by Giselle Carson

Employment Verification: Then and Wow!

A concerned client called because Immigration and Customs Enforcement (ICE) agents conducted an I-9 investigation. The agents found missing I-9s and errors on some I-9s, and requested an investigation into some employees who might not be authorized to work. ICE issued a notice of intent to fine for over $25,000 for I-9 errors. Several months later, the same client called and was very distressed because ICE agents were surrounding the business. The receptionist was given an extensive search warrant; ICE demanded that employees stop work and assemble in the cafeteria. There was panic and chaos. The agents arrested managers and employees and seized computers and paperwork.

Recent ICE Enforcement Actions

The above scenario is real and happening all over the country. For most of the 20 years since the passing of the Immigration Reform and Control Act of 1986 (IRCA),[1] the government's enforcement primary methods included education and training with only minimal fines. Currently, ICE's continuing aggressive enforcement employment verification strategies include significant civil and criminal charges and devastating raids. Recent ICE actions include:

• Mississippi — In August 2008, 595 undocumented workers were arrested at a manufacturing facility during a joint immigration enforcement action conducted by ICE and the Department of Justice. ICE special agents executed a federal criminal search warrant for evidence relating to aggravated identity theft, fraudulent use of Social Security numbers, and other crimes.

• California — In June 2008, ICE agents executed a search warrant as part of an investigation targeting a locally owned company that provided contract workers to the farming industry in the Imperial Valley area. ICE agents arrested two foremen on criminal charges and 32 employees on administrative immigration violations.

• Iowa — In May 2008, ICE agents arrested 389 undocumented workers at Agriprocessors, Inc. Two supervisors were arrested and charged with crimes including aiding and abetting aggravated identity theft and encouraging aliens to reside illegally in the U.S. The operation took place in collaboration with the U.S. attorney's office and law enforcement agencies.

• Florida — In May 2008, 25 undocumented persons working at the Lee County Sheriff's Office were arrested by ICE agents following a tip from the sheriff's office.

• New York — In February 2008, a grand jury returned a six-count felony indictment against five managers of a division of IFCO Systems North America (IFCO). The indictment charged the defendants with engaging in a conspiracy to harbor illegal aliens, to encourage and induce illegal aliens, and to transport illegal aliens.

All employers, regardless of whether they hire or sponsor foreign nationals, should be aware of the current trend in employment verification. Department of Homeland Secretary (DHS) Michael Chertoff has repeatedly said that DHS "is going to continue to keep pressure on and pursue cases against employers."

The Statutory Basis for These Actions

These actions are enforcement of IRCA, enacted to attempt to curtail illegal immigration. Designed to reform, update, and expand U.S. immigration law, IRCA made it unlawful for a person or an entity to knowingly hire, recruit, refer for a fee, or continue to employ unauthorized aliens.[2] For the first time, IRCA required employers to verify that employees were authorized to work through the use of Form I-9, Employment Eligibility Verification Form (I-9).

To address the fear that employers would discriminate against individuals who sounded or appeared "foreign," IRCA also prohibited employers from discriminating against any individual (other than an unauthorized worker) in hiring and firing on the basis of national origin or citizenship status.[3]

Failure to comply with IRCA's provisions can result in significant civil and criminal penalties, injunctions, cease and desist orders, and negative publicity. Employers can face penalties for failing to properly complete, retain, and/or make available for inspection the I-9 form (even if the employee is found to be authorized to work); knowingly employing, or continuing to employ, unauthorized workers; engaging in unlawful immigration-related discrimination; and knowingly participating in document fraud.

On the next page is a summary of the monetary civil fines that can be imposed under IRCA for violations

occurring after September 29, 1999:[4]

IRCA provides for criminal sanctions when an employer is found to have engaged in "a pattern or practice" of knowingly hiring or retaining an unauthorized worker.[5] Employers may face penalties up to $3,000 per unauthorized worker and/or up to six months of imprisonment.[6]

Employers are entitled to an administrative hearing before an administrative judge where the government must prove its allegations by a preponderance of the evidence. The administrative decision can be appealed.

