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What does Uncle Sam want?

Immigration compliance proves challenging for American employers.

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DURING THE YEAR just passed, Congress wrestled with immigration reform and lost. The Bush administration launched initiatives to force employers to comply with the immigration law through new regulations that now have been enjoined. Federal immigration enforcement agencies markedly have stepped up their efforts. As the country prepares to elect a new president, immigration is a new "third rail" of politics—a topic deadly to touch—and people are angry.

The year 2007 saw workers detained and deported, families torn apart, businesses disrupted and fined, and some business executives and managers facing jail time. State and local governments passed their own laws to deter employment of illegal aliens or to tell illegal aliens: Go away from here!

Security measures were implemented, with fence-building and new, more secure driver's licenses possible not far off in the future. Air travelers to neighboring countries to the north and south already need to have government-issued identification, predominately a U.S. passport, to re-enter the country.

And foreigners continue to come to the United States—in some categories, such as students, in record numbers.

Comprehensive reform of the immigration system has not happened. New visa categories providing greater numbers of immigrant workers have not come into being. Humanitarian acts benefiting innocent children and students, and foreign nationals willing to join the U.S. armed forces, have languished. While the fate of millions of illegal aliens remains in limbo, so does legal status to the next generation of both high-skilled and low-skilled foreign workers.

Unauthorized workers comprise 5% of the nation's labor force.

In 2006, *The National Law Journal* published two articles on the state of immigration compliance and the prospect for reform. Zlatko Hadzismajlovic, "Immigration Bills: Employer Compliance," NLJ, Oct. 16, 2006, at 18; Rebecca Riddick, "Florida Employers React to Immigration Raids," NLJ, Oct. 2, 2006, at S4. A year or so later, there has been a huge amount of discussion and even a few resulting changes.

One area of dramatic change is in immigration compliance. As of Dec. 26, 2007, all employers are required to use the new version of the I-9 form to verify or re-verify the employment authorization and identity of every new employee. Versions of the I-9 form have been around for more than 20 years. It is a mandatory part of every new hire and the first line of defense in an employer's compliance with the immigration laws. The form is a deceptively simple one-page document that is retained by the employer.

The purpose of the I-9 is to require employers to screen new hires, to assure that they are only employing individuals authorized to work in the United States.

The form has three parts and is introduced by a warning to employers that it is illegal to discriminate against work-eligible individuals. The first section of the I-9 is filled out by the new employee when he or she begins employment. Here, the employee attests to the source of his or her employment eligibility. The second part documents that a prospective employee has supplied original documents to the employer within three days of hire to prove his or her eligibility and identity. The new I-9 specifies the documents that the employer may accept to verify employment eligibility and identity. The employer risks discrimination charges by requiring any specific combination of approved documents. For example, a worker who presents a school photo ID and an unexpired Department of Homeland Security (DHS)-issued employment authorization document has complied with the law.

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The employer violates the law if the employer requires another set of documents such as a driver's license or Social Security card to prove identity or employment authorization. Most employers are not forensics experts, but they may rely on their own good faith in accepting the validity of the presented documents. The third section of the I-9 is used when revalidating an employee's authorization that is time-limited.

The Pew Hispanic Center has estimated that unauthorized workers make up nearly 5% of the total U.S. work force and about 12% of the construction industry work force. Pew Hispanic Center, Fact Sheet, "The Labor Force of Short-Term Unauthorized Workers" (April 13, 2006), at http://pewhispanic.org/files/factsheets/ 16.pdf. Apparently, the self-screening system doesn't work so well. Immigration law can be somewhat esoteric as it relates to employment authorization, and employers often find themselves choosing between violating the anti-discrimination laws and risking employer sanctions for hiring an illegal alien.

What constitutes 'constructive knowledge' of status?

Trying to eliminate risk

The government has tried to make it easier and less risky for employers to comply by developing an electronic verification system, known as E-Verify. This system connects the employer to the DHS and Social Security Administration (SSA) databases to verify that the person is authorized to work as represented. An employer is required to enter into a memorandum of understanding with the government in order to participate in E-Verify. The use of the system is limited to verifying employment authorization for new employees, not existing or potential ones. An employer that verifies work authorization under E-Verify has established a rebuttable presumption that it has not knowingly hired an unauthorized alien. But participation in the E-Verify program does not provide a "safe harbor" from worksite enforcement. See U.S. Citizenship and Immigration Services Web site, available at www.tinyurl.-com/22g9qc.

