

## WORKSITE ENFORCEMENT AND E-VERIFY

*updated by Roger Tsai\**

### RECENT DEVELOPMENTS

One of the most frequent questions employers will be asking immigration attorneys is, “Should I be using E-Verify?” E-Verify is a free voluntary web-based tool that allows employers to electronically verify the employment authorization of new hires. Just as Apple developed iTunes and created a technological solution to the legal problem of rampant online music sharing, E-Verify is seen as the silver bullet to combat the widespread document fraud that enables the employment of undocumented workers. Within the last year, E-Verify use has more than doubled to over 385,000 employers, and according to the U.S. Department of Homeland Security (DHS), E-Verify is used to verify one out of every eight new hires nationally.

While many attorneys expect that E-Verify will eventually become mandatory and replace the I-9 as the primary tool for employment verification, critics have focused on its inaccuracies. According to a 2007 DHS commissioned report by Westat, legal foreign born workers are 30 times more likely to receive a tentative non-confirmation than U.S. born workers. As E-Verify currently exists, employment authorized workers who have been wrongly categorized have no administrative or judicial appeals process.

Despite the concern and advocacy of AILA attorneys across the country, 29 states have passed laws mandating E-Verify use for some employers, usually state contractors. On May 27, 2011, Arizona’s worksite enforcement law which makes E-Verify mandatory for all employers was upheld by the U.S. Supreme Court. In February 2010, Oklahoma’s HB 1804 which made E-Verify mandatory for state contractors was upheld by the U.S. Court of Appeals for the Tenth Circuit.<sup>1</sup> In March 2009, a federal court invalidated an Illinois statute prohibiting employers from using E-Verify on the basis of the Supremacy Clause. In short, the legal and constitutional opposition to E-Verify implementation has floundered.

The federal government has also attempted to increase employer E-Verify participation through incentives and mandates. In April 2008, the U.S. Citizenship and Immigration Services (USCIS) began offering an additional 17 months of optional practical training (OPT) work authorization status for STEM (science, technology, engineering, mathematics) graduates, if the employer agrees to register for E-Verify. The DHS regulation mandating some federal contractors to use E-Verify went into effect on September 8, 2009.

Within the first two years of the Obama Administration, well-publicized worksite raids are being replaced with mass I-9 audits on a semi-annual basis. Already, U.S. Immigration and Customs Enforcement (ICE) has removed the 11 pages of worksite enforcement raid press releases that it had previously touted. After the first major ICE worksite enforcement raid of the new administration, the White House stated that “these raids are not a long-term solution.”<sup>2</sup> DHS Secretary Napolitano has said that she intends to focus more on prosecuting criminal cases of wrongdoing by companies, but analysts think “ICE may conduct fewer raids, focusing routine enforcement on civil infractions of worker eligibility verification rules.”<sup>3</sup> This policy shift was echoed by Marcy M. Forman, Director, ICE Office of Investigations, who stated, “[W]e expect that the increased use of the administrative fines process will result in meaningful penalties for those who engage in the employment

---

\* **Roger Tsai** is an immigration attorney with the Denver-based firm of Holland and Hart and specializes in employment-based immigration and worksite enforcement. A graduate of the University of Houston Law School and University of Michigan, Mr. Tsai has spoken to numerous organizations on the topic of worksite enforcement including the AILA 2008 Worksite Enforcement Conference and the 2009 Federal Bar Association Workplace Enforcement Conference. He currently serves as the Utah AILA Chapter Chair and can be reached at [rytsai@hollandhart.com](mailto:rytsai@hollandhart.com).

<sup>1</sup> Note that other provisions of Oklahoma’s law were found to be impliedly or expressly preempted.

<sup>2</sup> S. Dinan, “Illegal Raid Dismays Obama Backers,” *Washington Times*, Feb. 26, 2009.

<sup>3</sup> S. Hsu, “Delay in Immigration Raids May Signal Policy Change,” *The Washington Post*, Mar. 29, 2009.

of unauthorized workers.”<sup>4</sup> According to a newly released “worksite enforcement strategy,” I-9 audits are now considered the “most important administrative tool” within worksite enforcement. Mass I-9 audits are now becoming as regular as dental checkups. To assist with the growing number of audits, ICE announced the creation of an employment compliance inspection center in Crystal City, Virginia with 15 auditors that support field office auditors.<sup>5</sup>

Since January, 2009, ICE initiated I-9 inspections against 8,079 businesses nationwide.<sup>6</sup> Almost half of the 430 audits conducted between July 1, 2009, and January 31, 2010, were of companies with fewer than 25 employees.<sup>7</sup> Out of the 86,000 I-9s reviewed nationwide, ICE found 22,000 “suspect” documents. 762 companies have been debarred from federal contracts on the basis of worksite enforcement violations.<sup>8</sup>

State law enforcement has also become active in worksite enforcement. South Carolina’s Office of Immigrant Worker Compliance employs 23 auditors to investigate and fine employers.<sup>9</sup> In its first year of operation, auditors investigated 1,850 businesses and warned or fined 175 businesses. That office fined Kent companies, a concrete company, \$850 for failing to E-Verify a new hire working on a school construction site.

In the next year,<sup>10</sup> the pace of audits and criminal investigations will continue to grow in frequency from both federal and state agencies.

## THE SWIFT RAID

Swift & Company has become synonymous with worksite enforcement and E-Verify. As one of the first employers to voluntarily sign up for E-Verify, the Swift case illustrates an employer that has been forced to walk a tightrope between compliance and discrimination. On December 12, 2006, ICE conducted one of its largest raids in history by arresting 1,282 workers at six meat processing plants across the Midwest.<sup>11</sup> In February 2006, ICE began investigating Swift when immigrants who were being processed for removal confessed to identity theft and working at the Iowa Swift plant.<sup>12</sup> ICE also had received anonymous calls through its hotline and referrals from local police.<sup>13</sup> Due to the arrests, Swift lost 40 percent of its labor force and temporarily suspended operations at all six of its plants. The raid on the second largest meat packing company in the world was part of an increased effort by ICE to target undocumented workers in low wage industries including restaurants, construction, and retail.

A casual observer might ask how Swift could not have suspected that much of its labor force was undocumented. In fact, fearful of being penalized for hiring undocumented workers, Swift had intensely scrutinized the documents of its workers, so much so that in 2001, it was forced to pay a \$200,000 settlement to the U.S. Department of Justice (DOJ) Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) for excessively scrutinizing documents of individuals who looked or sounded “foreign.”<sup>14</sup> Federal immigration laws prohibit employers from considering foreign appearance, accents, or national origin in their

---

<sup>4</sup> Statement of Marcy M. Forman, Director, ICE Office of Investigations, “Testimony Before House Subcommittee on Homeland Security on Priorities Enforcing Immigration Law” (Apr. 2, 2009), *published on* AILA InfoNet at Doc. No. 09040764 (posted Apr. 15, 2009).

<sup>5</sup> “ICE & Tyson Foods Partner in an Effort to Protect Nation’s Lawful Workforce” *ICE News Release*, Jan. 20, 2011.

<sup>6</sup> U.S. Department of Homeland Security (DHS) Testimony of Janet Napolitano before the House Judiciary Committee, July 19, 2012.

<sup>7</sup> “Warnings Abound in Enforcing Immigration Job Rules,” *Associated Press*, Nov. 1, 2010.

<sup>8</sup> DHS Testimony of Janet Napolitano before the House Judiciary Committee, July 19, 2012.

<sup>9</sup> “SC Agency Identifies 35 Illegal Immigrants 5 School Construction Sites; Company Fined,” *Associated Press*, Aug. 27, 2010).

<sup>10</sup> *Id.*

<sup>11</sup> ICE Press Release, “ICE Arrests 1,282 Foreign Nationals at Large Meat Processing Company” (Dec. 13, 2006), *published on* AILA InfoNet at Doc. No. 06121379 (posted Dec. 13, 2006).

<sup>12</sup> S. Reddy, “Government Raids of Swift Plants Add to Growing Immigration Debate,” *The Dallas Morning News*, Dec. 14, 2006.

<sup>13</sup> *Id.*

<sup>14</sup> Staff Reports, “Swift Responds to Plant Raids,” *The Greeley Tribune*, Dec. 22, 2006.

hiring practices. Employers are caught between two federal agencies with opposing interests: ensuring that all workers are authorized for employment and protecting those who are lawfully able to work from discrimination.

## EMPLOYER RESPONSIBILITIES UNDER IRCA

### *The I-9 Form*

The Immigration Reform and Control Act of 1986 (IRCA)<sup>15</sup> requires employers to fill out an I-9 form, for all employees hired since November 6, 1986, regardless of their immigration status.<sup>16</sup> The purpose of the I-9 is to verify the identity and employment authorization of workers. The form consists of three sections. In the first section, the employee attests, under penalty of perjury, that he or she is a citizen, lawful permanent resident, or foreign national authorized to work temporarily.<sup>17</sup> Section 1 must be completed at the time of hire. In the second portion, employers are required to record that they have examined original documents from a specified list verifying the employee's identity and eligibility to work.<sup>18</sup> Employers must accept the documents if they appear "reasonably genuine" and relate to the person presenting the documents.

Section 2 of the I-9 must be completed within three days of starting work.<sup>19</sup> The I-9 is not submitted to ICE; instead, the employer must keep the form on file for three years from the date of hire or one year after the last day of work, whichever is later.<sup>20</sup> The I-9 may be stored in its original form, microfilm, microfiche, or electronically.<sup>21</sup> The only exceptions to an employer's I-9 obligation are for independent contractors and sporadic domestic workers.<sup>22</sup> Employers are not required to complete an I-9 for independent contractors, but remain liable if they know that contractors are using unauthorized noncitizens to perform labor or services. The Internal Revenue Service (IRS) and U.S. Department of Labor (DOL) recently announced audits of 6,000 companies to identify improper "independent contractor" classifications. This is likely to bring additional scrutiny into the employment authorization of independent contractors, especially those who are misclassified.

### *Changes to the I-9 Form*

On December 17, 2008, DHS issued an interim final rule revising the list of acceptable documents and issuing a corresponding new I-9 form which employers were required to begin using for new hires starting April 3, 2009.<sup>23</sup> Significant changes to the I-9 include: (1) requiring that all I-9 employment authorization and identity documents be unexpired; (2) adding "U.S. national" as a possible immigration status; and (3) eliminating the I-688 temporary resident card, I-688A employment authorization card, and I-688B employment authorization card as acceptable list A documents.<sup>24</sup> A substantially revised M-274 guide was released in July 2009 to accompany the new I-9. A new M-274 was released on January 12, 2011, which highlighted additional issues:

- An H-1B employee's Form I-94 issued for employment with the previous employer along with his or her foreign passport, would qualify as a List A document. You should write "AC21" and record the date you submitted Form I-129 to USCIS in the margin of Form I-9 next to Section 2.
- When seeking employment under the H-1B 240-day rule, employers are advised to keep: (1) a copy of the new Form I-129; (2) proof of payment for filing a new Form I-129; and (3) evidence that the employer mailed the new Form I-129 to USCIS.

<sup>15</sup> Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359.

<sup>16</sup> 8 CFR §274a.2(b).

<sup>17</sup> 8 CFR §274a.2(b)(1)(i)(A).

<sup>18</sup> 8 CFR §274a.2(b)(1)(i)(B).

<sup>19</sup> 8 CFR §274a.2(b)(1)(ii).

<sup>20</sup> 8 CFR §274a.2(c)(2).

<sup>21</sup> 8 CFR §274a.2(b)(2)(ii).

<sup>22</sup> 8 CFR §274a.1(j).