IIRAIRA

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA),[7] which amended some of the IRCA provisions. IIRAIRA requires a showing of intentional discrimination in a case against an employer for alleged document abuse (asking for more or different documents than required to demonstrate work authorization). IIRAIRA authorizes the creation of pilot programs to strengthen and improve the employment verification process.[8]

The Good Faith Exception. IIRAIRA also amended the Immigration and Nationality Act (INA) to provide for an affirmative defense against a charge of knowingly employing an unauthorized worker if the employer makes a good faith attempt to comply with the employment verification requirements.[9] The amendment applies to failures occurring on or after September 30, 1996.

Under the good faith defense, the employer is considered to have complied with the verification requirements of the INA notwithstanding technical or procedural errors in the completion of the I-9 form. The government may challenge this defense by showing that the documents presented did not appear genuine, or that the verification was pretextual, among other methods.

To benefit from this defense, the employer must correct the I-9 errors within 10 business days of the notice of failure to comply. The defense is also not available if the employer is found to have engaged in a pattern or practice of violations of immigration laws.

Violation	Offense	Fines
Failure to properly complete, retain, or make available the form I-9	---	$110 - $1,100 per form
Knowing employment of unauthorized aliens	First offense	$375 - $3,200 per person
Knowing employment of unauthorized aliens	Second offense	$3,200 - $6,500 per person
Knowing employment of unauthorized aliens	Subsequent offense	$4,300 - $16,000 per person
Immigration-related discrimination	First offense	$325 - $3,200 per person
Immigration-related discrimination	Second offense	$3,200 - $6,500 per person
Immigration-related discrimination	Subsequent offense	$4,300 - $16,000 per person
Document fraud	First offense	$275 - $2,200 per person
Document fraud	Subsequent offense	$2,200 - $5,500 per person

Penalties Against Employers. In fiscal year 2007, ICE obtained more than $30 million dollars in criminal fines, restitution awards, and civil judgments in worksite enforcement cases. ICE arrested 863 people in criminal cases, including 90 business owners, managers, and supervisors, and made more than 4,000 administrative arrests, a tenfold increase over 2002 figures.

As of August 2008, ICE had made more than 1,022 criminal arrests tied to worksite enforcement investigations. Of the 1,022 individuals arrested, about 116 are owners, managers, supervisors, and human resource employees facing charges including harboring or knowingly hiring illegal aliens. The other criminal arrests include undocumented workers criminally charged with aggravated identity theft and Social Security fraud. ICE has also made more than 3,900 administrative arrests for immigration violations during worksite enforcement operations, and collected significant administrative fines utilizing the notice of intent to fine procedure pursuant to IRCA.

ICE cases against employers are based on information developed over time and obtained from sources such as audits, anonymous calls to ICE, wiretaps, referrals from local police, informants, and others. ICE is also using information contained in the I-9 forms against the employer to establish the required knowledge for certain felony charges.

ICE is charging employers with violations that carry criminal penalties and provide for asset forfeiture. Managers and corporate officers are being charged with harboring illegal aliens and money laundering. Harboring illegal aliens is a felony with a potential 10-year prison sentence. Money laundering is a felony with a potential 20-year prison sentence. Undocumented employees are commonly charged with possession of fraudulent documents, identity theft, Social Security fraud, and/or re-entry after removal.

