcontracts for construction and for services. They noted that these types of subcontracts often involve lower dollar amounts, and thus refused to increase the threshold level of $3,000 to apply the E-Verify rule as to subcontract values. The Councils also noted that they had decided not to extend the 120 day performance limit on flow-down subcontracts. The period of performance of the subcontract is not within the control of the government according to the Councils. They stated that if the subcontractor does not have any subcontract running longer than 30 days, the subcontract term would end before the subcontractor would be required to register with E-Verify. They also indicated that if the subcontract performance period runs beyond 30 days, the subcontractor would be required to enroll in E-Verify, and if the subcontractor continues to receive subcontracts, it would be obligated to begin using E-Verify for its new hires.

What Responsibility Does the Prime Contractor Have for Subcontractor Violations?

There is an extensive discussion in the supplementary information to the final rule on this issue. The Councils note that prime contractors are responsible "for all aspects of contract performance including subcontract requirements." The Councils also noted that the "methods used to assure compliance are also the responsibility of the prime and the subcontractor." Contractors "should perform" general oversight of subcontractor compliance in accordance with the contractor's normal procedures for oversight of other contractual requirements that flow down to subcontractors. The supplementary information to the final rule provides that prime contractors are not expected to monitor the verification of individual subcontractor employees or the subcontractor's hiring decisions. Prime contractors, however, are responsible for ensuring by "whatever means" that the contractor considers appropriate that every tier incorporates the E-Verify clause and that all subcontractors use the E-Verify system. The Councils also note that these responsibilities are "adequately addressed" in the federal contractor MOU for E-Verify. This MOU contains a provision requiring the employer (prime contractor and subcontractor) to acknowledge that compliance with the MOU is a performance requirement under the terms of the federal contract/subcontract and that the employer consents to the release of information relating to compliance with its verification responsibilities under the MOU to contracting officers or other officials authorized to review the employer's compliance with federal contracting requirements. The Councils did not endorse the need for a separate notice to subcontractors regarding this requirement from prime contractors, but said that a prime contractor may "write such a notice."

Industry Specific Information

- *Hospitality Industry*. The Councils noted that because the E-Verify clause is inapplicable to contracts having a period of performance of less than 120 days, it may eliminate almost all hotel contracts from being subject to the rule. In addition, the decision to allow contractors the option of using E-Verify for all existing employees, rather than just those assigned to the contract will resolve difficulties regarding the segregation of certain areas for government employees by hotel industry employees.
- *Financial Institutions*. The Councils noted that agreements or activities performed by financial institutions that are not subject to FAR are not required to comply with the E-Verify provisions and clauses of FAR. This was in response to a comment concerning financial agency agreements (FAA) with the federal government under 41 USC §§ 251–260, which provide that the FAA is not a federal procurement contract and is therefore not subject to the provisions of the Federal Property and Services Act, FAR, or any other federal procurement law.
- *Agriculture*. The Councils noted that virtually all food products are COTS and COTS contracts are exempt from the rule. There are various types of arrangements in which a cooperative may buy agricultural products from a grower and resell them to the government. In this case, the growers or subcontractors would be exempt because the contract involves a supply rather than a service. Other cooperatives involve pooling arrangements under which there is one prime contract between the government and the cooperative on behalf of the growers. In this case, if the growers may be considered prime contractors for another purpose, an E-Verify requirement may be imposed.

