

EMPLOYERS OF “ESSENTIAL” WORKERS”: WORKSITE ENFORCEMENT – THE ICE MAN COMETH

By: Richard R. Rulon and Theodore J. Murphy

I. Background

In 1986, Congress enacted the Immigration Reform and Control Act (IRCA)¹ which for the first time made employers active participants in the government’s objective of establishing a comprehensive system that would eliminate employment as a “magnet” that attracts individuals to enter and reside in the United States illegally. The law sought to end unauthorized employment in the United States by imposing penalties on employers who knowingly hire or continue to employ foreign nationals not authorized to work in the United States. To accomplish this, all employers are required to verify the identity and work authorization of all individuals hired after November 6, 1986. This requirement is implemented through the completion and execution of Section 1 of Form I-9 by the employee, submission to the employer by the employee of acceptable I-9 identity and employment eligibility documents and the review and verification of these documents by the employer as documented on Section 2 of Form I-9.

Richard R. Rulon is a founding partner of Klasko, Rulon, Stock & Seltzer, LLP. He is a past Chair of the AILA Philadelphia Chapter and past Chairman of Board of Trustees for AILF. In 2005, Rich received AILF’s Honorary Fellow Award for lifelong service to the field of immigration and nationality law and in 2007, he received AILA’s Advocacy Award for outstanding efforts in support of AILA’s legislative and media advocacy agenda. He has also spoken and written on a variety of employment-based immigration issues. Rich received his undergraduate degree from Brown University (B.A. 1964) and his Law Degree from the University of Pennsylvania Law School (J.D. 1967).

Theodore J. Murphy serves as Counsel of Klasko, Rulon, Stock & Seltzer, LLP and has been involved with immigration for the past 14 years – over a decade with ICE and the former INS. He represented the Agency in all matters before the Immigration Courts and Board of Immigration Appeals, handing criminal, national security, fraud and employer sanction cases. Ted has served as a Special Assistant United States Attorney and as an Adjunct Professor of Law at Temple University Beasley School of Law. In addition, he is a veteran of the United States Army’s 82nd Airborne Division. Ted received his

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

undergraduate degree at Georgetown University (B.A. 1983) and his Law Degree (J.D. 1994) and Masters of Law (International Law) (LL.M. 1997) from Temple University.

Failure to complete the required documentation properly carries a maximum civil fine of \$1,100 per employee,² and the hiring of an unauthorized worker carries a maximum civil fine of \$3,200 per employee for a first time offense. If an employer has more than two offenses, the maximum civil fine is \$16,000 per employee.³ Moreover, 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.⁴

The I-9 employment verification system created by IRCA is to this day the sole employment eligibility verification program with which all employers must comply. The program has undergone some changes since 1986. For example, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA)⁵, among other things, reduced the number of acceptable documents for I-9 purposes;⁶ established a good faith defense against technical paperwork violations; and provided some protection for employers who are part of multi-employer associations. At the same time, this law also broadened the government's investigatory authority and created additional penalties. But the basic system has remained largely in tact. In addition to the I-9 process there are other programs that employers can use on a voluntary basis to verify work authorization. One such program is the Social Security Number Verification System, a Web-based system where employers can verify new employees' Social Security numbers against the Social Security Administration (SSA) database. It is made clear to those using this system that information provided by the SSA should not be used to verify an employee's immigration status.⁷

Another such system is an electronic employment eligibility verification system operated by DHS under the name "E-Verify," formerly known as the Basic Pilot program. It is a voluntary free Internet-based system that employers can use to confirm that newly hired employees are authorized to work in the United States. The system compares social security number data and information in DHS' immigration databases to the employee's name and other Form I-9 information to confirm that the employee's information matches

² See 8 C.F.R. §274a.10(b)(2). For paperwork violations occurring prior to September 29, 1999 the fine ranged from \$100 to \$1,000. Paperwork violations occurring on or after September 29, 1999, carry a fine ranging from \$110 to \$1,100.

³ See 8 C.F.R. §274a.10(b)(1)(ii). First, second and third offenses refer to the number of times an employer has been investigated and fined by DHS. The offenses do not refer to the number of unauthorized employees. There was a significant increase, effective March 27, 2008, in the amount of the civil fines imposed per employee. For offenses occurring on or after March 27, 2008, the civil fine for a first offense ranges from \$375 to \$3,200 per unauthorized employee. For a second offense, the civil fine ranges from \$3,200 to \$6,500 per unauthorized employee. For a third offense the civil fine ranges from \$4,300 to \$16,000 per unauthorized employee.

