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# BUSINESS INTERRUPTION & EMPLOYER LIABILITY IN THE AGE OF ICE RAIDS

*Tyler D. Bolden\**

Imagine you are working when suddenly you hear sirens and see dozens of flashing lights approaching your workplace. Workers begin running in multiple directions, some take flight out the doors, while others hide inside. In one fell swoop, your workers are taken away by Federal agents and you do not have enough workers left to run the next shift. What do you do? How does this impact your production requirements and your company's image? What will this cost you administratively or operationally? Will you face civil or even criminal charges?

On October 7, 2008, managers at the House of Raeford's Columbia Farms poultry plant in Greenville, South Carolina, were faced with such an event. In what was later described as the "largest workplace immigration crackdown ever in the Carolinas," hundreds of workers were detained by Federal agents from the Immigration and Customs Enforcement ("ICE") agency.<sup>1</sup> This raid followed an extensive ten-month investigation into the company's hiring practices.<sup>2</sup> In the end, three hundred and thirty workers were removed from the plant, production was halted, and the company's image was tarnished in the media.<sup>3</sup> The House of Raeford's Greenville poultry plant had been under scrutiny for several months, as current and former supervisors fell under Federal investigation. Some admitted to knowingly employing undocumented workers and others plead guilty to falsifying various employment documents.<sup>4</sup> How did the company

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<sup>1</sup> Eric Connor, *6 Juveniles Among Hundreds Arrested in Immigration Raid*, GREENVILLE NEWS, October 8, 2008.

<sup>2</sup> Eric Connor & Paul Alongi, *Workers Ran for Doors When Federal Agents Arrived at Chicken Plant, Witnesses Say*, GREENVILLE NEWS, October 7, 2008.

<sup>3</sup> Connor, *supra* note 1 (News reports indicate that people in the community knew illegal workers were employed at the plant. In fact, of those arrested during the raid, six undocumented workers were juveniles.)

<sup>4</sup> Connor, *supra* note 2 (Seven supervisors plead guilty to falsifying employment documents, and a human resources manager was charged with

get to this point, and what changes, if any, did they implement after the initial contact from Federal authorities? Why did not anyone in the company react to the use of false documentation presented for employment?<sup>5</sup> What can other companies learn from this real-life case example? The purpose of this article is to advise companies on best practices and ways to avoid these kinds of situations. Some safeguards are easy to put into place, while others require more thoughtful consideration and analysis. The hope is that readers finish this article with a better understanding of the myriad of issues facing businesses today in the area of immigration compliance.

## I. UNDOCUMENTED IMMIGRANT POPULATION

In 2000, there were an estimated 8.5 million undocumented immigrants in the United States.<sup>6</sup> Since 2000, the undocumented immigrant population has increased by 40 percent, with an average of 800,000 new undocumented immigrants entering the United States between 2000 and 2004.<sup>7</sup> The latest statistical data available estimates there are currently about 11.9 million undocumented immigrants residing in the United States.<sup>8</sup> Despite the huge increases in the beginning of the millennium, the United States has finally started to see a decrease in this population over the past two years.<sup>9</sup> This decline has

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“twenty counts of immigration fraud.”); *Illegal Immigrants Find Poultry Jobs Easy to Get, Report Says*, GREENVILLE NEWS, Tuesday, February 12, 2008.

<sup>5</sup> Franco Ordonez & Ames Alexander, *Feds Appear to be Building Case Against Poultry Plant*, THE CHARLOTTE OBSERVER, October 13, 2008 (Ninety-four percent of employment eligibility forms reviewed by authorities contained false information.)

<sup>6</sup> Michael Hoefer, Nancy Rytina & Bryan C. Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2007* (Department of Homeland Security: Office of Immigration Statistics, Washington, DC), September 2008, available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2007.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2007.pdf).

<sup>7</sup> Ordonez, *supra* note 5.

<sup>8</sup> Jeffrey S. Passel & D’Vera Cohn, Pew Hispanic Center, *Trends in Unauthorized Immigration: Undocumented Inflow Now Trails Legal Inflow* (October 2, 2008) <http://pewhispanic.org/reports/report.php?ReportID=94>.