<sup>23</sup> 73 Fed. Reg. 76505 (Dec. 17, 2008); 74 Fed. Reg. 5899 (Feb. 3, 2009).

<sup>24</sup> *Id.*

- You may not begin the Form I-9 process until you offer an individual a job and he or she accepts your offer.

Prior to this, the last update to the I-9 form took place on December 26, 2007. In an effort to comply with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA),<sup>25</sup> legacy Immigration and Nationality Service (INS) issued an interim rule effective September 30, 1997, which has yet to be superseded by a final rule. The interim rule removed the following documents from the list of acceptable identity and work authorization documents: certificate of U.S. citizenship, certificate of naturalization, Form I-151 alien registration receipt card, unexpired re-entry permit, and unexpired refugee travel document.<sup>26</sup> The number of documents that employers could review was reduced to lessen confusion. The 2007 I-9 also added the new I-766, employment authorization document, to List A. Prior to 2007, the last change to the I-9 form took place on June 21, 2005, when DHS rebranded the form and eliminated outdated references to legacy INS.

### ***“Knowing” Employment***

In addition to the affirmative employment verification required through the I-9, employers must also terminate employment at the point that they acquire knowledge that an employee is not authorized to work. IRCA prohibits any person or entity from knowingly hiring or continuing to employ an unauthorized worker.<sup>27</sup> “Knowledge may be either actual (employer knew) or constructive (employer should have known).” 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.<sup>28</sup> A non-exhaustive list of conditions that would establish a rebuttable presumption of constructive knowledge include employers who: (1) fail to complete or improperly complete the I-9 form; (2) have information that would indicate that the foreign national is not authorized to work; or (3) act with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized foreign national into the workforce.<sup>29</sup>

Initially, courts interpreted the doctrine of constructive knowledge fairly narrowly. Constructive knowledge was specifically found where employers ignored notices from INS stating that certain employees were not authorized to work.<sup>30</sup> The U.S. Court of Appeals for the Ninth Circuit overruled an administrative law judge’s (ALJ) finding of constructive knowledge where the employer had failed to notice that the employee’s name was misspelled on his social security card and a lack of lamination of the social security card.<sup>31</sup> The court disagreed with the INS’s argument that constructive knowledge should be found where the employer failed to notice the delay in presentation of a social security card, the lamination of the card, the misspelling of “Rodriguez” as “Rodriquez” on the card, the lack of any reference to the United States on the card, and the use of two family names on Rodriguez’s California driver’s license but not on the card. In that case, the Ninth Circuit noted that “to preserve Congress’ intent ... the doctrine of constructive knowledge must be sparingly applied.”<sup>32</sup> More recent cases have broadened the interpretation of constructive knowledge to include instances where an employer is in possession of an I-9, which indicated the noncitizen was out of status, but failed to re-verify.<sup>33</sup>

Constructive knowledge arising from “reckless and wanton disregard” may have originally been intended for employers who accept employees through recruiters, but this section has been interpreted to include em-

---

<sup>25</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104–208, div. C, 110 Stat. 3009, 3009–546 to 3009724.

<sup>26</sup> 62 Fed. Reg. 51001 (Sept. 30, 1997). Under sec. 412 of IIRAIRA, the certificate of naturalization, the certificate of citizenship, and foreign passports were eliminated from the List A documents. However, legacy Immigration and Naturalization Service (INS) used its discretion to continue the use of foreign passports for nonimmigrants and birth certificates in List C.

<sup>27</sup> INA §274A(a).

<sup>28</sup> 8 CFR §274a.1(l)(1).

<sup>29</sup> *Id.*

<sup>30</sup> *Mester Mfg. Co. v. INS*, 879 F.2d 561 (9th Cir. 1989); *New El Rey Sausage Co. v. INS*, 925 F.2d 1153 (9th Cir. 1991).

<sup>31</sup> *Collins Foods International Inc. v. INS*, 948 F.2d 549 (9th Cir. 1991).

<sup>32</sup> *Id.* at 555.

<sup>33</sup> *INS v. China Wok Restaurant, Inc.*, 4 OCAHO 608, OCAHO Case No. 93A00103 (Feb. 10, 1994).

employers who recklessly entrust incompetent employees with hiring or I-9 compliance.<sup>34</sup> Because whoever completes Section 2 of the I-9 does so on behalf of the employer; and any knowledge acquired by the agent may be imputed to the employer, regardless of the agent's actual authority to hire.<sup>35</sup>

### ***The Obligation to Re-verify***

Knowledge acquired by the employer after the initial hire may trigger an obligation to re-verify the I-9 documents. The obligation to re-verify is triggered when: (1) the temporary employment authorization expires; or (2) the employee presents a receipt for the application of an acceptable I-9 document.<sup>36</sup>

Re-verification procedures should mirror initial I-9 procedures. The employee may choose which documents to present. An employer should not specify which documents, nor should it specify that the document provided must be a USCIS document. If any changes are made to the I-9, the employee should initial and date the updated information. Instead of re-verifying through an entirely new form, an employer may use Section 3 of the I-9 if the original I-9 was executed within three years of the date of rehire. In all instances an employer may use a new form to re-verify as well.

### ***Good Faith Defense***

If an employer has employed an undocumented worker, good faith compliance with I-9 procedures provides a "narrow but complete defense."<sup>37</sup> A person or entity that has complied in good faith with the requirements of employment verification has established an affirmative defense against unlawful hiring.<sup>38</sup> Completion of the I-9 form raises a rebuttable presumption that the employer has not knowingly hired an unauthorized noncitizen, but the government may rebut the presumption by offering proof that the documents did not appear genuine on their face, the verification was pretextual, or that the employer colluded with the employee in falsifying the documents.<sup>39</sup> The good faith defense does not apply for employers who fail to make corrections on the I-9 after being given 10 days notice, or employers who have a pattern and practice of hiring undocumented workers.<sup>40</sup> Therefore, setting proper policies and training employees who administer I-9 documents is critical to demonstrating good faith compliance.

### ***Social Security No-Match Letters***

In April 2006, seven managers of IFCO Systems (the largest pallet services company in the country) were arrested on criminal charges for failing to terminate workers after being repeatedly notified that more than half of its 5,000 employees had invalid or mismatched social security numbers. Nearly 1,200 illegal workers were rounded up in raids on IFCO's U.S. facilities. Employers must be aware of how their companies respond to no-match letters, because ICE has informally stated that it considers the percentage of employees who have received a social security no-match and the employer's failure to respond to the letter as a factor in demonstrating lack of good faith compliance.

### ***When Are They Issued?***

In recent years the U.S. Social Security Administration (SSA) has refrained from sending letters to employers due to the DHS no-match regulation litigation but continued to send out notices to employees.<sup>41</sup> So-

<sup>34</sup> *United States v. Carter*, 7 OCAHO 931, OCAHO Case No. 95A00164 (May 9, 1997).

<sup>35</sup> *Id.*

<sup>36</sup> 8 CFR §274a.2(b)(1)(vi).

<sup>37</sup> *United States v. Walden Station, Inc.*, 8 OCAHO 1053, OCAHO Case No. 99A00040 (Apr. 21, 2000); INA §274A(b)(6)(A).

<sup>38</sup> *Id.*

<sup>39</sup> H.R. Rep. No. 99-682 at 57 (1986), as quoted in *Collins Foods*.

<sup>40</sup> INA §274A(b)(6)(B)-(C). IIRAIRA sec. 411. "Technical or paperwork violations of the employer sanctions provisions are exempted, as long as there has been a "good faith attempt" by an employer to comply with the verification requirement. The exemption will not apply if the employer fails to cure the violations within a 10-day window or if the employer has engaged in pattern and practice violations. This section applies to violations occurring on or after Sept. 30, 1996."

<sup>41</sup> According to the U.S. Department of Justice (DOJ) Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), the U.S. Social Security Administration (SSA) has not sent letters to employers about multiple employees who have mismatched records since October 2007. See DOJ OSC Update, "DOJ OSC Winter 2011 Newsletter," published on AILA InfoNet at Doc. No. 11012566 (posted Jan. 25, 2011).

cial security no-match letters are issued when the employee name and social security number (SSN) provided on the W-2 form conflicts with SSA records. Out of the 245 million W-2 forms submitted, 10 percent of those forms contain non-matching SSNs. In prior years, 140,000 letters were sent to employers who had more than 10 employees with non-matching data and where the non-matching data constituted at least half of one percent of their employees. As a side note, taxed wages that cannot be doled out to individuals due to no-matches are sent to the SSA earnings suspense file, which now totals \$586 billion.<sup>42</sup> The SSA also issued nine million letters to employees reminding them that correcting the information is in their best interest.

SSA expects the employer to check typos and talk with employees about any discrepancies without demanding a social security card. If the discrepancy is unresolved, the employee should be advised to check with their local SSA office. The IRS may penalize employers \$50 for each W-2 filed with an incorrect SSN.<sup>43</sup> Employers will only face fines if they fail to respond to IRS notices that employee SSN information is incorrect, and not social security no-match letters.<sup>44</sup>

### How Is Information Shared Between SSA and ICE?

While there has been significant debate concerning information-sharing between SSA and ICE, currently the database of no-match employers is not used to target specific employers. In 1998 and 1999, INS attempted to use SSA work records to identify unauthorized noncitizens in Operation Vanguard.<sup>45</sup> After significant criticism from workers, farmers, and industry leaders, SSA limited the agency's ability to check employee records to instances where INS had "reasonable cause to believe that a worker is unauthorized."<sup>46</sup>

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

### The Rescinded Social Security No-Match Regulation

On August 15, 2007, DHS issued a controversial final regulation on how employers should respond to a social security no-match letter.<sup>47</sup> The regulation describes "safe-harbor" procedures employers can follow after receiving a letter to avoid a constructive knowledge finding. It also effectively broadens constructive knowledge to include when the employer fails to take reasonable steps in response to: (1) a social security no-match letter; or (2) written notice from DHS that the employment authorization document (EAD) submitted for I-9 purposes does not match DHS records.<sup>48</sup>

After a legal challenge by the AFL-CIO and the ACLU and a two-year delay in implementation, the Obama Administration rescinded the safe-harbor regulation effective November 6, 2009.<sup>49</sup> The rationale for the rescission was to focus resources on tools such as E-Verify which are universally available, as opposed to reactive no-match letters which are issued only to a limited number of employers.

---

<sup>42</sup> P. Orrenius, "No Match, No Sense," *Wall Street Journal*, Aug. 13, 2007.

<sup>43</sup> 26 USC §6721.

<sup>44</sup> T. Dobbins, "IRS Letter Regarding Penalty Waiver in SSN No-Match Situation," *published on AILA InfoNet at Doc. No. 03100745 (posted Oct. 7, 2003)*.

<sup>45</sup> A. Siskin, "Immigration Enforcement within the United States," Congressional Research Service, Library of Congress, CRS-45, (Apr. 6, 2006), *available at* [www.fas.org/sgp/crs/misc/RL33351.pdf](http://www.fas.org/sgp/crs/misc/RL33351.pdf).

<sup>46</sup> *Id.*

<sup>47</sup> Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 71 Fed. Reg. 34281 (June 14, 2006) (to be codified at 8 CFR §274a).

<sup>48</sup> *Id.*

<sup>49</sup> "DHS Rescission of Safe-Harbor Procedures for Employers Who Receive a No-Match Letter" 74 Fed. Reg. 51447 (Oct. 7, 2009), *published on AILA InfoNet at Doc. No. 09100661 (posted Oct. 7, 2009)*.