⁴ See 8 U.S.C. § 1324a(f)(1). See also 8 C.F.R. §274a.10(a).

⁵ Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009.

⁶ See Updated Handbook for Employers, M-274 (rev. 11/1/07) which contains both the updated I-9 Form and examples of the current acceptable documents for employment verification.

⁷ See Restrictions on Using SSNVS <http://www.ssa.gov/employer/ssnvrestrict.htm>.

that in government databases. If the data and information being compared does not match, USCIS will notify the employer of the non-confirmation. If a worker shows up as “employment authorized” the employer will record the system-generated verification number on the Form I-9 or print out the confirmation and attach it to the I-9. On the other hand, if an employer gets a “tentative non-confirmation,” the employer must promptly provide the employee with information about how to challenge the information mismatch and the employee can then contest the determination and resolve the mismatch with the Social Security Administration (SSA) or the Department of Homeland Security (DHS). Should the employee choose not to contest the finding, the determination is considered final and the employer may terminate the employee and resolve the case. If the employee elects to contest the tentative non-confirmation, the employee will have eight federal work days to resolve the issue. The employee may continue to work while the case is being resolved.⁸

II. Worksite Enforcement – An ICE Top Priority

Responsibility for enforcement of the employment eligibility verification program created by IRCA was vested initially in the Immigration and Naturalization Service (INS). The principal focus of this agency was educating employers regarding their obligations under this law and seeking their compliance with such obligations. With respect to enforcement initiatives undertaken by INS, more often than not they resulted in settlements with negotiated fines and the employer’s agreement to comply in the future. However, since the creation in March 2003 of the U.S. Immigration and Customs Enforcement (ICE) agency, the largest investigative branch of DHS,⁹ enforcement of the country’s immigration laws, including worksite enforcement, has become a top priority.

As part of the Secure Border Initiative (SBI) initiated by ICE in 2005, the agency has mounted what it describes as a “nationwide effort to shut down the employment magnet fueling illegal immigration.”¹⁰ ICE has prioritized its worksite enforcement efforts by focusing on the sites related to critical infrastructure and national security such as airports, nuclear power plants, chemical plants, military bases, defense facilities and seaports.¹¹ In addition, ICE also is focusing on all sectors of the economy that employ unskilled and semi-skilled workers including, among others, restaurant workers, retail clerks, construction trades people, manufacturing line workers, hotel service workers, food production workers, landscape workers, and health care aids. This is evidenced by

⁸ See Scofield, Chu, Ganchan and Fragomen, “Employment Verification Systems – Where Are We and Where Are We Going,” Immigration & Nationality Handbook 2006-07 Edition, pp. 508-520 for more detailed discussion of Employment Verification System.

⁹ Pursuant to the Homeland Security Act of 2002, Pub. Law No. 107-296 (Nov. 25, 2002), the authorities of the former INS were transferred to three new agencies in the Department of Homeland Security: U.S. Citizenship and Immigration Services (CIS), U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE). The two DHS immigration components most involved with employment eligibility verification and worksite enforcement are CIS and ICE. CIS is responsible for most documentation of alien work authorization, for the Form I-9 itself, and for the E-Verify employment eligibility verification program. ICE is responsible for enforcement of the penalty provisions of Section 274A of the Act, and for other immigration enforcement within the United States.

¹⁰ See <http://www.ice.gov/pi/news/newsreleases/articles/080515sandiego.htm>.

¹¹ See <http://www.ice.gov/pi/news/newsreleases/articles/080515ftmyers.htm>.

its recent worksite enforcement actions including, by way of example, a raid on AgriProcessors Inc. in Postville, Iowa where 306 people were arrested; a raid on a French restaurant in San Diego where 18 persons were arrested and the filing of criminal indictments against a car wash franchise and five members of its management charging them with conspiring to steal identities and using these identities to employ and harbor illegal aliens.

