

Immigration Enforcement in the Workplace: A Review of Past and Current Law and Policy

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Employment often is the magnet that attracts people to enter the United States or to remain in the country unlawfully. In 1986, Congress passed the Immigration Reform and Control Act (IRCA), whose purpose was to prevent unauthorized immigration by requiring employers to hire only lawful workers.¹ It established a two-pronged approach to limit the employment of unauthorized workers: (1) a process for verifying the employment eligibility of all new hires and (2) a program to sanction employers that did not comply with the law. IRCA applied equally to private and public employers.

Over time, IRCA's employment-verification process and sanctions program have not proven to significantly deter the employment of unauthorized workers. There is broad agreement that declining enforcement of IRCA and the widespread availability and use of fraudulent documents have largely undermined IRCA's administration.²

In the absence of comprehensive immigration reform, the U.S. Department of Homeland Security (DHS) under President George W. Bush employed a more aggressive approach to the enforcement of immigration laws in the workplace. In particular, DHS adopted broader criminal-enforcement strategies and began conducting large-scale worksite raids, arresting workers and some employers. Also, DHS turned

to an electronic program, E-Verify, to screen out unauthorized workers more reliably and to bolster IRCA's process for verifying employment eligibility. Although many have lauded the program as a tool to curb unauthorized immigration, others have criticized it as error-prone and vulnerable to fraud.

This article reviews past and current law and policy on immigration enforcement in the workplace. It specifically covers the following topics:

- Requirements for verification of employment eligibility, and related penalties, under IRCA
- Efforts to enforce immigration law in the workplace
- Standards, practices, and results of E-Verify
- Requirements and legal effects of the no-match rule

The Immigration Reform and Control Act

IRCA subjects both public and private employers to civil and criminal liability for knowingly employing a person who is not authorized to work in the United States.³ When Congress passed IRCA, there was concern that some employers, in seeking to comply with the act, might discriminate against particular people who looked or sounded "foreign." As a result, IRCA prohibits employers from discriminating against authorized workers on the basis of citizenship or national origin.⁴

Efforts to enforce IRCA violations are referred to as "worksite enforcement." U.S. Immigration and Customs

Enforcement (ICE), an agency of DHS, is currently responsible for worksite enforcement, which was previously overseen by the now-defunct Immigration and Naturalization Service (INS).

The I-9 Form: Verification of Employment Eligibility

IRCA created a specific process to verify the employment eligibility of employees, which involves employers' completing the Employment Eligibility Verification Form, also known as the I-9 form. The purpose of the form is to ensure that employers hire only people who are authorized to work in the United States. A noncitizen is "unauthorized" if he or she has not been admitted for permanent residence (that is, if he or she does not have a "green card") or has not been authorized by the federal government to work in the United States.⁵ Employers must complete and retain an I-9 form for almost all employees, including U.S. citizens. They are not required to fill out an I-9 form for employees hired before November 7, 1986; employees hired sporadically as domestic workers in private homes; and independent contractors and their employees.⁶

Steps to Be Taken to Comply with I-9 Form Requirements

To comply with the requirements of the I-9 form, employers must take the following steps:

1. Within three days of each employee's date of employment, employers must verify that employee's employment eligibility.⁷ To do so, an employer must physically examine the

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documents provided by an employee and accept them if they appear to be genuine and to relate to the employee. An employer is not expected to be a document expert, but is expected to make a good-faith effort to evaluate a document's genuineness.

2. An employee has a right to choose which documents to show to an employer, from a list of acceptable documents set forth on the I-9 form.⁸ An employer may not specify which documents an employee should present. Doing so is a violation of IRCA under certain circumstances.⁹ Employees must present original documents, except that a birth certificate may be a certified copy.
3. In some cases, employers may be required to reverify an employee's work authorization—for example, if the work authorization presented has an expiration date.¹⁰
4. Employers are required to retain completed I-9 forms for the entire period of employment, and for three years after the date of hire or one year after the date of termination, whichever is later.¹¹ I-9 forms now may be retained electronically, as long as the employer's systems for record-keeping, attestation of I-9 forms, and retention of I-9 forms comply with DHS standards.¹²

Employer Violations of IRCA

A violation of IRCA may result in the imposition of civil or criminal penalties. An employer can violate the compliance provisions of IRCA in four ways: by knowingly hiring or continuing to employ unauthorized workers, by violating paperwork requirements, by knowingly accepting forged or counterfeit documents for verification purposes, or by discriminating against lawful employees.