<sup>9</sup> Ordonez, *supra* note 5 and *Report: Number of Illegal Has Stopped Growing*, THE GREENVILLE NEWS, October 3, 2008.

been linked to tougher state immigration laws, increased worksite enforcement efforts, and a weakened economy in the United States.<sup>10</sup>

Notwithstanding this decline, a peculiar phenomenon has developed over the past decade. Studies show that immigrant settlement in the United States has shifted away from the major settlement states of California, New York, Texas, Florida, Illinois, and New Jersey.<sup>11</sup> Instead, most undocumented immigrant growth over the past decade can be seen in the Rocky Mountains, the Midwest, and most notably, the Southeastern portion of the United States.<sup>12</sup> Statistics indicate that the undocumented immigrant population in Arizona, Georgia, and North Carolina is now higher than the undocumented immigrant population in the state of New Jersey – a state with over 400,000 undocumented immigrants.<sup>13</sup> California, a major settlement state, has even experienced declines in the past decade.<sup>14</sup>

## II. ILLEGAL IMMIGRATION REFORM IN SOUTH CAROLINA

It is estimated that between 1990 and 2004, South Carolina saw a 1000% increase in the number of undocumented immigrants in the state.<sup>15</sup> Currently, several sources calculate that South Carolina has between 35,000 to 75,000 undocumented immigrants.<sup>16</sup> This number is

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<sup>10</sup> Stephen Ohlemacher, *Illegal Immigration Declines as US Economy Falters*, USA TODAY, October 2, 2008, available at [http://www.usatoday.com/news/nation/2008-10-02-491714290\\_x.htm](http://www.usatoday.com/news/nation/2008-10-02-491714290_x.htm).

<sup>11</sup> Passal, *infra* note 12 (Pew Hispanic Center estimates based on March 2004 Current Population Survey (Passel 2005) and 1990 Census.)

<sup>12</sup> Jeffrey Passel, Randolph Capps & Michael E. Fix, *Urban Institute, Undocumented Immigrants: Facts and Figures* (January 12, 2004), [http://www.urban.org/UploadedPDF/1000587\\_undoc\\_immigrants\\_facts.pdf](http://www.urban.org/UploadedPDF/1000587_undoc_immigrants_facts.pdf); *Illegal Immigrants Expanding Footprint*, USA TODAY, March 29, 2006, available at [http://www.usatoday.com/news/washington/2006-03-29-immigration-debate\\_x.htm](http://www.usatoday.com/news/washington/2006-03-29-immigration-debate_x.htm).

<sup>13</sup> Passel, *supra* note 12.

<sup>14</sup> Passel, *supra* note 12.

<sup>15</sup> Passel, *supra* note 12.

<sup>16</sup> See Federation for American Immigration Reform, *Immigration Impact: South Carolina*, [http://www.fairus.org/site/PageServer?pagename=research\\_research430a](http://www.fairus.org/site/PageServer?pagename=research_research430a) (last visited May 26, 2009) (citing numbers from the U.S. Census Bureau); StateMaster.com, *Estimated Number of Illegal Immigrants By State*, [http://www.statemaster.com/graph/peo\\_est\\_num\\_of\\_ill-imm-people-estimated-number-illegal-immigrants](http://www.statemaster.com/graph/peo_est_num_of_ill-imm-people-estimated-number-illegal-immigrants) (last visited May 26, 2009); PEW HISPANIC CENTER, *FACT SHEET: ESTIMATES OF THE UNAUTHORIZED MIGRANT POPULATION FOR STATES BASED ON THE MARCH 2005 CPS* (April 26, 2006), <http://pewhispanic.org/files/factsheets/17.pdf>; but see Noah Haglund,

significant in light of the historically small presence of immigrants in the state. The undocumented immigrant populations in South Carolina tend to cluster in certain industries such as construction, agriculture, janitorial or cleaning services, and meat-processing.<sup>17</sup>

The unprecedented growth of undocumented workers in South Carolina has impacted the state's tax, education, social welfare, and healthcare systems.<sup>18</sup> This impact prompted many in the state to speak out for immigration reform. Indeed, over the past few years, the issue of immigration reform has grown from a few small voices requesting change to hordes of advocates on both sides of the issue demanding change. While many of the demographic changes in South Carolina are the result of legal entry into the United States, thousands of undocumented immigrants have also come to the state for work. What makes South Carolina a magnet for undocumented workers? It could be the availability of lower-skilled jobs or the fact that South Carolina was previously considered a safe-harbor state because it did not have a state immigration law like its neighboring state Georgia.<sup>19</sup>