The results of ICE's dramatically-enhanced worksite enforcement efforts are very telling. In fiscal year 2007, ICE secured more than \$30 million in criminal fines, restitutions, and civil judgments in worksite enforcement cases. It arrested 863 people in criminal cases and made more than 4,000 administrative arrests, which is a tenfold increase over 2002 figures.¹²

III. What Should Employers Do In Anticipation of the ICE-Man Coming

All employers, particularly those engaged in business sectors that involve either critical infrastructure or national security, or employ large numbers of unskilled or semi-skilled workers, should take steps to prepare for a possible unannounced visit by agents of ICE. Among the steps an employer should take, if it has not already done so, is to establish clear and consistently applied policies on:

- a. Avoiding the hiring of any employees without authorization to work for the employer including statements that the company will only hire those with authorization to work for the company, that any employee who has knowledge of an employee not having authorization to work in the U.S. must reveal such information to management, that all levels of management are required to comply with and actively enforce the policy, and that any employee who accepts a document from a prospective hire that is known to be a counterfeit document for verifying identity or employment authorization will be terminated.
- b. Termination of employees who are found to be without authorization to work or to be out of legal status including developing a system to track status expiration dates of work authorization.
- c. I-9 compliance including timely completion of I-9 forms, procedures for handling employees who do not have all necessary documents at the time of completion of Form I-9, acceptable document or documents to establish identity and employment eligibility, updating and reverification of I-9 forms, retention of I-9 forms, copying of acceptable documents, establishing where I-9 forms are kept, providing training on I-9

¹² See <http://www.ice.gov/pi/news/newsreleases/articles /080515ftmyers.htm>.

compliance, performing I-9 audits, and I-9 compliance of contractors and subcontractors.¹³

- d. Avoiding national origin and citizenship discrimination.
- e. Participation in the E-Verify program.
- f. Steps to be taken upon receipt of a “No-Match” letter from the Social Security Administration (SSA) or notice of discrepancy from DHS.

In establishing its policies and practices on I-9 compliance, an employer should review USCIS’ “Handbook for Employers, Instructions for Completing the Form I-9,” re-released on March 31, 2008, as it provides, from the government’s perspective, an overview of I-9 compliance including how to complete the current Form I-9 correctly, and what document or documents presented by an employee establish identity and employment eligibility.¹⁴ In a similar vein, it is also useful to keep in mind what ICE considers “Best Hiring Practices.” ICE advises that employers, in connection with the hiring function, should:

- A. Develop a protocol for dealing with SSA “no-match” letters.
- B. Develop policies to ensure that the employer’s I-9 process is not discriminatory.
- C. Carry out semi-annual I-9 audits either by an external firm or a trained employee not otherwise involved in the I-9 process.
- D. Use the “E-Verify” program formerly known as the Basic Pilot Program.
- E. Permit the I-9 and E-Verify Program process to be conducted only by individuals who have received training, and include a secondary review as part of each employee’s verification to minimize the potential for a single individual to subvert the process.
- F. 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.
- G. Establish a protocol for assessing the adherence to the “Best Practices” guidelines by the company’s contractors and subcontractors.

¹³ See Cooper, Scofield, Weigle and Ladik, “The New Look of Worksite Enforcement,” Immigration & Nationality Law Handbook, 2007-08 Edition, pp. 142-151 on self-audit do’s and dont’s and practice tips for employers.

¹⁴ This re-released Handbook (which still bears the 11/01/07 revision date) can be found at CIS’s website – <http://www.uscis.gov/Files/nativedocuments/m-274.pdf>.

- H. Establish a self-reporting procedure for reporting to ICE any violations or discovered deficiencies.
- I. Establish a tip line for employees to report activity relating to the employment of unauthorized aliens and a protocol for responding to employee tips.¹⁵

In deciding which policies and practices it should adopt and implement, an employer must carefully weigh the potential ramifications that the adoption of each such policy or practice may have on the employer, taking into account its particular circumstances. As part of this process, an employer should give serious consideration to seeking the advice and guidance of immigration counsel and employment law counsel in light of the potential legal consequences that may flow from the policies and/or practices adopted such as possible civil rights actions stemming from illegal national origin and/or citizenship discrimination.

Developing policies and best practices to prohibit the employment of unauthorized aliens, to terminate aliens found to be unauthorized and to comply with employment verification requirements should be relatively straightforward because the employer's obligations are clearly spelled out in the relevant statutes and implementing regulations. However, establishing policies and best practices for (i) responding to SSA "no-match" letters and DHS notices of discrepancies; (ii) using or not using E-Verify; and (iii) establishing self-reporting procedures to report violations or deficiencies to ICE, is a more difficult undertaking involving the balancing of various competing legal and other interests.