The use of E-Verify is increasingly being required of employers, especially those that have government contracts. The state of Arizona has gone so far as to require all employers to use E-Verify, while Illinois has passed an amendment to its Right to Privacy in the Workplace Act that forbids employers from participating in E-Verify unless or until the DHS and SSA can provide the employer with a confirmation of employment eligibility or ineligibility within three days for 99% of the requests.

Immigration raids target an array of industries.

Both in Arizona and in Illinois the laws have been challenged in court: in Arizona by business and other diverse groups in *Chicanos Por La Causa Inc. v. Napolitano*, No. CV-07-01355-NVW (D. Ariz.), and in Illinois by the federal government in the case of *U.S. v. Illinois*, No 07-3261 (C.D. Ill.). As of this writing, the parties in the Illinois case have agreed to a stay pending litigation. The Arizona law came into effect on Jan. 1.

E-Verify is an add-on to the I-9. Using it doesn't relieve the employer of the need to complete the I-9. The new form doesn't require the employee to reveal his or her Social Security number unless the employer participates in E-Verify.

The user of E-Verify submits identity information and the new employee's Social Security number electronically. If there is a match, the system notifies the employer almost instantly. That part of the system appears to work well.

But if there is a mismatch, E-Verify reports a "tentative non-confirmation." Social Security officials then check their records and notify the DHS to do likewise. This process can take 10 or more days. Meanwhile, the employer must continue to employ the new worker unless or until there is a "final non-confirmation." Even then, the employer proceeds at its peril, because there are many mismatches that arise innocently, from faulty record keeping.

A major problem with E-Verify is that the DHS and Social Security databases are not accurate, as the agencies concede. Mismatches occur in cases of fraud or identity theft, but also, for example, when a person changes his or her name because of marriage, when the numbers are misread or when a person's status changes. The Social Security Administration estimates that 17.8 million, or 4.1%, of its records contain discrepancies, including 12.7 million that involve citizens. Office of the Inspector General, Social Security Administration, Congressional Response Report: Accuracy of the Social Security's Numident File, December 2006. A December 2006 study conducted for the DHS found that, "due to database errors, foreign born workers (including those who have become U.S. citizens) are 30 times more likely than native-born U.S. citizens to be incorrectly identified as not authorized for employment." National Immigration Law Center, Basic Pilot/E-Verify Not a Magic Bullet, Sept. 17, 2007 (revised Sept. 27, 2007).

For many years, the Social Security Administration has been confronted with mismatches between the Social Security numbers on employees' W-2 forms and the numbers on record. Since 1994, Social Security has been sending letters to employers whose W-2 data are mismatched. Not all mismatches trigger an employer letter; they are sent to any employer that reported more that 10 mismatches representing more than 0.5% of the W-2s submitted by that employer. Social Security mismatch letters have identified millions of mismatched employees, advising employers of the mismatch and warning employers that the receipt of the letter alone is not evidence that the worker is unauthorized to work, nor a reason to discharge that worker.

In the past, employers often did nothing upon receipt of such a letter, but that is changing—quickly. When there is a mismatch, and payroll taxes have been forwarded to SSA, the earnings go into the agency's earnings suspense file. Since the beginning of the program in 1937 through tax year 2003, the suspense file has grown and now contains more than 255 million W-2 forms. An SSA official testified before Congress in 2006 that, as of October 2005, $57.8 billion in payroll taxes placed in the suspense file for the 2003 tax year remained there. Martin H. Gerry, testimony before the House Committee on Government Reform, Subcommittee on Regulatory Affairs, July 25, 2006.

Employer sanctions rule

One of the reactions of the government to Congress' inability to pass comprehensive immigration reform was to dust off a 2006 proposed amendment to the employer-sanctions regulations that added receipt of a Social Security mismatch letter as an example of information that "may lead to a finding that an employer had…constructive knowledge" of an employee's unauthorized status. Safe-harbor Procedures for Employers Who Receive a No-Match Letter, 71 Fed. Reg. 34281-01, June 14, 2006. The rule was scheduled to go into effect on Sept. 14, 2007. In anticipation, the DHS had prepared letters to approximately 140,000 employers concerning more than 8 million suspect employees, advising the employers of the DHS' final rule, the specific procedures the employer should follow and the possible civil and criminal consequences of failure to do so. As discussed below, the rule has been enjoined.

If implemented, the rule would add receipt of a no-match letter to the list of examples of what would constitute "constructive knowledge" by an employer of an employee's unauthorized status. In addition, the rule would create safe-harbor procedures that, if followed by the employer, would negate constructive knowledge that the mismatched employee was unauthorized to work. The employer would be ordered to check its own records for the source of the mismatch within 30 days of receipt of the mismatch letter. If that failed to resolve the mismatch, the employee would be given 90 days from the letter's receipt date to resolve the discrepancy. At the end of 90 days, the employer would have three more days to complete a new I-9 form with new documents. If the mismatch could not be reconciled, the employee would need to be discharged if the employer wanted to avoid possible civil and criminal penalties.