Prior to the final regulation, SSA and legacy INS had indicated that a no-match letter alone was not a reliable indicator of employment authorization.<sup>50</sup> Under the final regulations, employers must: (1) attempt to resolve the discrepancy within 30 days; and (2) re-verify employment authorization through the I-9 procedure within 93 days.<sup>51</sup> If the employer completes a new I-9 for the employee, it should use the same procedures as if the employee were newly hired, except that documents presented for both identity and employment must: (1) not contain the SSN, although the alien number may be used for employment authorization; and (2) must contain a photograph.<sup>52</sup>

There has been some disagreement as to whether this expands an employer's existing obligations. The DHS view of current obligations finds support in *Mester Mfg. Co. v. INS*,<sup>53</sup> a Ninth Circuit case where an employer was found to have constructive knowledge after receiving notice that three noncitizens were suspected of green card fraud. In *Mester*, the Ninth Circuit held that the employer must terminate an unauthorized employee within a "reasonable" time period. The determination of what constitutes a reasonable time period includes factors such as "the certainty of the information provided," and the steps taken by the employer to confirm it.<sup>54</sup> Ultimately, a two-week delay in firing an undocumented worker after an employer received a notice of intent to fine from INS was found to constitute continued employment of an undocumented worker.<sup>55</sup>

The rescission of the no-match regulation may leave both employers and immigration attorneys questioning how to resolve discrepancies to avoid a finding of constructive knowledge. Interestingly, DHS takes the view that they have provided sufficient guidance in responding to discrepancies. While the DHS safe-harbor regulations have been rescinded, those regulations may be useful to employers seeking guidance when encountering situations which might constitute constructive notice.

If employers receive credible information regarding the false status of an individual employee (*i.e.*, notice from commercial background check companies, health care providers, and state governments), employers may want to treat it similar to a no-match letter. U.S. Department of Justice OSC warns employers to treat no-match notices from third parties with caution. "In responding to a no-match letter from a source other than SSA, an employer should, at a minimum, follow the same policies, procedures, and timelines as it does for SSA no-match letters."<sup>56</sup>

### ***Claims of Discrimination on the Basis of National Origin or Citizenship***

In verifying employment authorization, employers with more than three employees may not discriminate on the basis of national origin or citizenship status except against unauthorized noncitizens.<sup>57</sup> The anti-discrimination provisions act to limit overzealous employers from excluding lawful workers who appear foreign. Knowledge that an employee is unauthorized may not be inferred from an employee's foreign appearance or accent.<sup>58</sup> Discriminatory practices include copying identity documents for only certain employees, or scrutinizing documents more carefully for workers who look foreign. Pre-screening prospective employees through the I-9 process is also considered a discriminatory practice.

On September 30, 1996, the provisions regarding document abuse were amended to require the intent to discriminate.<sup>59</sup> Document abuse involves the refusal of documents or the request for more or different documents.<sup>60/61</sup> Employers also should avoid requests for specific documents, such as the applicant's social security

<sup>50</sup> Legacy INS Letter from D. Martin to B. Larson (Dec. 23, 1997), reproduced in 76 *Interpreter Releases* 203 (Feb. 9, 1998).

<sup>51</sup> 71 Fed. Reg. at 34281-82.

<sup>52</sup> 71 Fed. Reg. at 34285.

<sup>53</sup> 879 F.2d 561 (9th Cir. 1989).

<sup>54</sup> *Id.* at 567.

<sup>55</sup> *Id.*

<sup>56</sup> DOJ OSC Update, "DOJ OSC Winter 2011 Newsletter," published on AILA InfoNet at Doc. No. 11012566 (posted Jan. 25, 2011).

<sup>57</sup> INA §274B(a)(1).

<sup>58</sup> 8 CFR §274a.1(l)(2).

<sup>59</sup> INA §274B(a)(6).

<sup>60</sup> *Id.*

<sup>61</sup> DOJ OSC settled a document abuse case with Hoover Vacuums for \$10,200 after re-verifying permanent residents whose cards had expired. Similarly a logging company in Oregon agreed to pay \$15,200 in back wages to a former employee, after

*continued*

card. Any request for an applicant's social security card should be made separately from the I-9 process. Where employers are found to have requested more or different documents than an employee chooses from List A or List B and C, they may be fined \$100–\$1,000 for each individual determined to have suffered such document abuse.<sup>62</sup> Prior to the 1996 amendment, document abuse was treated as a strict liability offense. Since the amendment, employers who have rejected documents due to their lack of awareness of the receipt rule were not found to have intentionally discriminated.<sup>63</sup> Lastly, the date of employment authorization expiration should not be considered in the hiring process as that could be deemed to discriminate on the basis of immigration status.<sup>64</sup>

Because IRCA also prohibits discrimination in employment practices on the basis of citizenship or immigration status, employers must be aware of potential pitfalls in pre-hiring inquiries. The OSC maintains that employers may inquire in an interview or employment application whether an applicant is legally authorized to work in the United States.<sup>65</sup> Depending on the response of the applicant, the employer may not inquire any further.<sup>66</sup> If the applicant responds affirmatively, the interviewer should not inquire further. If the applicant responds in the negative, the employer can inquire into the person's current immigration status. Because unauthorized workers are not protected from discrimination under IRCA, such pre-hiring questions pose minimal risk. If the applicant lacks employment authorization, the employer is allowed to ask whether the applicant now or in the future requires sponsorship for an employment visa, such as an H-1B.<sup>67</sup> Pre-employment questions should focus on employment authorization rather than specific status as a citizen or permanent resident, as those questions could be later interpreted to have been the basis for discriminating on the basis of citizenship.

Claims of unlawful discrimination are handled through the Office of Special Counsel for Unfair Employment-Related Discrimination for employers with four to 14 workers or the Equal Employment Opportunity Commission (EEOC) for employers with 15 or more workers.<sup>68</sup> Employers may be ordered to pay civil monetary penalties of \$375–\$3,200 per individual discriminated against for the first offense; \$3,200–\$6,500 per individual discriminated against for the second offense; and \$4,300–\$16,000 per individual for subsequent offenses.<sup>69</sup> The variation in the fine imposed will be partly based on whether economic damage was done to the employee. It also should be noted that fines are discretionary, not mandatory.<sup>70</sup>

The employee or prospective employee must file charges with the OSC within 180 days of the alleged discrimination. The OSC will inform the employer of the charges within 10 days and begin an investigation. If OSC has not filed a complaint with an ALJ 120 days after receiving a charge of discrimination, the charging party may file a complaint with an ALJ within 90 days.

OSC issued an insightful report in November 2006.<sup>71</sup> From 1997 to 2005, OSC secured \$1,374,664 in back-pay for workers, as well as \$1,578,865 in civil penalties from employers. In FY 2011, \$725,120 in civil penalties had been collected. While those numbers include the \$200,000 that Swift was forced to pay in 2001, it is a bit misleading to say that OSC has been aggressive in pursuing discrimination charges against employers.<sup>72</sup> From 2003 to 2006, out of 1,038 investigations of employer discrimination, not a single case resulted in

---

requesting an unexpired permanent resident card for I-9 purposes. DOJ OSC Update, "DOJ OSC Winter 2011 Newsletter," published on AILA InfoNet at Doc. No. 11012566 (posted Jan. 25, 2011).

<sup>62</sup> INA §274B(e)(5).

<sup>63</sup> *United States v. Diversified Tech.*, 9 OCAHO No. 1098, OCAHO Case No. 01B00059 (June 10, 2003).

<sup>64</sup> DOJ OSC, *Handbook for Employers*, at 9 (2006) available at [www.usdoj.gov/crt/osc/pdf/en\\_guide.pdf](http://www.usdoj.gov/crt/osc/pdf/en_guide.pdf).

<sup>65</sup> E. Scofield, N. Chu, L. Ganchan, and A. Fragomen, "Employment Verification Systems—Where Are We and Where Are We Going?" *Immigration & Nationality Law Handbook* 518 (AILA 2006–07 Ed.). See also Office of Special Counsel Opinion Letter on Pre-Employment Inquiries (Aug. 6, 1998).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Memorandum of Understanding Between the Equal Employment Opportunity Commission and the DOJ OSC (Dec. 18, 1997), available at [www.eeoc.gov/policy/docs/oscmou.html](http://www.eeoc.gov/policy/docs/oscmou.html).

<sup>69</sup> INA §274B(g)(2). A 25 percent increase in fines applies where the discrimination took place after March 27, 2008. 28 CFR §68.52(d)(1).

<sup>70</sup> Upon an administrative law judge's finding of a violation based on a preponderance of the evidence, he or she "also may require" a civil penalty. *Id.*

<sup>71</sup> DOJ OSC, *OSC Update* (Nov. 2006).

<sup>72</sup> *Id.*



an ALJ order or fines.<sup>73</sup> This is in large part due to a shift in attitude away from heavy-handed penalties to educating employers through the OSC hotline and encouraging settlements. Examples of recent OSC cases include the following: OSC secured back pay in the amount of \$8,640 where an employer unnecessarily attempted to re-verify employment eligibility after a worker's green card expired.<sup>74</sup> In another case, after a bakery improperly suspended a worker who received an E-Verify tentative non-confirmation, OSC intervened and ordered the worker reinstated with \$4,104 in back pay.<sup>75</sup>

In an effort to reduce employer misuse of E-Verify, OSC and USCIS have established a protocol for receiving complaints of employer misuse of E-Verify which exceeds OSC's jurisdiction. Under the memorandum, USCIS will share data from the queries run through E-Verify with OSC to assist in identifying patterns of discrimination violations as well as in furthering individual claims of discrimination.

### ***The Extent of Personal Liability***

IRCA imposes liability on a "person or other entity" who knowingly hires undocumented workers. The U.S. Court of Appeals for the Eighth Circuit held that the "person or other entity" language of IRCA can impose joint liability on both the employer and the agent.<sup>76</sup> An agent of a company will not escape personal liability when hiring undocumented workers simply because he or she is acting on behalf of the company and not in an individual capacity. In addition, in large companies, executives with control over hiring policies may arguably be held individually liable.

## **RECENT DEVELOPMENTS IN IRCA**

### ***Civil Fines and Criminal Prosecution***

Employer compliance under IRCA has focused primarily on civil fines, and a maximum penalty of six months and \$3,000 fine for pattern and practice of unlawful hiring.<sup>77</sup> Penalties for I-9 paperwork violations can be a civil fine ranging from \$110 to \$1,100 per employee involved.<sup>78</sup> Employers must be given 10 days to cure technical and procedural I-9 violations,<sup>79</sup> and a five-year statute of limitations period applies to substantive I-9 errors.<sup>80</sup> The fines for knowingly hiring undocumented workers can reach \$11,000 for each worker. In February 2008, DHS Secretary Michael Chertoff announced a 25 percent increase in the civil fines for employing undocumented workers, the first increase since 1999.<sup>81</sup> Violations occurring on or after March 27, 2008, are subject to a maximum fine of \$16,000 rather than \$11,000.<sup>82</sup> In setting the proposed fine, the government must weigh five statutory factors: (1) the size of the employer; (2) the good faith of the employer; (3) the seriousness of the violation; (4) any history of previous violations; and (5) any actual involvement of unauthorized noncitizens. The severity of the violation takes into account whether the forms simply contained errors, if important sections or attestations were incomplete, or if the requisite form and documents were retained at all.<sup>83</sup> During the course of an I-9 audit, once a Notice of Intent to Fine (NIF) is issued, the employer has 30 days to either negotiate a settlement with ICE or request a hearing before the Office of the Chief Administrative Hearing Officer (OCAHO). If the employer takes no action, ICE will issue a final order. Because

<sup>73</sup> *Id.*

<sup>74</sup> DOJ OSC, "DOJ Office of Special Counsel Winter 2010 Newsletter," published on AILA InfoNet at Doc. No. 10020167 (posted Feb. 1, 2010).