Timelines for Federal Contractors Not Enrolled in E-Verify at Time of Contract Award

The final rule provides for the following timeline for federal contractors not enrolled in E-Verify:

- Enroll as a federal contractor in the E-Verify program within 30 calendar days of the contract award.
- Within 90 calendar days of enrollment in the E-Verify program, "begin" to use E-Verify to initiate verification of employment eligibility of all new hires who are working the United States, whether assigned to the contract or not, within three business days after date of hire for the duration of the contract.
- For each employee "assigned to the contract," initiate verification within 90 calendar days after the date of enrollment in E-Verify or within 30 calendar days of the employee's assignment to the contract, whichever date is later. "Assigned to a contract" means any employee hired after November 6, 1986 who is directly performing work in the United States An employee is not considered to be directly performing work if the employee: 1) normally performs support work, such as indirect or overhead functions; and 2) does not perform any substantial duties applicable to the contract.
- Contractors may elect to verify all existing employees hired by the contractor after November 6, 1986. If this option is chosen, the contractor shall initiate the verification of each existing employee working in the United States. who was hired after November 6, 1986 within 180 calendar days of the contractor's enrollment in E-Verify or notification to E-Verify Operations of the contractor's decision to exercise the option using the contact information contained in the E-Verify MOU.

Timelines for Federal Contractors Enrolled in E-Verify at Time of Contract Award

The final rule provides for the following timeline for federal contractors enrolled in E-Verify at the time of the contract award:

- If Enrolled in E-Verify for 90 calendar days or more at the time of contract award, verify all new hires using E-Verify, who are working in the United States, whether or not assigned to the contract, within three business days after the date of hire.
- If Enrolled in E-Verify for less than 90 calendar days at the time of contract award, within 90 calendar days after enrollment in the E-Verify program as a federal contractor, "begin" to use E-Verify to initiate verification of employment eligibility of all new hires who are working in the United States, whether assigned to the contract or not, within three business days after date of hire for the duration of the contract.
- For each employee "assigned to the contract," initiate verification within 90 calendar days after the date of the contract award or within 30 calendar days of the employee's assignment to the contract, whichever date is later. "Assigned to a contract" means any employee hired after November 6, 1986 who is directly performing work in the United States An employee is not considered to be directly performing work if the employee: 1) normally performs support work, such as indirect or overhead functions; and 2) does not perform any substantial duties applicable to the contract.
- Contractors may elect to verify all existing employees hired by the contractor after November 6, 1986. If this option is chosen, the contractor must initiate the verification of each existing employee working in the United States who was hired after November 6, 1986 within 180 calendar days of the contractor's enrollment in E-Verify or notification to E-Verify Operations of the contractor's decision to exercise the option using the contact information contained in the E-Verify MOU.

The Office of Communications set up a page on the USCIS website for federal contractors to obtain information and answers to FAQs on the final rule.[81] The page also provides information on webinars and seminars to be sponsored by USCIS.[82]

The E-Verify FAR MOU ended up being just another version of the basic E-Verify MOU with a section added for federal contractors. The version became available on about January 15, 2009." Cur-

[81] *See www.uscis.gov*. Click on the E-Verify link, then "Information for Federal Contractors."

[82] To sign up for a webinar or seminar, call 1-888-464-4218 or send an e-mail to *E-Verify@dhs.gov*.

rent E-Verify users can update their profile on the "Maintain Company" page and select "federal contractor" to be flagged to obtain a tutorial refresher. New E-Verify users, must select "federal contractor" upon registration in E-Verify to be flagged to obtain the FAR tutorial when available.

RECENT DEVELOPMENTS

As of July 14, 2008 the Department of State began the production of the U.S. passport card to document citizenship status for land border admissions from Canada, Mexico, the Caribbean, and Bermuda. On August 8, 2008, USCIS issued a press release informing the public that the new U.S. passport card (PASScard) may be used for the I-9 employment eligibility verification form process as a List A document.

The final no-match regulation, which has been postponed in implementation due to the lawsuit filed by the American Federation of Labor and Congress Industrial Organizations (AFLCIO), the San Francisco Chamber of Commerce, and the United Food and Commercial Workers International Union in the United States District Court for the Northern District of California, could be implemented in early 2009. Now it appears that the Department of Justice will ask Judge Breyer to grant an additional 60 days to the government to respond in the no-match litigation, which would push the response date to around June 10th.