Knowingly Hiring or Continuing to Employ Unauthorized Workers

ICE may impose penalties on an employer if it establishes that the employer has hired or continued to employ a worker knowing that he or she is not authorized to work. The federal regulations implementing IRCA adopt a broad definition of

“knowing,” which includes not only actual knowledge of an employee's unauthorized work status, but also constructive knowledge.¹³ “Constructive knowledge” is that “which would lead a person, through the exercise of reasonable care, to know about a certain condition.”¹⁴

The regulations provide examples of situations in which an employer may, depending on the totality of relevant circumstances, have constructive knowledge of an employee's unauthorized status. For example, the employer may fail to complete or may improperly complete the I-9 form. Or it may fail to take reasonable steps after receiving information that the employee may not be authorized to work, such as written notice from DHS that it does not have a record of the employee's immigration status or employment-authorization document or that the document is assigned to another person.¹⁵

Good-faith compliance with the I-9 verification requirements is an affirmative defense to a charge of knowing employment of an unauthorized worker.¹⁶

Penalties for hiring or continuing to employ unauthorized workers generally include orders to cease and desist from such activity and the following civil penalties:¹⁷

- First offense: \$375 to \$3,200 for each unauthorized worker
- Second offense: \$3,200 to \$6,500 for each unauthorized worker
- Third offense or more: \$4,300 to \$16,000 for each unauthorized worker

Individuals or entities that knowingly violate these rules regularly and repeatedly may face fines of up to \$3,000 per employee and/or six months' imprisonment.¹⁸

Violating Paperwork Requirements

Civil penalties may be imposed for failure to properly complete, retain, or present for inspection I-9 forms. The penalty amount ranges from \$110 to \$1,100 for each I-9 form.¹⁹ The amount of the fine is discretionary and is based on a number of factors, including the size of the employer, the seriousness of the violation, and any history of previous violations.²⁰

IRCA allows a good-faith defense for paperwork violations that are technical and procedural in nature (as opposed to substantive in nature), unless the employer failed to correct errors within ten business days after notice of the violation.²¹

Knowingly Accepting Forged or Counterfeit Documents

Employers found to have engaged in immigration-related document fraud by fraudulently completing an I-9 form or knowingly accepting a forged or counterfeit document for verification purposes may be ordered to cease and desist from the unlawful activity and be assessed a civil penalty.²² The civil penalties are as follows:²³

- First offense: \$375 to \$3,200 for each fraudulent document
- Second offense: \$3,200 to \$6,500 for each fraudulent document

A separate federal law makes the use of fraudulent documents or false attestation to satisfy I-9 verification requirements a criminal offense.²⁴ People who violate this provision are subject to a fine and/or imprisonment for up to five years.²⁵

Discriminating against Lawful Employees

The antidiscrimination provisions of IRCA protect people from discrimination on the basis of national origin in hiring, recruitment, referral, or discharge.²⁶ The provisions also protect citizens and certain authorized immigrants from discrimination on the basis of citizenship status.²⁷ The antidiscrimination provisions do not apply to an employer who employs fewer than four people.²⁸ These provisions are independent of the antidiscrimination provision of Title VII of the Civil Rights Act of 1964.²⁹

IRCA also protects those who file charges or assert rights under the act against intimidation or retaliation.³⁰ Further, it covers intentional discrimination due to “document abuse,” in which an employer, seeking to comply with I-9 requirements, requests more or different documents than required, or refuses to accept documents that are genuine on their face.³¹

If an employer is found to have engaged in unlawful discrimination (also referred to as “unfair immigration- related employment practice” in the statute and the regulations), the employer will be ordered to stop the prohibited practice. The employer also may be ordered to take one or more corrective steps, such as hiring or reinstating people directly injured by the discrimination, with or without back pay; retaining records relating to all job applicants for up to three years; posting notices about employees’ rights and employers’ obligations; and paying civil penalties.³²

The civil penalty for document abuse is from \$110 to \$1,100 for each person discriminated against.³³ The civil penalties for other offenses are as follows:³⁴

- First offense: \$375 to \$3,200 for each person discriminated against
- Second offense: \$3,200 to \$6,500 for each person discriminated against
- Third offense or more: \$4,300 to \$16,000 for each person discriminated against

Worksite Enforcement

There is consensus that, although well intentioned, IRCA’s work-eligibility verification program and employer sanctions have failed to accomplish the goal of reducing the number of unauthorized immigrants in the United States.³⁵ The number of unauthorized workers employed in recent years in the United States remains substantial.³⁶