Constructive Knowledge. The employer's knowledge that a worker is unauthorized may be actual or constructive. Constructive knowledge is defined as knowledge which 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.[10]

The regulations provide the following examples where the employer may, depending on the totality of the circumstances, be found to have constructive knowledge: failure to complete or improper completion of the I-9; having information which would indicate that an employee might not be authorized for employment; and reckless and wanton disregard for the legal consequences of allowing an individual to introduce an unauthorized worker in the workforce.[11]

The courts have found constructive knowledge in various circumstances including when the employer received information from Legacy INS that some employees were suspected of having presented a false document to show work authorization and failed to investigate the employee's status;[12] failed to complete Form I-9 coupled with evidence that the employer should have known or consciously avoided acquiring knowledge of the employee's unauthorized status;[13] failed to re-verify the work authorization of an employee with time-limited work authorization and continued to employ worker beyond the authorized period of employment;[14] recklessly delegated the duty of completing the I-9 forms; and verifying employment authorization to a person who was not trained in the I-9 process and could not understand the directions on the form.[15]

Employers should conduct annual internal audits. Audits can be used as evidence of good faith compliance and are extremely helpful in decreasing potential civil fines.

Employer Compliance

One of the most important steps that an employer can take to reduce the risk of enforcement verification liability is to train employees engaged in I-9 compliance and to ensure that all I-9s are completed in an appropriate and timely manner. Because immigration laws, regulations, interpretations, and documents change frequently, regular annual training, at a minimum, is recommended.

Document	Acceptable Receipt	Days to Produce Actual Document
Any document from List A, B, or C	Receipt for replacement of a document that is lost, stolen, or damaged	90 days
Employment Authorization Document (*i.e.,* Form I-766 or I-688B) or a combination of an unrestricted Social Security card and a List B document	Form I-94 containing an unexpired refugee admission stamp	90 days after hire, or in the case or re-verification, the date the employment authorization expires
Form, I-551, Permanent Resident Card (green card)	Form I-94 containing a temporary I-551 stamp (green card)	Present Form I-551 by the expiration date of the I-551 stamp, or within one year from the issuance of the Form I-94, if the I-551 stamp does not provide an expiration date
USCIS approval notice or new visa and Form I-94	Application to renew an H, L, E, O, or P visa with the same employer	240 days

Employers must have a completed I-9 for all employees hired after November 6, 1986. The current version of the form bears a revision date of June 5, 2007. No previous editions are accepted.

During the I-9 process, the employer verifies that the employee is authorized to work by reviewing the document(s) presented from a list of acceptable documents. The I-9 provides for three lists of documents. List A documents establish both identity and employment eligibility. List B documents establish identity and List C documents establish employment eligibility. The employee is to provide one List A document or two documents, one from List B and one from List C. In 2007, the lists were amended to decrease the number of allowable documents. The new instructions provide that the employee is not obligated to provide his or her Social Security number in section one of the Form I-9, unless the employer is enrolled in E-verify.

Determining the work eligibility of foreign nationals is difficult because it requires significant understanding of immigration laws and regulations. Many newly arrived foreign nationals present an unexpired foreign passport with an unexpired arrival-departure record, Form I-94,[16] which authorizes work in a particular job opportunity. This is an acceptable combination of List A documents if the class of admission allows for work with the employer in a specific job. Some of the most common I-94 classes of admission that authorize temporary employment include: H-1B, H-2A, H-2B, L-1A, L-1B, O-1, O-2, P-1, P-2, P-3, E-1, and E-2. Foreign nationals whose I-94 shows admission as refugees or asylees are authorized to work for any employer in any job opportunity.

Certain foreign nationals admitted as L-2, E-2, J-2, F-1, M-1, and K status are entitled to apply for an employment authorization document (Form I-766, an acceptable combination of List A documents), which if granted allows the person to work for any employer in any job opportunity for as long as the work authorization is valid.

The employee must present origi-

nal documents, except in certain circumstances when a receipt may be accepted as noted. A receipt or application for a new document following the expiration of a previous document is not an acceptable receipt.

I-9s that need to be reverified because the employee has limited work authorization should be filed according to the expiration dates of the employment documents provided by the employee.

I-9s should be filed separately from personnel records for several reasons, including ease of internal auditing and ease of retrieval in the case of a government audit or inspection. I-9s should be filed in three groups: terminated employees, current employees, and employees that need to be reverified.

