KEEPING TRACK: SELECT ISSUES IN EMPLOYER SANCTIONS AND IMMIGRATION COMPLIANCE

By Gary Endelman[*] and Cyrus D. Mehta[**]

The Form I-9, Employment Eligibility Verification, that was established under the Immigration Reform and Control Act of 1986 (IRCA)[1] is a deceptively simple form, but it involves a most complex process that an employer in the United States has to comply with when hiring any employee.[2] §274A(a)(1) of the Immigration and Nationality Act (INA) states that it is unlawful to hire, recruit or refer for a fee, a person who is not authorized to work in the US. Mandated by INA §274A(b), an employer must verify an employee's eligibility to work in the US and attest under penalty of perjury on Form I-9 that the employee submitted to the employer documents that establish both employment authorization and identity. Although this advisory does not cover the entire gamut of I-9 compliance, the authors focus on the most salient aspects that will assist the employer to remain compliant, along with a discussion of selected issues.

---

[*] **Gary Endelman obtained a B.A. in History from the University of Virginia, a Ph.D. in United States History from the University of Delaware, and a J.D. from the University of Houston. From 1985 to 1995, he worked in the private practice of Immigration and Nationality Law. From 1995 to present, he has worked as the in-house counsel for BP America Inc. and BP handling all U.S. immigration matters. Dr. Endelman is Board Certified in Immigration and Nationality Law. He is a frequent speaker and writer on immigration related topics including a column on immigration law. He served as a senior editor of the national conference handbook published by the American Immigration Lawyers Association (AILA) for a decade. In July 2005, Dr. Endelman testified before the United States Senate Judiciary Committee on comprehensive immigration reform. Dr. Endelman is the author of SOLIDARITY FOREVER: ROSE SCHNEIDERMAN AND THE WOMEN'S TRADE UNION MOVEMENT published in 1978 by Arno Press. All opinions expressed herein are the personal views of Gary Endelman and do not represent those of BP or BP America Inc. in any way.**

[**] **Cyrus D. Mehta, a graduate of Cambridge University and Columbia Law School, is the Managing Member of Cyrus D. Mehta & Associates, PLLC in New York City. Mr. Mehta is the Chair of the AILA's National Pro Bono Committee. He is a former Chairman of the Board of Trustees of the American Immigration Law Foundation (2004-2006). He was also the Secretary and member of the Executive Committee (2003-2007) and the Chair of the Committee on Immigration and Nationality Law (2000-2003) of the New York City Bar. He is a frequent speaker and writer on various immigration-related issues, and is also an Adjunct Associate Professor of Law at Brooklyn Law School, where he teaches a course entitled "Immigration and Work." All opinions expressed herein are the personal views of Cyrus D. Mehta and do not represent those of the organizations he has been part of in the past and presently.**

The authors thank Deborah Notkin for reviewing and editing this article.

[1] PL 99-603. The I-9 form is available at http://www.uscis.gov/files/form/i-9.pdf.

[2] See Josie Gonzales, *The Great I-9 Debate: Re-designing The Most Complex One Page Form in America*, The I-9 and E-Verify Blog, http://www.electronici9.com/?p=805.

I-9 Basics

The Form I-9 contains three lists, A, B and C. List A allows an employer to verify a document establishing both employment and identity.[3] Documents that can be verified under List A of Form I-9 include:

- U.S passport (expired or unexpired) or passport card;
- Permanent Resident Card or Alien Registration Receipt Card (Form I-551);
- Foreign passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa;
- Employment Authorization Document (unexpired) with photograph (Form I-766);
- Unexpired foreign passport, which includes a Form I-94 containing a nonimmigrant visa endorsement authorizing the employee to work; and
- Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands with Form I-94 or I-94A indicating nonimmigrant admission under the Compact of Free Association Between the US and the FSM and RMI.

If an employee presents a document that is included in List A, the employer must not ask for further documents to verify employment eligibility under the Form I-9.

Documents evidencing identity are listed under B include:[4]

- Driver's license or State ID or ID of outlying possession of the US with photo or other information such as name, date of birth, gender, height, eye color and address;
- ID card issued by federal, state or local government agency or entities, provided it contains the same biographical information as above;
- School ID card with a photograph;
- Voter registration card;
- US military card or draft record;
- Military dependant's ID card;
- US Coast Guard Merchant Mariner Card;
- Native American tribal document;
- Driver's license issued by a Canadian government authority; and
- For persons under the age of 18 who are unable to present the above documents:
  - A school record or report card;
  - A clinic doctor or hospital record;

[3] 8 C.F.R. §274a.2(b)(1)(v)(A). Note that this list was substantially reduced, and the naturalization certification, N-550, which is issued to newly minted American citizens was also removed from the list. 72 Fed. Reg. 65974-80 (Nov. 26, 2007).

[4] 8 C.F.R. §274a.2(b)(1)(v)(B).

- A day care or nursery school record.

Unlike a document presented under List A, an employer cannot only accept a document listed under B. If the employee presents a document under List B, the employee must also submit a document listed under C, which provide for employment authorization, which include:[5]

•Social Security card (but does not include a card stating "not authorized for employment");
• Certification of Birth Abroad issued by Department of State (DOS) (Form FS-545);
• Certification of Report of Birth issued by DOS (Form DS-1350);
• Original or certified copy of birth certificate issued by a State, country , municipal authority, or outlying possession of the US bearing an official seal;[6]
• Documentation evidencing authorization for employment in the US without a photo;
• Native American tribal document;
• US Citizen or resident citizen ID Card (Form I-197).

Part 1 of Form I-9 must be completed no later than at the time of hire, which requires the employee to state under penalty of perjury his or her name and address, date of birth, social security number (but this is optional), and most importantly, whether the employee is: a) a citizen of the US; b) a non-citizen national of the US; c) a lawful permanent resident (with a listing of the A#); or d) is an alien authorized to work in the US, with a listing of the Alien # or Admission # and the date of expiration of such authorization.[7]

The employer is required to verify the document under List A or List B and List C within three business days of hire.[8] If the employee is hired for less than three days, then the verification must take place at the time of hire.[9]

There is no requirement for the employer to photocopy the documents it has verified for the I-9, but if the employer does choose to photocopy documents, it must do so for everyone. The advantage in retaining photocopies is that if Section 2 has not been filled out correctly, but the documents that were verified were correct, as proved by the

[5] 8 C.F.R. §274a.2(b)(1)(v)(C).

[6] Note that on or after October 31, 2010, employer must only accept a Puerto Rican birth certification issued on or after July 1, 2010 as an acceptable List C document. The USCIS press release is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=45e3285ca77fa210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.

[7] Refugees and asylees can be authorized to work without an expiration date. They do not need an EAD, and can present either a Form I-94 or a driver's license **and** a social security card. The employer may state N/A in the column of Form I-9 that requests an expiration date.

[8] 8 C.F.R. §274a.2(b)(1)(i).

[9] 8 C.F.R. §274a.2(b)(1)(iii).

photocopies, the employer fill face lesser penalties for not completing the form properly. The retention of photocopies will also assist the employer in establishing an internal compliance program and to conduct self-audits. On the other hand, if the employer did not properly verify the documents, and retains photocopies of unacceptable or fraudulent documents, the photocopies will incriminate the employer even further in an enforcement action.

Although the employer is required to verify an employee's eligibility to work in the US, he or she walks on thin ice. If an employer is careless with the verification process, and accepts documents that appear to be patently false, or employs a worker who is unable to submit documents under List A or List B and C, the employer faces the possibility of civil and criminal sanctions.[10] On the other hand, if the employer requires specific documents, or more or different documents than are required, or refuses to honor documents which on their face reasonably appear to be genuine, the employer runs the risk of violating the provision relating to Unfair Employment Practices if there is discriminatory intent.[11] Protected individuals under IRCA include US citizens or nationals, lawful permanent residents, refugees, asylees, and temporary residents who were granted legalization under INA §210(a) or §245A(a)(1). However, even those who are not protected under IRCA's anti-discrimination provisions may seek redress under other anti-discrimination statutes such as Title VII.[12] If an employee's work authorization

---

[10] INA §274A(e) & (f). The penalties for hiring or continuing to employ unauthorized aliens are as follows:

•First Offense- Not less than $375 and not more than $3200 for each unauthorized alien. 8 C.F.R. §274a.10(b)(1)(ii)(A).
•Second Offense- Not less than $3200 and not more than $6500 for each unauthorized alien. 8 C.F.R. §274a.10(b)(1)(ii)(B).
•Subsequent offenses- Not less than $4300 and not more than $16,000 for each unauthorized alien. 8 C.F.R. §274a.10(b)(1)(ii)(C).
•Failure to complete I-9, or to complete it properly, can result in civil penalties ranging from $110 to $1100 per violation. 8 C.F.R. § §274a.10(b)(2). There are also potential criminal fines in egregious circumstances of up to $3000 per employee and/or 6 months imprisonment. 8 C.F.R. §274a.10(a).
•There are also penalties for discrimination from $375 to $3200 for first offense, from $3200 to $6500 for second offense, and $4300 to $16,000 for subsequent offenses. 28 C.F.R. §68.52(d)(1)(viii)-(xi); 28 C.F.R. §68.52(d)(2)-(6).
•Employers who commit documentary abuse by requiring more or different documentation for the purpose or with the intent of discriminating can be fined from $110 to $1,110 per incident. 28 C.F.R. §68.52(d)(1)(xii); 28 C.F.R. §68.52(d)(2)-(6).