Under INS, enforcement efforts focused on educating employers regarding their IRCA obligations and seeking their compliance. Worksite violations were enforced primarily through the issuance of administrative fines. INS, however, experienced difficulties in proving employer violations and in setting and collecting fine amounts that meaningfully deterred employers from hiring unauthorized workers.³⁷ Worksite enforcement often was a low priority for INS.³⁸ For example, employer audits (inspections of employers’ I-9 forms) declined from nearly 10,000 in fiscal year 1990 to fewer than 2,200 in fiscal year 2003.³⁹ The number of notices of intent to fine issued to employers decreased from 417 in fiscal year 1999 to 3 in fiscal year 2004.⁴⁰

Further, the I-9 process does not provide employers who want to comply with the law with a reliable way to screen documents, and the process has made it easier for unscrupulous employers to hire unauthorized workers knowingly.⁴¹

Since March 2003, ICE has been primarily responsible for enforcement of the immigration laws, including the employer-sanction provisions. ICE has generally increased enforcement efforts and changed the strategy toward enforcement in the workplace. Particularly since 2006, ICE has focused on broader criminal enforcement, which has resulted in a dramatic increase in worksite raids, criminal arrests of both workers and employers, and deportations of workers.⁴² To date, ICE’s efforts have focused on private-sector employers, not public-sector employers.

In conducting raids, ICE has arrested thousands of workers and charged hundreds with identity theft or the use of fraudulent documents. Recent enforcement actions also have resulted in the indictments of some company executives on felony charges for harboring unauthorized immigrants, laundering money, and knowingly hiring unauthorized workers.⁴³ In fiscal year 2008, ICE made 1,100 criminal arrests tied to worksite investigations (of both workers and employers, the large majority being workers), up from 25 in fiscal year 2002.⁴⁴ Also, ICE took more than 5,100 unauthorized immigrants into custody on administrative immigration violations (for deportation purposes) during worksite investigations, up from 485 in fiscal year 2002.⁴⁵

ICE’s recent enforcement actions have not come without criticism. Civil rights groups and unions have complained about the treatment of immigrants and U.S. citizens at the worksite and on home raids.⁴⁶ Several lawsuits have been filed against ICE related to the raids, alleging constitutional violations of the rights of workers.⁴⁷ Congressional hearings have been held on the immigration raids and their impact in communities.⁴⁸

The E-Verify Program

The federal government also has increased enforcement efforts in the

workplace through expansion and promotion of E-Verify. E-Verify is structured as a voluntary Web-based program operated by DHS in partnership with the Social Security Administration (SSA). It allows participating employers to verify the employment eligibility of new employees electronically. The predecessor program to the current E-Verify, called Basic Pilot, was created in 1996 to improve the efficiency and the accuracy of the I-9 system for verification of employment eligibility. As of the date of this article, E-Verify is scheduled to expire on September 30, 2009.⁴⁹

Employers Required to Use E-Verify

DHS encourages the use of E-Verify, but, by federal law, may not require employers to use it.⁵⁰ Nevertheless, some state legislatures, including the North Carolina General Assembly, have mandated its use by certain employers. North Carolina requires all state agencies, departments, institutions, and universities to use E-Verify to check the work authorization for employees hired on or after January 1, 2007, and it requires local education agencies to use it for employees hired on or after March 1, 2007.⁵¹ North Carolina local governments are not required to use E-Verify, although they may voluntarily elect to do so.

In question is whether state and local governments may legally require private employers or government contractors to use the program, or whether such an action would violate federal law. Thus far, federal courts in Arizona, Missouri, Oklahoma, and Pennsylvania have issued conflicting decisions on the legality of such laws.⁵²

Effective September 8, 2009, certain federal contractors and subcontractors also will be required to use E-Verify. The federal government has issued a final rule amending the Federal Acquisition Regulations to require entities that contract with the federal government to verify employment eligibility of all new hires and all employees directly performing work on the federal contract.⁵³

When state and local governments and institutions of higher education directly enter into a contract with the federal government, they will be required to use E-Verify only for employees assigned to the contract, not for all

new hires.⁵⁴ The new rule applies to prime contracts of more than \$100,000 and to subcontracts of more than \$3,000 for services or for construction. It does not apply to prime contracts lasting fewer than 120 days. It also does not apply to the recipients of federal grants.⁵⁵

On December 23, 2008, the U.S. Chamber of Commerce and other business and human resource groups filed a lawsuit challenging the legality of the new regulation requiring federal government contractors to participate in the E-Verify program.⁵⁶

Although the accuracy of the program has improved substantially, evaluators have concluded that the rate of error is too high for the program to be mandatory.⁵⁷ Critics of E-Verify also have expressed concerns about privacy and due process, as well as the system's cost and ability to handle the increased volume of activity.⁵⁸ Some of these groups propose scrapping the system entirely until a new, more workable system can be developed.

