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Immigration Enforcement in the Workplace: Form I-9, E-Verify and Social Security No-Match Letters

A Brief Guide for North Carolina Public Employers

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North Carolina public employers employ fewer non-citizen workers than their private sector counterparts. But public employers are nevertheless subject to the same, ever-increasing set of laws and regulations designed to limit the employment of unauthorized immigrant workers. Understanding the rules governing the I-9 work authorization form, knowing how to respond to a “no-match” letter about one of its employees from the Social Security Administration, and deciding whether or not to participate in the federal government’s E-Verify program to confirm employee identity and authorization to work are just three of the immigration law issues that today’s public employer must understand. This Bulletin provides an introduction to these issues.

Background

Unauthorized immigration to the United States is driven largely by employment opportunities. In 1986, Congress passed the Immigration Reform and Control Act (IRCA), which made it unlawful to knowingly employ an unauthorized immigrant worker. The purpose of the law was to curb unauthorized immigration by requiring employers to hire only lawful workers—and thereby remove the magnet of employment.[1] The act established a two-pronged approach to limit the employment of unauthorized workers: (1) an employment verification process through which employers verify the work eligibility of all new hires and (2) a sanctions program to fine employers who do not comply with the law.

The employment verification process and sanctions program have not proven to significantly deter the employment of unauthorized workers over time. In the absence of comprehensive immigration reform, the Department of Homeland Security (DHS) under President George W. Bush employed a more aggressive approach towards the enforcement of the immigration laws in the workplace. In particular, the DHS adopted broader criminal enforcement strategies, and began conducting large-scale worksite raids and arresting both workers and employers. Under President Bush, DHS also

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1. *See e.g.*, Alison Siskin et al., CRS Report for Congress RL 33351, Immigration Enforcement within the United States (Cong. Research Serv. Apr. 6, 2006), available at http://fas.org/sgp/crs/misc/RL33351.pdf; U.S. Dep’t of Homeland Sec., Handbook for Employers: Instructions for Completing the Form I-9 3(2007), available at http://www.uscis.gov/files/nativedocuments/m-274.pdf.

turned to programs such as E-Verify to more reliably screen out unauthorized workers and bolster the employment verification process, which has been undermined by the widespread use of fraudulent documents.

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

- work eligibility verification requirements and penalties under the Immigration Reform and Control Act;
- a review of efforts to enforce immigration law in the workplace;
- requirements and use of the E-Verify program; and
- requirements and legal status of the no-match rule.

The Immigration Reform and Control Act

In 1986, Congress passed the Immigration Reform and Control Act (IRCA) to curb the use of unauthorized immigrant labor by U.S. employers.[2] IRCA subjects both public and private employers to civil and criminal liability for knowingly employing an individual who is not authorized to work in the United States. The act also requires employers to verify the employment eligibility of new hires through a process set out in the law. When Congress passed the act, there was concern that some employers, in seeking to comply with the act, might discriminate against particular individuals who looked or sounded “foreign.” As a result, IRCA prohibits employers from discriminating against authorized workers on the basis of citizenship or national origin.[3]

Efforts to enforce IRCA violations are referred to as worksite enforcement. U.S. Immigration and Customs Enforcement (ICE), a sub-agency within DHS, is currently responsible for worksite enforcement, which was previously overseen by the now defunct Immigration and Naturalization Service (INS).

The I-9 Form: Work Eligibility Verification Requirements

IRCA created a specific process to verify the work eligibility of employees, which involves completing the Eligibility Verification Form, also known as the “I-9” form. The purpose of this 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 is not admitted for permanent residence (does not have a green card) or is not authorized to work in the United States by the federal government.[4] U.S. employers must complete and retain the I-9 form for all employees, including U.S. citizens. Employers are not required to fill out an I-9 form for employees hired before November 7, 1986, and independent contractors and their employees.[5]

What steps must employers take to comply with I-9 requirements?