On December 17, 2008, USCIS published an interim final rule revising Form I-9 and changing the list of acceptable identity documents that employers may use in completing the I-9 for new hires. The list of approved documents that employees can present to verify their identity and employment authorization is divided into three sections: List A documents verify identity and employment authorization, List B documents verify identity only, and List C documents verify employment authorization only. The new rule:

- Requires all documents presented for the Form I-9 completion process to be unexpired;
- Eliminates List A identity and employment authorization documentation Forms I-688, I-688A, and I-688B (Temporary Resident Card and outdated Employment Authorization Cards);
- Adds to List A documents as evidence of identity and employment authorization:
  - A temporary I-551 printed notation on a machine-readable immigrant visa in addition to the foreign passport with a temporary I-551 stamp;
  - The U.S. Passport Card; and
  - Valid passports for citizens of the Federated States of Micronesia (FSM) and the Republic of the Marshall Islands (RMI) with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States. and the FSM or RMI.

Originally, the revised Form I-9 was scheduled for required use for all new hires and for reverification of any employee with expiring employment authorization beginning February 2, 2009.[83] This implementation date was delayed. The implementation date for the new I-9 form was pushed to April 3, 2009. [84] The M-274 Employer Manual was revised and posted on USCIS' website on March 19, 2009 for use as to hires on or after April 3, 2009.[85] Unfortunately, the new M-274 has numerous errors related to immigration status.

The M-396 Guide to Selected U.S. Travel and Identity Documents, has been updated.[86] However, it should be noted that the documents do not exactly track the new list of I-9 acceptable documents. For example, a sample naturalization certificate and a reentry permit are included, but have been eliminated as acceptable documents in the new Form I-9. Nevertheless, it is a very good teaching tool for those doing I-9 audit training.

The revised Form I-9 also makes "citizen of the United States" and "noncitizen national of the United States, as defined in [INA §308]" two separate categories in the employee attestation part of the form. Currently, the first box in that section states:

---

[83] *See www.uscis.gov/files/article/I9_qa_12dec08.pdf*.

[84] *See http://www.uscis.gov/files/form/I-9_IFR_02-02-09.pdf*.

[85] *Seewww.uscis.gov/files/nativedocuments/m-274_3apr09.pdf*.

[86] A copy of the M-396 can be obtained through the National Distribution Center by completing the form located at *forms.cbp.gov/pdf/CBP_Form_262.pdf* and faxing it to (317) 290-3046.

"a citizen or national of the United States." Separating those two groups will facilitate prosecuting those who make false claims to U.S. citizenship. Noncitizen nationals of the U.S. include persons born in American Samoa, certain former citizens of the former Trust Territory of the Pacific Islands, and certain children of noncitizen nationals born abroad. A definition of "noncitizen national" is added to the instructions to the Form 1-9.[87]

As noted above, the current Form I-9 will no longer be valid and employers must begin to use the revised Form I-9 for all new hires and to re-verify any employee using the new Form I-9 beginning April 3, 2009. In addition, USCIS has indicated that it is developing a new I-551 permanent resident card, which will actually be green for a change for release later in 2009! In addition, USCIS is developing a new electronic I-9 process for the future, which will be employee based.

On December 19, 2008, DHS made an announcement regarding the record-setting settlement of $20.7 million by IFCO, a Houston-based pallet company, to resolve its criminal investigation of nearly 1,200 undocumented workers.

On December 23, 2008, the U.S. Chamber of Commerce, the Associated Builders and Contractors, the Society for Human Resource Management, the American Council on International Personnel, and the HR Policy Association filed a complaint to enjoin the implementation of the FAR regulations as to E-Verify in the U.S. District Court for the Southern District of Maryland. On January 27, 2009, the litigants in the suit filed, regarding the regulations imposing E-Verify upon certain federal contractors agreed, to extend the applicability date of the regulations to May 21, 2009, and asked the court to stay the proceedings to allow President Obama's administration an opportunity to review the rule.