<sup>75</sup> *Id.*

<sup>76</sup> *Steiben v. INS*, 932 F. 2d 1225, 1228 (8th Cir. 1991).

<sup>77</sup> INA §274A(f)(1); 8 CFR §274a.10(a).

<sup>78</sup> 8 CFR §274a.10(b)(2), as amended by 64 Fed. Reg. 47099 (Aug. 30, 1999).

<sup>79</sup> 63 Fed. Reg. 16909–13 (Apr. 17, 1998); INS Memorandum, P. Virtue, "INS Memo on Employer Sanctions Under IIRAIRA & Selective Appendices" (Mar. 6, 1997), published on AILA InfoNet at Doc. No. 97030691 (posted Mar. 6, 1997).

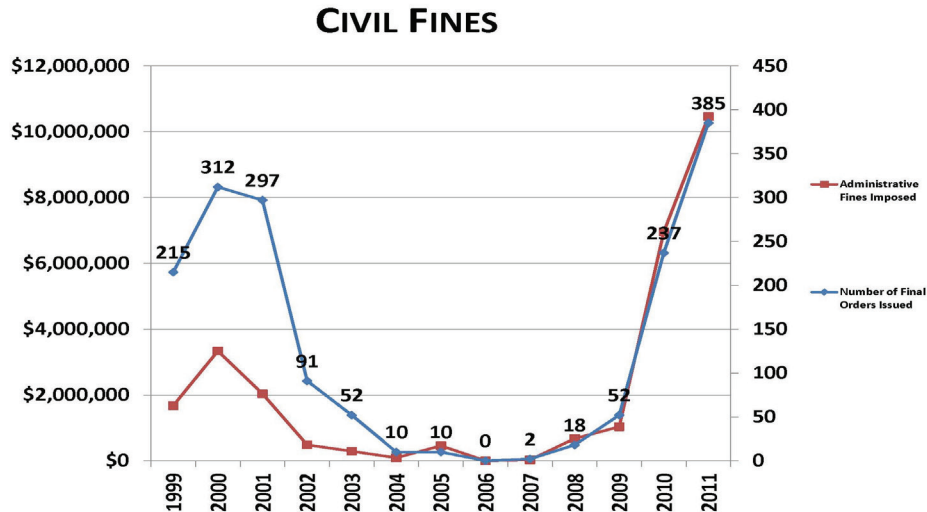
<sup>80</sup> "AILA ICE Worksite Enforcement Meeting Summary and I-9 Worksite Enforcement Practice Tips," published on AILA InfoNet at Doc. No. 10031669 (posted Mar. 16, 2010).

<sup>81</sup> Inflation Adjustment for Civil Monetary Penalties Under Sections 274A, 274B, and 274C of the Immigration and Nationality Act, 73 Fed. Reg. 10130 (Feb. 26, 2008); 28 CFR §68.52(c)(1)(iii).

<sup>82</sup> *Id.*

<sup>83</sup> *United States v. Hudson Delivery Serv., Inc.*, 7 OCAHO 945, OCAHO Case No. 97A00003 (June 6, 1997).

OCAHO has not issued precedent cases involving I-9 fines in recent years, there have been wide discrepancies in I-9 civil fine settlements. In an effort to bring greater predictability to the settlement process, the ICE Office of Investigations, Worksite Enforcement Unit published guidance on standard fine amounts.<sup>84</sup>



In the late 1990s, legacy INS faced several obstacles in pursuing civil fines against companies. Often, the fine amounts were so low that employers considered them part of the cost of doing business, or corporate entities would simply fold, making it impossible to collect the fine. For instance, in 2002, legacy INS only collected \$72,585 in administrative fines.<sup>85</sup>

In 2006, the federal government shifted its focus from imposing civil penalties to criminal prosecution of employers who knowingly employ workers without work authorization.<sup>86</sup> Through a combination of criminal fines, restitutions, and civil judgments, ICE claims to have collected over \$29 million from employers in just the first half of 2007.<sup>87</sup> More recently in 2008, of the 1,100 criminal arrests made during worksite enforcement operations, 135 were of managers, supervisors, and human resource managers. In the same year, ICE also made over 5,184 administrative arrests, mostly for identity theft.<sup>88</sup>

ICE investigators have particularly focused on employers involved in human trafficking, smuggling, and harboring. It is a felony to knowingly: (1) bring an illegal noncitizen into the United States; (2) transport an illegal noncitizen in order to further their unlawful presence; (3) conceal, harbor, or shield an illegal noncitizen from detection; or (4) encourage or induce a noncitizen to illegally enter the country.<sup>89</sup> Congress amended the statute to eliminate the prior express exclusion of employers in the harboring statute.<sup>90</sup> While several courts have found that unauthorized employment alone is insufficient for a harboring conviction, additional acts, such as facilitating a change in identity, willfully misrepresenting facts on the I-9,<sup>91</sup> assisting with the procurement of false documents, providing housing, and warning noncitizens about impending inspections

<sup>84</sup> U.S. Immigration and Customs Enforcement (ICE), “ICE Form I-9 Inspection Overview and Civil Fine Guidance” (Nov. 19, 2009), published on AILA InfoNet at Doc. No. 09111920 (posted Nov. 19, 2009).

<sup>85</sup> DHS Press Release, “No More Slaps on Wrist for Work-Site Violations.” (June 26, 2007).

<sup>86</sup> Statement from J. Myers, Assistant Secretary of DHS and Head of ICE. “The most effective way [to enforce worksite regulations] is to bolster our criminal investigations against employers hiring illegal immigrants. For many employers, fines had become just another “cost of doing business.” More robust criminal cases against unprincipled employers are a much more effective deterrent than fines.” *USA Today* (Apr. 25, 2006).

<sup>87</sup> DHS Press Release, “No More Slaps on Wrist for Work-Site Violations.” (June 26, 2007).

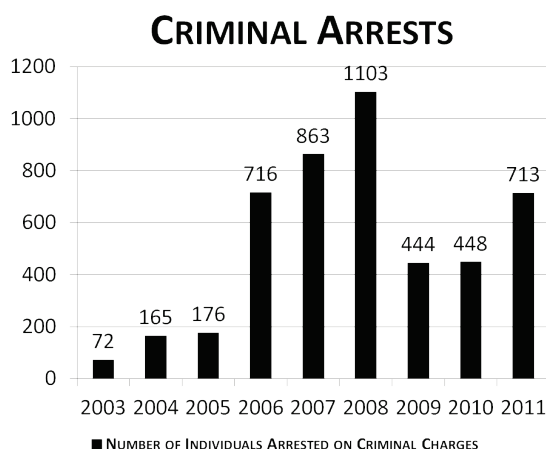
<sup>88</sup> DHS Press Release, “Worksite Enforcement Overview.” (Apr. 30, 2009).

<sup>89</sup> INA §274(a).

<sup>90</sup> *Id.*

<sup>91</sup> *United States v. Kim*, 193 F.3d 567 (2d Cir. 1999).

constitute harboring.<sup>92</sup> If harboring was “done for the purpose of commercial advantage or private financial gain,” the maximum prison term is 10 years.<sup>93</sup> Employers who pay noncitizens low wages and fail to withhold taxes have been subject to the higher prison term.<sup>94</sup>



If an employer is not convicted of harboring, another provision specifically addresses employers. Any person who during any 12-month period knowingly hires for employment at least 10 individuals, with actual knowledge that the individuals are unauthorized foreign nationals, shall be fined, imprisoned for not more than five years, or both.<sup>95</sup>

### ***Emerging Issues with Electronic Storage***

On October 30, 2004, Congress passed legislation giving employers the option of completing the I-9 form electronically.<sup>96</sup> On June 15, 2006, DHS issued regulations giving employers guidance on how I-9 forms may be written and stored electronically. DHS issued the final regulation regarding electronic signature and storage effective August 23, 2010, four years after the interim final rule was released.<sup>97</sup>

The standards for electronic retention are fairly flexible and technology neutral.<sup>98</sup> Any system employed must include an audit trail, or timestamp whenever any I-9 is altered.<sup>99</sup> Other requirements include backup and recovery of records to protect against information loss and a retrieval system that allows searching based on fields.

The program must be able to attach an electronic signature to the completed I-9 at the time of the creation of the record, create and preserve a record certifying the identity of the person producing the signature, and provide a printed confirmation of the I-9 to the employee if the employee requests a hardcopy.<sup>100</sup> If the electronic signature does not meet the requirements stated, the I-9 will be considered improperly completed in violation of INA §274(a)(1)(B).<sup>101</sup>

A number of vendors entered the market with programs that electronically complete and store I-9s. They may soon have competition from USCIS, which is developing its own electronic I-9 that will populate E-

<sup>92</sup> *Id.*

<sup>93</sup> INA §274(a)(1)(B)(i).

<sup>94</sup> *United States v. Zheng*, 306 F.3d 1080 (11th Cir. 2002).

<sup>95</sup> INA §274(a)(3)(A).

<sup>96</sup> Electronic Signature and Storage of Form I-9, Employment Eligibility Verification, 71 Fed. Reg. 34510 (June 15, 2006) (to be codified at 8 CFR §274a.2).

<sup>97</sup> 75 Fed. Reg. 42575 (June 22, 2010)

<sup>98</sup> *Id.*

<sup>99</sup> 8 CFR §274a.2(e)(8).

<sup>100</sup> 8 CFR §274a.2(e), (g).

<sup>101</sup> 8 CFR §274a.2(h)(2).

Verify data fields.<sup>102</sup> Electronic completion and storage offers the potential to catch employer mistakes (such as when an employee checks that he or she is a noncitizen temporarily authorized to work, but provides a permanent resident card). The electronic I-9 software can be integrated into an employer's existing human resource software to streamline the hiring process and remove duplication. However, many of these vendors are technology companies operating without immigration counsel. While electronic storage creates the opportunity for a streamlined I-9 process and increased accuracy when fields are skipped or improperly entered, employers must take care in adhering to the regulatory standards when implementing electronic storage. ICE Homeland Security Investigations issued a memo on electronic I-9 audit trail requirements to remind auditors to verify that the software meets the regulatory requirements.<sup>103</sup>

### ***Verifying Employment Authorization***

With widespread document fraud and the requirement that employers accept documents that reasonably appear genuine, employers are faced with difficult choices in challenging a worker's employment authorization. Despite an employer's best attempts at verifying documents, only the issuing agency will know for certain whether documents are genuine and match the individual. Due to these enormous challenges, Congress authorized a pilot verification system that would allow employers to ensure employment authorization.

### **The E-Verify Program**

IIRAIRA authorized DHS to create an online system that allows registered employers to quickly verify employment eligibility. While E-Verify was only initially available in five states, since December 1, 2004, the program has been an option for employers nationwide.<sup>104</sup> As of February 2013, about 385,000 employers nationwide use the E-Verify program.<sup>105</sup>

Because E-Verify is a voluntary program, participation is further evidence of good faith compliance with IRCA.<sup>106</sup> Former DHS Secretary Michael Chertoff has stated that good faith participation in E-Verify will protect employers from civil and criminal penalties regarding the hiring of undocumented workers.<sup>107</sup> DHS also asserts that use of E-Verify establishes a rebuttable presumption that the employer has not knowingly employed an unauthorized screened worker.<sup>108</sup> Note that this rebuttable presumption may be similarly achieved through the proper completion of an I-9.<sup>109</sup>

### ***Using E-Verify***

In order to participate in E-Verify, an employer must sign a Memorandum of Understanding (MOU).<sup>110</sup> Under the MOU terms, the employer must verify all new hires within the enrolled hiring site.<sup>111</sup> E-Verify

<sup>102</sup> USCIS Memorandum, M. Aytes, "Aytes Memo Responds to CIS Ombudsman Recommendation 38 on E-Verify in Arizona," published on AILA InfoNet at Doc. No. 09033164 (posted Mar. 3, 2009). See also Jan. 20, 2011 U.S. Chamber letter to ICE and USCIS suggesting the option of electronically completing an I-9 through a government web portal.