Employers must retain I-9s for three years from the date of the employee's hire or one year from the date employment ends, whichever is later.[17] I-9 forms for terminated employees should be filed in order of eligible purge date for administrative convenience. The regulations require that an employer be given three business days to comply with a request for inspection of I-9s. No subpoena or warrant is required. A refusal or delay in presenting the forms for inspection could be considered a violation of the retention requirements.[18] It is often possible to negotiate an extension of time for the production of the I-9s.

I-9 Internal Audit

Employers should conduct annual internal audits. Audits can be used as evidence of good faith compliance and are extremely helpful in decreasing potential civil fines. Audits provide an opportunity to correct technical or procedural mistakes; train the person(s) responsible for I-9 completion; and establish and/or reevaluate policies and procedures of the process. An internal audit should mirror a potential government audit.

To conduct an audit, the auditor should obtain a payroll list of all current and former employees (those that have separated within the last three years). The audit should verify that all current employees (hired after November 6, 1986) have an I-9 form on file.

The auditor should methodically review each I-9 to check for errors and omissions. Common mistakes include:

- Section One: Employee fails to sign and/or date the form; employee fails to complete section on the date of hire; employee fails to check one of the three boxes regarding employment status; employee checked the incorrect box regarding his or her status; and employee fails to list his or her alien number, admission number, or expiration date.
- Section Two: Employer fails to sign and/or date section; employer fails to fill in the date of hire; employer fails to complete section within three business days of hire; employer photocopied the employee's documents and noted "see attached" without completing section; employer accepted unacceptable documents (expired legal permanent residency card; I-94 card indicating visitor's visa status); and employer accepted too many documents (including items from lists A, B, and C).
- Section Three: Employer fails to complete this section when an employment authorization has expired; employer fails to enter date of rehire or date noted is wrong; and employer fails to note the title and/or identification number of the List A or List C document provided by employee.

During the audit, corrections should be made. Section one can only be corrected by the employee. Sections two and three can only be corrected by the employer's representative. The person making corrections should use a different color of ink to write in the correct information and cross out the incorrect information with a single line, then initial and date the correction. The auditor should note on the form "corrected during self-audit, [date]."

If information is discovered during the audit that could lead a reasonable person to believe that the documents produced are not genuine or do not relate to the person presenting them, the employer should take further steps to investigate the employee's work authorization and status. Otherwise, the employer could face liability for knowingly employing an unauthorized worker. Further investigation could include meeting with the employee and/or asking the employee to present additional documentation. However, the employer should be careful not to engage in document abuse and employment discrimination related practices.

Best Practices in Worksite Enforcement

To facilitate compliance with em-

ployment verification and minimize liability, attorneys should advise clients to:

• Establish, at a minimum, an annual training program for those involved in the I-9 process. The training should include updates on immigration law-related changes.

• Conduct yearly preventative I-9 audits by an external auditing firm or immigration lawyer trained in IRCA provisions.

• Ensure that all employees' I-9 forms are completed in an appropriate and timely manner.

• Establish uniform policies regarding the I-9 process and compliance, including whether to copy supporting documents; storage of I-9s; addressing credible reports of suspected unlawful employment and/or fraudulent identity; and retention and purging.

• Establish a tickler system for reverification of employees with limited work authorization.

• Provide those involved in the I-9 process with access to an immigration attorney trained in IRCA provisions to provide advice and guidance when a problem and/or question arises.

• Obtain the name of the ICE agent and copies of all the documents taken in the case of an ICE I-9 audit.

• Include contractual provisions that subcontractors are responsible for the proper employment verification and completion of I-9s for all of their employees assigned to the employer's place of business.

• Have subcontractors certify that they enforce strict immigration policies.

• Require subcontractors to submit to third-party employment verification audits.

• Include an indemnity provision in the subcontractors contract whereby the subcontractor agrees to defend and indemnify the employer for any liability arising out of claims that subcontractors' employees are not authorized to work.

• Include an inquiry into the immigration status and employment eligibility of the workforce in case of restructuring, merger, or acquisition.

