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WHAT THE IMMIGRATION CONUNDRUM PORTENDS: ICE IN THE WORKPLACE

by MARGARET H. McCORMICK, J.D.

INTRODUCTION

During this intense election year, the immigration debate has not resonated in the way many predicted it would. After the defeat of immigration reform in June of 2007,¹ many believed that anti-immigration voices would gain momentum, particularly on the Republican side. But that has not happened. Instead, the issue has been relegated to the back burner and barely was addressed by the candidates.² But many employers and their employees are finding that while the issue did not gain much traction during the primaries or general elections, that has not stopped the government from stepping up its enforcement activities in America's workplace.³ These actions go well beyond

the employer sanction provisions of the Immigration Reform and Control Act (IRCA) of 1986,⁴ which emphasized civil actions and administrative fines.

For nearly two decades, the job of enforcing employer sanctions fell to the now defunct Immigration and Naturalization Service (INS), an agency within the U.S. Department of Justice.⁵ The INS' mission was specifically dedicated to immigration and naturalization and citizenship issues. After 9/11, the Bush administration established a cabinet-level agency, the Department of Homeland Security (DHS), with a far broader mission to "anticipate, preempt, detect and deter threats to the homeland and to safeguard our people and their freedoms, critical infrastructure, property and the economy of our nation from acts of terrorism, natural disasters and other emergencies"⁶ Within DHS, the U.S. Citizenship and Immigration Service (USCIS)⁷ is responsible for the traditional adjudications functions of the INS, and the Immigration and Customs Enforcement agency (ICE) is responsible for interior enforcement of the immigration laws.⁸ ICE is the largest agency within the DHS, and is the federal government's second largest investigative agency (after the FBI).⁹ Because ICE is an amalgamation of prior agencies of immigration and customs, many of the tools that had been used in the area of customs enforcement have migrated into immigration enforcement in the workplace.

With an estimated 12 million people living and working in the United States illegally,¹⁰ the focus is no longer only on the so-called "illegals," but has shifted to the U.S. employers who supply their jobs. Over the past three years, ICE has been issuing new priorities and regulations for worksite enforcement that has placed a target squarely on the backs of employers.¹¹ According to ICE Assistant Secretary Julie L. Myers:

In fiscal year 2007, ICE secured more than \$30 million in criminal fines, restitutions and civil judgments in worksite enforcement cases. We arrested 863 people in criminal cases and made more than 4,000 administrative arrests. That is a tenfold increase over just five years before.¹²

The laws prohibiting employment of unauthorized workers have been on the books for more than twenty years,¹³ but until the establishment of ICE enforcement was so minimal as to be almost nonexistent. With the passage of new immigration laws in 1996¹⁴ it became even more difficult for people who came to or stayed in the United States illegally to legalize their status, leading to an increase in the number of illegal workers since that time.¹⁵ Furthermore,

many of the jobs filled by illegal workers, particularly the millions of low-skilled jobs, are difficult to fill with U.S. citizens, whereas unauthorized workers are eager for the work.¹⁶ Those industries with severe labor shortages are now those most targeted by ICE.¹⁷

The implications of strict enforcement, especially criminal enforcement, without a comprehensive reform of our immigration laws are only just beginning to register. As they do, employers must balance the intricacies of potential criminal exposure, appropriate employment verification procedures, the possibility of losing large numbers of workers, and discrimination and wrongful termination lawsuits from employees.

EMPLOYER SANCTIONS FOR UNLAWFUL EMPLOYMENT OF FOREIGN WORKERS

With the passage of IRCA in 1986,¹⁸ employers for the first time became liable for employing foreign nationals without employment authorization. IRCA made it illegal to knowingly hire, recruit or continue to employ aliens not authorized to work in the United States.¹⁹ Prior to IRCA, unauthorized workers could be arrested and deported, but nothing happened to the employer.²⁰ After IRCA, employers had to take on the role of immigration enforcement officers.²¹ Generally, the law requires an employer complete an I-9²² verification form for all employees, both citizen and noncitizen, with the exception of 1) grandfathered employees who have been working for an employer since before IRCA (November 9, 1986); 2) employees of independent contractors; and 3) intermittent or sporadic domestic employees.²³