IV. Responding to SSA "No Match" Letters and DHS Notices of Discrepancy

With respect to an employer's obligation upon receiving an SSA no-match letter or DHS notice of discrepancy, DHS issued a Final Rule addressing this subject which was to have become effective September 14, 2007. However, its implementation has been enjoined.¹⁶ This proposed Final Rule modifies the current regulatory definition of "knowing"¹⁷ to add three additional situations where the employer's failure to take reasonable steps could lead to a finding that an employer had constructive knowledge of the fact that an employee was an "unauthorized alien." The additional situations are:

¹⁵ ICE's Best Hiring Practices can be found at www.ice.gov/partners/opaimage.

¹⁶ The Final Rule was enjoined in a decision issued by the Federal District Court of the Northern District of California. Subsequently, DHS reissued this Final Rule, virtually without change, on March 26, 2008 (Supplemental Proposed Rule Docket Number ICEB-2006-004.) Whether this Supplemental Proposed Rule will be implemented remains uncertain. See Federal Register/Vol. 73, No. 59/ Wednesday March 26, 2008 p. 15,944. The web URL is <http://edocket.access.gpo.gov/2008/E8-6168.htm>.

¹⁷ Prior to the issuance of the "Final Rule" which has been enjoined, 8 C.F.R. § 274a.1(l)(1) defined "knowing" as follows: "(l)(1) The term *knowing* includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. Constructive knowledge may include, but is not limited to, situations where an employer: (i) Fails to complete or improperly completes the Employment Eligibility Verification Form, I-9; (ii) 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 (iii) 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."

1. An employee's request that the employer file a labor certification or employment-based visa petition on behalf of the employee;
2. Receipt of a "no match" letter from SSA noting that the combination of name and social security number (SSN) submitted for an employee does not match SSA records;
3. Receipt of written notice from DHS that the immigration status document or employment authorization document presented or referenced by the employee in completing Form I-9 was assigned to another person or that there is no agency record that the document was assigned to anyone.

The proposed Final Rule describes the steps which DHS considers reasonable that an employer may take after receiving a "no match" letter from the SSA or a notice of discrepancy from DHS. Taking such steps will provide the employer with a "safe harbor" ensuring that DHS will not use such a written notice as any part of an allegation that the employer had constructive knowledge that the employee to which the notice referred was not authorized to work in the U.S.

The "reasonable steps" DHS proposes require that, within 30 days of receipt of the "no match" letter or notice of discrepancy, an employer must first confirm whether an error in its own records caused it to submit incorrect information to SSA. If that turns out not to be the case, then the employer must request that the employee deals directly with SSA (or DHS, depending on the circumstances) to resolve the discrepancy, and provides confirmation from the government agency that it has been resolved. If, after 90 days, the discrepancy to which the SSA no match letter or notice of discrepancy from DHS refers is not resolved and the employee's identity and work authorization cannot be verified through completion of a new I-9 Form,¹⁸ the employer must choose between terminating the employee or facing the risk that DHS may find that the employer had constructive knowledge that the employee was an unauthorized alien and therefore, by continuing to employ the alien, the employer violated INA Section 274A(a)(2).

The proposed Final Rule also provides that whether an employer will be found to have constructive knowledge in any particular case will depend on the "totality of relevant circumstances." No "safe harbor" protocol is available where an employee requests employer sponsorship for a labor certification or an employment-based visa petition. DHS considers this an example of a situation that may, depending on the totality of relevant circumstances, require an employer to take reasonable steps in order to avoid a finding by DHS that the employer has constructive knowledge that the employee is an unauthorized alien. DHS does acknowledge that not all situations involving such a

¹⁸ Under the proposed Final Rule, in completing the new I-9, the employer cannot accept (i) any document referenced in the notice, (ii) any document with the disputed social security or alien number, or (iii) any receipt for replacement of such documents. That Rule also requires that the employee must present a document with a photograph as part of the process in completing the new I-9.

request will be evidence of constructive knowledge and cites as an example work-authorized employees who are seeking permanent residency.