See USCIS's M-274, *Handbook for Employers – Instructions for Completing Form I-9 (Employment Eligibility Verification Form)*, available at http://www.uscis.gov/files/form/m-274.pdf .

[11] INA §274B(a)(6); *US v. A.J. Bart*, 3 OCAHO no. 538 (July 15, 1993); *USA v. Zabala Vineyards*, 6 OCAHO no 830 (Dec. 13, 1993); Debarment pursuant to Executive Order 12989 (Feb. 16,1996), 61 FR 6091 as amended by EO 13465 http://edocket.access.gpo.gov/2008/pdf/08-1348.pdf

[12] Notwithstanding *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), which precluded an undocumented worker from being awarded back pay for a wrongful termination, the U.S. Equal Employment Opportunity Commission announced that it would continue to protect immigrants from workplace discrimination on grounds of race, national origin, gender and religion without regard to the worker's undocumented status. *See Procedures and Remedies for Discriminatees Who May Be*

expires or DHS provides notification that the work authorization is insufficient, the employer must re-verify the I-9 or terminate the employee.[13] The I-9 must be retained for either 3 years after the date of hire or 1 year after termination, whichever is later.[14]

For further details, we strongly recommend that practitioners and their clients also review the USCIS' M-274, *Handbook for Employers – Instructions for Completing Form I-9 (Employment Eligibility Verification Form),* available at http://www.uscis.gov/files/form/m-274.pdf, *supra*.

"Knowing" Requirement

Because of the proliferation of fraudulent documents that pass off as genuine to the untrained eye of the employer, the I-9 verification may not always deter the hiring of a person who is not authorized to work in the US. An employer can also be snared if during the course of an audit an Immigration and Customs Enforcement (ICE) Notice of Suspect Documents indicates that certain employees are not authorized to work because the documents presented belong to other people, there is no record of the alien registration numbers being issued, or the individual is not employment authorized according to DHS records or the person's EAD has expired.

While INA §274A(a)(1)(A) clearly makes it unlawful to hire "an alien *knowing* (emphasis added) the alien is an unauthorized alien," an employer cannot bury his or her sand in the ground like an ostrich, and ignore telltale signs that the person may indeed not be authorized. The regulations at 8 C.F.R. §274a.1(*l*)(1) defining "knowing" includes "constructive knowledge" and defines the term as follows:

(l)(1) The term knowing includes having actual or constructive knowledge. Constructive knowledge is knowledge that may fairly be inferred through notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about a certain condition. Examples of situations where the employer may, depending on the totality of relevant circumstances, have constructive knowledge that an employee is an unauthorized alien include, but are not limited to, situations where the employer:

> (i) Fails to complete or improperly completes the Employment Eligibility Verification, Form I-9;
> (ii) 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; and
> (iii) Fails to take reasonable steps after receiving information indicating that the employee may be an alien who is not employment authorized, such as -

---

Undocumented Aliens After Hoffman Plastic Compounds Inc., GC-02-06(July 19, 2002) available at http:///www.nlrb.gov/gvmemo/gc02-06.html"

[13] 8 C.F.R. $274a.2(b)(1)(vii).

[14] INA §274A(b)(3)(B).

> (A) An employee's request that the employer file a labor certification or employment-based visa petition on behalf of the employee;
> (B) Written notice to the employer from the Social Security Administration reporting earnings on a Form W-2 that employees' names and corresponding social security account numbers fail to record; or
> (C) Written notice to the employer from the Department of Homeland Security that the immigration status document or employment authorization document presented or referenced by the employee in completing Form I-9 is assigned to another person, or that there is no agency record that the document has been assigned to any person.

Yet, not all courts or administrative tribunals have found that an employer had knowledge that an alien was unauthorized to work in the US. In *Collins Food International, Inc. v. INS*,[15] a seminal case involving the application of constructive knowledge, an employer was sanctioned for knowingly hiring an alien as he made a job offer prior to checking the alien's documents and because the employer did not verify the back of the social security card. The Ninth Circuit rejected the government's charges under both the factual circumstances. First, there was nothing in the law or regulations that required an employer to verify documents at the time of the job offer and prior to the hire of the alien. In fact, pre-employment questioning concerning the prospective employee's national origin, race or citizenship would expose the employer to charges of discrimination under Title Seven. Regarding the employer's failure to properly verify the back of the social security card, the Ninth Circuit held that under INA §274A(b)(1)(A) an employer will have satisfied its verification obligation by examining a document which "reasonably appears on its face to be genuine." There was also nothing in the statute that required the employer to compare the employee's social security card with the example in the handbook of the Immigration and Naturalization Service, and the "card that Rodriguez presented was not so different from the example that it necessarily would have alerted a reasonable person to its falsity." Finally, the Ninth Circuit was concerned that if the doctrine of constructive knowledge was applied so broadly, the employer may be tempted to avoid hiring anyone with appearance of alienage to avoid liability.

The facts in *Collins Food International* ought to be contrasted with situations where an employer has been notified by the government after a visit to its premises that certain employees are suspected to be unlawful aliens and is asked to take corrective action.[16] Thus, in *US v. El Rey Sausage*, where the INS found several employees using improper or borrowed alien registration numbers, and the INS warned in a letter that unless these individuals provide valid employment authorization they will be considered unauthorized aliens, and the employer simply accepted the word of the aliens as to their legal status, the Ninth Circuit found constructive knowledge. Therefore, it is one thing when an employee who is untrained accepts a false document, as in *Collins Food International*,

[15] 948 F.2d 549 (9th Cir. 1991).

[16] *See Mester Mfg. Co. v. INS*, 879 F.2d 561 (9th Cir. 1989); *US v. New El Rey Sausage Co*., 1 OCAHO no. 66 1989, aff'd, 925 F.2d 1153 (9th Cir. 1991).

and quite another when an employer receives notice from ICE that certain employees may not have proper work authorization. Yet, even under these circumstances, an employer should still give the employee an opportunity to explain the allegation, and if such an employee insists that the documentation is valid, the employer must communicate this to ICE and inform that the employer will continue to employ the worker but if ICE disagrees, it should inform employer's counsel immediately.[17] Of course, if the employer gains knowledge of the employee's unlawful status through a genuine confession, then the employer must terminate the employee immediately. Any termination must be effectuated in a non-discriminatory manner. Even if 8 C.F.R. §274a.1(c)(1)(iii)(A) attributes an employer with constructive knowledge if the employee requests sponsorship through a labor certification, it should not be automatically assumed that the individual is not authorized to work in the US. Such an employee could possess a valid employment authorization as one who has been granted withholding of removal or temporary protected status, which without a sponsorship through the employer, may not provide him or her with any opportunity to obtain permanent residence.[18]

With regards to a social security "no-match" letter, the issue of whether the employer is deemed to have constructive knowledge continues to remain fuzzy. The DHS promulgated a rule in 2007 that would have imputed constructive knowledge to an employer who received either a "no-match" letter from the Social Security Administration (SSA) or a DHS notice.[19] The rule would have provided a safe harbor to an employer if it took the following steps to remedy the no-match within 90 days. The employer first checks its own records to determine whether there is a typographical error or similar clerical error. If it's not the employer's error, the employer asks the employee to confirm the information. If the employee says that the information is incorrect, the employer must correct its records and send the correct information to the SSA. If the employee insists that the information he or she gave to the employer is correct, the employer must request the employee to resolve the discrepancy with the SSA. If the employer is unable to verify with the SSA that the erroneous information has been corrected within 90 days, the employer must allow the employee to present new verification documents without relying on the documents that created the mismatch. The regulation was stayed as a result of a challenge in federal court, [20]and the rule was finally rescinded. [21]

---

[17] Readers will profit from the Practice Pointer by Josie Gonzales and Jeff Joseph, *Knowledge In The Context Of The Receipt Of An ICE Notice Of Suspect Document*, AILA's Immigration Practice Resource Guide (2010-11 Edition). One often notices a mass termination of workers following an ICE audit of a business as we recently saw with Chipotle restaurants in the Minnesota area, *See* John Fay, *Rock Meet Hard Place: Form I-9 Audit in Minnesota Leads to Mass Firings*, The I-9 and E-Verify Blog, http://www.electronici9.com/?p=877.

[18] *See US. V. Jonel, Inc*. 7 OCAHO no. 967 (1997); *US v. Valenca Bar and Liquors, Inc*. 7 OCAHO no. 995 (1998).

[19] 72 Fed. Reg. 45611 (August 15, 2007).

[20] *See AFL-CIO v. Chertoff*, 552 F. Supp. 2d 299 (N.D. Cal. 2007).

[21] 74 Fed. Reg. 51447 (October 7, 2009).

