

IMMIGRATION UPDATE:
CRIMINAL SANCTIONS AND STATE LAW REGULATION OF THE
EMPLOYMENT OF UNAUTHORIZED WORKERS

By Elise Fialkowski¹

For the last two years, Immigration and Customs Enforcement (ICE), a component of the Department of Homeland Security (DHS), has conducted a series of high-profile enforcement actions against employers, meant to emphasize their commitment to enforcement of the immigration laws. This enforcement effort is in response to the failure of Congress to pass a comprehensive immigration reform bill that would have provided status to the approximately 12 million undocumented immigrants living in the United States. This enforcement effort (like the failure to pass immigration reform) results from the public's perception that federal authorities have not done enough to enforce existing immigration laws. In particular, the failure to enforce the restrictions of employment of immigrants without proper authorization is perceived to be a powerful magnet attracting immigrants trying to make a better life. Given problem of a broken immigration system that gives migrants no legal pathway to enter the US to take available jobs, increased enforcement of sanctions on employers for hiring unlawful workers has become the "simple" solution to the current situation of undocumented workers.

The efforts to target employers of unauthorized immigrants have not been limited to the federal level. As the federal government has stalled in its efforts to pass comprehensive immigration reform, states have stepped in to fill the void. According to the National Conference of State Legislatures, as of November 16, 2007, no fewer than 1562 immigration related bills have been introduced in various states and approximately 244 of those bills have become law.² State legislatures have introduced almost three times more bills in 2007 than in 2006, and many of those bills target employers who do not properly verify the employment eligibility of their workforce. The volume of state immigration-related bills has continued to increase this year. As of June 30, 2008, 1404 immigration-related bills and resolutions were considered and 182 of these bills have become law.³

¹ Elise Fialkowski has practiced immigration law for fourteen years and is a partner at Klasko, Rulon, Stock & Seltzer, LLP. Her clients run the gamut from multinational corporations and their employees to private individuals. In addition to employment-based immigration work, she has particular experience in advising employers with regard to compliance with the Immigration Reform and Control Act including I-9 Employment Eligibility Verification and worksite enforcement issues. She has provided counseling, training and policy development services to employers in a diversity of industries including, for example, pharmaceutical, food and beverage, manufacturing, healthcare and continuing care retirement communities. Elise is a member of the Executive Committee of the Philadelphia Chapter of AILA and can be reached at efialkowski@klaskolaw.com.

² NCSL Immigrant Policy Project, "2007 Enacted State Legislation Related to Immigrants and Immigration," available at <http://www.ncsl.org/programs/immig/2007immigrationfinal.htm> (last visited August 16, 2008).

³ NCSL Immigrant Policy Project, "State Laws Related to Immigrants and Immigration," available at <http://ncsl.org/programs/immig/immigreportjuly2008.htm> (last visited August 16, 2008).

This article looks at these two trends and provides guidelines for counseling employers on compliance.

I. Increased Federal Criminal Enforcement Against Employers

The Government's traditional tools of enforcing the restrictions on employment of unauthorized workers were deportation of the workers and civil fines against employers who have accepted documentation that does not verify the employment eligibility of its workforce, or who have failed to request such documentation at all.⁴ The civil penalties administered by the former Immigration and Naturalization Service (INS) were relatively small, however. A failure to complete correctly the Form I-9 on which a new hire's employment eligibility and identity are verified could bring a fine of \$1000 per violation. If the employer knowingly employed an unauthorized worker (including by failing to complete an I-9 for a worker who was not authorized to work), the fine rose to \$3000 per violation. The maximum fine possible per violation was \$10,000, if the employer was a repeat offender. INS could also request that the U.S. Attorney bring misdemeanor criminal charges against any employer who engaged in a "pattern or practice" of hiring illegal workers.⁵

During the 1990's, there was little incentive for INS to conduct investigations of employers. US Attorneys were reluctant to bring criminal charges in the face of heavy caseloads of drug- and firearms-related crimes. When INS brought civil fine proceedings, employers could often defend themselves against charges of illegally employing foreign workers by pointing to properly-completed I-9 forms that were based on genuine-looking, but fraudulent, documents, so that the employer had satisfied its obligation. The fine levels were so low as to provide little deterrent effect, and INS focused its relatively limited enforcement resources on identifying and removing foreign nationals convicted of crimes in the United States, rather than employers of illegal workers. In those few instances where INS did conduct effective enforcement actions, public outcry against their tactics (such as arresting most of a restaurant's cooking staff in the middle of lunch) led to a backlash against worksite enforcement, and it dropped to the bottom of the agency's domestic enforcement priorities.