Whatever the reason, this past year, legislators in South Carolina began debating over state immigration bills, while advocates and critics commented on every phase of the law-making process through editorial pieces, front-page news articles, television stories, and town hall meetings. The subject invoked strong emotions in many South Carolinians and some thought a state law was long overdue. Finally, in the summer of 2008, South Carolina passed what was hailed as the toughest immigration law in the country.<sup>20</sup> Critics of the law state that the construction, agriculture, landscaping, hospitality, and tourism industries will be the first to feel an impact. According to some in the state, these businesses will "virtually shut down" without illegal

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*Legislation Could Have Big Effect on Workplace, Health Care, Police*, THE POST AND COURIER, February 16, 2008 (stating that there are 200,000 illegal immigrants in South Carolina).

<sup>17</sup> Passel, *supra* note 12 and *Illegal Immigrants Find Poultry Jobs Easy to Get*, Report Says, GREENVILLE NEWS, February 12, 2008.

<sup>18</sup> See Bobby Harrell, *Illegal Immigration Will Top Agenda for State*, GREENVILLE NEWS, January 25, 2008 (Undocumented workers cost tax payers in South Carolina roughly \$186 million a year.)

<sup>19</sup> See Alan Hawes & James Scott, *Loopholes and Lapses in Immigration Enforcement*, The Post and Courier, December 16, 2007 ("Robert Rodriguez, an assistant special agent in charge at U.S. Immigration and Customs Enforcement in Atlanta, said South Carolina has one of the fastest growing populations of illegal immigrants because jobs are a big magnet.").

<sup>20</sup> South Carolina Illegal Immigration Reform Act (SCIIRA), S.C. Code § 8-14-20, § 41-80-10 (2008) (codifying H. 4400, Rat. 0327, Act 0280).

labor.<sup>21</sup> Over the next few months, South Carolina will be able to see if there is any truth to this theory. Most private employers will be forced to comply with the new law by July 2009, public employers must comply even sooner. If industries that depend heavily on undocumented labor are to thrive, they will need to find a new source for workers, and this search must include a concerted effort to find an authorized labor pool. This sentiment is best described in a statement from John M. Keeley of the Center for Immigration Studies in which he stressed that companies should “build a workforce on concrete rather than sand, a workforce that will have no reason to run away if there’s an immigration raid, a workforce that won’t be arrested when the inevitable – and I believe it is inevitable – crackdown comes.”<sup>22</sup>

### III. SOUTH CAROLINA ILLEGAL IMMIGRATION REFORM ACT (SCIIRA)

“We’ve said from day one that while we’re a nation of immigrants, we’re also a nation of laws . . . South Carolina shouldn’t be in the business of sanctioning illegal activity with a wink and a nod.”<sup>23</sup>

On June 4, 2008, Governor Mark Sanford signed the *South Carolina Illegal Immigration Reform Act* into law. South Carolina’s new immigration law applies to both public and private employers throughout the state. The law goes into effect in phases with most large private employers required to comply by July 1, 2009.<sup>24</sup>

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<sup>21</sup> Press Release, South Carolina Chamber of Commerce, Businesses Call for Federal Immigration Reform (April 30, 2007); Eric K. Ward, *Hispanic Leaders React to Legislative Backlash*, COLUMBIA FREE TIMES, January 23, 2008; Diana Smith, *S.C. Illegal Immigration Reform Act: Papers Please*, SOUTH CAROLINA LAWYERS WEEKLY, July 21, 2008.

<sup>22</sup> *The Impact of Employment Verification: Field Hearing for Rep. Thelma Drake* (Sept. 12, 2006) (statement of John M. Keeley, Center for Immigration Studies), <http://www.cis.org/articles/2006/jmktestimony091206.html>.

<sup>23</sup> Press Release, South Carolina Office of the Governor, Statement from Mark Sanford, Governor of South Carolina (June 4, 2008), available at [http://www.scgovernor.com/news/releases/news\\_release\\_june08\\_a06-04-08.htm](http://www.scgovernor.com/news/releases/news_release_june08_a06-04-08.htm).