- Employers must verify the employment eligibility and identity documents presented by employees and record the document information on the I-9 form within three days of each employee’s date of employment.[6] An employer must physically examine the documents provided by an employee and accept them if they appear genuine and to relate to the employee. (An employer is

2. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended at 8 U.S.C. §§ 1101 *et. seq.*).
3. 8 U.S.C. § 1324b(a)(1) (2000).
4. 8 U.S.C. § 1324a(h)(3) (2000).
5. 8 C.F.R. §§ 274a.1(f),(h)&(j) (2008).
6. 8 C.F.R. §§ 274a.2(b)(1)(i), (ii) (2008).

not expected to be a document expert, but is expected to make a good faith effort to evaluate a document's genuineness.)

- 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 itself.[7] An employer cannot specify which documents an employee should present—to do so would be a violation of IRCA under certain circumstances.[8] Employees must present original documents, with the exception of a certified copy of a birth certificate.
- In some cases, employers may be required to re-verify an employee's work authorization, if, for example, the work authorization presented has an expiration date.[9] An employer can re-verify directly on the existing I-9 form in section 3 or may complete a new I-9 form.
- Employers are required to retain completed I-9 forms throughout the entire period of employment—for three years after the date of hire or one year after the date of employment ends, whichever is later.[10] I-9 forms may now be retained electronically, as long as the recordkeeping, attestation, and retention systems comply with DHS standards.[11]

Penalties for Employer Violations of IRCA

A violation of IRCA may result in the imposition of civil or criminal penalties. There are a number of ways an employer can violate these provisions:

- by knowingly hiring or employing an unauthorized worker,
- by violating paperwork requirements,
- by knowingly accepting a forged or counterfeit document for verification purposes, or
- by discriminating against lawful employees.

Knowing Employment of Unauthorized Workers

Immigration and Customs Enforcement (ICE), the agency within DHS charged with enforcing IRCA, may impose penalties on an employer if it is established that an 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, but also constructive knowledge of an employee's unauthorized work status.[12] Constructive knowledge is defined as that "which would lead a person, through the exercise of reasonable care, to know about a certain condition."[13] The regulations provide examples of situations where an employer may, depending

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7. 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 will no longer be able to accept expired documents to verify employment authorization on the Form I-9. This rule also adds a new document to the list of acceptable documents that establish both identity and employment authorization. It makes other technical changes as well. Employers must use the revised form for all new hires and to re-verify any employee with expiring employment authorization beginning April 3, 2009. The current version of the form (dated 06/05/2007) will not be valid after that date. *See* Documents Acceptable for Employment Eligibility Verification, 73 Fed. Reg. 76505 (December 17, 2008); 74 Fed. Reg. 5899 (February 3, 2009) (delaying implementation of rule).
8. *See* 8 U.S.C. § 1324b(a)(6).
9. 8 C.F.R. § 274a.2(b)(1)(vii) (2008).
10. 8 U.S.C. § 1324a(b)(3) (2008).
11. DHS standards for electronic retention of I-9 forms are set forth at 8 C.F.R. §§ 274a.2(e)-(i) (2008).
12. 8 C.F.R. § 274a.1(*l*)(1).
13. *Id*.

on the totality of relevant circumstances, have constructive knowledge of an employee's unauthorized status. These include circumstances where, for example, the employer fails to complete or improperly completes the I-9 form or fails to take reasonable steps after receiving information indicating that the employee may not be authorized to work such as a so-called "no-match" letter from the Social Security Administration (SSA) stating that an employee's social security number does not match the SSA's records,[14] or 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:

- First offense: $375 to $3,200 for each unauthorized worker;
- Second offense: $3,200 to $6,500 for each unauthorized worker;
- Third or more offenses: $4,300 to $16,000 for each unauthorized worker.[17]

Persons or entities who regularly and repeatedly knowingly hired or continued to employ unauthorized workers may face fines of up to $3,000 per employee and/or six months imprisonment.[18]

Paperwork Violations Connected with the I-9 Form

Civil penalties can be issued for failure to properly complete, retain, or present for inspection I-9 forms. The penalty amount ranges from $110-$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]

Document Fraud

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 assessed a civil penalty.[22] The civil penalties are as follows:

- First offense: $375 to $3,200 for each fraudulent document;
- Second offense: $3,200 to $6,500 for each fraudulent document. [23]