⁴ Immigration and Nationality Act of 1952, as amended (hereafter "INA") §274A, *codified at* 8 USC §1001 *et seq.*

⁵ While the fines increased as of March 27, 2008, the increase was not dramatic. Currently, employers who fail to properly complete the required I-9 documentation face a maximum civil fine of \$1,100 per employee while those found to have knowingly hired and continued to employ an unauthorized worker could pay a civil fine of up to \$3,200 per employee for a first time offense and a civil fine of up to \$16,000 per employee if an employer has more than two offenses. If an employer engages in a pattern and practice of failing to comply with IRCA's employer sanctions provisions, such criminal conduct could result in criminal fines of \$3,000 per unauthorized employee and a prison term of not more than six months.

Since the government perceived the tools previously used by INS to be ineffective, under its new enforcement strategy, ICE now uses the criminal tools at its disposal to charge employers with a variety of felonies related to immigration compliance. In many cases, employers can be charged with knowingly making false statements on an immigration-related form, the Form I-9.⁶ ICE uses circumstantial evidence (such as Social Security “no match” letters, which inform an employer that the Social Security Number provided by the employee does not match the Social Security Administration’s records) to prove “willful blindness” on the part of the employer to the employee’s unlawful status. In other cases, ICE has added a charge of “alien harboring” – a felony offence prohibiting anyone from “aiding or abetting” an unlawful alien to remain in the United States, with employing the person being charged as “aiding” them to remain in the United States.⁷ Managers at a number of companies have now been charged under that provision, and where employers have provided transportation to and from work for illegal workers, they have also been charged under the “alien harboring” provision that prohibits transportation of illegal workers within the United States.⁸

Beyond the criminal provisions in the Immigration and Nationality Act, the government has been using other charges that can be made out in a situation where the employer has relied on false documentation, such as criminal misuse of a Social Security Number;⁹ making false statements to government officials;¹⁰ and identity theft.¹¹ The government has also pursued fraud, money laundering and tax evasion charges. US Attorneys will also use forfeiture provisions available under a variety of statutes to try and seize business assets of the company and personal assets of the owners, on the theory that the illegal employment of workers resulted in the employer’s profits from a “criminal enterprise.”¹²

The penalties for many of these felonies are severe. For example, the maximum penalty for alien harboring is five years *for each alien harbored*, unless the crime is done for commercial advantage or financial gain, in which case the maximum penalty is ten years. Money laundering is a felony with a potential 20 year prison sentence.

The difference in approach is remarkable. Fiscal year 2002 worksite enforcement actions resulted in only 25 criminal arrests (including arrests of corporate officers, managers, human resource employees and contractors) and 485 administrative arrests of illegal alien workers. In 2007, the numbers grew to 863 criminal arrests and 4,900 administrative arrests. In 2007, ICE also collected over \$30 million in criminal fines, restitutions and civil judgments in worksite enforcement cases.

⁶ 18 USC §1546(a).

⁷ INA §274(a)(1)(A)(iv). Prior to 1986, “alien harboring” could not be predicated merely on the act of employing an unauthorized worker; that proviso was eliminated in 1986.

⁸ INA §274(a)(1)(A)(ii).

⁹ 42 USC §408(g)(2).

¹⁰ 18 USC §1001.

¹¹ 18 USC §1028.