On January 20, 2009, President Obama's Chief of Staff, Rahm Emanuel, issued a memorandum instructing federal agency heads not to send any proposed or final regulations to the Federal Register office for publication unless reviewed and approved by a department or agency head appointed or designated by President Obama after noon on January 20, 2009, or in the case of the Department of Defense, the Secretary of Defense. Although President Obama has previously supported the use of E-Verify and his appointee for Secretary of Homeland Security, former Gov. Janet Napolitano, has voiced support for continued criminal enforcement actions against unscrupulous employers of undocumented workers, this notice also had an impact upon the pending implementation of the Federal Acquisition Regulation changes as to mandates for certain public contractors to use E-Verify and the recent proposed revisions to the I-9 form. For further information about Secretary Napolitano's position on immigration issues, please consider her testimony as to her nomination before the Senate Homeland Security and Governmental Affairs at: *http://www.dhs.gov/xnews/testimony/testimony_1232547062602.shtm*. She resigned as Governor of Arizona at 5 pm January 20, 2009 after confirmation earlier that day as the Secretary for Homeland Security.

As to insight regarding how President Obama's administration will use immigration raids, on February 24, 2009, ICE conducted a raid of Yamato Engine Specialists in Bellingham, Washington and arrested 28 foreign nationals. Secretary Napolitano indicated that she had not been informed of the raid and subsequently ordered a review of why the raid had happened. Some of those arrested were provided with work authorization while cooperating with ICE, which led to allegations by some of the government tactics being the equivalent of an "amnesty" (a word constantly misused by many). Earlier in April of 2009, ICE returned to the Yamato plant to serve a criminal search warrant. Thus, it appears that the raid focus may now be on the employer's actions.

Post the Yamato raid in February, Secretary Napolitano at the end of March 2009 delayed a series of proposed raids and other worksite enforcement actions. She noted that there would be change in policy regarding the use of immigration raids and that protocols would be issued by DHS to ensure more consistent worksite investigations and less "haphazard" decision making.

CONCLUSION

It should be clear that employment verification is located in the eye of a politically intense storm. The

[87] Information on noncitizen U.S. nationals can be found at:. *www.travel.state.gov/law*.

belief is that employers have long been off the hook concerning compliance with the employment verification law passed back in 1986. Based on the announcements of Secretary Napolitano and other government representatives, the expectation is that enforcement actions against employers will be ramped up, but it appears that raid type enforcement actions may decline in favor of a rebirth of administrative penalties while the government attempts to strike a balance between the use of such fines and the use of cost-intensive criminal investigations.

Certainly, the prognostication as to employers continuing to remain in the enforcement cross-hairs has already been proven valid through the proliferation of numerous state and local laws in the area of employment verification.

ATTACHMENTS

A. I-9 Substantive and Technical Violations Chart.

B. Current Frequently Asked Questions Regarding Worksite Enforcement Posted on *www.ice.gov* dated August 12, 2008.

C. ICE Forms—Enforcement Actions and Sanitized Penalty Notice.

D. Department of Justice, McNulty Memorandum.

E. Department of Justice, Filip Guidelines.

F. Copy of Wal-Mart Consent Decree and Order Resulting From ICE Enforcement actions, 1998–2003.

G. Application and Affidavit for Search Warrant Regarding Action Rags, USA, Filed June 18, 2008 with the U.S. District Court for the Southern District of Texas—Houston Division.

H. Plea Agreement, Shipley Do-Nut Flour and Supply Company Filed September 5, 2008 with the U.S. District Court for the Southern District of Texas—Houston Division.

I. State Law Chart Regarding Employment Verification Laws.

J. Sample Audit Report.

K. Outline of Procedures Recommended for Employers to Follow Upon Receipt of a SSA No-Match Letter or DHS Notice.

L. Form Letter for Employers to Provide to Employees Concerning Receipt of a No-Match Letter.