<sup>103</sup> HSI Memo, J. Dinkins, "HSI Memo on Electronically Generated Form I-9s" (Aug. 22, 2012), published on AILA InfoNet at Doc. No. 12101240 (Oct. 12, 2012).

<sup>104</sup> The E-Verify Program Extension and Expansion Act of 2003, Pub. L. No. 108-456, expanded the program from the initial five states to all 50 states and required implementation no later than December 1, 2004.

<sup>105</sup> Jordan, Miram, "U.S. News: Feds Target Illegal Hires," *Wall Street Journal*, Feb. 17, 2011.

<sup>106</sup> "A rebuttable presumption is established by §402(b) of IIRAIRA that the employer has not violated §274A(a)(1)(A) of the INA with respect to the hiring of any individual if it obtains confirmation of the identity and employment eligibility of the individual in compliance with the terms and conditions of E-Verify." E-Verify Memorandum of Understanding, [www.uscis.gov/files/native/documents/MOU.pdf](http://www.uscis.gov/files/native/documents/MOU.pdf).

<sup>107</sup> Press Release, DHS Secretary Michael Chertoff (Dec. 13, 2006) ("As a consequence of participating in E-Verify, if you participate in that in good faith, then you are not going to be charged criminally or be held civilly liable.").

<sup>108</sup> E-Verify Memorandum of Understanding, [www.uscis.gov/files/native/documents/MOU.pdf](http://www.uscis.gov/files/native/documents/MOU.pdf).

<sup>109</sup> H.R. Rep. No. 99-682, at 57 (1986), as quoted in *Collins Foods*.

<sup>110</sup> Since February 2006, only electronic registration of E-Verify is available.

<sup>111</sup> I-9 Telephonic Seminar (Feb. 22, 2006), G. Ratliff, Chief of the USCIS Verification Division. Limiting the registration of E-Verify to hiring sites will prevent multi-national employers from having to use E-Verify on all new hires worldwide. Hiring sites are defined as locations at which the company processes new hires.

cannot be used on prospective employees, employees who need to be re-verified, or existing employees.<sup>112</sup> Employers who participate in E-Verify must still complete the I-9 and must only accept List B documents that contain a photograph.<sup>113</sup> Employers must submit the employee's information to E-Verify within three days of the employee's hire date.<sup>114</sup> The submission of information may only be done online; there are no phone or fax alternatives. An employer may also choose to authorize a third party to process its employees through E-Verify.

Once the new hire's information has been submitted, most employers receive verification within seconds. While USCIS administers E-Verify, both SSA and DHS provide their databases to process the queries. If the new hire is a citizen, the name and SSN will be submitted to SSA and checked against more than 449 million SSA records. If the new hire is a noncitizen, then the name, SSN, and "A" number will be submitted to DHS and checked against 80 million DHS records.<sup>115</sup> If neither SSA nor DHS can confirm work authorization within 24 hours, the employer receives a tentative non-confirmation.

During the tentative non-confirmation period, an employer may not terminate employment<sup>116</sup> and should check the accuracy of the information for misspellings. If an employee does not contest or resolve the non-confirmation finding within eight days, E-Verify issues a final non-confirmation notice and employers are required to either immediately terminate the employee or notify DHS that they continue to employ the worker.<sup>117</sup> If the employee contests the tentative non-confirmation, the employer will refer the employee to either visit the local SSA office or call DHS.<sup>118</sup> The employee has 10 days to resolve the issue with the local agency; otherwise, a final non-confirmation will be issued.<sup>119</sup> If the employer continues to employ the worker after a final non-confirmation, a rebuttable presumption is created that the employer has knowingly employed an unauthorized foreign national.<sup>120</sup> If the employer fails to notify DHS through E-Verify of the continued employment, the employer faces fines ranging from \$550 to \$1,100.<sup>121</sup> The E-Verify program raises concerns as to what constitutes constructive notice of an unauthorized worker, and whether a non-confirmed worker can continue to work if they provide additional non-SSN-related EADs.

### *E-Verify Burdens on Employers*

Employers that register with E-Verify are required to go through a web tutorial and ultimately pass a mastery test. An E-Verify user manual is also available online for employers and attorneys who have questions about the system.<sup>122</sup> Note that the employer must take certain steps which go beyond the normal obligations of an employer completing an I-9. An employer participating in E-Verify is required to obtain an SSN from their employee. If an employee presents a permanent resident card, employment authorization card, or a foreign passport, the employer must make a copy to compare with the E-Verify photo tool.

<sup>112</sup> E-Verify Memorandum of Understanding, [www.uscis.gov/files/native\\_documents/MOU.pdf](http://www.uscis.gov/files/native_documents/MOU.pdf), at 4. ("Employer agrees not to use the E-Verify procedures for re-verification, or for employees hired before the date this MOU is in effect."). The limited scope of E-Verify to only new hires is a reflection of IRCA's requirements to verify employment authorization of new hires. Certainly, the scope of E-Verify in the future could extend to existing employees as proposed in H.R. 4437, 109th Cong. (2005).

<sup>113</sup> E-Verify Memorandum of Understanding, [www.uscis.gov/files/native\\_documents/MOU.pdf](http://www.uscis.gov/files/native_documents/MOU.pdf), at 3.

<sup>114</sup> Government Accountability Office (GAO), "Immigration Enforcement: Preliminary Observations on Employment Verification and Worksite Enforcement Efforts" at 4 (June 21, 2005), available at [www.gao.gov/new.items/d05822t.pdf](http://www.gao.gov/new.items/d05822t.pdf).

<sup>115</sup> Congressional Testimony of Michael Aytes, Acting Deputy Director for USCIS. "Priorities Enforcing Immigration Law," (Apr. 3, 2009).

<sup>116</sup> IIRAIRA §403.

<sup>117</sup> GAO, "Immigration Enforcement: Preliminary Observations on Employment Verification and Worksite Enforcement Efforts" at 4 (June 21, 2005), available at [www.gao.gov/new.items/d05822t.pdf](http://www.gao.gov/new.items/d05822t.pdf).

<sup>118</sup> E-Verify Memorandum of Understanding, [www.uscis.gov/files/native\\_documents/MOU.pdf](http://www.uscis.gov/files/native_documents/MOU.pdf), at 4. Note if an SSA tentative non-confirmation is a result of a citizenship mismatch, the employee may call DHS to resolve the issue instead of visiting SSA.

<sup>119</sup> *Id.*

<sup>120</sup> IIRAIRA §403(a)(4)(C)(iii).

<sup>121</sup> IIRAIRA §403(a)(4)(C)(ii). An employer will have violated INA §274A(a)(1)(B) and will be subject to the fines stipulated in INA §274A(e)(5).

<sup>122</sup> [www.uscis.gov/files/native\\_documents/E-Verify\\_Manual.pdf](http://www.uscis.gov/files/native_documents/E-Verify_Manual.pdf).

### *Timeliness and Accuracy of E-Verify*

Of the queries submitted to E-Verify, 92 percent are handled by SSA and only 8 percent are passed along to DHS, which is responsible for verification for noncitizens.<sup>123</sup> USCIS notes that accuracy has improved and currently 98.6 percent of all submissions are automatically verified as work authorized.<sup>124</sup> In 2002, this automatic verification rate was 83 percent, and in 2007, 94.7 percent. The percentage of initial tentative non-confirmations that later result in work authorizations only constitute 0.01 percent of all E-Verify submissions.<sup>125</sup>

Secondary verifications are performed by USCIS employees who manually verify employment authorization.<sup>126</sup> The majority of secondary verifications by USCIS are typically resolved within 24 hours, but some queries may take up to two weeks.<sup>127</sup> Previous studies indicated that E-Verify may have growing pains, as more and more employers registered particularly in the secondary verification. Note that SSA requires a physical visit to a local office to resolve a tentative non-confirmation.<sup>128</sup>

DHS has made efforts to shorten the time required to update the system on changes in immigration status.<sup>129</sup> Previously, data on new immigrants was often unavailable for six to nine months.<sup>130</sup> Now, information is typically available for verification within 10 to 12 days of arrival in the United States.<sup>131</sup>

In an effort to improve the accuracy of E-Verify, USCIS has introduced an employee self-check process effective March 18, 2011.<sup>132</sup> It will allow employees to confirm their work authorization status in E-Verify after the worker authenticates his or her identity. In addition to providing basic biographical information, the worker will be asked two to four “knowledge-based questions” based on information collected by third party financial institutions such as their bank transaction history, mortgage payments, or past addresses.

### *Weaknesses in E-Verify*

Former USCIS Director Emilio Gonzalez conceded “the E-Verify system is not fraud-proof and was not designed to detect identity fraud.”<sup>133</sup> E-Verify cannot detect when workers are using another person’s name and SSN.<sup>134</sup> As long as an unauthorized worker presents documents containing valid information, E-Verify will verify the employee as work authorized.<sup>135</sup> On September 25, 2007, USCIS launched photo capabilities which display the identity photo of 17 million EAD and green cards to assist employers in detecting fraud.<sup>136</sup> USCIS has approached state DMV offices about sharing state drivers’ license photos through the RIDE program. Currently only the state of Mississippi participates. In December 2008, DHS signed a Memorandum of Agreement with DOS to share passport data and photographs from DOS records, and in February 2009, USCIS began incorporating passport data into E-Verify in order to check citizenship

<sup>123</sup> GAO, “Immigration Enforcement: Preliminary Observations on Employment Verification and Worksite Enforcement Efforts” at 4 (June 21, 2005), available at [www.gao.gov/new.items/d05822t.pdf](http://www.gao.gov/new.items/d05822t.pdf), at 11.

<sup>124</sup> [www.uscis.gov](http://www.uscis.gov)

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Social Security Act §205(e)(2)(B)(ii). SSA has different standards of evidence, SSA must confirm true identity.

<sup>129</sup> Westat Report, “Findings of the Web Basic Pilot Program Evaluation,” (Nov. 2007).

<sup>130</sup> “USCIS Report to Congress on Basic Pilot Program for Employment Verification” (June 2004), published on AILA InfoNet at Doc. No. 04081940 (posted Aug. 19, 2004).

<sup>131</sup> *Id.*

<sup>132</sup> 76 Fed. Reg. 9034 (Feb. 16, 2011).

<sup>133</sup> USCIS Press Release, “USCIS Launches Photo Screening Tool for E-Verify Program,” (Sept. 25, 2007).

<sup>134</sup> GAO, “Immigration Enforcement: Preliminary Observations on Employment Verification and Worksite Enforcement Efforts” at 4 (June 21, 2005), available at [www.gao.gov/new.items/d05822t.pdf](http://www.gao.gov/new.items/d05822t.pdf), at 11.