¹² Most commonly the Racketeering Influenced and Corrupt Organizations Act, *codified at* 18 USC §1961 *et seq.*

The pace is increasing. It is likely that the number of criminal arrests this year will double last year's figures. Michael Chertoff, Secretary of DHS, reported that as of May 31, 2008, ICE worksite enforcement actions have already resulted in 875 criminal arrests-more than all of last year.

ICE is also using new criminal enforcement tools heretofore unheard of in worksite enforcement. ICE is actively using wiretaps, undercover investigations, and confidential informants to investigate and pursue possible worksite enforcement violations. ICE has also exchanged information and coordinated with other federal agencies including the Internal Revenue Service (IRS), the Department of Labor (DOL) and the Social Security Administration (SSA). In addition, ICE has coordinated with state and local agencies including, for example, state and local police as well as sheriff departments. ICE has instituted hot-line numbers in which illegal workers can be reported.

II. Administrative Mechanisms to Increase Compliance

While ramping up its criminal enforcement efforts, ICE has also encouraged employers to help it prevent unlawful employment by implementing what it refers to as "best practices."¹³ In these "best practices," ICE is encouraging employers to accept obligations beyond those required by the law, and that assist ICE in limiting employment opportunities to those who have lawful status in the United States. For example, after ICE's best hiring practices, employers should voluntarily follow the protocol for dealing with Social Security Administration "no-match" letters set forth in a regulation that ICE has been enjoined from enforcing. The employer should also develop an I-9 policy with the following features: a prohibition on discriminatory implementation of the policy; use of the USCIS's "E-Verify" system for new hires (discussed below) to verify that documents presented were issued to a person with that name; provision for semi-annual I-9 audits by an external firm or internal auditor; a self-reporting program to provide ICE with information any time the employer makes a mistake in the I-9 process; and a "tip line" for employees with information about possible violations, with a protocol for responding for such tips.

ICE also recommends that employers establish an internal training program, with annual updates, on how to manage completion of Form I-9 and how to detect fraudulent use of documents in the I-9 process; permit the I-9 and E-Verify program process to be conducted only by individuals who have received training; and include a review of the completed I-9 and documents by a second person as part of each employee's verification to minimize the potential for a single individual to subvert the process. While implementing such a policy may not protect an employer if large numbers of unauthorized workers are found in the workforce, ICE hopes with these "best practices" to encourage a change in culture among employees doing hiring. This change in culture would be similar to the change in the culture of financial reporting and auditing created by the Sarbanes-Oxley Act, and requires human resources to conduct a similar policy

¹³ Available at http://www.ice.gov/doclib/pi/news/newsreleases/articles/wse_advisory_v27.pdf (last visited March 21, 2008).

development initiative and implementation oversight process as was developed on the financial side.

III. Private Measures to Increase Employers' Immigration Compliance

To help encourage employer compliance, ICE has enlisted large corporations in its efforts to reduce employment opportunities for unlawful workers. In 2001, ICE settled a criminal action against Wal-Mart. That criminal action asserted Wal-Mart had a practice of using subcontractors in an attempt to isolate itself from liability for unlawful employment of unauthorized immigrants. Normally, employers are allowed to rely upon the employment eligibility verification carried out by their subcontractors, and do not need to worry about the immigration status of the subcontracted employees. This protection, however, does not apply if the user of the contract services has knowledge that employees are actually unauthorized for employment. The Government asserted that Wal-Mart managers had knowledge of the unlawful status of many of the cleaning crews performing overnight cleaning services for contractors in Wal-Mart stores. While denying the government's allegations, Wal-Mart agreed to a multi-million dollar settlement.¹⁴

As part of the settlement, Wal-Mart agreed that it would assume legal obligations under the settlement agreement not required by the Immigration and Nationality Act. In particular, Wal-Mart agreed to oversee the I-9 compliance of all of its contractors, as well as of its contractors' subcontractors. ICE has actively encouraged businesses to follow Wal-Mart's lead and impose contractual obligations on themselves and their contractors that go beyond the statute. Many small businesses doing business with prominent corporations have now received the "Wal-Mart Contract," in which the contractor must agree to comply and utilize ICE's "best hiring practice" in its own hiring, as well as agreeing to onerous employee eligibility verification requirements overseeing its own subcontractors. These requirements will be a further cost of doing business on these contractors, much as the onerous Sarbanes-Oxley accounting and financial control requirements have imposed costs on publicly-traded companies. These costs will include providing training to employees, hiring auditors, and possibly losing the services of US citizen subcontractors and employees until they can verify their identity with approved government documents.