THE I-9 VERIFICATION PROCESS

On the I-9 form, the employer must verify the employment eligibility and identity documents presented by the employee and record the documented information.²⁴ This verification process begins on the first day of the employee's work and must be completed by the third day, unless the employee is hired for fewer than three days.²⁵ The form itself contains a list of permissible identity documents.²⁶ Section 1 of the I-9 is completed by the employee, which requires him or her to affirm his or her employment eligibility to work.²⁷ A fraudulent claim of employment eligibility is a crime.²⁸

The employer should review Section 1 for completeness.²⁹ The employer then completes Section 2, using original documents provided by the employee.³⁰ The employer attests on the I-9 that it has reviewed the documents and they appear genuine.³¹ However, the employer cannot require, suggest, or request specific or preferred documents for the employee to present for verification.³²

CONSTRUCTIVE KNOWLEDGE

More specifically, IRCA prohibits an employer from “knowingly” hiring or continuing to employ aliens who do not have employment authorization.³³ The term “knowing” includes not only actual knowledge, but also 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.³⁴ Constructive knowledge may include, but is not limited to situations where an employer:

- Fails to complete or improperly completes the Employment Eligibility Verification Form, I-9;
- Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or
- Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.
- Knowledge that an employee is unauthorized may not be inferred from an employee’s foreign appearance or accent. Nothing in this definition should be interpreted as permitting an employer to request more or different documents that are required under the Act or to refuse to honor documents tendered that on their face reasonably appear to be genuine and to relate to the individual.³⁵

COURT INTERPRETATION OF CONSTRUCTIVE KNOWLEDGE

The case law that has developed around the notion of constructive knowledge evolved during the period when the INS was conducting I-9 audits and press-

ing employers to comply with IRCA. Most of these cases were decided in the early 1990s. At the time it appeared that enforcement would create more clarity as to appropriate employer conduct. Instead, enforcement literally dried up.³⁶ From about 1995 until the INS was dismantled in 2003, enforcement was on the decline.³⁷ With the establishment of ICE in 2003, enforcement dramatically re-emerged.³⁸ Suddenly, the concept of constructive knowledge is taking on a new and urgent meaning for employers.

A series of early cases decided in the 9th Circuit established the standard for determining constructive knowledge. In *Mester Manufacturing Company v. Immigration and Naturalization Service*, the court was not persuaded by the argument that the employer would have had to receive written notice that employees were using false green cards from the INS in the context of an I-9 audit.³⁹ The court found sufficient knowledge where the employer was told that several employees were likely not authorized and took no further steps to determine their status.⁴⁰ In this case the workers were in fact unauthorized, and the court found that the knowledge element was satisfied.⁴¹

Later, in *U.S. v. Noel Plastering and Stucco, Inc.*, the 9th Circuit found that the employer had constructive knowledge, even if it had no specific knowledge of the employee's unauthorized status when he began his employment.⁴² The elements of a "continuing-employment" violation were premised upon the constructive knowledge theory in a re-verification situation.⁴³ The Court found that the employer acquired a duty to re-verify the individual's employment eligibility after receiving specific and detailed information regarding that individual's possible unauthorized status.⁴⁴ The court said that the standard applicable in IRCA proceedings is modeled after the criminal law concept of "imputed-knowledge" which holds that a deliberate failure to investigate suspicious circumstances imputes knowledge.⁴⁵

However, the court in *Collins Food International, Inc. v. U.S. Immigration and Naturalization Service* set about to limit the extent of constructive knowledge by finding that the employer satisfied its obligations to verify employment eligibility when it examined the face of the alien's false social security card and his driver's license.⁴⁶ The crucial inquiry in constructive notice cases, according to the court, was whether the employer has deliberately failed to investigate suspicious circumstances brought to its notice by the INS.⁴⁷ The fact that the employer did not look at the back of the Social Security card, or that they did

not compare the alien's card to the social security card in the INS handbook, did not rise to the level of constructive knowledge.⁴⁸