Moreover, according to DHS, an employer who follows the “safe harbor” procedures laid out in the proposed Final Rule avoids only the risk of being found to have “constructive knowledge” that an employee is not authorized to work in the United States based on receipt of a no match letter. DHS takes the position that it is not precluded from finding that an employer had constructive knowledge from other sources or that an employer had actual knowledge that an employee was an unauthorized alien. Also, an employer with actual knowledge that one of its employees is an unauthorized alien cannot avoid liability by following the “safe harbor” procedures described in the proposed Final Rule. Indeed, even if the employer takes steps set forth in this Final Rule and the discrepancies in the no match letter are resolved, that in and of itself, according to DHS, does not demonstrate that the employee is authorized to work in the United States.

Since the fate of the proposed Final Rule is uncertain and, in light of the additional burdens compliance with this proposed Rule would impose, an employer should decide which, if any, of ICE’s proposed “reasonable steps” it is willing to implement voluntarily at this time. As part of this process, employers should examine very closely the procedures and practices they already have in place to ensure I-9 compliance and to avoid the unlawful hiring or continued employment of unauthorized aliens.

V. Voluntary Participation in the E-Verify Program

Deciding to participate in E-Verify, on its face, may seem a simple, straightforward step for an employer to take to help ensure that newly-hired employees are authorized to work in the United States. However, the obligations that an employer accepts when joining this program deserve careful consideration. In order to participate in E-Verify, an employer must register online at the DHS E-Verify page and accept the electronic Memorandum of Understanding (MOU) that details the responsibilities of the Social Security Administration, Department of Homeland Security and the employer. By joining the E-Verify program, including signing the MOU, an employer agrees to, among other things:

- Notify DHS of any employee the employer continues to employ after a final nonconfirmation (and face fines of between \$500 and \$1000 for each failure).
- Permit DHS and SSA officials to visit their worksites to review E-Verify, related records (Forms I-9, SSA transaction records and DHS verification records) as well as other employment records and to interview an employer’s authorized agents or designees regarding the employer’s experience with E-Verify for the purpose of evaluating E-Verify. (Such permission may constitute a waiver of 4th Amendment protections.)

While an employer participating in E-Verify is presumed not to have violated the employer sanctions rules in INA Section 274A with respect to the hiring of any

individual if it obtains confirmation of the identity and employment eligibility in compliance with the terms and conditions of E-Verify, DHS does not consider using E-Verify to provide a “safe harbor” from worksite enforcement. Nonetheless, the fact that the employer used E-Verify to verify electronically the employment eligibility of its newly hired employees may have a positive impact on the outcome of any enforcement action taken.¹⁹ If, however, an employer continues to employ a new hire after receiving a final non-confirmation, there is a rebuttable presumption that the employer is knowingly employing someone who is ineligible to work.

Despite the obvious concerns that an employer joining E-Verify may have regarding the access it has granted DHS to its relevant employment records, three recent developments may move certain employers in the direction of participating in the program. First, President Bush issued an Executive Order on June 6, 2008 that requires federal contractors as a condition of each future federal contract to agree to use E-Verify 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 has indicated its intention to implement this Executive Order as soon as possible.²⁰ Secondly, USCIS recently issued a new rule that permits students with degrees in the fields of science, technology, engineering and mathematics (STEM) to extend their optional practical training time (usually 12 months) by 17 months enabling such students to continue their employment in the U.S. and to have two additional opportunities to be selected for the H-1B annual lottery. However, for a student to be eligible for such an extension, his or her employer has to be participating in E-Verify.²¹ Thirdly, some states have passed laws that, among other things, require all companies employing persons within such states and/or contracting with such states or local entities to register and use the E-Verify program.²²

VI. The ICE-Man Commeth Unannounced – What To Do

Even if an employer has in place a strong I-9 compliance program, participates in E-Verify and otherwise takes all appropriate steps to ensure that it employs only individuals who may legally work in the United States, such an employer, because of the nature of its business or the type of workers it employs, may be the target of an ICE enforcement action.

¹⁹ The Swift meat-packing company benefited from participation in E-Verify. On December 12, 2006 Swift sites around the country were raided by ICE, resulting in the arrest of over 1,000 illegal workers. While the individual illegal workers were charged with identity theft, the Swift company and its management did not face criminal charges because the E-Verify program confirmed that the employees had been authorized to work.

²⁰ See <http://edocket.access.gpo.gov/2008/O8-1348.htm>.

²¹ See Federal Register/Vol. 73, No. 68/ Tuesday April 8, 2008 p. 18,944. The web URL is <http://edocket.access.gpo.gov/2008/E8-7427.htm>.