In light of the vacuum resulting in the rescinding of this regulation, what guidance can employers rely on? Paul Virtue, former General Counsel of the INS, issued a letter stating that a no-match letter from the SSA did not, standing on its own, provide notice to the employer that the employee is not working without authorization in the US.[22] However, in the same letter, Mr. Virtue stated that a subsequent action or inaction by the employer, after receipt of such a letter, would be viewed under the "totality of circumstances" in determining whether the employer possessed constructive knowledge of whether the employee was authorized or not in the US. Notwithstanding, employers must not be too hasty in terminating employees if they receive no match letters. A recent decision, *Aramark Facility Services v. Service Employees International*,[23] is a case in point. There, the employer upon receiving no-match letters from the SSA gave its affected employees three days from the post mark of its letter to either get a new social security card or a receipt from the SSA that it has obtained a new one, and if the employee produced a receipt, the employee had 90 days to submit the new card. Those employees who could not comply with this demand were fired, but were told that they could be rehired if they obtained the correct document. Moreover, the employer did not have any specific basis to believe that the employees who were the subject of the no match letters were not authorized to work, and each of these employees had properly complied with the I-9 verification requirements at the time of their hire. The Ninth Circuit had to decide whether to set aside an arbitrator's award under a narrow exception that the award violated public policy in ordering back pay and reinstatement as the firings were without cause. Aramark's main argument under the public policy exception was that if it continued to employ these workers it would be sanctioned for knowing that they were not authorized to work in the US. The Ninth Circuit disagreed with the district court's decision setting aside the arbitrator's award and held that the mere receipt of no-match letters from the SSA without more did not put Aramark on constructive notice, and forcefully stated that by its own admission the SSA has acknowledged that "17.8 million of the 430 million entries in its database (called "NUMIDENT") contain errors, including about 3.3 million entries that mis-classify foreign-born U.S.citizens as aliens."[24] The Ninth Circuit, which relied on *Collins Food International*, further noted that employers do not face any penalty from SSA, which lacks an enforcement arm, for ignoring a no-match letter. Furthermore, the Ninth Circuit also gave short shrift to Aramark's second argument that the employee's reaction to the notification to take corrective action

---

[22] Letter, Virtue, General Counsel, INS HQCOU 90/10.15-C (Apr. 12, 1999), available on AILA InfoNet at Doc. No. 01061431 (posted on June 14, 2001).

[23] 530 F.3d 817 (9th Cir. 2008).

[24] *Id*. at 826. Moreover, the following observation from the Court's decision is also instructive:

> The Office of Special Counsel states that "[a] no match does not mean that an individual is undocumented" and that employers "should not use the mismatch letter by itself as the reason for taking any adverse employment action against any employee." Office of Special Counsel, Frequently Asked Questions, *available at* http://www.usdoj.gov/crt/osc/htm/facts.htm#verify (last visited June 9, 2008).
> *Id*. at 827.

imputed constructive knowledge on the ground that the arbitrator found no proof of any employee having undocumented status as well as to the fact that the employer's demand to take corrective action was even more demanding than the DHS's proposed 2007 regulations. Finally, the Ninth Circuit refused to upset the arbitrator's award in failing to consider that Aramark had offered to rehire the workers if they came back with the corrected document even after the time frame that it had stipulated in its notification to its employees.

The Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices recently issued the following do's and don'ts for employers on Social Security Number "no-match" letters, which provide useful nuggets on what one can do and one cannot do when an employer receives a no-match letter.

.

DO:

•Recognize that name/SSN no-matches can result because of simple administrative errors.
•Check the reported no-match information against your personnel records.
•Inform the employee of the no-match notice.
•Ask the employee to confirm his/her name/SSN reflected in your personnel records.
•Advise the employee to contact the SSA to correct and/or update his or her SSA records.
•Give the employee a reasonable period of time to address a reported no-match with the local SSA office.
•Follow the same procedures for all employees regardless of citizenship status or national origin.
•Periodically meet with or otherwise contact the employee to learn and document the status of the employee's efforts to address and resolve the no-match.
•Submit any employer or employee corrections to the SSA.

DON'T:

•Assume the no-match conveys information regarding the employee's immigration status or actual work authority.
•Use the receipt of a no-match notice alone as a basis to terminate, suspend or take other adverse action against the employee.
•Attempt to immediately re-verify the employee's employment eligibility by requesting the completion of a new Form I-9 based solely on the no-match notice.
•Follow different procedures for different classes of employees based on national origin or citizenship status.
•Require the employee to produce specific documents to address the no-match.
•Ask the employee to provide a written report of SSA verification. [25]

---

[25]The document is available at http://www.justice.gov/crt/osc/pdf/publications/SSA/Employers.pdf. A similar document for employees is available at http://www.justice.gov/crt/osc/pdf/publications/SSA/Employees.pdf. A related FAQ is available at http://www.justice.gov/crt/osc/pdf/publications/SSA/FAQs.pdf.

What Is E-Verify?

Start at the USCIS E-Verify website.[26]

E-Verify allows employers to run online employment authorization checks against Social Security Administration and DHS databases using Social Security Numbers and alien registration numbers. When an employer elects to participate in the program and verifies work authorization under E-Verify, a rebuttable presumption is created that it has not knowingly hired an unauthorized alien. Enrollment in E-Verify only goes so far; it does not guarantee a "safe harbor" from worksite enforcement, however. An employer can still be raided or otherwise held liable for employer sanctions despite enrollment in E-Verify. Moreover, E-Verify does not protect against identity theft.

The National Conference of State Legislatures has compiled a user-friendly FAQ on E-Verify that is an excellent ready reference tool. [27] Beyond that, USCIS put together an easy to follow power point slide show that explains the basics of the program. [28]

The decision to enroll in E-Verify is strictly voluntary for most employers, save for those employers who come under the coverage of various State E-Verify laws or who are federal contractors. Employers who voluntarily participate may also elect to terminate their participation at any time. E-verify began as a pilot program under the Illegal Immigration Reform and Immigrant Responsibility Act and but has been expanded and extended since then. Most recently, the FY10 Homeland Security spending bill (H.R.2892), extended the E-Verify program through September 30, 2012.[29]

Employers can register for E-Verify on-line at the DHS website.[30] The nature and scope of the participation is set by a Memorandum of Understanding between the Employer,

---

Also, the National Employment Law Project issued "Top 10 Tips for Employers" on Social Security no-match letters. The tips are available at http://www.nilc.org/immsemplymnt/ssa-nm_toolkit/top_ten_tips_11-07-07.pdf, and are linked to a National Immigration Law Center "No-Match Letter Toolkit" available at http://www.nilc.org/immsemplymnt/ssa-nm_toolkit/index.htm.

[26] http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=e94888e60a405110VgnVCM1000004718190aRCRD&vgnextchannel=e94888e60a405110VgnVCM1000004718190aRCRD

[27] http://www.ncsl.org/?tabid=13127#What_is_E-Verify.

[28] http://www.aila.org/content/default.aspx?docid=24136.

[29] See Public Law No: 111-83. (Oct. 28, 2009).

[30] https://e-verify.uscis.gov/enroll/StartPage.aspx?JS=YES.

DHS, and SSA. Employers with multiple locations may elect to sign up all of their locations or only select locations.[31]

E-Verify is NOT a substitute for the Form I-9 which must be completed first before enrollment in E-Verify. While the I-9 is required for all employees, E-Verify is used for new hires rather than current employees, unless they are working directly under a federal contract with an E-Verify clause.

When an Employer signs up for E-Verify it makes certain basic promises. What are they?

They are set forth in the Memorandum of Understanding:

(1) that it will not initiate electronic verification until after the employee has been hired and the Form I-9 completed; (2) that it will verify all, not just some, of its new employees; (3) that it will display posters in public and clearly visible locations announcing the E-Verify enrollment and providing warnings against employment discrimination ; (4) that it will not discipline, terminate or otherwise act in an adverse manner against an employee while the SSA or DHS is processing a verification request; specifically, no action must be initiated in response to a tentative non-confirmation unless the employer learns definitively from another source that the employee is unauthorized; (5) that it will allow both DHS and SSA to examine its employment records and (6) that it will use the information only to verify the identity and work authorization of newly hired employees and not for any other purpose.

You can join or quit the program at any time. DHS may also terminate E-Verify employer eligibility should it determine conclusively that the employer "has substantially failed to comply with its obligations" under the program.

Are there any situations where participation in E-Verify is mandatory?

Yes, consider the following: (1) employers who have been found to have violated the employer sanctions or anti-discrimination provisions of IRCA may be compelled to join ; (2) employers who hire F-1 students in science, technology, engineering and mathematics (STEM) fields of study and wait a 17 month extension of optional practical training once the initial 12 months of OPT has expired; and (3) employer with federal contracts that include a clause requiring the contractors to use the E-Verify program for all new hires as well as current employees working in direct support of the federal contract; (4)employers who are subject to state E-Verify laws, usually due to state contracts..

Can you tell me more about the 17 month STEM OPT Extension?

---

[31] http://www.aila.org/content/default.aspx?docid=24084.