TRANSITIONING TO IRCA

Just after IRCA passed, there was a period where employers were educated about the new requirements and received warnings rather than penalties.⁴⁹ Eventually the education period ended and enforcement actions were taken against employers.⁵⁰ Generally, employers were assessed fines, which were often negotiated.⁵¹ During the early to mid-1990s most actions taken by the then-INS were civil and employers were often targeted randomly. Yet, the penalties were often perceived as the cost of doing business, especially by employers who relied heavily on the employment of unauthorized workers.⁵²

The imposition of IRCA I-9 requirements spawned a proliferation of fraudulent document providers making documents easily available in immigrant communities.⁵³ Indeed, some employers even assisted in supplying documents to workers in need.⁵⁴ The INS did take an increasing amount of action against employers during the early years,⁵⁵ but by the 1990s the INS determined that its priorities on workplace enforcement actions should focus on employers who were exploiting workers. Eventually, random enforcement actions disappeared, and by 2000 INS workplace enforcement actions were all but stopped.⁵⁶

IRCA'S ANTI-DISCRIMINATION PROVISIONS

One of the major concerns surrounding the enactment of IRCA was the likelihood that employers would discriminate against applicants who appeared to be non-U.S. citizens. Significant evidence of widespread discrimination was found soon after the I-9 requirements were enforced.⁵⁷ Many attributed the discrimination to a lack of understanding of the requirements.⁵⁸ Moreover, the dual interests being served, i.e. to prevent discrimination and unauthorized employment, were confusing to employers. Some felt it was easier to avoid hiring anyone who looked foreign or talked with an accent to avoid any problems.

IRCA included certain protections, one of which was the establishment of the Office of Special Counsel for Immigration-Related Unfair Employment Practices, to help protect against discriminatory practices.⁵⁹ This agency, within the Department of Justice, is charged with enforcing the anti-discrimination provisions of IRCA.⁶⁰ These provisions prohibit discrimination with respect to hiring, firing and recruitment or referral for a fee, by employers with four or more employees on the basis of citizenship or immigration status,⁶¹ or by employers with more than three and fewer than 15 employees on the basis of national origin.⁶²

IRCA also prohibits unfair documentation practices, i.e. document abuse related to verifying the employment eligibility of employees.⁶³ Employers may not, on the basis of citizenship status or national origin, request additional or different documents than are required to verify employment eligibility and identity, and may not reject reasonably genuine-looking documents or specify the preference of certain documents over others.⁶⁴ U.S. citizens and all work-authorized immigrants are protected from document abuse.⁶⁵ Finally, employers may not retaliate against individuals who file charges, cooperate with an investigation, or who contest actions that may constitute unfair documentary practices or discrimination based upon citizenship status or national origin.⁶⁶

“NO-MATCH” LETTERS & THE SAFE HARBOR CATCH 22

Constructive knowledge was redefined in the long anticipated and highly controversial regulations published by the DHS in August of 2007, entitled “Safe-Harbor Procedures for Employers Who Receive a No-Match Letter.”⁶⁷ These regulations provide a safe harbor from a finding of “constructive knowledge” if an employer receives a Social Security “No-Match” letter and complies with the verification/re-verification provisions therein.⁶⁸

A “No-Match” letter is a written notification from the Social Security Administration (SSA) that the Social Security number (SSN) provided by the employer does not match the information in the agency’s database.⁶⁹ A “No-Match” letter may signify no more than just a transposition of numbers or a recent name change, or it may result because of a system error in the database.⁷⁰ However, it could also mean identity theft or fabricated SSNs, either of which may signal the employment of unauthorized workers.

To obtain safe harbor after receiving such a “No-Match” letter, employers must act during a very specific time period to resolve discrepancies between their employee records and the SSA’s records.⁷¹ Prior to this regulation, the arrival of a “No-Match” letter would not have triggered a finding of constructive knowledge.