The "Wal-Mart Contract" provisions are particularly onerous on companies using subcontractors to conduct operations in remote locations. These employers now need to develop procedures under which they can review the employment eligibility verification documentation of the employees of their subcontractors, even though they may never physically meet those subcontractors in a normal course of doing business.

It remains to be seen whether the Government's continued enforcement of these immigration-related hiring requirements will be effective in deterring employers from hiring individuals who have no immigration status. It is certain, however, that the broad availability of high-quality fraudulent documentation makes it difficult for employers to be assured that their work force is in valid status, because many unauthorized immigrants

¹⁴ Press Release on the settlement at <http://www.walmartfacts.com/articles/2293.aspx>. (last visited March 21, 2008).

can present valid-appearing documents seeming to verify their status as permanent residents, employment-authorized immigrants, or United States citizens.

It is certain, however, that in the short term employees must be aware of the new world of enforcement, both public enforcement by ICE and private enforcement by companies, which has changed the landscape with respect to compliance requirements in hiring. Employers should carefully review their hiring practices, ensure that the staff conducting their I-9 verification process are well-trained, and that their policies conform with the new “best practices” imposed by ICE over and above mere statutory compliance.

IV. Federal Measures to Increase Contractor’s Compliance

On June 6, 2008, President Bush issued an Executive Order amending Executive Order 12989 requiring contractors, as a condition of each future federal contract, to agree to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment eligibility of all persons hired during the contract term and all persons performing work within the United States on the federal contract. DHS Secretary Michael Chertoff subsequently designated E-Verify as the system of choice.

The Executive Order is not yet effective as implementing regulations are required. Proposed implementing regulations were published in the Federal Register on June 12, 2008.¹⁵ The sixty day comment period on the proposed regulations closed on August 11, 2008. The proposed regulations provided that future contracts (and renewed contracts) would require language consistent with the Executive Order’s requirements. The proposed regulations also included a “flow down” requirement for subcontractors engaged in contracts for construction or services that are above the de minimus threshold of \$3,000. The government has stated that the new requirement will be effective 30 days after the final regulations are issued.

V. State Measures to Increase Employers’ Immigration Compliance

Among many new state-level laws being enacted are bills which seek to address employment of illegal aliens by requiring employers to use E-Verify. E-Verify is a voluntary internet-based Employment Eligibility Verification System run by United States Citizenship and Immigration Services (USCIS) that allows employers to electronically verify the employment eligibility of newly hired employees. E-Verify allows an employer to electronically compare employee-provided information from I-9s against records in the Social Security Administration (SSA) and Department of Homeland Security (DHS) databases.

A growing number of states, including Arizona, Colorado, Georgia, Minnesota, Mississippi, Missouri, Oklahoma, Rhode Island, South Carolina, and Utah, have recently

¹⁵ The proposed regulations can be found at the following link:
<http://edocket.access.gpo.gov/2008/pdf/E8-13358.pdf>.

enacted legislation or issued executive orders requiring the use of E-Verify by employers doing business in those states. At this point, Colorado, Georgia, Minnesota, Mississippi, Missouri, Oklahoma, Rhode Island, South Carolina, and Utah require E-Verify for employers who have public contracts with state agencies or political subdivisions. Virtually all of these states also require public employers to use E-Verify. The Arizona and Mississippi statutes, which became effective, respectively, in January and July of this year, are the most far-reaching of current legislation as they require all employers within the state to use E-Verify.