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14. A preliminary injunction has been issued against this part of the regulation. *See infra* pages 10-11.
15. 8 C.F.R. §§ 274a.1(*l*)(1)(i)-(iii).
16. 8 U.S.C. § 1324a(a)(3) (2000); 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. 10130 (February 26, 2008). Note that the penalties are less for violations which occurred prior to March 27, 2008.
18. These are known as "pattern and practice" violations. *See* 8 C.F.R. §§ 274a.10(a), 274a.1(k) (2008).
19. 8 C.F.R. § 274a.10(b)(2) (2008).
20. *Id*.
21. 8 U.S.C. § 1324a(b)(6) (2000).
22. 8 U.S.C. § 1324c(a) (2000).
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. 10130 (February 26, 2008). Note that the penalties are less for violations which occurred prior to March 27, 2008.

A separate federal provision, 18 U.S.C. § 1546(b), criminalizes the use of fraudulent documents or false attestation to satisfy I-9 verification requirements.[24] Persons who violate this provision are subject to a fine and/or imprisonment for up to five years.[25]

Unlawful Discrimination

The anti-discrimination provisions of IRCA protect individuals from discrimination based on national origin in hiring, recruitment, referral, or discharge.[26] The provisions also protect citizens and certain authorized immigrants from discrimination based on citizenship status.[27] The anti-discrimination provisions do not apply to an employer who employs fewer than four individuals.[28] These provisions are independent of the anti-discrimination provision of Title VII of the Civil Rights Act of 1964. IRCA's anti-discrimination provisions are enforced by the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), based within the U.S. Department of Justice.[29]

IRCA also protects against intimidation or retaliation against those who file charges or assert rights under the act.[30] It also covers intentional discrimination due to "document abuse" where the employer, in seeking to comply with I-9 requirements, requests more or different documents than required, or refuses to accept documents which 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 regulations), the employer will be ordered to stop the prohibited practice. The employer may also be ordered to take one or more corrective steps, such as hiring or reinstating individuals directly injured by the discrimination, with or without backpay; retaining records relating to all job applicants for up to three years; posting notices about employee rights and employer obligations; and paying civil penalties.[32]

The civil penalty for the offense of document abuse is between $110 and $1,100 for each individual discriminated against.[33] The civil penalties for other offenses are as follows:

- First offense: $375 to $3,200 for each individual discriminated against;
- Second offense: $3,200 to $6,500 for each individual discriminated against;
- Third or more offenses: $4,300 to $16,000 for each individual discriminated against.[34]

Worksite Enforcement

There is consensus that, although well intentioned, the Immigration Reform and Control Act'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

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24. 18 U.S.C. § 1546(b) (2000).
25. *Id.*
26. 8 U.S.C. § 1324b(a)(1)(A) (2000); 28 C.F.R. § 44.200(a)(1) (2008).
27. 8 U.S.C. §§ 1324b(a)(1)(B), (a)(3) (2000); 28 C.F.R. § 44.200(a)(1) (2008).
28. 8 U.S.C. § 1324b(a)(2)(A) (2000).
29. *See* U.S.C. § 1324b(c) (2000). Title VII of the Civil Rights Act of 1964 is enforced by the U.S. Equal Employment Opportunity Commission (EEOC). *See* 42 U.S.C. § 2000e *et seq* (2000).
30. 8 U.S.C. § 1324b(a)(5) (2000); 28 C.F.R. § 44.200(a)(2) (2008).
31. 8 U.S.C. § 1324b(a)(6) (2000); 28 C.F.R. § 44.200(a)(3) (2008).
32. 8 U.S.C. § 1324b(g)(2) (2000); 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 which occurred before March 27, 2008.
35. *See e.g., Immigration Enforcement at The Workplace: Learning From The Mistakes Of 1986: Hearing Before the Subcomm. on Immigration, Border Sec. and Citizenship of the S. Comm. on the Judiciary,* 109th Cong. (2006) (statement of Julie L. Myers, Assistant Secretary, U.S. Immigration and Customs Enforcement,

employed in recent years in the United States remains substantial.[36] Until recently, critics have contended that IRCA has not curbed unauthorized employment over time largely because of declining enforcement of the employer sanction provisions and the widespread use of fraudulent documents.[37]