• Prepare for the possibility of worksite enforcement action by ICE and have a contingency plan if a significant percentage of the workforce is arrested.

Regular training and proper and timely completion of the employment verification process are the first line of defense in the current hostile immigration enforcement environment.

Conclusion

Regular training and proper and timely completion of the employment verification process are the first line of defense in the current, and expected to continue, hostile immigration enforcement environment. Employers must remain informed about ICE's operations and evaluate their potential exposure in light of potential criminal liability, significant sanctions, and business disruptions. Taking proactive measures such as those outlined in this article can help companies prepare and minimize liability.[19] ❑

[1] P.L. 99-603, 100 Stat. 3359. IRCA amended the Immigration and Nationality Act (codified as amended at 8 U.S.C. §§1101 *et seq.*).

[2] I.N.A. §274A(a); 8 U.S.C. §1324a defines an "unauthorized alien" as one who is not at a particular time either a) lawfully admitted for permanent residence; or b) authorized to be so employed by law or by the Attorney General. 8 U.S.C. §1324a(h)(3).

[3] I.N.A. §274B; 8 U.S.C. §1324b.

[4] Some of these civil fines were increased in March 27, 2008. The table reflects these increases.

[5] 8 U.S.C. §1324a.

[6] I.N.A. §274A(f); 8 U.S.C. §1324a(f)(l); 8 C.F.R. §274a.10(a).

[7] P.L. 104-208, 110 Stat. 3009 (hereinafter IIRIRA).

[8] The Basic Pilot Program (E-verify) is the only one of these programs remaining. E-Verify was intended to be a voluntary, free web-based system to assist employers verify workers' employment eligibility. The federal government and several states have enacted laws encouraging and/or requiring businesses to use E-verify. In June 2008, Secretary Chertoff designated E-verify as the electronic verification system that all federal contractors will be required to use. There are ongoing concerns about the accuracy of the data used by the E-verify process. The program was set to expire November 30, 2008, but it has been extended until 2009.

[9] I.N.A.§274A(a)(3);I.N.A.§§274A(b)(6)(B) and (C).

[10] 8 C.F.R. §274a.1(l)(1).

[11] Under proposed regulations, a no-match letter to an employer from the Social Security Administration (SSA) that an employee's name and Social Security number do not match SSA records; and written notice from Department of Homeland Security (DHS) that the employee's immigration status or the document used during the I-9 process was assigned to another person, or that there is no record that the document was assigned to anyone, could constitute evidence of constructive knowledge.

[12] *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).

[13] *U.S. v. Valdez*, 1 OCAHO 598 (ref. no. 91) (Sept. 1989).

[14] *INS v. China Wok Restaurant, Inc.*, 4 OCAHO 608 (Feb. 1994).

[15] *U.S. v. Carter*, 7 OCAHO 931 (May 1997).

[16] The I-94 form is the arrival/departure card that nonimmigrants receive when they enter the country and is normally stapled to their passport. Among other things, the form indicates the person's immigration classification (*i.e.*, F-1, J-1, H1-B, etc.) and how long the person is authorized to say in the U.S. For students in F-1 status, the I-94 form is annotated "D/S" which means that they authorized to stay in the U.S. for the duration of their student status.

[17] 8 C.F.R. §274a.2(b)(2)(i).

[18] 8 C.F.R. §274a.2(b)(2)(ii).

[19] *See* Worksite Enforcement Arrests Chart, ICE Worksite Enforcement Fact Sheet, *available at* www.ice.gov/pi/news/factsheets/worksite.htm.

Giselle Carson *practices immigration and naturalization and civil litigation with the law firm of Marks Gray, P.A., in Jacksonville. She is on the Jacksonville Bar Association Board of Governors and a member of the American Immigration Lawyers Association. She has written and spoken on various aspects of immigration law.*

This column is submitted on behalf of the Labor and Employment Law Section, Alan O. Forst, chair, and Frank E. Brown, editor.