<sup>135</sup> *Id.*

<sup>136</sup> USCIS Press Release, “USCIS Launches Photo Screening Tool for E-Verify Program,” (Sept. 25, 2007).

status.<sup>137</sup> As of November 10, 2010, E-Verify Photo Tool now includes passport photos in addition to the 15 million EADs or Permanent Resident Cards (green cards).<sup>138</sup>

Despite the additional effort required for E-Verify, participation will not immunize employers from I-9 compliance audits, nor will it preclude the possibility of a raid. Swift & Co. had tried unsuccessfully to head-off the raids after company records were subpoenaed by ICE last spring.<sup>139</sup> In December 2006, company lawyers were denied a court injunction against the raids. A December 2010 study by Westat commissioned by DHS found that as of 2009, only 3 percent of all U.S. employers participate in E-Verify.<sup>140</sup> Employers who are concerned about E-Verify data being used to target employers for I-9 audits may have reason to worry. In December 2008, ICE and USCIS entered into a formal information sharing agreement.<sup>141</sup> The USCIS Verification Division will notify the ICE Worksite Enforcement Unit of incidences or patterns of “misuse, abuse, or fraudulent (E-Verify) use, the employment of unauthorized aliens, and the failure to use E-Verify all (on new hires) as required under the E-Verify MOU.” E-Verify is particularly interested in monitoring employers with a high incidence of uncontested tentative non-confirmations, as this is often an indicator of employers that are using the E-Verify system for prescreening.<sup>142</sup>

There is a lack of clarity as to the depth and frequency of the information sharing, but any employer seeking to register and use E-Verify needs to be aware of the potential liability. The Government Accountability Office (GAO) has recognized that E-Verify data could potentially be used for ICE worksite enforcement operations.<sup>143</sup> While ICE has no direct role in monitoring the use of E-Verify,<sup>144</sup> it has requested and received pilot program data from USCIS on specific employers who participate in the program and are under investigation.<sup>145</sup>

ICE officials have also stated that the program data could help target employers who do not follow program requirements. For instance, if the same SSN is submitted repeatedly through E-Verify, concerns may be raised about whether employees at that site are fraudulently using SSNs and whether unscrupulous employers are blindly accepting them. This usage by ICE may be considered unlawful because the information is being used not to determine whether an individual is an unauthorized foreign national, but to target other employees who may be associated with the same employer.<sup>146</sup> As of October 2012, E-Verify officials state that they have conducted 48 desk reviews, off-site reviews of an employer’s E-Verify records and practices, such as the failure to print tentative non-confirmations.

### *Federal Contractors and E-Verify*

In November 2008, DHS published a final rule requiring some federal contractors to use E-Verify, in response to President Bush’s issuance of Executive Order 12989 on June 6, 2008.<sup>147</sup> Unless exempt, federal

<sup>137</sup> Congressional Testimony of Michael Aytes, Acting Deputy Director for USCIS. “Priorities Enforcing Immigration Law,” (Apr. 3, 2009).

<sup>138</sup> BNA Daily Labor Report. Nov. 10, 2010.

<sup>139</sup> M. Cooper, “Lockdown in Greeley,” *The Nation* (Feb. 26, 2007).

<sup>140</sup> Available on AILA InfoNet at Doc. No. 11020362 (posted Feb. 3, 2011). “Many policymakers have looked for ways to reduce unauthorized employment, including State law mandates to participate in E-Verify for all employers (in Arizona and Mississippi).”

<sup>141</sup> [www.uscis.gov/files/nativedocuments/USCIS-ICE-E-VerifyMOA.pdf](http://www.uscis.gov/files/nativedocuments/USCIS-ICE-E-VerifyMOA.pdf).

<sup>142</sup> “AILA E-Verify Liaison Meeting Summary (6/7/10)” (June 7, 2010), published on AILA InfoNet at Doc. No. 10091362 (posted Sept. 13, 2010).

<sup>143</sup> GAO Report, “GAO Report on Use of Earnings Data and Unauthorized Work” at 10 (July 11, 2006), published on AILA InfoNet at Doc. No. 06071362 (posted July 13, 2006).

<sup>144</sup> USCIS maintains the E-Verify Program.

<sup>145</sup> GAO, “Immigration Enforcement: Preliminary Observations on Employment Verification and Worksite Enforcement Efforts” at 4 (June 21, 2005), available at [www.gao.gov/new.items/d05822t.pdf](http://www.gao.gov/new.items/d05822t.pdf), at 10.

<sup>146</sup> INA §274A(d)(2)(C). “Any personal information utilized by the system may not be made available to government agencies, employers, and other persons except to the extent necessary to verify that an individual is not an unauthorized alien.”

<sup>147</sup> 73 Fed. Reg. 67704.

contracts awarded under the Federal Acquisition Regulations after September 8, 2009,<sup>148</sup> must include a clause committing government contractors to use E-Verify. Exempt from the final rule are (1) contracts with a value of less than \$100,000; (2) contracts to be performed in a period of less than 120 days; (3) contracts in which all work is to be performed outside the United States; and (4) contracts that include only commercially available off-the-shelf items. Subcontracts for services or construction with a value of \$3,000 or more must also include E-Verify obligations if the prime federal contract includes the E-Verify clause.

Prior DHS policy permitted E-Verify to be used only on new hires. Under the new final rule, federal contractors and subcontractors must use E-Verify for all new hires, and for all existing employees assigned to the federal contract. Existing employees who are assigned to the contract must be screened through E-Verify within 90 days of the contract award. A company awarded a contract with the federal government must enroll in E-Verify within 30 days of the contract award date.

### IMAGE Program

The ICE Mutual Agreement between Government and Employers (IMAGE) program was introduced in July 2006 as a cooperative best-practices program for employers.<sup>149</sup> Under the program, ICE reviews an employer's hiring practices and policies and recommends ways to correct compliance issues. The program requires nine best practices including participation in E-Verify as well as a mandatory ICE audit of current I-9 forms.<sup>150</sup> Other best practices include: (1) semi-annual external audits; (2) establishing internal training on I-9s and fraudulent use of documents; (3) creating a no-match letter protocol; (4) establishing a self-reporting procedure for any violation; (5) assessing compliance of sub-contractors; (6) creating a tip line; and (7) ensuring practices are not discriminatory.<sup>151</sup> As you can imagine the program is not terribly popular.<sup>152</sup> As of November 2008, there were only 46 employers participating in IMAGE nationwide. Due to the lack of popularity of IMAGE, ICE introduced the IMAGE associate program which allows an employer to defer the ICE I-9 audit for a two-year period.

Once an employer has registered and implemented ICE's best hiring practices, they will be deemed "IMAGE-certified." No regulations or statutes have been issued on IMAGE, but ICE intends to release regulations on IMAGE in the coming months. ICE states on its website "that participation may be considered a mitigating factor in the determination of civil fine amounts should they be levied."<sup>153</sup> Informally, ICE has stated that companies who undergo a civil audit as part of IMAGE will be given a two-year waiver of any additional audits.

Perhaps one of the largest benefits to participating in IMAGE is the decreased risk of raids, and if undocumented workers are found through ICE audits, an employer may be given more time to dismiss and transition to new workers. ICE has stated that it "will attempt to minimize disruption of business operations resulting from a company's self-disclosure of possible violations."<sup>154</sup> The Swift raids demonstrate that civil and criminal fines may not be the most critical liability that an employer may face. One day of lost production cost Swift an estimated \$20 million and another \$10 million to find replacement workers. Ultimately, this may drive Swift, the second largest meat packing company in the world and a company that has been in existence for 150 years, out of business.<sup>155</sup>

---

<sup>148</sup> The final rule was originally scheduled for implementation on Jan. 15, 2008, but was delayed to Feb. 20, 2009, as a result of litigation brought by the chamber of commerce and other business groups. The effective date of the final rule requiring certain federal contractors and subcontractors to use E-Verify was delayed until Sept. 2009.

<sup>149</sup> DHS Press Release, "DHS Highlights Best Practices for Maintaining Legal Workforces" (July 26, 2006), available at [www.dhs.gov/xnews/releases/press\\_release\\_0966.shtm](http://www.dhs.gov/xnews/releases/press_release_0966.shtm).

<sup>150</sup> ICE Mutual Agreement Between Government and Employers, [www.ice.gov/partners/opaimage](http://www.ice.gov/partners/opaimage).

<sup>151</sup> T. Weigel, "Thinking Twice About Partnering with ICE—An Analysis of ICE's 'Best Hiring Practices' and IMAGE," *Immigration Law Weekly*, available at [www.ilw.com/articles/2007,0130-weigel.shtm](http://www.ilw.com/articles/2007,0130-weigel.shtm).

<sup>152</sup> D. Fears and K. Williams, "In Exchange for Records, Fewer Immigration Raids," *Washington Post* (Jan. 29, 2007) at A03.

<sup>153</sup> ICE Mutual Agreement Between Government and Employers, [www.ice.gov/partners/opaimage](http://www.ice.gov/partners/opaimage).

<sup>154</sup> *Id.*

<sup>155</sup> K. Arellano and J. Dunn, "Swift & Co. Weighs a Sale," *The Denver Post* (Jan. 22, 2007).



## Social Security Number Verification Service

SSA provides an online and phone-based<sup>156</sup> social security number verification system (SSNVS).<sup>157</sup> The online SSNVS began in December 2004, and allows registered employers to verify 10 names and SSNs online and receive results immediately.<sup>158</sup> The online SSNVS system also allows employers to upload batch files of up to 250,000 names and SSNs and usually receive results the next government business day. The primary purpose of SSNVS is to ensure accurate wage reporting on W-2 statements. The W-2 provided by the employer must match SSA's records in order for the employee's wage and tax data to be properly posted to their earnings record.<sup>159</sup>

Unlike the E-Verify program, SSNVS can be used on new hires as well as current employees. SSNVS is not intended to determine employment authorization, and employers should not take punitive action against employees on the basis of a no-match. If an employer elects to use the system, they may acquire knowledge of the identity or employment authorization of an employee that would arguably prompt further investigation. An employer may not use the system as a new hire screening tool for job applicants and is subject to Privacy Act sanctions for misuse of the system.

## EMPLOYEE ISSUES

### *REAL ID Act and Driving Privilege Cards*

The REAL ID Act,<sup>160</sup> having passed the House and Senate without hearings or testimony, will have a significant impact on the ability of many lawful immigrants to obtain proper employment authorization.<sup>161</sup> REAL ID requires that after May 11, 2008 (although states may seek extensions until May 11, 2011), all states must require driver's license applicants to provide: (1) proof of an SSN or verification that the person is ineligible for one; and (2) proof that the applicant is legally present in the United States. The state must then verify each of the documents with the issuing agency.<sup>162</sup> If a state fails to require these documents, the state-issued identification card would not be accepted as valid identification by the federal government. Many states are passing joint resolutions opposing REAL ID.<sup>163</sup> Other states have made it increasingly difficult for immigrants to obtain driver's licenses.

### *Misrepresentations of Citizenship Status on the I-9*

There are two primary concerns when a noncitizen completes Section 1. An individual must attest under penalty of perjury that the individual is a citizen or national, permanent resident, or foreign national authorized to be employed.<sup>164</sup> If the noncitizen marks citizen/national in Section 1, he or she may have (1) made a claim to U.S. citizenship for a benefit under the INA which would render them inadmissible;<sup>165</sup> or (2) made a false statement as to a material fact on a document required under the INA, or knowingly presented an application or document that "fails to contain any reasonable basis in law or fact."<sup>166</sup> Note that for I-9s completed after April 3,

<sup>156</sup> Phone verification can be accessed at 1-800-772-6270.

<sup>157</sup> Social Security Act, §232, 42 USC §432, authorizes SSA to collect wage and tax information and to supply it to the Internal Revenue Service. The Privacy Act, 5 USC §552a(b)(3), provides the authority to disclose personal information without consent in certain "routine" use situations. SSA's disclosure regulations mirror the Privacy Act criteria. See 20 CFR §§401.25 and 401.110. Finally, the "Blue Book" explains the routine uses the SSA will employ under the Privacy Act authority.

<sup>158</sup> 69 Fed. Reg. 71865 (Dec. 10, 2004).

<sup>159</sup> *Id.*

<sup>160</sup> REAL ID Act of 2005 (REAL ID), Pub. L. No. 109-13, div. B, 119 Stat. 231, 302-23.