Steps to Be Taken in Using E-Verify

To participate in E-Verify, an employer must enter into a written agreement, called a "memorandum of understanding" (MOU), with DHS and SSA.⁵⁹ The MOU sets up a contractual obligation, whether the employer is voluntarily electing to use the program or is required to use it under North Carolina law. Under the MOU, employers must take the following steps with respect to each employee:

1. The employer must first complete an I-9 form.
2. The employer then must enter the worker's information from the I-9 form into E-Verify, and it must be checked against information contained in federal databases.
3. If the data and the information being compared do not match, an employer will receive a tentative nonconfirmation notice. In that case, the employer must promptly provide the employee with information on how to challenge the information mismatch. The employee then has eight workdays to contact the appropriate federal agency (either SSA or DHS) to resolve the discrepancy.

4. If the worker contacts SSA or DHS to resolve the tentative nonconfirmation, the employer is prohibited from terminating or otherwise taking adverse action against the worker while awaiting a final resolution from the government agency, even if resolving the matter takes more than ten business days.
5. If the employee does not contest the charge within eight days, the employer is *required* to discharge the employee.

No-Match Letters

To expand worksite enforcement under President Bush, DHS also changed its policy regarding so-called no-match letters. Under DHS's new rule, these letters may be evidence of knowing employment of unauthorized workers.

SSA issues a "no-match letter" when a name or a Social Security Number reported on a W-2 form does not match SSA's records. SSA processes the information on W-2 forms as an agent of the Internal Revenue Service and uses earnings information to determine a worker's eligibility for Social Security benefits and the amount to which that worker may be entitled. That is the only purpose for which SSA may use W-2 information. When no match occurs, SSA sends a letter to the employee and the employer asking for corrected information. SSA has sent no-match letters to employees since 1979 and to employers since 1994. The purpose of the letters always has been to identify the person to whom reported earnings belong so that he or she may be credited with earnings for purposes of Social Security benefits.

Before 2007, SSA advised in its no-match letters that the mismatch might be due to a typographical error, a failure of the employee to report a name change, or submission of a blank or incomplete W-2 form.⁶⁰ DHS and its predecessor, INS, maintained that a no-match letter *did not*, standing alone, provide notice to an employer that an employee was working without authorization.⁶¹

On August 15, 2007, DHS changed its policy and published a final rule providing that a no-match letter may be used as evidence that an employer had constructive knowledge of an employee's unauthorized status, if the

employer fails to take certain actions set forth in the rule.⁶² The rule offers a safe harbor to employers who follow its steps in good faith.

Legal Status of the No-Match Rule

The DHS no-match rule is not yet in effect. On October 10, 2007, a federal district court in California issued a preliminary injunction blocking its enforcement because of questions about its legality.⁶³ The court was in part concerned about the wrongful termination of lawful workers as a result of the new rule, because the letters are based on SSA records that include numerous errors.⁶⁴

In response to the injunction, DHS issued a supplemental final rule on October 28, 2008.⁶⁵ The supplemental final rule does not substantively change the August 2007 no-match rule, but includes additional information that attempts to address the specific concerns raised by the federal court when it issued the preliminary injunction. On December 5, 2008, the federal court rejected DHS's request to expedite consideration of the case, observing that the administration of President Barack Obama might want to take another look at the issue.⁶⁶ On July 9, 2009, under President Obama, DHS announced that it was going to rescind the rule. However, the Senate subsequently approved an amendment to the DHS spending bill prohibiting DHS from rescinding the rule.⁶⁷ As of the date of this article, the supplemental final rule still is subject to the preliminary injunction issued by the federal district court. SSA has stated that it will not issue any more no-match letters until the litigation is resolved.

Steps to Be Taken under the No-Match Rule

DHS has set forth specific steps in its rule and offers employers who follow those steps a safe harbor from ICE's use of SSA no-match letters in any future enforcement action to show that an employer has knowingly employed unauthorized workers in violation of the federal law. If the rule becomes effective, employers should take the following steps on receipt of a no-match letter:⁶⁸

1. Employers must check their records within thirty days to determine

whether any discrepancy results from a typographical, transcription, or similar clerical error.

2. If the discrepancy is not due to an error in the employer's records, then the employer must request the affected employee to confirm the accuracy of his or her employment records and advise the employee to resolve the discrepancy with SSA within ninety days of the employer's receipt of the letter.
3. If these steps lead to a resolution of the problem, the employer should correct the information with SSA and retain a record of the verification from SSA.
4. If the discrepancy cannot be resolved in ninety days, the employer must complete a new I-9 form for the employee without using the questionable Social Security Number and instead using other acceptable documentation that includes a photograph.
5. If the employer is unable to confirm employment eligibility through these procedures, DHS advises the employer to terminate the employee or risk liability for knowingly continuing to employ an unauthorized worker.