Under these new regulations, if an employer receives a “No-Match” letter from the SSA it must inform the affected employee of the date of receipt of the “No Match” letter. The employer then has 30 days to internally verify and correct any typographical, transcription or similar errors; inform the SSA if such errors exist; then verify with the SSA that the corrected employee name and SSN assigned match SSA records.⁷² If the employer cannot locate the source of the “No-Match” error internally, it must advise the employee in question to first ensure that no typographical or clerical errors exist, and then ask the affected employee to resolve the discrepancy with the SSA individually and immediately.⁷³ If the employer is unable to verify the record correction with SSA within 90 days, it has only three more days to re-verify the I-9 with the employee based on documents un-related to those with the “No-Match” SSN.⁷⁴ If the employer is unable to re-verify, the employee must be terminated.⁷⁵

If the employer takes the actions described above within the timeline prescribed, DHS cannot impute “constructive knowledge” of unauthorized alien employment, which provides a safe harbor from any subsequent DHS audits, fines, or sanctions.⁷⁶ However, failure to take these specific actions could result in a finding of constructive knowledge.

COURT INTERPRETATION OF SAFE HARBOR

This Safe Harbor rule has been challenged in federal court and there is currently an injunction against the DHS from enforcing the regulation.⁷⁷ Moreover, after the Safe Harbor rule was published the SSA announced that it would not send out hundreds of thousands of No-Match letters.⁷⁸ It is not clear whether the SSA is ready for the sudden and additional administrative burden this DHS regulation will bring, or whether 90 days will be enough to clarify all SSN discrepancies. Further, it is unclear how strict adherence to this new regulation will impact states such as California, which expected the relief of a temporary guest worker program and overall immigration reform to be implemented hand-in-hand with these tougher enforcement rules.

E-VERIFY: THE GOVERNMENT'S AUTOMATED VERIFICATION SYSTEM

In an effort to avoid issues relating to unauthorized employment, constructive knowledge, and "No-Match" letters, DHS has introduced the E-Verify program in conjunction with the SSA.⁷⁹ This program allows employers to electronically verify the employment eligibility of their newly hired employees.⁸⁰ Formerly known as Basic Pilot, the E-Verify system allows participating employers to compare employee information taken from employees against the database records of the SSA and DHS.⁸¹ There are more than 425 million records in the SSA database and more than 60 million records in the DHS database.⁸² Employers who participate in the program receive virtually immediate responses regarding new employees.

Unfortunately, there are several problems with the E-Verify program. First, it is still prone to error as it relies upon the information in the SSA database.⁸³ According to some estimates the SSA database has a 4.1 percent error rate, and approximately 12.7 million of the discrepancies pertain to U.S. citizens,⁸⁴ leaving people entitled to work out of luck.⁸⁵ While this program is still voluntary, some state laws and municipal ordinances have stepped in and made E-Verify mandatory.⁸⁶ Further, the program still requires an employer to complete the I-9 form in person before using the E-Verify system.⁸⁷ Finally, using E-Verify does not provide the employer with a Safe Harbor against audits or raids. In fact, the Memorandum of Understanding for E-Verify states that DHS "reserves the right to conduct Form 1-9 compliance inspections during the course of E-Verify, as well as to conduct any other enforcement activity."⁸⁸ Therefore, until the system improves it does not appear to be the best tool for employers hoping to avoid I-9 problems.

CONCLUSION

As the immigration debate rises and falls employers are finding the requirements of I-9 verification to be an increasingly complex minefield. The stakes are considerable, as managers are being held criminally liable and the lives of thousands are irreparably disrupted.⁸⁹ Moreover, the traditional context of immigration law enforcement, which in the past was primarily civil, has been transformed into a criminal violation against both the foreign worker and the employer. As the DHS relies more and more on criminal charges against com-

panies and their employees, immigration enforcement in the workplace has become an extremely volatile area of law. Employers are being forced to balance between implementing immigration laws and accurately complying with I-9, E-Verify, and “No-Match” requirements, while simultaneously building a business and avoiding discrimination and improperly laying off authorized workers and US citizens. Meanwhile, within the chaos and uncertainty employers and their attorneys are scrambling to find the right balance.

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