In addition to the ten states that have already passed legislation or executive orders requiring E-Verify, dozens of states have legislation pending that mandates the use of E-Verify. In a December 3, 2007 E-Verify presentation, the USCIS reported that Texas, Florida, Kentucky, Arkansas, Kansas, Tennessee, Louisiana, Maryland and California have legislation pending that would require public employers to use E-Verify. It has also been reported that Idaho, Indiana, New Jersey, Pennsylvania, Massachusetts, Tennessee and Wyoming have legislation pending that would require the use of E-Verify.

While the vast majority of states are currently introducing legislation that requires the use of E-Verify, because of concerns regarding inaccuracies in both the SSA and DHS databases, Illinois has enacted legislation prohibiting employers from enrolling in E-Verify until such problems are resolved.

The status of such state statutes have been subject to litigation on preemption grounds. Challengers argue that such laws are inconsistent with the federal scheme of legislation that governs immigration. The focus has been on the Immigration Reform and Control Act of 1986 (IRCA), which was the first federal law prohibiting the employment of unauthorized workers.¹⁶ IRCA provides that “the provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.” IRCA requires employers to complete Form I-9, Employment Eligibility Verification Form, for employees hired after November 6, 1986. Once this form has been completed, including a review by the employer of acceptable documentation of identity and employment eligibility, and maintained for required periods, the employer’s responsibility to verify the employee’s authorized work status under IRCA is complete.

Much of the current litigation against the state statutes focuses on whether the legislation is an impermissible interference with federal law or whether the legislation qualifies as a “licensing or similar law” which is not preempted by IRCA. Opponents also argue that many of the state statutes which require E-Verify impermissibly make a program that is clearly voluntary under federal law into a mandatory program.

The Arizona and Oklahoma statutes, for example, are currently being challenged in federal court. Opponents argue that the laws are preempted by federal law and that they

¹⁶ IRCA’s employer sanctions regime is set out at INA §274A.

violate the constitutional rights of employees and employers. While the District Court upheld the Arizona statute, that decision has been appealed to the United States Court of Appeals for the 9th Circuit and appellant's initial brief on appeal was submitted April 1, 2008. On June 4, 2008, the United States Court for the Western District of Oklahoma, entered a preliminary injunction which postponed enforcement of the employment-related portions of Oklahoma's law including all E-Verify requirements.

The Department of Homeland Security (DHS) has also brought an action to enjoin enforcement of the Illinois law prohibiting the use of E-Verify. Although the law was to take effect beginning January 1 of this year, Illinois has agreed not to enforce the law until the litigation is resolved.

VI. E-Verify Enrollment and Procedures

In order to use E-Verify, an employer must register online with DHS and accept the electronic Memorandum of Understanding (MOU), an agreement between the employer, the SSA and DHS that details the responsibilities of each with regard to E-Verify.¹⁷ By entering into the MOU, the employer agrees, among other things, to process all employees hired after enrollment through E-Verify. Employers may also have another company or "designated agent" complete the E-Verify process for the company's employees. There are a number of such companies that advertise this service for employers.

An employer (or designated agent) must screen the employee through E-Verify after an offer of employment is accepted and after the Form I-9 is completed. E-Verify must be completed no later than three business days after the employee's actual start date unless there is no social security number available for the employee, in which case the employer must wait until that number is available. Note that while the E-Verify screening can be before the start date, an Employer needs to be consistent in timing of the queries for all employees so as to avoid discrimination. If an employer screens prior to the start date, especially where there is no written evidence of an offer, there is a risk of allegation that an employer unlawfully used E-Verify to pre-screen applicants.

Employers should carefully consider whether to participate in E-Verify. Indeed, as of June 10, 2008, the USCIS reported that only about 69,000 employers nationwide had enrolled in E-Verify.¹⁸ Even where there are state statutes mandating E-Verify, there has been reluctance by employers to enroll. In Arizona, for example, although the statute requiring E-Verify was effective January 1 and widely publicized, Arizona newspapers reported that, as of May 27, 2008, only about 20,000 of Arizona's 150,000 employers had enrolled.

¹⁷ The registration page for E-Verify is at <https://www.vis-dhs.com/EmployerRegistration>.