Worksite Enforcement under the former INS

Under the former Immigration and Naturalization Service (INS), the focus of enforcement efforts was on educating employers regarding their obligations under IRCA and seeking their compliance with such obligations. 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.[38] Worksite enforcement was often a low priority for INS.[39] For example, employer audits (inspections by INS or, now, ICE, of employer I-9 forms) declined 77 percent since 1990, from nearly 10,000 to fewer than 2,200 in 2003.[40] The number of notices of intent to fine (the document that commences a fine proceeding against an employer) issued to employers decreased from 417 in fiscal year 1999 to 3 in fiscal year 2004.[41]

In addition, there is broad agreement that the widespread availability and use of fraudulent documents have largely undermined the I-9 system.[42] The existing I-9 process does not provide employers who want to comply with the law a reliable way to vet documents, and it has made it easier for unscrupulous employers to knowingly hire unauthorized workers.[43]

Department of Homeland Security), *available at* http://www.ice.gov/doclib/pi/news/testimonies/060619MyersSenateJudiciary.pdf; *Immigration Enforcement: Preliminary Observations on Employment Verification and Worksite Enforcement Efforts: Testimony Before the Subcomm. on Immigration, Border Sec. and Claims of the H. Comm. on the Judiciary,* 109th Cong. (2005) (statement of Richard M. Stana, Dir., Homeland Sec. and Justice, Government Accountability Office), *available at* http://www.gao.gov/new.items/d05822t.pdf; Peter Brownell, Migration Information Source, *The Declining Enforcement of Employer Sanctions* (2005), *available at* http://www.migrationinformation.org/Feature/display.cfm?id=332.

36. *See, e.g.,* Jeffrey Passel, Pew Hispanic Center, *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.* 9 (2006), *available at* http://pewhispanic.org/files/reports/61.pdf (estimating that about 7.2 million unauthorized migrants were part of the workforce in March 2005); Jennifer Van Hook, Frank D. Bean, and Jeffrey Passel, Migration Information Source, *Unauthorized Migrants Living in the United States: A Mid-Decade Portrait* 2 (2005), *available at* http://www.migrationinformation.org/feature/display.cfm?ID=329 (From 1990-2004, there was an average increase in the undocumented population of roughly one-half million persons annually).

37. However, there is a long-standing debate over whether enforcing immigration laws would significantly reduce the number of unauthorized immigrants. Some have argued that because unauthorized immigrants are so firmly embedded in American society, enforcement would not significantly reduce their numbers. *See e.g.,* Steven A. Camarota and Karen Jensenius, Center for Immigration Studies, *Homeward Bound: Recent Immigration Enforcement and the Decline in the Illegal Alien Population* 1 (2008), *available at* http://www.cis.org/trends_and_enforcement.

38. *See* Stana, *Immigration Enforcement: Preliminary Observations on Employment Verification and Worksite Enforcement Efforts* at 16 (cited in note 35).

39. *See id.* at 12.

40. *See* Brownell, *The Declining Enforcement of Employer Sanctions* (cited in note 35).

41. *See* Stana, *Immigration Enforcement: Preliminary Observations on Employment Verification and Worksite Enforcement Efforts* at 14 (cited in note 35).

42. *See e.g.,* Stana, *Immigration Enforcement: Preliminary Observations on Employment Verification and Worksite Enforcement Efforts* at 7-8, 16 (cited in note 35); Arizona Contractors Ass'n., Inc. 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 ….").

43. *See id.*

Today's Worksite Enforcement under ICE

Since March 2003, U.S. Immigration and Customs Enforcement (ICE), an agency within DHS, has been primarily responsible for enforcement of the immigration laws, including the employer sanction provisions. ICE has significantly enhanced enforcement efforts and changed the strategy towards 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 and prosecutions of both workers and employers, and removals (deportations) of workers.[44] To date, ICE's efforts have generally focused on private-sector employers, not public 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 have also resulted in the indictments of some company executives, owners, and managers on felony charges for harboring unauthorized immigrants, money laundering, and/or knowingly hiring unauthorized workers.[45] In fiscal year 2008, ICE made 1,100 criminal arrests tied to worksite investigations (of both workers and employers, the majority being workers), up from 25 in 2002.[46] Also, ICE took more than 5,100 unauthorized immigrants into custody on administrative immigration violations (for removal purposes) during worksite investigations, up from 485 in 2002.[47]

E-Verify Program

The federal government is also increasing enforcement efforts in the workplace through the expansion and promotion of the E-Verify program. E-Verify is structured as a voluntary web-based program operated by the Department of Homeland Security in partnership with the Social Security Administration. It allows participating employers to electronically verify the employment eligibility of new employees. The E-Verify program is scheduled to expire on September 30, 2009.[48]

44. *See* Myers, *Immigration Enforcement At The Workplace: Learning From The Mistakes Of 1986* (cited in note 35).