Confusing? Many observers apparently thought so.

In *AFL-CIO v. Chertoff*, No C 07-cv-4472, 2007 WL 2972952 (N.D Calif. Oct. 10, 2007), a number of labor, civil rights and business groups including the American Civil Liberties Union (ACLU) sought to enjoin the implementation of the mismatch procedure. They were successful at the district court level. In his opinion of Oct. 10, 2007, U.S. District Judge Charles R. Breyer granted the injunction.

Breyer's written opinion reviewed the Social Security mismatch program and the government's proposed new regulation and found that the plaintiffs had proven irreparable harm to innocent workers and employers and raised serious questions of law.

Breyer opined: "Although the safe harbor rule represent a change in DHS's historical position that no-match letters cannot, by themselves, put an employer on notice, DHS did not supply a reasoned analysis for the change. Accordingly, plaintiffs have raised a serious question whether the rule is arbitrary and capricious and therefore a violation of the Administrative Procedures Act, 5 U.S.C. § 706(2)(A)." Id. at *9.

The court added that the plaintiffs raised serious questions about whether the DHS exceeded its authority by interpreting the anti-discrimination provisions of the Immigration Reform and Control Act of 1986, a duty delegated by Congress to the Department of Justice's Office on Special Counsel for Immigration Related Unfair Employment Practices. 8 U.S.C. 1324b.

Citing the effect of the new regulation on small employers, and the government's failure to conduct a Regulatory Flexibility Act (RFA) analysis, the court found: "Because failure to comply subjects employers to the threat of civil and criminal liability, the regulation is 'the practical equivalent of a rule that obliges an employer to comply or to suffer the consequences; the voluntary form of the rule is but a veil for the threat it obscures.' The rule as good as mandates costly compliance with a new 90 day timeframe for resolving mismatches. Accordingly, there are serious questions whether DHS violated RFA by refusing to conduct a final flexibility analysis." Id. at *13.

On Dec. 4, 2007, DHS filed its appeal to lift the injunction with the 9th U.S. Circuit Court of Appeals. Announcing the appeal, Homeland Security Secretary Michael Chertoff issued a press release, in which he said: "I believe that the No-Match rule is a major step forward in preventing employment of illegal migrants. Contrary to the ACLU's incorrect statements, the rule is not harmful to legal workers. DHS is not abandoning it….The ACLU's lawsuit has put this vital protection on hold. That is bad for immigration enforcement and bad for America's law-abiding employers and legal workers. The only real beneficiaries of the ACLU's strategy are employers who would rather close their eyes to cheap and profitable illegal labor than obey the laws of our country." Statement by Homeland Security Secretary Michael Chertoff on the No-Match Appeal, Dec. 5, 2007, available at www.dhs.gov/xnews/releases/pr_1196872065694.shtm.

Workplace raids

Meanwhile, in the field, DHS is conducting raids on employers known or believed to employ large numbers of unauthorized workers. These raids have targeted a wide range of industries including food processing and packaging firms, contractors (landscape, cleaning and janitorial services), construction, temporary employment services and the fast food industry. Major ongoing and newly instituted investigations affect a wide range of employers, from large national firms (such as Koch Foods Inc., Specialty Foods Group Inc., Fresh Del Monte Produce Inc. and Michael Bianco Inc.) to small employers and restaurant chains. See, e.g., U.S. Immigration and Customs Enforcement news release, "ICE executes federal criminal search warrants at Koch Foods and arrests more than 160 on immigration charges," at www.ice.gov/pi/news/newsreleases/articles/070828cincinnati.htm; "Oregon: More than 165 Workers are Detained After Raid," Associated Press, N.Y. Times, June 13, 2007, at www.nytimes.com/2007/ 06/13/us/13brfs-immigration.html?_r=1&oref=slogin; Robin Shulman, "Immigration Raid Rips Families," Wash. Post, March 18, 2007, at A6.

Of course, the best protection against a raid is immigration compliance and vigilance in all employment practices. This should include using the new I-9 form, acting to correct Social Security mismatches and performing periodic internal I-9 audits. Some employers may choose or be required by local law to sign up for and utilize E-Verify. Others may use one of the I-9 compliance software products on the market; these eliminate most paperwork errors and perform basic background checks on new employees.

With no immigration reform in sight anytime soon, employers can look forward to heightened enforcement efforts and more lawsuits. NLJ