On April 8, 2008, the DHS published an interim final rule allowing for a 17-month extension of Optional Practical Training (OPT) for college graduates in science, technology, engineering and mathematics (STEM) disciplines.[32] The rule requires employers to be registered in the E-Verify program at the specific location of employment as a condition of the OPT extension. The STEM graduate must file a Form I-765, along with the I-765 filing fee, asking for a renewal of work permission before the expiration of the initial OPT extension. The I-765 must include the employer's E-Verify identification number or a valid E-Verify Client Company Identification Number if an outside vendor or agent handles the verification. It is important to remember that, if the STEM graduate is already working for the employer before the 17-month extension request is filed, the employer may not run the graduate's information through E-Verify. Why? Because verification of existing employees is prohibited under the E-Verify rules and applying E-Verify to existing employees unless required to do so by federal contract can be considered a discriminatory act.

Do federal contractors have to sign up for E-Verify?

On June 6, 2008, President George W. Bush issued Executive Order (EO) 13465, which amended President Clinton's Executive Order 12989, dated February 13, 1996 banning federal contracts with employers who violated IRCA. The new EO requires businesses entering into a contract with an agency or department of the federal executive branch to use E-Verify.[33]

In November 2008, DHS published a rule that would implement the Executive Order 13465.[34] The regulation, which is an amendment to the Federal Acquisition Regulations (FAR), ordered government contracting officers to include an E-Verify clause in certain federal contracts as applied to new hires within three days of hire and existing employees directly assigned to work on the federal contract. The contracts have to last more than 120 days with a value over $100,000. Subcontracts must also have an E-Verify clause, if the value of the subcontract is over $3,000. It does not matter if the performance period of the subcontract is less than 120 days.

Initially, the requirement was to become effective on January 15, 2009. The US Chamber of Commerce and several business groups went into federal court to invalidate the FAR E-Verify regime but ultimately lost in August 2009.[35] Consequently, the rule went into effect on September 8, 2009.

---

[32] *See* 73 Fed. Reg. 18944 (April 8, 2008).

[33] An excellent website on E-Verify for federal contractors can be found at http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=534bbd181e09d110VgnVCM1000004718190aRCRD&vgnextchannel=534bbd181e09d110VgnVCM1000004718190aRCRD.

[34] *See* 73 Fed. Reg. 67651 (Nov. 14, 2008).

[35] See *U.S. Chamber of Commerce v. Napolitano*, 2009 WL 2632761 (D. Md. August 25, 2009).

Since then, federal contractors must enroll in E-Verify within 30 days of the contract award date. E-Verify applies to all new hires, whether employed on a federal contract or not, and existing employees directly working on these contracts . It is up to the federal contracting agency, not the private employer, to insist upon insertion or adoption of the E-Verify clause. Contractors are responsible, however, for ensuring that certain covered subcontracts include the E-Verify clause where necessary. That this is so reflects the extent to which the demands of US immigration law trump the traditional "hands off" attitude that contract law has always displayed. How can such assurances of I-9 compliance be provided and at what cost? Will the failure to provide them be grounds for contract termination or should any prudent federal contractor now insist upon indemnity for breach of I-9 warranties? As the authors conclude *infra,* the need to ask such questions, not to mention the absence of ready answers, eloquently illustrates the exquisite interdependence between immigration law and the wider economy. This is particularly so now that President Obama has decided to focus less on mass raids that terrorize the undocumented and more on criminal and civil prosecution of employers who hire those that lack permission to work.[36]

Remember that E-Verify would not apply for work that will be performed outside of the U.S.; (3) if the contract lasted less than120 days; or (4) contained only "commercially available off-the-shelf" (COTS) items or for items that would be COTS but for minor modifications. A COTS item is a commercial item that is sold in substantial quantities on the open market and is sold to the government in the same way or with slight changes. Food and agricultural products are typical illustrations of COTS items.

In general, the rule applies only to contracts awarded after the effective date of the rule. Current federal contracts will not be affected unless they are extended, renewed, or otherwise amended.

Only the corporate entity that enters into the contract with Uncle Sam is covered, not its parent or affiliate companies.

For the first time, rather than being discriminatory, the verification of existing employees is not only allowed but required if they are assigned to and directly performing work under a covered federal contract.

Who are these employees?

First, they must be hired after the I-9 requirement became the law on November 6, 1986; anyone hired before then is grandfathered for E-Verify purposes. It does not matter how much time the existing employee so designated spends on contract-related activities, if there are large gaps between such involvement or if most of their job has nothing to do with the federal contract. Employees who do not perform any substantial duties under the contract or who perform support work (e.g., administrative or clerical functions) are exempt. If the employer has already used E-Verify to verify an existing employee's

---

[36] DHS Fact Sheet accessible at www.ice.gov/doc/doclib/pi/news/factssheets/worksite_strategy.pdf.

eligibility, it should not re-verify that employee. It is not enough if the covered employee was electronically verified. The current employer must do it all again. If it is too confusing or difficult to determine who is assigned to a federal contract and who is not, federal contractors and subcontractors retain the option of verifying all of their existing employees. Exercising that option involves updating the employer profile and running the entire work force through E-Verify within the following 180 days.

With regard to the compliance timelines under the November 2008 rule, an employer must enroll in E-Verify within 30 days of being awarded a federal contract that contains the E-Verify clause. When enrolling in E-Verify, the employer must indicate that it is a federal contractor. After enrolling in E-Verify, the contractor has 90 days to phase in its use. Within 90 days of the enrollment date, the employer must use E-Verify for every existing employee who is assigned to work on a covered federal contract. Also within 90 days, the employer must begin a practice of verifying each new employee.

What are the E-Verify time lines for federal contactors?

First, there is a 90 days phase in for employers new to E-Verify. Next, the contractor must use E-Verify for new hires within three business days after each employee's start date. The contractor must deploy E-Verify for existing employees assigned to work on the contract within 90 days of the award of a federal contract or within 30 days of the employee's assignment to work on the contract, whichever is later.

What if you have already signed up for E-Verify but only for a short period of time?

If an employer has been a member of the E-Verify club for less than 90 days when it is awarded a federal contract, then the time lines for new enrollees apply. If the employer has been enrolled in E-Verify for 90 days or more at the time the contract is awarded, it must continue to use E-Verify to verify all new hires within three business days. Existing employees assigned to work on the contract must be electronically verified within 90 days from contract award or within 30 days of an employee's assignment to work on the contract, whichever is later. If an employer is awarded a federal contract and is already enrolled in E-Verify, it must update its company profile to indicate that it is a federal contractor and all E-Verify users must then successfully complete a federal contractor tutorial.

Are there any state E-Verify laws?

On the state level, several states now require all employers or some employers (such as state contractors) to utilize the E-Verify Program Even if they are not state contractors, all employers in Arizona, Mississippi, and South Carolina have to sign up . Colorado requires all employers to complete an additional attestation. Colorado, Georgia, Minnesota, Missouri, Oklahoma, Rhode Island, and Utah require some, but not all, state contractors to participate in E-Verify. The National Conference of State Legislatures' Immigration Policy Project maintains a list, most recently revised on February 4, 2010, of

the various States that have enacted E-Verify laws.[37] More recently, both Utah and Virginia also passed E-Verify laws.[38] It should be noted that the Virginia law only applies to public not private employers while the Utah law exempts public entities while covering all new hires since July 1, 2010, by private employers with 15 or more workers. These state statutes are captured in the following chart compiled by Greenberg Traurig LLP.[39]

What could happen when an E-Verify Query is submitted?

Three things. In the vast majority of cases, almost instantly, a confirmation of employment authorization will come back. In a minority of cases, you will receive a "Tentative Nonconfirmation." What then? The employer must notify the employee of the tentative nonconfirmation and find out if the employee will contest it. If the employee does not contest a tentative nonconfirmation, this becomes a "Final Nonconfirmation." If the employee contests the TNC, the employer should allow the employee to correct any discrepancies in his or her record. The employee must visit a SSA field office within eight work days to clarify or correct any mistakes in SSA records. In some cases, especially naturalized citizens, they may opt to call in rather than visit a field office. If the employee contests a tentative nonconfirmation response received from the DHS, he or she must contact the DHS either by calling a toll free telephone number or visiting a local DHS office within eight work days. Oftentimes, a phone call suffices.

The SSA and the DHS have 10 work days from the date the employee was advised of the tentative nonconfirmation to respond. During this 10-day period, an employer may not terminate or take adverse action against the employee unless and until a final nonconfirmation of work authorization comes through. Taking such adverse actions would be an act of employment discrimination. For an SSA case, run it through E-Verify a second time after 10 days to get a final decision. In the case of referrals to the DHS, expect an online final verdict within the 10-day period.

What does an employer have to do in the event a final nonconfirmation is received?

---

[37] *See* http://www.ncsl.org/?tabid=13127. The Supreme Court heard oral argument to a challenge to Arizona's E-Verify Law on December 8, 2010, http://www.scotusblog.com/2010/12/on-aliens-arizona-may-win-for-now/, and the Justices appeared receptive to upholding the Arizona's E-Verify requirements. For a split in Circuits regarding state immigration laws, *Compare CPLC v. Napolitano*, 558 F.3d 856 (9th Cir. 2008) *with Lozano v. City of Hazleton*, 620 F.3d 170 (3rd Cir. 2010).