Conclusion

Under President Bush, DHS made enforcement of the immigration laws a priority, including worksite enforcement. It expanded worksite enforcement efforts through worksite raids, criminal prosecution of unauthorized employees and noncompliant employers, and deportation of unauthorized workers in larger numbers. To increase the efficiency of the administration of the federal law, DHS also expanded the use of E-Verify and changed its policy on use of no-match letters as evidence of knowing employment of unauthorized workers.

Under President Obama, the status of the nation's current immigration laws and enforcement strategies may change. President Obama is a proponent of comprehensive immigration reform and has called for measures to

both secure U.S. borders and legalize the status of unauthorized immigrants. Specifically, he supports a system that would allow unauthorized immigrants who are in good standing to pay a fine, learn English, and go to the back of the line for the opportunity to become U.S. citizens. Regarding worksite enforcement, President Obama has questioned the effectiveness of immigration raids that have resulted in deportations and broken families, but, in many cases, have left employers unharmed. He has called for more efforts to punish employers who exploit immigrant labor, and the creation of a system to verify the eligibility of workers accurately. President Obama has spoken of the need for a reliable way to check workers' legal status. He appears to support E-Verify, for he has sought additional money for its expansion.⁶⁹ DHS Secretary Janet Napolitano has ordered a review of E-Verify to address concerns that the system is vulnerable to identity fraud and falsely rejects many U.S. citizens and legal residents.⁷⁰

Many experts predict that the Obama administration will significantly curtail high-profile workplace raids, in which large numbers of unauthorized immigrant workers are arrested and deported.⁷¹ DHS Secretary Napolitano delayed a series of proposed immigration raids and other enforcement actions at U.S. workplaces in March, asking agents in her department to apply more scrutiny to the selection and the investigation of targets, as well as the timing of raids. Worksite raids, however, probably will not end altogether. According to DHS officials, the focus more likely will shift to holding employers more accountable through criminal prosecutions and other sanctions.⁷² In particular, the Obama administration will likely devote more resources to protecting wage and safety standards. This change of focus also may have the effect of leveling the playing field and weeding out unauthorized workers.

Notes

1. See, e.g., Alison Siskin et al., *Immigration Enforcement within the United States* (Washington, DC: Congressional Research Service, 2006), <http://fas.org/spp/>

crs/misc/RL33351.pdf; U.S. Department of Homeland Security, *Handbook for Employers: Instructions for Completing the Form I-9* (Washington, DC: U.S. Department of Homeland Security, 2007), www.uscis.gov/files/nativedocuments/m-274.pdf.

2. See, e.g., House Committee on the Judiciary, Subcommittee on Immigration, Border Security, and Claims, *Immigration Enforcement: Preliminary Observations on Employment Verification and Worksite Enforcement Efforts: Testimony before the Subcommittee on Immigration, Border Security, and Claims of the House Committee on the Judiciary*, 109th Cong., 1st sess. (2005) (statement of Richard M. Stana, Director, Homeland Security and Justice, Government Accountability Office), www.gao.gov/new.items/d05822t.pdf; *Arizona Contractors Ass'n v. Candelaria*, 534 F. Supp. 2d 1036, 1043 (D. Ariz. 2008) ("the I-9 system has been thoroughly defeated by document and identity fraud, allowing upwards of eleven million unauthorized workers to gain employment in the United States labor force").

3. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended at 8 U.S.C. § 1101 *et seq.* (2006)).

4. 8 U.S.C. § 1324b(a)(1) (2006).

5. 8 U.S.C. § 1324a(h)(3) (2006).

6. 8 C.F.R. § 274a.1(f), (h), (j) (2008).

7. 8 C.F.R. § 274a.2(b)(1)(i), (ii) (2008).

8. DHS has amended its regulations governing the types of acceptable identity and employment-authorization documents that employees may present to their employers for completion of the I-9 form. Under the interim rule, employers may no longer accept expired documents to verify employment authorization. This rule also added a new document to the list of acceptable documents that establish both identity and employment authorization. It makes other technical changes as well. Beginning April 3, 2009, employers must use the revised form for all new hires and for reverification of any employee with expiring employment authorization. The current version of the form (dated June 5, 2007) is not valid after that date. See Documents Acceptable for Employment Eligibility Verification, 73 Fed. Reg. 76,505 (December 17, 2008); Documents Acceptable for Employment Eligibility Verification, 74 Fed. Reg. 5,899 (February 3, 2009) (delaying implementation of rule).