<sup>161</sup> Emergency Supplemental Appropriations, Legislative History, H. Conf. Rep., Pub. L. No. 109-13, 119 Stat. 231, Title II §202(c)(3)(B) (May 11, 2005). Under a Jan. 11, 2008, DHS final rule, states may seek an extension until May 11, 2008, to implement these provisions.

<sup>162</sup> *Id.*

<sup>163</sup> On Jan. 25, 2007, Maine passed a joint resolution. Georgia, Massachusetts, Montana, and Washington may soon follow. 84 *Interpreter Releases* 352 (2007).

<sup>164</sup> INA §274A(b)(2).

<sup>165</sup> INA §212(a)(6)(C)(ii).

<sup>166</sup> 18 USC §1546.

2009, this ambiguity will not exist because the U.S. citizen and national box has been divided into two separate options.

### Claim to U.S. Citizenship

It is unclear whether checking the citizenship/national box qualifies as a false statement of U.S. citizenship to obtain “a benefit” under the INA. In an unpublished decision, the Board of Immigration Appeals (BIA) found that merely checking the “citizen or national” box on the I-9 is insufficient, without more, to support a false claim to citizenship charge.<sup>167</sup> The BIA found no clear and convincing evidence demonstrating that the worker intended to represent himself as a U.S. citizen rather than a U.S. national and decided that removal under INA §212(a)(6)(C)(ii) was not justified.<sup>168</sup>

All U.S. citizens are also nationals of the United States,<sup>169</sup> but instances of national status without U.S. citizenship are limited. U.S. nationality is bestowed on persons born in or having ties with “an outlying possession of the United States,”<sup>170</sup> including American Samoa and Swains Island.<sup>171</sup> Proof of national status would be indicated on a passport.<sup>172</sup>

### False Statement

Prior to the passage of IIRAIRA, incorrectly marking U.S. citizen/national in Section 1 was not regarded as a violation of INA §274(c).<sup>173</sup> IIRAIRA makes it a crime to knowingly make a false statement as to a material fact in any application or document required under the INA, or to knowingly present any such application or document that contains a false statement or that “fails to contain any reasonable basis in law or fact.”<sup>174</sup> The Eighth Circuit found a noncitizen ineligible for adjustment because at the time that the box was marked, there was no reasonable basis in fact or law to a claim for either national or citizenship status.<sup>175</sup> Moreover, under INA §245(c), a foreign national, other than an immediate relative or specified special immigrant, who accepts or continues unauthorized employment, is disqualified from adjustment of status.<sup>176</sup>

### CONCLUSION

While we may see a shift away from well-publicized ICE raids to low profile civil fines against egregious employers, worksite enforcement will remain a cornerstone of comprehensive immigration reform. As with IRCA, which legalized millions of workers while imposing new obligations on employers, any new immigration reform bill will likely impose a higher standard of due diligence for employers.<sup>177</sup> With the government’s continued enforcement efforts, simple precautionary measures—such as internal audits and strict compliance with I-9-related regulations—are now more important than ever.

### FREQUENTLY ASKED QUESTIONS FROM EMPLOYERS

#### *Should an Employer Accept Documents that Have Names Swapped (John Doe and Doe John)?*

During the I-9 process, the employer must ensure that identity and employment authorization documents relate to the individual and are reasonably genuine.<sup>178</sup> The employer may reject a document if in the exercise

<sup>167</sup> *Matter of Oduor*, A75 904 456 (Mar. 15, 2005) (on file with author).

<sup>168</sup> *Id.*

<sup>169</sup> INA §101(a)(22).

<sup>170</sup> INA §308.

<sup>171</sup> INA §101(a)(29).

<sup>172</sup> 8 USC §1452(b)(1).

<sup>173</sup> *United States v. Remileh*, 5 OCAHO 724, OCAHO Case No. 94C00139 (Dec. 5, 1995), reported in 72 *Interpreter Releases* 319 (Mar. 6, 1995).

<sup>174</sup> 18 USC §1546, as amended by §214 of IIRAIRA.

<sup>175</sup> *Ateka v. Ashcroft*, 384 F.3d 954 (8th Cir. 2004).

<sup>176</sup> INA §245(c). If an immediate relative, see INA §201(b).

<sup>177</sup> New legislation may include increased civil and criminal penalties, as well as mandatory participation in E-Verify, as proposed in the 2005 Senate and House immigration bills.

<sup>178</sup> 8 CFR §274a.2(b)(1)(v).

of reasonable business judgment, it is determined that the document does not relate to the individual, such as where the name on the identity document does not match the employment authorization document.

If the employer chooses not to accept the documents, the new hire may: (1) select a different document to establish identity or employment authorization; or (2) obtain a new document with a name that does match. If the employee applies for a new document (*i.e.*, driver's license) within three business days of hire, he or she should present the receipt of the application for the document to the employer. The employer should record the receipt document in lieu of the actual document. The employee must present the actual document to the employer for inspection within 90 days of hire.<sup>179</sup>

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

### ***Should Employers Make Copies of the Employment Authorization and Identity Documents?***

IRCA does not require employers to make copies of the supporting documentation.<sup>180</sup> However, if employers choose to make copies, they must do so for all new hires regardless of citizenship or national origin and those copies should be kept with the I-9.<sup>181</sup> Employers should be mindful that copies of supporting documentation could reveal errors in recording the document information in Section 2 of the I-9. On the other hand, employers would have greater ease in conducting internal audits to ensure that documents were recorded properly and to determine when re-verification is necessary. If an employer chooses to stop copying I-9 supporting documentation, a company-wide memo should be sent out to mark the end of the copying and ensure uniform compliance.

### ***When Can the Verification Systems Be Used?***

The E-Verify system may only be used on new hires within three days of hire, unless the employer is a federal contractor after September 8, 2009. Workers who were hired before the employer entered into the MOU may not be verified, nor may prospective employees be screened through the system.

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

### ***How Do the Two Verification Systems Differ?***

E-Verify is administered by USCIS, and is intended to verify employment authorization. The SSNVS is only intended to verify social security information to provide accurate W-2 statements. A no-match through SSNVS alone should not prompt an employer to take punitive action against an employee. Both E-Verify and the SSNVS use data provided by SSA, but E-Verify goes a step further by checking the immigration status of noncitizens.

### ***May an Employer Continue to Employ a Worker Who Has Notified It that His or Her Past I-9 Documentation Was Invalid and that He or She Now Has Valid Documents?***

It depends on whether the employer has a policy to terminate employees who have lied or committed fraud in the hiring process. If the employer has such a policy in place, it may choose to terminate the employee, but must do so consistently in similar situations.<sup>182</sup> The employer may also elect to continue to employ the worker once new I-9 documents are recorded, as the employer did not knowingly employ an unauthorized noncitizen.

---

<sup>179</sup> 8 CFR §274a.2(b)(1)(vi).

<sup>180</sup> 8 CFR §274a.2(b)(3).

<sup>181</sup> *Id.*

<sup>182</sup> *Garcia-Contreras v. Cascade Fruit Co.*, 9 OCAHO 1090, OCAHO Case No. 02B00008 (Feb. 4, 2003). The Office of the Chief Administrative Hearing Officer (OCAHO) did not find discrimination where the employee had given Cascade falsified documentation in 1994, attained legal documentation and status in 2000, but was fired for violating the dishonesty policy.

### ***Can a Worker Without an SSN Be Hired?***

The new 2009 I-9 specifically notes that the employee is not required to provide a social security number<sup>183</sup> unless the employer is participating in E-Verify.<sup>184</sup>

Employers often raise the issue of how to pay workers who do not have a social security card. Neither the Internal Revenue Code nor IRCA require an employee to possess an SSN to begin work. They simply require that an application for an SSN (SS-5) be made within seven days of commencing employment for taxable wages.<sup>185</sup> An employer may request to see a social security card on the first day of work.<sup>186</sup> However, this request should be made separately from the I-9 process, because a request to see a specific document may constitute document abuse.<sup>187/188</sup>

In lieu of a social security card, the employee may provide a receipt acknowledging that an application for an account number has been received<sup>189</sup> or a signed statement from the employee stating the employee's full name, present address, date and place of birth, father's full name, mother's full name before marriage, the employee's gender, and the date and place the employee filed an SS-5 application.<sup>190</sup>

If the employee has applied for a card but has not received the card, then 000-00-000 may be entered into the payroll software to generate a paycheck. When the employee receives a social security card, he or she must present the document.<sup>191</sup> A Form W-2c (corrected wage and tax statement) may be filed to show the employee's correct SSN.<sup>192</sup>

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

### ***Should an Employer Conduct an I-9 Internal Audit?***

Yes. I-9s are often administered by a variety of managers and employees with limited training. An audit will provide an indication of good faith compliance with IRCA, which will be the primary defense in case of a civil fine or criminal prosecution. Other indications of good faith compliance would include annual training for the employer agents who consistently handle I-9s, as well as standard policies for re-verification and I-9 processes. Internal audits allow employers the opportunity to review the I-9s at their own pace as opposed to the 10-day notice that is provided before an ICE audit.

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

### ***Must an Employer Verify the Employment Authorization of Independent Contractors or Laborers Provided by an Independent Contractor?***

No. Independent contractors are one of the three categories of workers exempt from I-9 verification: (1) grandfathered employees hired before November 7, 1986; (2) independent contractors; and (3) casual domestic workers who perform sporadic, irregular, or intermittent service in private homes. Whether a worker is

<sup>183</sup> Section 7 of the Privacy Act.

<sup>184</sup> IIRAIRA §403(a)(1)(A).

<sup>185</sup> 26 CFR §31.6011(b)(2).

<sup>186</sup> 26 CFR §31.6011(c).

<sup>187</sup> INA §274B(a)(6).

<sup>188</sup> DOJ OSC settled a document abuse case with Hoover Vacuums for \$10,200 after re-verifying permanent residents whose cards had expired. Similarly a logging company in Oregon agreed to pay \$15,200 in back wages to a former employee after requesting an unexpired permanent resident card for I-9 purposes.<sup>188</sup>

<sup>189</sup> 26 CFR §31.6011(b)(2)(B)(iii).

<sup>190</sup> 26 CFR §31.6011(b)(2)(B)(iv).

<sup>191</sup> 26 CFR §31.6011(b)–6012(b)(2).

<sup>192</sup> Social Security W-2 Reporting Instructions and Information Answer, ID 377 (July 31, 2006).

considered an independent contractor will be determined on a case-by-case basis. Factors to be considered include, but are not limited to whether the individual or entity supplies the tools or materials; makes services available to the general public; works for a number of clients at the same time; has an opportunity for profit or loss as a result of labor or services provided; invests in the facilities for work; directs the order or sequence in which the work is to be done and determines the hours during which the work is to be done.<sup>193</sup>

While employers are not required to complete I-9s for independent contractors or laborers provided by contractors, employers may not use independent contractors in order to circumvent immigration laws.<sup>194</sup> Employers may still be held liable if they have constructive knowledge of unauthorized employment. Constructive knowledge includes knowledge that a reasonable and prudent employer should know. For example, an employer may have a duty to investigate further if laborers provided by independent contractors are subjected to substandard working conditions or wages as the employer may be using unlawful workers to gain a competitive advantage in contract bidding.