[38] http://www.worksite-compliance.com/articles-events.php?action=view&id=95.

[39] http://www2.gtlaw.com/practices/immigration/newsletter/Summer10b/04.htm

An employer receiving a "Final Nonconfirmation" from SSA or the ICE should terminate the employee, and incurs no civil or criminal liability as long as the action was taken in good faith. If the employer does not terminate an employee after receiving a final nonconfirmation from SSA or the ICE, the employer must let DHS know. Failure to notify the DHS is considered a paperwork violation. The continued employment of such an employee creates a rebuttable presumption that the employer has engaged in the knowing employment of an unauthorized alien for which civil but not criminal pattern or practice penalties may be imposed. If a discrepancy in the SSA database results in a final nonconfirmation, despite the fact that the employee may actually have work authorization, any employer will then be confronted with an exceedingly difficult decision. This is especially so since, by signing up for E-Verify, the employer must allow DHS and SSA to conduct periodic worksite reviews of all related documentation including, but not limited to, I-9. The possibility of elevated I-9 penalties under these circumstances cannot be ignored. A prudent employer would do well to remember that being a member of E-Verify in good standing offers no shield against either civil or criminal penalties. Just ask Swift Meatpacking![40] Here, rather than insulating itself against a workplace raid, Swift may have invited it by signing up with the E-Verify Basic Pilot and, by so doing, handing ICE the key to its hiring and employment practices.

Have there been any recent improvements to E-Verify?

In June 2008, USCIS made several positive changes to E-Verify. E-Verify now includes naturalization data which should go far to cut down on the number of SSA mismatches. If your naturalized citizen client still gets an SSA mismatch, have them contact USCIS to clear up matters by updating their records or simply have them visit a local SSA field office. E-Verify now incorporates real-time arrival data from the Integrated Border Inspection System (IBIS) for newly arriving workers. A redesigned E-Verify website encourages employer participation.

Most recently, USCIS starting adding State Department passport data for foreign-born citizens. This feature allows USCIS to check State Department, thus cutting down on tentative nonconfirmations. E-Verify Photo matching of US passports began September 26, 2010. Compare that photo from a US passport while completing the I-9 with a digitally stored photo maintained online by USCIS (if there is one). Use the same procedures as with photo matching for EAD or "green cards." If the employee proffers a US passport, then make a photocopy of the passport biographic page and store it with I-9.

Are there any possible discrimination issues triggered by E-Verify?

Pursuant to E-Verify, an employer must reject List B documents that do not contain photographs and copy certain List A documents such as US passports, permanent resident cards and employment authorization documents. Is this insistence upon certain documents an example of document abuse, thereby rendering the employer vulnerable to charges of employment discrimination under the anti-discrimination provision of the INA, §274b?. In response to an inquiry from an employer, the Office of Special Counsel

[40] http://tindallfoster.com/immigrationexpertise/AttorneyArticles/FearTheICEMan.pdf

for Unfair Immigration-Related Employment Discrimination opined on March 6, 2009 that an employer who signed a Memorandum of Understanding with DHS for E-Verify was allowed to reject List B documents lacking a picture on them so long as this policy was consistently and uniformly enforced. Beyond that, if an employer routinely photocopies Form I-551 permanent resident cards or I-766 employment authorization documents during the I-9 process, doing so to comply with E-Verify obligations is not discriminatory.[41]

What are some Do's and Don'ts on E-Verify?

•DO post notices provided by the government to let everyone know that you have signed up for E-Verify.

•DO prominently display anti-discrimination notice issued by the Office of Special Counsel for Immigration-Related Unfair Employment Practices.

•DO verify all newly hired employees, both U.S. citizens and non-citizens. DO NOT verify selectively based on perceived "foreign" accent or appearance

•DO insist that all "List B" identity documents must contain a photograph.

•DO NOT use E-Verify selectively only due to suspicions about "foreign" accent, origin or appearance.

•DO NOT ask for more or additional documentation in response to a Tentative non-confirmation

•DO NOT prescreen applicants for employment, or go back and check employees hired before a company signed the Memorandum of Understanding with the DHS and the SSA.

•DO NOT run an E-Verify query if the employee still awaits issuance of an SSN

•DO NOT use E-Verify to reconfirm a renewal of prior employment authorization.

•DO NOT terminate or take other adverse action against an employee based on a tentative nonconfirmation.

•DO NOT postpone training or defer an actual start date due to either a tentative non-confirmation or a delay in receiving final positive confirmation.

---

[41] Available on AILA InfoNet at Doc. No. 09041365. (Posted 04/13/09).

Is it 3 or 4 days in which an employer must complete Section 2?

While the I-9 regulation at 8 C.F.R. § 274a.2(b)(1)(i), (ii) stipulate completion of Section 2 within 3 days from date of hire, E-Verify actually allows a 4th day. The employer must create a case in E-Verify by the third business day AFTER the first day at work.[42]

What does E-Verify have to say about work authorization during H-1B portability?

While this paper presents a general overview of E-Verify, the importance of a recent development in the delicate relationship between E-Verify and H-1B portability compels us to mention it if only in passing. In late October 2010, the Verification & Documentation Liaison Committee of the American Immigration Lawyers Association (AILA) received confirmation from E-Verify that it would no longer verify work authorization for an employee who is working for an employer under H-1B portability where the employee previously held H-1B status but has since held an intervening status. This came as a stunning development. In the past, many AILA members had relied upon the text of Section 105(a) of the American Competiveness in the 21st Century Act (AC 21), now codified at INA § 214(n), to advise that such employees were work authorized based on the clear language of the statute. However, in an unannounced change of policy, AILA recently received reports that E-Verify had been issuing final nonconfirmations for employees working pursuant to H-1B portability who currently hold another status, such as H-4 or F-1. The Committee requested clarification from E-Verify, citing the language in the statute which permits a beneficiary to work if he or she "was previously issued" an H-1B visa or status and meets the other requirements for portability. INA §214(n).

In response to the Committee's inquiry, E-Verify provided the following response:

> *The Office of Chief Counsel at USCIS has advised us that similarly situated individuals are not employment authorized. … The H-1B Portability Rule does not apply to a nonimmigrant who was in H-1B status at one time, but who is currently in another valid status and for whom a non-frivolous I-129 Petition to obtain H-1B status has been filed. … USCIS has interpreted Section 105 of AC21 (INA section 214(n)) as allowing those who are currently in H-1B status, or who are in a "period of authorized stay" as a result of a pending H-1B extension petition(s), to begin new employment upon the filing by the prospective employer of a new (H-1B) petition on the alien's behalf. USCIS guidance dated December 27, 2005, states that "porting under INA §214 does not require that the alien currently be in H-1B status as long as he or she is in a 'period of stay authorized by the Attorney General.'" That statement serves to clarify the earlier section specifically referring to an "H-1B alien" and should be read in the context of the particular example given: an alien who was in H-1B status and is now in an authorized*

---

[42] http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=c00b59cca6149210VgnVCM100000082ca60aRCRD&vgnextchannel=d4abfb41c8596210VgnVCM100000b92ca60aRCRD… or AILA InfoNet Doc. No. 10071560 (Posted 07/15/2010).

period of stay based on a timely filed extension of H-1B status petition on the alien's behalf, and who then seeks to start working for a different H-1B employer upon that employer's filing of a petition. This interpretation is consistent with USCIS guidance to the public on its website (Nonimmigrant Services, H-1B FAQs, page 61) which states:

Changing employers *- An H-1B worker can change employers, but first the new employer must file a labor condition application and then file a new H-1B petition. If the worker is already an H-1B, he or she can then begin the employment as described in the petition without waiting for USCIS to approve the petition. This is called a "portability provision," and it only applies to someone already in valid H-1B status.*

Based on this guidance, E-Verify queries will continue to result in nonconfirmations in similar cases. "

The authors strongly believe that the USCIS interpretation underlying the E-Verify protocol is inconsistent with the clear language of AC 21.[43]

Electronic I-9 Forms

Legislation was first enacted on October 30, 2004, that permitted employers to retain and store I-9 forms in an electronic format. [44] Essentially, INA §274A(b)(3) was modified to allow retention of Form I-9 is a "paper, microfiche, microfilm or electronic version of the form." DHS first issued an interim rule allowing for electronic storage of Form I-9s.[45] It was not until July 21, 2010 that DHS finalized the electronic I-9 regulation.[46]

The requirements for an electronic system are quite flexible, and must include: 1) reasonable controls to ensure the integrity, accuracy and reliability of the electronic generation or storage system; 2) reasonable controls to prevent and detect unauthorized or accidental creation of, in addition to, alteration of, deletion of, or deterioration of an electronically completed or stored Form I-9 including the electronic signature; 3) an

---

[43] AILA InfoNet Doc. No. 10102268 (posted Oct. 22, 2010). On another note, if a worker is porting from H-1B to H-1B status, the USCIS' M-274, *Handbook for Employers – Instructions for Completing Form I-9 (Employment Eligibility Verification Form)*, available at http://www.uscis.gov/files/form/m-274.pdf, *supra*, indicates that the worker must submit Form I-797 demonstrating USCIS' receipt of the H-1B petition. This too is not consistent with INA §214(n) authorizing work upon the filing of a new H-1B petition, which may be demonstrated in other ways such as through a courier delivery confirmation or a USCIS email confirmation if the petition was filed through premium service processing.