45. *See id.* at 4-7.

46. U.S. ICE News Release, October 23, 2008, http://www.ice.gov/pi/nr/0810/081023washington.htm?searchstring=worksite%20AND%20enforcement.

47. *Id.* ICE's enforcement actions have not come without criticism. Civil rights groups and unions have complained about the treatment of workers, both U.S. citizens and immigrants, in the midst of the worksite and home raids. For example, the American Civil Liberties Union (ACLU) has challenged the legality and constitutionality of many of these raids including worksite raids conducted in New Bedford, Massachusetts, and Van Nuys, California. *See* ACLU Press Release, *ICE Immigration Raids Are Reckless and Unconstitutional*, May 20, 2008, http://www.aclu.org/immigrants/gen/35397prs20080520.html. In addition, several lawsuits have been filed against ICE related to the raids, alleging constitution violations of the rights of workers. *See e.g.,* UFCW v. Chertoff, No. 07-00188 (N.D. Tex. filed Sept. 12, 2007). In addition, Congressional hearings have been held on the immigration raids and their impact in communities. *See ICE Workplace Raids: Their Impact on U.S. Children, Families, and Communities: Hearing Before the Subcomm. on Workforce Protection of the H. Comm. on Education and Labor*, 110th Cong. (2008); *Immigration Raids: Postville and Beyond: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. (2008).

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

Who is Required to Use E-Verify?

The Department of Homeland Security encourages the use of E-Verify, but cannot require employers to use it.[49] Nevertheless, some state legislatures, including the North Carolina General Assembly have mandated its use by certain employers. The North Carolina General Statutes, for example, require 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 local education agencies must use it for employees hired on or after March 1, 2007.[50] North Carolina local governments are not required to use E-Verify, although they may voluntarily elect to do so.

Public Employers as Federal Contractors

Effective May 21, 2009, new rules take effect that require entities who contract with the federal government to use E-Verify.[51] State and local governments and institutions of higher education that directly enter into prime contracts above $100,000 and to subcontracts over $3,000 for services or for construction with the federal government must use E-Verify to check the employment eligibility for all employees assigned to the contract.[52] Note that the new rule does not apply to prime contracts lasting less than 120 days. *The new rule does not apply to the recipients of federal grants.*[53]

On December 23, 2008, the U.S. Chamber of Commerce and other business and human resources groups filed a lawsuit challenging the legality of the new regulation requiring federal government contractors to participate in the E-Verify program.[54]

While the accuracy of the program has improved substantially, evaluators of the program determined that the rate of error remains too high for the program to become mandatory for all employers.[55] Critics of E-Verify have also expressed concerns about privacy and due process, as well as the system's

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

50. N.C. Gen. Stat. § 126-7.1 (2006).

51. Federal Acquisition Regulation; FAR Case 2007–013, Employment Eligibility Verification, 73 Fed. Reg. 67651 (November 14, 2008); 74 Fed. Reg. 5621 (January 30, 2009) (delaying implementation of rule). This new rule amends the Federal Acquisition Regulations (FAR) and implements Executive Order 13465 signed by President Bush on June 6, 2008. Under the new rule, federal contracts awarded and solicitations issued after May 21, 2009 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 30 days of the contract award date.

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

53. 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, as these are not governed by Federal Acquisition Regulation (FAR). The requirements to use E-Verify only occur when a contract includes the FAR clause. A specific federal grant program, however, may choose to make the use of E-Verify a requirement for that specific grant.