9. See 8 U.S.C. § 1324b(a)(6) (2006).

10. 8 C.F.R. § 274a.2(b)(1)(vii) (2008).

11. 8 U.S.C. § 1324a(b)(3) (2008).

12. DHS standards for electronic retention of I-9 forms are set forth at 8 C.F.R. § 274a.2(e)-(i) (2008).

13. 8 C.F.R. § 274a.1(l)(1) (2008).

14. *Ibid.*

15. 8 C.F.R. § 274a.1(l)(1)(i)-(iii) (2008).

16. 8 U.S.C. § 1324a(a)(3) (2006); 8 C.F.R. § 274a.4 (2008).

17. 8 C.F.R. § 274a.10(b) (2008); Inflation Adjustment for Civil Monetary Penalties under Section 274A, 274B, and 274C of the Immigration and Nationality Act, 73 Fed. Reg. 10,130 (February 26, 2008). The penalties are less for violations that occurred before March 27, 2008.

18. 8 C.F.R. § 274a.10(a) (2008). These are known as “pattern and practice” violations. See 8 C.F.R. § 274a.1(k) (2008).

19. 8 C.F.R. § 274a.10(b)(2) (2008).

20. *Ibid.*

21. 8 U.S.C. § 1324a(b)(6) (2006).

22. 8 U.S.C. § 1324c(a) (2006).

23. 8 C.F.R. § 270.3(b)(1) (2008); Inflation Adjustment for Civil Monetary Penalties under Section 274A, 274B, and 274C of the Immigration and Nationality Act, 73 Fed. Reg. 10,130 (February 26, 2008). The penalties are less for violations that occurred before March 27, 2008.

24. 18 U.S.C. § 1546(b) (2006).

25. *Ibid.*

26. 8 U.S.C. § 1324b(a)(1)(A) (2006); 28 C.F.R. § 44.200(a)(1) (2008).

27. 8 U.S.C. § 1324b(a)(1)(B), (a)(3) (2006); 28 C.F.R. § 44.200(a)(1) (2008).

28. 8 U.S.C. § 1324b(a)(2)(A) (2006).

29. See 42 U.S.C. §§ 2000e *et seq.* (2006).

30. 8 U.S.C. § 1324b(a)(5) (2006);

28 C.F.R. § 44.200(a)(2) (2008).

31. 8 U.S.C. § 1324b(a)(6) (2006);

28 C.F.R. § 44.200(a)(3) (2008).

32. 8 U.S.C. § 1324b(g)(2) (2006);

28 C.F.R. § 68.52(d) (2008).

33. 28 C.F.R. § 68.52(d)(xii) (2008).

34. 28 C.F.R. § 68.52(d)(viii) (2008). The penalties are less for offenses that occurred before March 27, 2008.

35. See, e.g., Senate Committee on the Judiciary, Subcommittee on Immigration, Border Security and Citizenship, *Immigration Enforcement at the Workplace: Learning from the Mistakes of 1986: Hearing before the Subcommittee on Immigration, Border Security and Citizenship of the Senate Committee on the Judiciary*, 109th Cong., 2d sess. (2006) (statement of Julie L. Myers, Assistant Secretary, Immigration and Customs Enforcement, U.S. Department of Homeland Security), www.ice.gov/doclib/pi/news/testimonies/060619MyersSenateJudiciary.pdf; House Committee on the Judiciary, *Immigration Enforcement* (statement of Stana); Peter Brownell, *The Declining Enforcement of Employer Sanctions* (Washington, DC: Migration Policy Institute, 2005), www.migrationinformation.org/Feature/display.cfm?id=332.

36. See, e.g., Jeffrey S. Passel, *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.* (Washington, DC: Pew Hispanic Center, 2006), <http://pewhispanic.org/files/reports/61.pdf> (estimating that about 7.2 million unauthorized immigrants were part of workforce in March 2005); Jennifer Van Hook, Frank D.

Bean, and Jeffrey Passel, *Unauthorized Migrants Living in the United States: A Mid-Decade Portrait* (Washington, DC: Migration Policy Institute, 2005), www.migrationinformation.org/feature/display.cfm?id=329 (reporting that, from 1990 to 2004, there was average annual increase in undocumented population of roughly one-half million people).