[44] Pub. L. No. 108-390, 11 Stat. 2242 (2004), amending INA § 274(b).

[45] 71 Fed. Reg. 34510-17(June 15, 2006).

[46] 75 Fed. Reg.42575-42579(July 21, 2010), effective August 23, 2010. The I-9 handbook for employers can be found at http://www.uscis.gov/files/nativedocuments/m-274.pdf, *supra*. Part 3, pp. 15-16 deals with electronic I-9s.

inspection and quality assurance program evidenced by regular evaluations, including periodic checks, 4) a retrieval system that includes an indexing system that permits searches, and 5) the ability to reproduce legible and readable hardcopies. [47]

An electronic system must also be able to retrieve and make available to any US agency documentation of the business process that created the retained Forms I-9; modified and maintained the retained I-9s; and established the authenticity and integrity of the I-9s, such as audit trails. [48] Moreover, any person or entity who elects to retain I-9s electronically must implement an effective security system to 1) ensure that only authorized persons have access to records; 2) provide for backup recovery of records to protect against information loss; 3) ensure that employees are trained to minimize the risk of unauthorized or accidental alteration or erasure of records; 4) ensure that whenever an electronic record is created, completed, updated, modified altered or corrected, a secure and permanent record is created that establishes the date of access, the identity of the individual who accessed the record, and the particular action taken.[49]Finally, the electronic system must be able to capture an electronic signature, and must include a method to acknowledge that the attestation to be signed has been read by the signatory. The electronic signature must be attached to or logically associated with an electronically completed I-9. [50]

The minor modifications made by the final rule were: (a) the employer had 3 business not calendar days to complete I-9; (b) the employer can use paper, electronic systems or combination of both; (c) the employer may change electronic I-9 storage systems as long as systems met performance requirement of the regulations; (d) the employer need not retain audit trails each time an I-9 is electronically viewed but only when I-9 is created, completed, updated, modified, altered or corrected; (e) the employer may transmit or provide confirmation of I-9 transaction but not required to do so unless employee requests copy.

An electronic I-9 system is no guarantee against I-9 liability. If the system is faulty or the training is incomplete, then great liability may well ensure. Consider the unhappy experience of clothing retailer Abercrombie & Fitch's who recently settled their own I-9 troubles only after paying a fine of more than $1 million for I-9 violations. An I-9 audit of their Michigan retail outlets conducted by the US Immigration and Customs Enforcement (ICE) in November 2008 disclosed "numerous technology-related deficiencies in Abercrombie & Fitch's electronic I-9 verification system."[51] For those who think an electronic system is the silver bullet that will make all I-9 worries magically disappear, consider the statement by the ICE investigator in charge, "Employers are

[47] 8 CFR §274a.2(e)(1).

[48] 8 CFR §274a.2(f).

[49] 8 CFR §274a.2(g).

[50] 8 CFR §274a.2(h).

[51] The ICE Press Release is available at http://www.ice.gov/news/releases/1009/100928detroit.htm

responsible not only for the people they hire but also for the internal systems they choose to utilize to manage their employment process and those systems must result in effective compliance," said Brian M. Moskowitz, special agent in charge of ICE HSI for Ohio and Michigan." Interestingly, ICE found NO unauthorized workers; the entire fine was due to deficiencies in design and operation of the electronic I-9 scheme. In this case, selecting the wrong I-9 software was a major and very costly mistake.

An electronic I-9 system is the beginning not the end of a robust I-9 compliance superstructure. Immigration expert Ann Allot of Denver, Colorado, recommends that any employer considering "going paperless" ask the following series of questions BEFORE making a decision.[52]

1) How secure is the system? Remember, you are storing very vital personal information on each Form I-9. Does it meet the criteria set forth by USCIS?
2) Where is the information stored? Is it on your company network or is it an on-line storage system?
3) What type of back-up is in place to ensure data is never lost even in the event of a natural disaster such as flood or tornado?
4) Who will have access to the information stored in the system? Does the system have an audit log to record every time a record is accessed and who accessed it?
5) If requested by ICE, will you be able to produce all current employees' I-9 Forms and all terminated employees' I-9 Forms going back 3 years time within 3 business days?
6) If you cannot produce the documents according to a legitimate Government request within 3 days, does the software/system provider have insurance to cover your company's losses and fines for failure to produce within the time allowed?
7) What provisions are in place in the system for complying with various State specific employment verification issues?
8) Does the provider recommend the use of IMAGE (Ice Mutual Agreement with Employers)?
9) Does the program have a tickler system to remind you when I-9 Forms need updating when work authorization documents expire that are necessary to re-verify?
10) Does the program provider offer a training program for field agents who will be completing the Form I-9?
11) Does the provider offer training concerning the use of E-verify and /or SSNVS (Social Security Number Verification Service)?
12) Who will observe the prospective employee complete Section 1 of the Form I-9?
13) Who will observe the prospective employee's physical appearance and identity documents to ascertain they appear to be the documents of the individual who is presenting them?
14) Can an applicant complete the Form I-9 without including his/her Social Security number in Section 1?
15) Is there a place in the system to store the date of termination?

---

[52] http://allottimmigrationlaw.com/blog/2010/09/29/form-i-9-violations-result-in-million-dollar-fine/

16) What provisions are in place for updating the Form I-9 when an employee changes their name for payroll purposes?
17) How are the ID and work authorization documents produced by the employee stored?
18) Can the system store the confirmation or non-confirmation returned by E-Verify?
19) Are you able to store SSNVS results?
20) Are there provisions in place to handle special circumstances such as;

- An employee who enters the US on an L-1A and E-Verify will not certify they are eligible to work?
- What do you do when a new hire shows a Native American card and E-Verify will not certify them?
- What do you do when a foreign worker applies for a Social Security number and is rejected by the SSA without a receipt because their system does not yet have his or her entry into the US?
- If an employee is rejected because he or she presented documents that did not match the E-Verify document, such as an I-551, and the same applicant comes back with a new name and new documents and passes E-verify, how is it processed?

21) Does the system provider have insurance to cover losses if, as a result of their system, a person is successful in collecting double wages at USDOJ/OSC because the applicant was not hired?
22) Does the system provider offer advice about policies that should be in place to keep the system current with government standards?
23) What provisions are in place to handle the Form I-9 if an employee is transferred to a new location?
24) Does the provider train clients on how to recognize fake identity documents?
25) If a new hire presents a Green Card, what number from the I-551 (lawful permanent resident card) does the system require in Section 2, List A?"

The lesson to be learned from Abercrombie & Fitch's misfortune is not to avoid electronic I-9s but to realize that the cost of purchase must be augmented by additional training costs and an extra level of review above and beyond basic compliance. That will give your client a better chance to achieve efficiency and accuracy without mounds of paper. The benefits of an I-9 electronic system are plentiful. Large organizations with multiple worksites can store all I-9s in one centralized system, which can be quickly produced for inspection. Another significant benefit is that an electronic I-9 system will minimize the occurrence of errors on I-9s as well as incompletely prepared I-9s.

The authors wish to provide some practical tips on what it means to move to an electronic I-9 form system, and extend their sincere thanks to Darlene Baker of HireRight Inc. for her expert tutelage on this very important topic. This section will include questions of the authors that have been answered by Ms. Baker.[53].

[53] More information can be obtained through looking at http://www.hireright.com/Partner-Overview.aspx.

1. Wait until the candidate has successfully completed the background clearance and pre-employment medical screening to send them instructions on I-9 completion. You can send them prior to the first day of work. They should be sent to the new hire's personal email address.

2. Advise the employer's representative to complete Section 2 only after you have reviewed and verified the required documentation from the new hire. The employer may make copies of the employee's supporting documents and then use the copies to enter the data (preferably within 24 hours, but, by Federal law, within 72 hours of hire date). After completing Section 2, please destroy/shred any copied documents if they are not retained by the employer for privacy reasons. Some employers retain such copies to prove that documentation was examined. This may help in event of an audit but, if the documentation was flawed, can be used against the employer.

3.When HR finalizes Section 2, please ensure you complete all information requested, including your name, title and business address. Be sure that you check all three boxes to electronically sign the document . The electronic I-9 form lists acceptable List A or List B and C documents and will flag any input errors.

4. For companies moving to electronic I-9 Forms using a vendor that has a proven record of ensuring Form I-9 compliancy is a must. There must be a built-in system of automated compliance checks. Built in and automated compliancy checks with user friendly error message helps companies ensure the I-9 is completed on time and accurately. Email reminders to submit the I-9 by Day 3, and automatic re-verification notifications help ensure the process is complete and correct.

5. Key I-9 compliance issues include: employers not performing re-verification in a timely manner, employers not destroying the I-9 forms when the retention period has been met(something that should be done to minimize exposure in a totally compliant manner) and employers allowing persons unfamiliar with the I-9 form to complete the form. Electronic systems are helping with many of these items.