¹⁸ Testimony of Jonathan "Jock" Scharfen, Acting Director USCIS before House Committee on the Judiciary on June 10, 2008; <http://www.uscis.gov/files/pressrelease/testimony.pdf> (last visited August 16, 2008).

The use of E-Verify does not provide full protection from claims of discrimination. Although the MOU provides that “no person or entity participating in E-Verify is civilly or criminally liable under any law for any action taken in good faith on information provided through the confirmation system,” this provision does not fully insulate an employer against claims and charges of discrimination. In fact, as part of its participation in the program, an employer must post an anti-discrimination notice issued by the Office of Special Counsel for Immigration – Related Unfair Employment Practices, Department of Justice (DOJ) in an area visible to prospective employees. In addition, the MOU language does not fully insulate an employer as such claims are often heavily based upon facts. Thus, an employer may be faced with fighting a discrimination charge or claim and incur substantial attorneys fees in defending itself to show that its actions were based in good faith upon E-Verify rather than upon some other discriminatory basis alleged by the complainant. The likelihood of such actions also increases when one considers the database errors referenced above.

In addition, the provisions in the MOUs which allow for the federal government and designees to conduct site visits, have full access to employment records, and to interview employees cause concern among many. By entering into such an MOU, the employer is waiving its Fourth Amendment rights and allowing the government free access to employment records.

Although an employer who verifies work authorization under E-Verify is presumed to have not knowingly hired an unauthorized alien, participation in E-Verify does not provide a safe harbor from worksite enforcement. An example of protection afforded to an employer by participation in E-Verify is the December 12, 2006 worksite enforcement action by the United States Immigration and Customs Enforcement (ICE) at Swift meat packing plants around the country. Although ICE raided the company and found over a thousand illegal workers, unlike recent similar enforcement efforts in which ICE commonly brings criminal actions against company owners, managers and supervisors for harboring illegal aliens, document fraud and the like, ICE did not pursue any criminal actions against Swift or its management. Because E-Verify had actually confirmed that the employees were authorized, Swift and its management did not face the now common criminal charges and the government instead proceeded against the individual employees on criminal grounds such as identity theft and reentry after deportation. New photo tool enhancements to E-Verify have been instituted in an effort to deal with the situation that occurred at Swift. It is unclear, however, whether employers will be able to effectively use this tool and whether they will continue to be afforded the same treatment and protection from criminal action that those at Swift received.

It is also important to emphasize that to the extent that E-Verify provides any greater protection than that afforded by an employer following the standard I-9 process, such protection only extends to those employees queried under the E-Verify system. E-Verify currently only allows employers to verify the employment of hires following enrollment and it does not allow for verification of contractors or reverification of current employees. Therefore, E-Verify will not provide any protection with regard to past hires or contractors. All employers are, therefore, well advised to follow consistent I-9

procedures and to audit I-9 records for all current employees for compliance with IRCA. Such advice also applies to those who choose to sign up under E-Verify especially as those employers, through the MOU, agree to site visits, employee interviews and the production of employment documentation.

Lastly, in considering whether to enroll, employers must review the ever changing landscape of state and federal legislation and executive orders regarding E-Verify. This includes the particular legislation that applies to its worksites, challenges to such legislation and the impact of either participation or non-participation in E-Verify under that legislation. For example, even though Arizona currently has legislation mandating the use of E-Verify, many employers are currently resisting enrollment in E-Verify not only because of the pending litigation but because there is no penalty under the statute for failure to enroll. Rather than providing a penalty for non-enrollment, the statute encourages enrollment by providing a rebuttable presumption that the employer did not intentionally or knowingly employ an unauthorized worker should the employer participate in E-Verify. Employers are also relying on the fact that the statute also preserves the good faith defense to unauthorized employment if the employer complies with its I-9 requirements under IRCA.

VII. Conclusion

The failure of comprehensive immigration reform has left employers with a dilemma: some five percent of the US workforce is not legally in the United States, and employers are being drafted by their states to the front lines of the government's enforcement efforts. Employers must be sure that their staffs are trained and they have created a "culture of compliance" to avoid violations and the criminal charges such violations may bring.