54. Chamber of Commerce, et al. v. Chertoff, et al., No. 8:08-cv-03444-AW (D. Md. Dec. 23, 2008).

55. In a September 2007 evaluation of the E-Verify program commissioned by the Department of Homeland Security, 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." The Social Security Administration estimated that 4.1 percent, or 17.8 million records, contained discrepancies related to name, date of birth, or citizenship status, of which 12.7 million discrepancies related to U.S. citizens. *See* Findings of the Web Basic Pilot Evaluation, September 2007, at http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf.

accuracy, cost, and ability to handle the increased volume of activity.[56] Some of these groups propose scrapping the system entirely until a new, more workable system can be developed.

What Steps Should Participating Employers Take when Using E-Verify?

In order to participate in the E-Verify program, a public employer must enter into a written agreement — called a memorandum of understanding (MOU) — with the Department of Homeland Security (DHS) and Social Security Administration (SSA).[57] This is true whether the employer is voluntarily electing to use E-Verify or is required to use the program because the General Statutes require it to do so. Under the MOU, employers must take the following steps with respect to each employee:

- The employer first completes an I-9 form.
- The employer then enters the worker's information from the I-9 form into E-Verify, which is checked against information contained in federal databases.
- 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 the information about 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.
- Under the MOU, 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 it takes more than 10 business days for the matter to be resolved.
- If the employee does not contest the charge within that time frame, the employer is required to discharge the employee.

No-Match Letters

Another recent development related to the employer sanction provisions and worksite enforcement is DHS's change in policy regarding so-called "no-match letters." A no-match letter is issued by the Social Security Administration (SSA) when a name or social security number reported on a W-2 does not match the SSA's records. The SSA processes the information on forms W-2 as an agent of the Internal Revenue Service and uses earnings information to determine eligibility for and the amount of Social Security benefits to which that worker may be entitled. That is the only purpose for which the

56. *See e.g., Employment Eligibility Verification Systems: Hearing Before the Subcomm. on Social Sec. of the H. Comm on Ways & Means,* 110th Cong. (2007) (Testimony and Statement of Marc Rotenberg, Executive Director, Electronic Privacy Information Center), *available at* http://www.epic.org/privacy/ssn/eevs_test_060707.pdf (EPIC Executive Director Marc Rotenberg testified that requiring the use of E-Verify at the national level would "greatly diminish employee privacy and make personal information vulnerable to theft and misuse."); ACLU Press Release, *Problematic E-Verify Program Expanded to Include All Federal Contractors,* November 14, 2008, http://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…"); U.S. Chamber of Commerce, *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,* August 11, 2008, *available at* http://www.uschamber.com/assets/labor/080811_fed_Ks.pdf (the U.S. Chamber submitted a 29-page comment condemning the rule requiring federal contractors to participate in E-Verify, in part because of the large costs to contractors).

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

SSA may use W-2 information. When there is a "no-match," the SSA sends a letter to the employee and the employer asking for corrected information. The SSA has sent no-match letters to employees since 1979 and to employers since 1994. The purpose of the letters has always been to identify the person to whom reported earnings belong so that the individual may be credited with earnings for social security benefits purposes.

Prior to 2007, the SSA advised in its no-match letters that the mismatch might be due to a typographical error, failure of the employee to report a name change, or submission of a blank or incomplete Form W-2.[58] Prior to 2007, DHS and its predecessor INS maintained that a no-match letter did not, standing alone, provide notice to an employer that an employee is working without authorization.[59]

On August 15, 2007, the DHS changed its policy and published a final rule providing that a no-match letter may be used as evidence that the employer had constructive knowledge of an employee's unauthorized status if the employer fails to take certain actions set forth in the rule.[60] The rule offers a safe harbor to those employers who follow its steps in good faith—that is, DHS will not use an employer's receipt of a no-match letter as evidence to find that the employer violated federal immigration law by knowingly employing unauthorized workers.

Legal Status of the No-Match Rule

The no-match rule is not yet in effect. On October 10, 2007, a federal district court in California issued a preliminary injunction blocking enforcement of the no-match rule because of questions around the legality of the rule.[61] The court was in part concerned about the wrongful termination of lawful workers as a result of this new rule because the letters are based on SSA records that include numerous errors.[62]

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58. *See* AFL-CIO v. Chertoff, 552 F. Supp. 2d 999, 1002 (N.D. Cal. 2007) (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").