6.Audit Support: Effective electronic systems help audits go smoothly by ensuring the forms were completed on time and accurately, with functionality that allows for automatic form deletion once the federal government retention guidelines are met, re-verification reminders (this is a big find during audits that employers do not re-verify on time), etc. Electronic systems ensure your I-9 forms are searchable, reportable, downloadable, all at the press of a button, so the employer has the forms at the ready for an audit. The employer can also store/classify forms by location for easy access, they can easily indicate if the person works on federal contracts and can ensure an E-Verify check is always run. E-systems allow for easy reporting and exporting of data compared to paper systems, they are much more secure for sensitive information (SSN, DOB) and all forms are in a central location unlike paper where they are mostly stored at each hiring location. Re-verification is an issue with paper systems because there is no method to easily track which employees will require re-verification, unlike an e-system. With paper, employers put post-it notes on the paper form to remind themselves, or re-key the data

into a spreadsheet – with electronic forms, the system will send email reminders and reports of expiring authorization.

What about remote locations? What special problems do this present for I-9 compliance? What about the logistics of certifying genuineness of documents where there is no designated company representative?

Remote locations typically use notaries to complete Section 2 since those employees are not near an office. If there is another employee nearby, that employee can complete the I-9 form, it does not have to be HR. Notaries typically are not skilled at understanding I-9 compliance which is an issue at audit time if the form was not completed properly by the notary. You can also designate I-9 compliance representatives to complete Section 2 at remote locations.

Once an employer switches to an electronic I-9 system, should they also convert their historic paper I-9s to an online format?

Absolutely! Get it all electronic – find an E-Verify vendor to provide the service to do this on the employer's behalf.

What are the main factors that are motivating the switch from paper to electronic I-9s?

Easier tracking and storage of forms, ability to report on the data, increased compliance and easier audits. But mostly compliance since the forms can check for errors automatically.

What are the main problems that an external E-Verify Vendor has with creating an easy to use indexing system for electronic I-9s?

Accommodating each employer's unique processes is challenging. Some employers think their internal process is USCIS mandated and oftentimes it is not so. Stick with the USCIS issued rules.

How would you compare the respective monetary costs of paper v. electronic I-9s?

Completing a paper form is free, electronic forms are not, however, paper forms become expensive when you cannot find the forms and have to redo them, or you lose them or you forget to re-verify an employee. There is also the cost of periodic client training on top of the basic purchase price.

What data fields do you should be used for electronic indexing system?

Index by All fields in the I-9 form, which is what ICE requires during an audit – to be able to search and locate by any field.

What about providing the employee with an I-9 receipt if one is requested? When is this generated? How do you send it?

This must be done. Upon completing Section 1, the employee can print a copy that is signed and stamped with time and date completion.

How much of a problem is it for employers to create an audit trail each time an electronic I-9 is viewed?

Electronic systems do this automatically! No need to manually track anything.

What kind of I-9 training guidance should most clients have?

The authors recommend that all employers have either internal or external legal counsel to bounce questions off of and we also recommend anyone completing an I-9 has access to the M274 I-9 Employer Handbook. A robust system of client training is vital to successful operation of an electronic I-9 system as the Abercrombie & Fitch fiasco reminds us.

Liability for Independent Contractors

The Form I-9 employment verification requirements under IRCA apply to the direct employees of an employer. An employee is defined as an individual who provides services or labor for an employer for wages or other remuneration.[54] On the other hand, an employer cannot circumvent its obligations by classifying an employee as an independent contractor. Moreover, even if an individual is truly an independent contractor, INA § 274A(a)(4) provides that a person or other entity who uses a contract, subcontract or other similar arrangement to obtain the labor of an alien in the United States knowing that the alien is unauthorized with respect to performing such labor, shall be considered to be in violation of IRCA.
DHS will determine whether an individual is an employee or an independent contractor on a case by case basis. 8 C.F.R. § 247a.1(j) provides:

> The term independent contractor includes individuals or entities who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results. Whether an individual or entity is an independent contractor, regardless of what the individual or entity calls itself, will be determined on a case-by-case basis. Factors to be considered in that determination include, but are not limited to, whether the individual or entity: supplies the tools or materials; makes services available to the general public; works for a number of clients at the same time; has an opportunity for profit or loss as a result of labor or services provided; invests in the facilities for work; directs the order or sequence in which the work is to be done and determines the hours during which the work is to be done. The use of

[54] 8 C.F.R. §274a.1(f).

> labor or services of an independent contractor are subject to the restrictions in section 274A(a)(4) of the Act and §274a.5 of this part…

Thus, the government has the authority to determine whether the person or entity had either actual or constructive knowledge that the employees of its contractors or subcontractors were not authorized to work in the US. Clearly, it is in the opinion of the authors that it will be more difficult for the government to establish that a person had constructive knowledge of the unauthorized status of his or her contractors or sub-contractors because there is no mandate to verify them on a Form I-9, and our discussion above already demonstrates that an employer cannot reflexively infer that an individual is not authorized to work based on a no-match SSA letter. In the same vein, suppose an entity is working with an independent contractor, and asks for the social security card for purposes of issuing a Form 1099, and discovers that the social security card has a restriction, such as not valid for work. Would this impute constructive knowledge? The authors do not think so as a person may have theoretically changed status from B-2 to permanent residence and may have forgotten to change the social security card.

However, the ICE enforcement action against Wal-Mart, which culminated in a consent decree and order, should give some pause to employers who may be liable under IRCA for the unauthorized status of contractor employees.[55] Wal-Mart received substantial government scrutiny because of janitorial subcontractor employees working on its locations. Wal-Mart has adopted a very conservative approach in dealing with indirect employees, which ensures the verification of the employment authorization of employees of subcontractors at any tier. Wal-Mart passes this liability on to its general contractors who must then impose additional requirements of its subcontractors.[56] We also refer you to a very incisive article by John Pearce, II, *The Dangerous Intersection of Independent Contractor Law and the Immigration Reform and Control Act: The Impact of the Wal-mart Settlement*, 10 Lewis & Clark L. Rev. 597 (2006), http://legacy.lclark.edu/org/lclr/objects/LCB10_3_Pearce.pdf (the Pearce article). [57]

This is what we would say: In the end, Wal-Mart teaches us that the issue of subcontractor I-9 compliance is a balancing act. In general, IRCA follows the larger principle that an employer is not liable for the civil or criminal wrongdoing of an independent contractor. 8 USC 1324(e). How can the employer be liable if it has no

---

[55] The consent decree is available at https://walmartjanitors.com/staticdata/Consent_Decree_and_Order.pdf.

[56] See Richard A. Gump, Jr., *The Wal-Mart Model of Best Practices and Subcontractor Liability: Tools for the Embattled Employer*, AILA's Guide to Worksite Enforcement & Corporate Compliance (Eds. Josie Gonzales, Tatia L. Gordon-Troy & Richard J Link); *See also* Angelo A. Paparelli & Ted J. Chiappari, *New Corporate Procurement Strategy: Minimizing Immigration Risks From Service Providers*, 845d4ce44_docu http://www.seyfarth.com/dir_docs/news_item/22f7ef1c-2838-47ec-9043-661mentupload.pdf & Mary Pivec on Independent Contractor Liability, http://www.realestatelanduseandenvironmentallaw.com/Labor%20Through%20Contract%20Theory%20of%20Sanctions%20Liability(2).pdf.

[57] This article was reprinted in 12 Bender's Immigr. Bull. 9, January 1, 2007.

control over what the independent contractor does? Is it not basic to the notion of being an independent contractor that the contractor has control over what it does and the manner or method of performance. At the same time, if you attempt to be willfully ignorant and hide behind the contract to avoid I-9 liability, this will not shield you if your subs break the law. Wal-Mart could not stick its head in the sand. An employer's liability for I-9 compliance cannot be outsourced by contract. On the other hand, there is an equal danger of over-reacting to Wal-Mart, of assuming direct liability for the employees of your subcontractor. This is problematic for many reasons. One, it raises the whole specter of co-employment so that the subcontractor's workforce can make a claim for your benefits, something that can be ruinously expensive.[58] If you begin treating these contract workers as employees by assuming direct responsibility for their I-9s, then they may have a valid claim for being treated as your employees for wage and benefit purposes, including pension and medical benefits. The more specific is the control that the employer exercises over those who work for the independent contractor, the greater is the likelihood that the protection afforded by the contract will be pierced. Assuming of direct responsibility for I-9 compliance goes far beyond general retention of ultimate control.

This issue shows a direct clash between the general rule that employers are not liable for the acts of their independent contractors and the IRCA rule articulated in INA § 274A (a)(4) that liability for I-9 compliance cannot be avoided by contract. We learn from the Wal-Mart case that employers may be required to verify that their contractors are taking reasonable steps to comply with IRCA. One immediately thinks of several questions:

1. How much can the contractors and subcontractors charge the employer for living up to the IRCA obligation?
2. Can the employer require the contractor and subcontractor to indemnify them if the actions of these agents results in I9 liability for the employer?
3. If the subcontractor and contractor create an I-9 program, should the employer review this program for completeness and accuracy? Does doing so result in the employer assuming liability for this I-9 program?
4. Who is going to pay for and operate the I-9 training and compliance program at independent contractors'?