An argument has been made that if a company requires a contractor to complete I-9s and has the ability to inspect I-9s, the company may have established sufficient controls over the contractor that would create direct liability for any undocumented workers hired by the contractor.<sup>195</sup>

***What Should an Employer Do if: (1) A Worker Provides the List A Permanent Resident Card or Another Non-SSN List A Document; (2) Receives a Social Security No-match Letter; and (3) The Worker Continues to Assert that the SSN Provided Is Valid?***

In the context of the DHS final (enjoined) regulations on no-match letters, employers are placed in a difficult position, as any new I-9 completed in compliance with the social security no-match safe harbor provision might contain essentially the same data as the previous year's form. This gray area remains unresolved. Because the social security no-match letter is issued sometimes years after the W-2 is submitted, employers may feel as though they are on a merry-go-round when they receive the annual no-match letters only to ask the employee to re-confirm, and to fill out a new I-9 with no changes, provided that the social security number is not recorded as the work authorization document. Despite the conflict, employers should continue to document their efforts to follow-up with the employee after a social security no-match letter is received, and re-verify the I-9 within a reasonable period of time.

***What Liabilities Might a Successor Corporation Inherit?***

Generally, in cases involving a corporate reorganization, merger, or sale of stock or assets, no new I-9 is necessary so long as the employer obtains and maintains the previous employer's I-9s.<sup>196</sup> A successor employer is exempt by regulation from completing I-9s where the predecessor employer has fulfilled that obligation.<sup>197</sup> An employer that has acquired a business and retains the predecessor's employees is neither expected to dispose of I-9s previously executed, nor required to execute new I-9s. However if the succeeding company chooses to retain the old I-9s rather than completing new ones, the succeeding company will be liable for any omissions and defects in the original I-9s.<sup>198</sup> Ultimately, the successor employer may choose to complete new I-9s for all employees to ensure proper completion.

***Must a Paid Recruiter Complete an I-9?***

The recruiter must ensure that an I-9 is completed within three days of hire, not three days of referral, but a recruiter may designate the employer as an agent responsible for completing the I-9.<sup>199</sup> If an agent is design-

<sup>193</sup> 8 CFR §274a.1(j).

<sup>194</sup> INA §274A(a)(1).

<sup>195</sup> J. Pearce, "The Dangerous Intersection of Independent Contractor Law and the Immigration Reform and Control Act: The Impact of the Wal-Mart Settlement," 12 *Bender's Immigr. Bull.* 9 (Jan. 1, 2007).

<sup>196</sup> 8 CFR §274a.2(b)(1)(viii)(A)(7): "An individual continues his or her employment with a related, successor, or reorganized employer, provided that the employer obtains and maintains from the previous employer records and Forms I-9 where applicable ...."

<sup>197</sup> *Id.*

<sup>198</sup> *U.S. vs. Nevada Lifestyles, Inc.*, 3 OCAHO 518, OCAHO Case No. 92A00131 (May 10, 1993).

<sup>199</sup> 8 CFR §274a.2(b)(1)(iv).

nated, the recruiter only needs to keep a copy of the I-9. A temporary agency that directly pays the worker would fall under the category of an employer, as opposed to a recruiter, and would be required to complete an I-9.

## NUMBERS FOR I-9 HELP

**E-Verify Program Help:** 1-888-464-4218

### SSA

Tim Beard, Attorney  
Northwest—Alaska, Idaho, Oregon, and Washington  
*Tim.beard@ssa.gov*; (206) 615-2125

### DOJ—Office of Special Counsel for Immigration-Related Unfair Employment Practices

Sebastian Aloom, Attorney  
*sebastian.aloom@usdoj.gov*; (202) 616-5594  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530  
Employee Discrimination Hotline: 1-888-897-7781

### Electronic I-9 Storage

Dan Siciliano, Professor  
Stanford Law School  
*siciliano@law.stanford.edu*; (650) 725-9045

### ICE—IMAGE

John Shofi, National Program Director *john.shofi@dhs.gov*; (202) 353-3611

## SUMMARY OF STATE LAW CHANGES

Across 41 states, 199 bills relating to worksite enforcement have been introduced. The following states have passed legislation, but note that this list is not exhaustive as new legislation is regularly introduced:

**Arkansas** Act 157—Enacted March 1, 2007, requires state contractors and subcontractors for services greater than \$25,000 to certify that it does not employ or contract an undocumented worker. If a contractor violates the provisions and does not remedy the violation within 60 days, the state will terminate the contract.

**Arizona** House Bill 2779—Effective January 1, 2008, all Arizona employers must participate in E-Verify. The state may suspend or revoke the business license for employers who knowingly employ undocumented workers. Both provisions were upheld by the Ninth Circuit. All public contractors, subcontractors, and employers receiving a grant, loan, or incentive are required to use E-Verify beginning September 30, 2008.

**California**—Unemployment Insurance Code, Division 3 Part 1, Chapter 2, Article 2, Sections 9601.1–.7 require public employers and their agents to comply with IRCA.

**Colorado** House Bill 1343—Effective June 6, 2006, employers with public contracts for services with state or local government must use E-Verify for new hires. Violators will be publicly posted on the secretary of state's website for two years.

**Colorado** House Bill 1001—Effective October 1, 2006, requires contractors to verify the work status of employees before applying for economic development incentive awards. Contractors receiving awards and later found to employ unauthorized workers must repay the award and will be ineligible for another award for five years.

**Colorado** House Bill 1017—Effective January 1, 2007, all employers must complete an Affirmation of Legal Work Status within 20 days of hire. The law also tasks the Department of Labor and Employment with

investigating unlawful employment of undocumented workers. Civil fines are increased to \$25,000 for second and subsequent offenses.

**Florida** State Statute 448.09—Effective since 1977, creates a civil fine up to \$500 for any employer who unlawfully employs, hires, or recruits an unauthorized worker.

**Georgia** House Bill 529—Requires public employers, contractors, and subcontractors to use E-Verify on a phased basis. Employers with 500 or more employees must comply starting July 1, 2007. Employers with 100 or more employees must comply starting July 1, 2008. All public contractors and subcontractors with 99 or fewer employees must comply by July 1, 2009. As of January 2009, the Georgia Department of Labor has been unable to enforce the law due to a lack of funding.<sup>200</sup>

**Hawaii** House Bill 1750—Act 052. Signed May 3, 2007, requires all persons seeking employment with the government of the state or in the service of any county to be citizens, nationals, or permanent residents, or be eligible for unrestricted employment in the United States.

**Idaho** Exec. Order 2006-40—Effective December 13, 2006, state contractors must warrant that they do not knowingly employ undocumented immigrants.

**Illinois** House Bill 1744 as amended by SB 1133—Effective January 1, 2010, any employer that uses E-Verify must be familiar with the system requirements. A \$500 penalty per employee may be sought against employers who willfully or knowingly violate this provision.

**Louisiana** Senate Bill 753—Effective June 24, 2006, any state agency or department may conduct an investigation of a contractor's hiring policies if the employment of unauthorized workers is suspected. The district attorney can order undocumented workers to be fired, and, if the contractor does not comply within 10 days, the contractor is subject to penalties of up to \$10,000. This applies only to contractors employing more than 10 people.

**Massachusetts** Exec. Order 481—Effective February 23, 2007, any employer contracting with the executive branch of the state must warrant that it does not knowingly use unauthorized workers, or recklessly engage in document fraud.

**Michigan** State Bill 229—Signed October 31, 2007, directs state agencies to consider a variety of factors when awarding or canceling contracts with private businesses, including the immigration and residency status of persons employed by a prospective contractor, and whether the use of noncitizen workers would be detrimental to state residents or the state economy.

**Minnesota** Exec. Order 08-01—Effective January 7, 2008, state contractors and subcontractors with contracts greater than \$50,000 are required to use E-Verify and certify compliance with IRCA.

**Mississippi** Senate Bill 2988—Makes it a felony for any individual to “accept or perform employment for compensation knowing or in reckless disregard” that the person is an unauthorized noncitizen. Employers will be required to use E-Verify under a phased process starting July 2008, for 250 or more employees, and all employers starting July 1, 2011.

**Missouri** House Bill 1549 and 2058—Effective January 1, 2009, employers are subject to a complaint-driven process involving state-level inquiries from the attorney general to verify employment authorization after the I-9 process. Contractors and subcontractors seeking public contracts over \$5,000 must use E-Verify.

**Nebraska** Law 403—Effective October 1, 2009, contractors and subcontractors performing contracts awarded by a public employer must use E-Verify on new employees performing services in Nebraska.

**New Hampshire** Revised Statute Ann. Section 274A:4a—Effective January 1, 2007, employers who knowingly employ an unauthorized worker may face fines up to \$2,500 per day of non-compliance.

**North Carolina**—Title 25, Subchapter 1H, Section 0636, effective February 1, 2007. All state agencies, offices and universities will verify employment eligibility of all employees hired.

---

<sup>200</sup> C. McWhirter, “Tough Illegal Immigration Law Ignored,” *The Atlanta Journal-Constitution* (Jan. 25, 2009).

**Oklahoma** House Bill 1804—Beginning November 1, 2007, all public employers must use E-Verify. Public contractors must begin screening new employees starting July 1, 2008. On June 4, 2008, the U.S. District Court for the Western District of Oklahoma issued an injunction barring the state from enforcing the law. The Tenth Circuit upheld the E-Verify mandate, but denied other provisions as federally pre-empted: making it discriminatory for an Oklahoma employer to replace a U.S. worker with an undocumented worker.

**Pennsylvania** House Bill 2319—Effective July 1, 2006, contractors found to have violated federal immigration laws on a public project are required to repay the loan or grant to the state and are ineligible to apply for a state contract for two years.

**Rhode Island** Exec. Order No. 08-01—Effective March 27, 2008, requires all businesses, contractors, and subcontractors doing business with the state to use E-Verify.

**South Carolina** requires public contractors and subcontractors with more than 500 employees and contracts greater than \$25,000 in a 12-month period to use E-Verify beginning January 1, 2009. All employers must use E-Verify by July 1, 2010, or in the alternative only employ workers who have a South Carolina (or other acceptable state) license or ID.

**Tennessee** Senate Bill 903, House Bill 1274 and House Bill 111—Effective January 1, 2008, employers must comply with a complaint-driven process directed by the Commissioner of Labor and Workforce Development, which may require employers to terminate any “illegal alien” workers after notice and hearing. It allows for a one-year suspension of an employer’s business license.

**Tennessee** House Bill 111—Effective January 1, 2007, state contractors and subcontractors must provide initial attestations of lawful status of workers, must use E-Verify for new employees, and may be subject to random audits. If a contractor has employed undocumented workers, the contractor may be prohibited from contracting for a one-year period.

**Texas** House Bill 1196—Effective September 1, 2007, restricts the use of certain public subsidies to employ undocumented workers. A public agency, state or local taxing jurisdiction, or economic development corporation shall require a business that submits an application to receive a public subsidy to include in the application a statement certifying that the business, or a branch, division, or department of the business, does not and will not knowingly employ an undocumented worker.

**Utah** Senate Bill 81 and SB 251—Effective July 1, 2009, requires all state employers and contractors with the state or a political sub-entity to use a status verification system (E-Verify). Makes it unlawful for an employer to terminate a citizen or permanent resident and replace them with a worker the employer knew or should have known was undocumented. Employers who use a status verification system are exempt from state liability. SB 251 makes E-Verify “mandatory” for all Utah employers, but a future amendment is expected to clarify that E-Verify is only voluntary.

**Virginia** House Bill 926 and 1298—Effective July 1, 2008, a business may lose its business license (loss of charter) for at least one year if it commits a pattern and practice of IRCA violations. Public contractors for good or services must certify compliance with IRCA.

**West Virginia** Senate Bill 70—Effective June 18, 2007, increases the civil penalties for knowingly hiring undocumented workers and creates a state criminal penalty of misdemeanor and civil fines up to \$10,000 per violation. The state Department of Labor Commissioner may suspend or revoke any contractor licenses held by the employer based on immigration violations.