37. See House Committee on the Judiciary, *Immigration Enforcement* (statement of Stana).

38. See *ibid.* at 12.

39. See Brownell, *Declining Enforcement*.

40. See House Committee on the Judiciary, *Immigration Enforcement* (statement of Stana), 14.

41. See *ibid.*

42. See Senate Committee on the Judiciary, *Immigration Enforcement* (statement of Myers).

43. See *ibid.*

44. ICE, news release, “ICE Multifaceted Strategy Leads to Record Enforcement Results: Removals, Criminal Arrests, and Worksite Investigations Soared in Fiscal Year 2008,” October 23, 2008, www.ice.gov/pi/nr/0810/081023washington.htm?searchstring=worksite%20AND%20enforcement.

45. *Ibid.*

46. For example, the American Civil Liberties Union has challenged the legality and the constitutionality of many of these raids, including worksite raids conducted in New Bedford, Massachusetts, and Van Nuys, California. See American Civil Liberties Union, press release, “ICE Immigration Raids Are Reckless and Unconstitutional,” May 20, 2008, www.aclu.org/immigrants/gen/35397prs20080520.html.

47. See, e.g., *UFCW v. Chertoff*, No. 2:07-cv-00188 (N.D. Tex. filed September 12, 2007) (alleging that federal agencies and officials violated federal immigration law and Fourth and Fifth amendments by arresting large groups of workers without warrant and without reasonable suspicion that workers were immigrants present in violation of immigration law).

48. See House Committee on Education and Labor, Subcommittee on Workforce Protection, *ICE Workplace Raids: Their Impact on U.S. Children, Families, and Communities: Hearing before the Subcommittee on Workforce Protection of the House Committee on Education and Labor*, 110th Cong., 2d sess. (2008); House Committee on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, *Immigration Raids: Postville and Beyond: Hearing before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the House Committee on the Judiciary*, 110th Cong., 2d sess. (2008).

49. See Pub. L. No. 111-008 (March 11, 2009).

50. Pub. L. No. 104-208, § 402(a), 110 Stat. 3009-1, -656 (1996) (“the Attorney General may not require any person or other entity to participate in [E-Verify].”).

51. N.C. GEN. STAT. § 126-7.1 (2006).

52. *Compare* *Chicanos Por La Causa v. Napolitano*, 544 F.3d 976 (9th Cir. 2008) (finding that state law in Arizona mandating use of E-Verify for all businesses that are required to have business license does not conflict with federal law that makes participation in program voluntary) *with* *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (finding that local law requiring city agencies and contractors to participate in E-Verify conflicts with federal law that makes participation in program voluntary). For a detailed discussion of the issue, see Sejal Zota, “Do State and Local Immigration Laws Violate Federal Law?” *Local Government Law Bulletin* 117, no. 1 (July 2008), www.sog.unc.edu/pubs/electronicversions/pdfs/lglb117.pdf.

53. Federal Acquisition Regulation; FAR Case 2007-013, Employment Eligibility Verification, 73 Fed. Reg. 67,651 (November 14, 2008); Federal Acquisition Regulation; FAR Case 2007-013, Employment Eligibility Verification, 74 Fed. Reg. 17,793 (April 17, 2009) (delaying implementation of rule). This new rule amends the Federal Acquisition Regulations and implements Executive Order 13465 signed by President Bush on June 6, 2008. Under the new rule, federal contracts awarded and solicitations issued after September 8, 2009 (recently delayed from May 21), will include a clause committing government contractors to use E-Verify. Entities awarded a contract with the federal government will be required to enroll in E-Verify within thirty days of the contract award date. To confirm the delay to September 8, visit www.uscis.gov/files/article/far-delay.pdf.

54. The new regulation does not apply to local government contracts with companies that also contract with the federal government.

55. Although grants are essentially a type of contract, the commentary to the new rule clarifies that the new E-Verify requirements do not apply to grants and cooperative agreements because these are not governed by Federal Acquisition Regulations. The requirements to use E-Verify only occur when a contract includes the Federal Acquisition Regulations clause. A specific federal grant program, however, may choose to make the use of E-Verify a requirement for its grants.

56. *Chamber of Commerce v. Chertoff*, No. 8:08-cv-03444-AW (D. Md. filed December 23, 2008).

57. In a September 2007 evaluation of E-Verify commissioned by DHS, the evaluators concluded that “the database used for verification is still not sufficiently up to date to meet the [federal law] requirement for accurate verification, especially for naturalized citizens.” SSA estimated that 4.1 percent,

or 17.8 million records, contained discrepancies related to name, date of birth, or citizenship status, and that 12.7 million of those discrepancies related to U.S. citizens. See Westat, *Findings of the Web Basic Pilot Evaluation* (Rockville, MD: Westat, 2007), xxi, www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf.