These are all issues that must be addressed in the negotiation of new contracts or the renegotiation of existing contracts. This is being done in a very difficult economic climate where cost control is supremely important. Moreover, while IRCA requires the employer to know that the independent contractor is hiring unauthorized aliens (INA Sec

[58] Perhaps the classic example of how expensive co-employment can be is *Vizcaino v. Microsoft Corp.,* 120 F.3d 1006(9th Cir. 1997) *cert. denied* 522 US 1098 (1998). Though it took 10 years to collect, former temporary employees who had been allowed to purchase Microsoft stock at a substantial discount were found to have been misclassified and entitled to retroactive benefits under Microsoft's employee stock purchase and 401(k) plans worth $96.9 million dollars. Beyond this, the attachment of co-employment in connection with independent contractors can give rise to a whole host of discrimination claims, as can be viewed on the website of Staffing Industry Analysts, http://www.staffingindustry.com/me2/dirmod.asp?sid=9B6FFC446FF7486981EA3C0C3CCE4943&nm=&type=MultiPublishing&mod=PublishingTitles&mid=6EECC0FE471F4CA995CE2A3E9A8E4207&tier=4&id=4D7FA821A2BC4B728A86DB8E57CFE4BB.

274A(a)(4)), pursuant to the general law on independent contracts,[59] an employer can be liable under a negligent hiring theory that it did not exercise reasonable care or due diligence in hiring the independent contractor in the first place or even in renewing the contract. As the Wal-Mart case shows, the larger the employer, the greater is the level of due diligence and sophisticated supervision over the independent contractor regarding I-9 compliance that will be expected.[60]

There is a very practical dilemma that companies face. Even if they demand the insertion of a contractual clause pursuant to which their contractors promise to create and operate an I-9 compliance/training regime, how is this to be verified? Should the employer demand a copy of the I-9 forms? Conduct I-9 audits? Should these audits be unannounced or only at pre-designated dates and times? Or should the employer simply take the contractor's written promise that all of this is being done? If direct involvement is the selected course, to what extent does the employer become responsible for correction of any inadequacies and does the employer have the contractual authority to implement such remediation? Can the employer insist upon immediate termination of an unauthorized alien who works for the subcontractor? Does not the action of the employer in assuming the oversight for these contract workers increase the likelihood that they will be found to have direct or constructive knowledge for IRCA purposes? Would not such knowledge result in a higher threshold of IRCA liability?

Strive for the golden mean, a sweet spot between intentional disregard of what the contractor does and active intervention in the I-9 compliance program that should be the responsibility of the independent contractor to operate in proper order.[61]. Is the subcontractor underbidding all competitors by such a large margin that a reasonable and prudent employer would have an obligation to investigate the possible use of undocumented workers? At a bare minimum, the Pearce article favors the "minimal inquiry" adopted by *Suarez v. Gonzalez,* 820 So.2d 342 (Fla.Dist.Ct.App. 2002). If there is a high level of justifiable concern that emerges from such an inquiry, then, but not before, the employer may demand that the contractor enroll in E-Verify or IMAGE.

Consider this sage observation in the conclusion to the article:"Each proactive step taken to authenticate the work status of contract labor has the effect of increasing company oversight costs, and the perverse effect of increasing employer liability, since it increases the employer's control over the independent contractor. Proactive policies to limit

---

[59] *See* the Pearce article at note 60, which refers to 41 Am. Jur. 2d Independent Contractors Sec. 33 (2005).

[60] The test for negligent hiring is set forth in *Kinsey v. Spann*, 533 S.E.2d 487 (N.C. Ct. App.2000), a case discussed in the article. Also, the more dangerous the work, the greater oversight that will be deemed reasonable under the circumstances for allocation of tort liability. *See* note 78 which refers to Restatement (Second) of Torts. Sec. 411. Interestingly, no such charge of negligent hiring was made against Wal-Mart.

[61] The Pearce article refers to the "reasonable and prudent employer" standard enunciated in *Enuk v. Slattery*, 803 F. Supp. 644 (EDNY 1992).

liability often have the unintended consequences of increasing the company's legal exposure."[62]

CONCLUSION

Looking back on the historical importance of IRCA, perhaps nothing stands out more than the fact that this law brought immigration in from the shadows, taking it from the fringes of American life directly in the center of a noisy national conversation. Once the need to prove valid work authorization through successful completion of an I-9 became the law of the land, employers throughout the land could no longer ignore immigration. It became something that they had to know about and deal with, even if only to create strategies of avoidance. Before IRCA, when the so-called "Texas Proviso" was the law, it may have been unlawful to come to the United States without proper papers but, if you managed to sneak in, it was not unlawful for an employer to hire you[63]. No longer. This changed everything and all the complexities discussed above stem from this basic change. They start here. As a result, immigration inevitably became a national issue, something to be argued about and debated not just by legislators and lobbyists inside the Beltway but by all those who worked in and were affected by changes in the national economy. You and me. All of us became instant immigration experts. This was entirely a new phenomenon in American life, one that has made it much harder to insulate immigration policy from the general political, economic and social forces sweeping through America as a whole. It is now impossible to think of virtually any industry, sector or business that can be evaluated in a comprehensive way without any reference to immigration.

In this, as in all things, law follows life. No longer can US immigration law remain unaffected by larger legal trends. For that matter, immigration lawyers must venture beyond the friendly confines of the INA or 8 CFR in order to zealously advocate for their clients. A robust example of this cross-fertilization is the emerging relevance since 1996 of the Racketeer Influenced and Corrupt Organizations Act ("RICO") as a tool to be used against allegedly unscrupulous employers by envious competitors and/or aggrieved workers. [64] In another novel class action law suit, American Apparel, which was subject

---

[62] *See* pp 622-623.

[63] The "Texas Proviso" was enshrined in the Immigration and Nationality Act of 1952, Pub.L. 82-412, 66 Stat. 163 at the insistence of then US Senator Lyndon B. Johnson (D- TX). Those interested in knowing more should examine the congressional testimony of Professor Stephen Yale-Loehr, available at http://judiciary.house.gov/hearings/April2007/Yale-Loehr070424.pdf.

[64] *See Anza v Ideal Steel Supply Corp*., 547 U.S. 451 (2006)(need to establish that RICO violation was direct cause of injury) *Williams v. Mohawk Industries Inc.*, 465 F.3d 1277 (11th Cir. 2006) (federal and state RICO claims state cause of action upon which relief can be granted); *Trollinger v. Tyson Foods Inc*., 370 F. 3d 602 (6th Cir. 2004) (ex-employees charge that employer hired illegal workers to depress wages); *Baker v IBP Inc.*, 357 F. 3d 685 (7th Cir. 2004) *cert denied* 543 US 956 (2004) (lack of common purpose among entities in enterprise defeats RICO claim); *Mendoza v. Zirkle Fruit Co*., 301 F.3d 37 (2d Cir. 2001) (legal workers claim loss of wages resulting from employment of undocumented laborers); *Commercial Cleaning Serv. Sys.*, 271 F.3d 374 (2d Cir. 2001) (rival company alleges that competitor hired undocumented workers to underbid contract proposal).

to a huge enforcement action for hiring undocumented workers, has been sued for securities fraud on the ground that the manufacturing was largely done using an undocumented immigrant workforce that was not disclosed to investors, thereby purportedly artificially inflating the price of American Apparel's securities.[65]

Before IRCA, US immigration policy looked outward to the oceans and the rest of the world, seeking to determine who could come here and under what terms and conditions. The advent of employer sanctions set in motion a fundamental shift in what immigration means. It no longer stops at the water's edge but continues on after arrival or admission to regulate what can be done and perhaps more importantly what cannot be done. Immigration is no longer something that happens just to the immigrant but, perhaps with equal import, something that happens to us. When we consider how to comply with the many issues and regulations whose complexity and number frustrate, confuse and often anger all who consider them, perhaps this is a good place to start.

---

[65] *See* http://classactionlawsuitsinthenews.com/class-action-lawsuits/american-apparel-securities-fraud-class-action-lawsuit/. The text of the federal complaint can be perused by inquiring minds at http://www.rgrdlaw.com/cases/americanapparel/complaint.pdf . Interestingly, there were no major fines in the American Apparel case nor did any "big shots" go to jail; sometimes, the really big impact is not felt until after the fact. http://www.i-9seminars.com/index.php/articles/1935-investors-sue-american-apparel-for-s... The strategy of Plaintiffs' counsel was nothing if not aggressive, http://www.rosenlegal.com/ongoing.php?id=124&text=2. Perhaps they were less than thrilled when American Apparel had to terminate 1,800 employees, a bloodletting greater than 25% of the entire work force, when an ICE audit uncovered discrepancies in Social Security records that could not be readily explained. *See* 86 No. 38 Interpreter Releases 2496 (Oct. 5, 2009). The tear-stained letter from company founder Dov Charney to these unfortunate ex-employees can be experienced in full at *http://www.dovcharney.com/20090902102021430.pdf*. For those employers trying to get visas for other countries, play by the rules or emigration can cost just as much as immigrat*ion*, *http://www.sec.gov/litigation/litreleases/2010/lr21374.htm*.