59. *See e.g., id.* at 1009 ("[T]he receipt of [a] 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, Virtue, General Counsel INS HQCOU 90/10.15-C (Apr. 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 not working without authorization. *See id.*

60. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45611 (Aug. 15, 2007) (codified at 8 C.F.R. § 274a). 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.

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

62. *Id.* 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.").

In response to the injunction, DHS issued a Supplemental Final Rule on October 28, 2008.[63] The supplemental rule did not substantively change the August 2007 no-match rule, but includes additional information that attempts to addresses the specific concerns the federal court raised when it issued the preliminary injunction. On December 5, 2008, the federal court rejected DHS' request to expedite consideration of the case, observing that the Obama administration may want to take another look at the issue.[64] As of the date of this Bulletin, the supplemental final rule is still subject to the preliminary injunction issued by the federal district court. The SSA has stated that it will not issue any further no-match letters until the litigation is resolved.

What Steps Should Employers Take under the No-Match Rule if It Becomes Effective?

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 upon receipt of a no-match letter:[65]

- Employers must check their records within 30 days to determine whether any discrepancy results from a typographical, transcription, or similar clerical error.
- If the discrepancy is not due to an error in the employer's records, then the employer must request that the affected employee confirm the accuracy of employment records, and advise the employee to resolve the discrepancy with the SSA within 90 days of the employer's receipt of the letter.
- 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.
- If the discrepancy cannot be resolved in 90 days, the employer must complete a new I-9 form within three days for the employee without using the questionable Social Security number and instead using other acceptable documentation that includes a photograph.
- If the employer is unable to confirm employment through these procedures, DHS advises the employer to terminate the employee or risk liability for knowingly continuing to employ an unauthorized worker.

Conclusion

With the swearing-in of a new administration in January 2009, the status of the nation's current immigration laws and enforcement priorities may change. Under President George W. Bush, DHS prioritized the enforcement of the immigration laws, including in the workplace. It expanded worksite enforcement efforts through worksite raids, criminal prosecution of unauthorized employees and noncompliant employers, removal of unauthorized workers in larger numbers, an expansion of the use of E-verify, and a change in policy regarding no-match letters which may be evidence of knowing employment of unauthorized workers.

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

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63. Safe Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Final Regulatory Flexibility Analysis, 73 Fed. Reg. 63843(October 28, 2008).

64. *See* Bob Egelko, *Obama Inheriting Fight Over Immigration Tactic,* S.F. Chronicle, December 6, 2008, at A3.

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

a system that allows 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 the removals of immigrant workers and broken families, but that, in most 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 accurately verify the eligibility of workers.

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 removed. Worksite raids, however, will probably not end altogether. More likely, the focus will shift to employers and holding them more accountable through criminal prosecutions and other sanctions. In particular, it is expected that the Obama administration will devote more resources to protecting wage and safety standards, which may also have the effect of leveling the playing field and weeding out unauthorized workers. While President-Elect Obama has spoken of the need for a reliable way to check workers' legal status, it is unclear whether he supports the expansion of E-Verify.

Public employers in North Carolina should take steps to be in compliance with immigration law, including the following:

- Employers must verify the identity and work authorization of every new hire on the I-9 form within three days of each employee's date of employment. Effective April 3, 2009, employers can no longer accept expired documents for verification purposes and must use the revised I-9 form for all new hires and to re-verify any employee with expiring employment authorization.
- Employers are required to retain completed I-9 forms throughout the entire period of employment—for three years after the date of hire or one year after the date of employment ends, whichever is later.
- All state agencies, departments, institutions, universities, and local education agencies must use E-verify to check the work authorization for new employees.
- Effective May 21, 2009, state and local governments and institutions of higher education that enter into contracts with the federal government are required to use E-Verify to verify the work eligibility of all employees assigned to the covered contract. This rule does not apply to federal grants.
- All E-Verify participants, including those who participate in the program voluntarily, must follow the steps set forth in the memorandum of understanding (MOU) with the Department of Homeland Security and Social Security Administration, including the process to resolve an information mismatch.
- If the no-match rule becomes effective, employers who receive a no-match letter must take certain actions to respond to the letter (as set forth in the rule) or risk a future charge of knowingly employing an unauthorized worker.

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