58. See, e.g., American Civil Liberties Union, press release, “Problematic E-Verify Program Expanded to Include All Federal Contractors,” November 14, 2008, www.aclu.org/immigrants/workplace/37764prs20081114.html (“E-Verify has been problematic since its inception—hobbled by bureaucratic errors in individuals’ Social Security files and runaway costs—preventing innocent Americans from working”); Federal Acquisition Regulation (“FAR”) Case 2007-013, Employment Eligibility Verification Comments from the U.S. Chamber of Commerce on Proposed Rule to Require Federal Contractors to Participate in the Basic Pilot/E-Verify Program, letter from Randel K. Johnson, Vice President, Labor, Immigration and Employee Benefits, and Angelo I. Amador, Director, Immigration Policy, U.S. Chamber of Commerce, to Laurieann Duarte, Regulatory Secretariat, General Services Administration, August 11, 2008, www.uschamber.com/assets/labor/080811_fed_Ks.pdf (condemning rule requiring federal contractors to participate in E-Verify, in part because of large costs to contractors); House Committee on Ways and Means, Subcommittee on Social Security, *Employment Eligibility Verification Systems: Hearing before the Subcommittee on Social Security of the House Committee on Ways and Means*, 110th Cong., 1st sess. (2007) (testimony and statement of Marc Rotenberg, Executive Director, Electronic Privacy Information Center), www.epic.org/privacy/ssn/eevs_test_060707.pdf (requiring use of

E-Verify at national level would “greatly diminish employee privacy and make personal information vulnerable to theft and misuse”).

59. For a copy of the MOU, see www.uscis.gov/files/nativedocuments/MOU.pdf.

60. See *AFL-CIO v. Chertoff*, 552 F. Supp. 2d 999, 1002 (N.D. Cal. 2007) (noting that SSA’s model 2006 no-match letter for tax year 2005 “reassured employers that there are three common reasons why reported information might mismatch SSA’s own records, all unrelated to immigration fraud: (1) typographical errors made in spelling an employee’s name or listing the SSN; (2) failure of the employee to report a name change; and (3) submission of a blank or incomplete Form W-2”).

61. See, e.g., *ibid.* at 1009 (“[T]he receipt of [an] SSA [no-match] letter by an employer, without more, would not be sufficient to establish constructive knowledge on the part of the employer regarding the employment eligibility of the named employee.”); letter, P. Virtue, Office of the General Counsel, INS, HQCOU 90/10.15-C (April 12, 1999). However, the agency held the view that subsequent action (or inaction) by the employer after receiving the letter, as well as the letter itself, would be considered in determining whether, under the “totality of the circumstances,” the employer had constructive knowledge that the employee was working without authorization. See letter, P. Virtue.

62. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611 (August 15, 2007) (codified at 8 C.F.R. § 274a (2008)). DHS has confirmed that, under the new rule, receipt of a no-match letter by itself can be sufficient to impart knowledge that the identified employee is unauthorized. See *AFL-CIO*, 552 F. Supp. 2d at 1009–10.

63. *AFL-CIO*, 552 F. Supp. 2d 999.

64. *Ibid.* at 1005–07 (“[T]he government’s proposal to disseminate no-match letters affecting more than eight million workers will, under the mandated time line, result in the termination of employment to lawfully employed workers. This is so because, as the government recognizes, the no-match letters are based on SSA records that include numerous errors [T]here is a strong likelihood that employers may simply fire employees who are unable to resolve the discrepancy within 90 days, even if the employees are actually authorized to work”).

65. Safe Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Final Regulatory Flexibility Analysis, 73 Fed. Reg. 63,843 (October 28, 2008).

66. See Bob Egelko, “Obama Inheriting Fight over Immigration Tactic,” *San Francisco Chronicle*, December 6, 2008, p. A3.

67. Cam Simpson, “Senate Resists Changes on Immigration,” *Wall Street Journal*, July 10, 2009, <http://online.wsj.com/article/SB124718283357420277.html>.

68. See 8 C.F.R. § 274a.1(l)(2)(i) (2008).

69. Organizing for America, Immigration, www.barackobama.com/issues/immigration/index_campaign.php.

70. Daniel González, “System That Checks Status of Workers Set to Expire,” *Arizona Republic*, March 2, 2009, www.azcentral.com/business/articles/2009/03/02/20090302everify.html.

71. Jennifer Ludden, “Immigration Experts Predict Fewer Workplace Raids,” *All Things Considered*, NPR, December 2, 2008, www.npr.org/templates/story/story.php?storyId=97700373.

72. Spencer S. Hsu, “Delay in Immigration Raids May Signal Policy Change,” *Washington Post*, March 29, 2009, p. A02.