²² These states include Arizona, Colorado, Georgia, Minnesota, Mississippi, Missouri, Oklahoma (currently enjoined from enforcement by order dated June 4, 2008 issued by U.S. District Court for the Western District of Oklahoma), Rhode Island and Utah. Note as well that Illinois passed a law that, although currently enjoined, prohibits employers in that state from signing up for E-Verify.

ICE's decision to target a particular employer may be precipitated by receipt of anonymous tips from people complaining of large numbers of foreign looking people getting out of vans at a local factory or going into single family homes in the neighborhood during early morning or late evening hours.²³ Sometimes the tips come from former spouses or their family members, disgruntled employees²⁴ or encounters between union and non-union employees. Such tips often provide the impetus for further investigation by ICE using undercover agents.²⁵ ICE also receives leads about illegal workers from investigations by local and state police following traffic accidents, audits by the U.S. Labor Department, and the review of wage and hour reports and the inspection of facilities relating to health and safety conditions.

When ICE has received what it considers sufficient evidence that a particular employer is employing unauthorized aliens, its agents may simply appear at the front door of the business with a pre-printed consent form demanding that the business open its door, sign the pre-printed consent form and give the agents free reign to look at whatever they want to see within the targeted business. When ICE's agents arrive unannounced, the employer's response may depend, in part, on whether it has entered into an E-Verify MOU or related agreement with ICE, or whether the ICE agents have a search warrant. If the targeted employer is a participant in the E-Verify program and has signed the MOU discussed above, ICE is likely to take the position that that employer agreed in advance to allow DHS and SSA officials to visit the employer's worksites to review E-Verify related records (Forms I-9, SSA transaction records and DHS verification records), as well as other employment records and to interview the employer's authorized E-Verify agent or designee. For the moment, at least, it is an open question whether an E-Verify participant, by signing the MOU, has waived some or all 4th Amendment protections. Absent a signed MOU, an employer is entitled under IRCA to be given a three-day Inspection Notice prior to a worksite visit to inspect I-9s.²⁶ For the present an employer, even one which has signed an MOU, should insist on the right to three days notice. If the employer has not received a three day notice for an I-9 audit, the employer should demand a warrant be presented before any search of the premises can take place. Under no circumstances, should the employer consent to a warrantless search of the workplace. The employer's refusal to allow a warrantless search in most cases will result in the service on the employer of a warrant or a three day notice. In any case, as soon as an

²³ In October 2007 the ANNA II Inc. staffing company in Bensenville, Illinois was raided following an investigation begun in April 2006. The illegal workers were picked up in vans in a local neighborhood and driven to various work-sites.

²⁴ On February 28, 2008, five managers of IFCO Systems North America (IFCO) were indicted in federal court in Albany, New York. The indictment alleged the managers were involved in a conspiracy to harbor, encourage and transport illegal aliens within the United States. The ICE IFCO operation began with a disgruntled employee's call to ICE in February 2005. The 15 month long investigation and subsequent raids covered 40 plants nationally and resulted in the arrest of over 1,200 illegal workers.

²⁵ The Del Monte raid in July 2007, which involved the use of an undercover operation beginning in January 2007, revealed that more than 90 percent of American Staffing employees used social security numbers that were fraudulent or belonged to other persons. This was a joint operation between ICE and the Social Security Administration.

²⁶ See 8 CFR Section 274a.2(b)(2)(ii). The web URL is http://edocket.access.gpo.gov/cfr_2008/janqtr/pdf/8cfr274a.2.pdf.

employer is aware that it is the target of an ICE investigation, counsel should be contacted to ensure that the rights of the employer are protected.

VII. Conclusion

For employers involved in business sectors targeted by ICE, as discussed above, it is extremely important that before the ICE-Man arrives, they have put in place and implemented appropriate policies and practices to ensure they are in compliance with the employer sanction provisions found in Section 274A of the INA, as amended, and implementing regulations. If an employer is found to have knowingly hired or continued to employ an unauthorized alien, and failed to comply with I-9 requirements, ICE, in addition to seeking civil penalties, is aggressively bringing criminal charges against officers and managers of employers including charging such individuals with smuggling of aliens into the country and concealing, harboring and shielding them from detection. A conviction on such charges can result in imprisonment of up to ten years. Time is running out for targeted employers so they need to put their “employer sanctions” house in order before the ICE-man arrives and initiates an enforcement action against them.