<sup>24</sup> S.C. Code §41-8-20 (2008).

Beginning July 1, 2009,<sup>25</sup> all South Carolina private employers will be ascribed a South Carolina business license that permits the employment of workers.<sup>26</sup> After July 1, 2009, a private employer may not employ a worker if that license is suspended or revoked.<sup>27</sup> In addition, private employers continue to be prohibited from knowingly employing undocumented workers, and are required to verify the employment eligibility of all new hires through one of two verification options: 1) the E-Verify program or 2) a driver's license verification scheme.<sup>28</sup> If employers decide to use the driver's license verification option, they must limit employment to workers that possess, or are eligible to obtain a valid driver's license or identification card from the South Carolina Department of Motor Vehicles or a state with licensing requirements at least as strict as South Carolina.<sup>29</sup> Currently, the list of states with approved licensing requirements includes: AK, AZ, CT, FL, GA, ID, IN, KS, KY, ME (credentials issued after 11/15/08), MA, MI, MO, MT, NH, NJ, PA, RI, TX, VA, WV, and WI.<sup>30</sup> As you can see, many states are not included on the approved list (e.g., California, New York, and North Carolina). Accordingly, employers should note that new employees transferring from these states to South Carolina will not be able to use their state identification or driver's license cards to meet the requirements of the SCIIRA driver's license verification scheme. To avoid running afoul of the law, employers may decide to use the E-Verify alternative to meet the verification requirements of the SCIIRA.

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<sup>25</sup> Requirements to meet SCIIRA apply to private employers with 100 or more employees on July 1, 2009 and private employers with less than 100 employees on July 1, 2010. S.C. Code §§ 41-8-20 (B-C).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at §§ 41-8-30, 41-8-20.

<sup>29</sup> *Id.* at 41-8-20(B); *but see* U.S. CITIZENSHIP AND IMMIGRATION SERVICES (UCIS), I AM AN EMPLOYER . . . HOW DO I . . . COMPLETE FORM I-9, EMPLOYMENT ELIGIBILITY VERIFICATION? (August 2008), [http://www.uscis.gov/files/article/E3\\_english\\_v.1.pdf](http://www.uscis.gov/files/article/E3_english_v.1.pdf) (instructing employers to not require specific documents from new hires to complete the Form I-9 document.).

<sup>30</sup> The South Carolina Department of Motor Vehicles ("DMV") is required to publish the list of States with approved licensing requirements. This information can be found at: [http://www.scdmvonline.com/DMVNew/default.aspx?n=sc\\_illegal\\_immigration\\_reform\\_act](http://www.scdmvonline.com/DMVNew/default.aspx?n=sc_illegal_immigration_reform_act). The list will continue to be updated periodically as more States are found to meet the requirements of the SCIIRA.

Employers that use the E-Verify option will be deemed to have presumably complied with the requirements of the SCIIRA.<sup>31</sup>

Employers that violate the verification requirements of the SCIIRA are subject to fines ranging from \$100 to \$1000 per worker.<sup>32</sup> If an employer is found to have knowingly or intentionally employed an undocumented worker, an employer's business license can be suspended or possibly even revoked for varying periods of time.<sup>33</sup>

Critics of the new law have expressed concern about the impact it may have on small businesses, as well as certain industries such as agribusiness and hospitality in the Low Country. In addition, critics have expressed concern that the law may open the door for possible racial profiling and Federal preemption issues.<sup>34</sup> Lastly, some in the state have expressed concern that the driver's license verification system option may contradict Form I-9 instructions which prevent an employer from mandating that an employee use a particular verification document.

#### IV. FEDERAL REQUIREMENTS

Immigration laws are governed by the Immigration and Nationality Act ("INA")<sup>35</sup> and the Immigration Reform and Control Act of 1986 ("IRCA")<sup>36</sup>. U.S. employers are responsible for verifying the identity and work authorization (or eligibility) of all employees hired after November 6, 1986, and must complete Employment Eligibility Verification Forms (Form I-9) for all new employees<sup>37</sup>.

Under the IRCA, an employer must accurately complete the Form I-9 and review an employee's original documentation of identity and employment authorization. If this review yields no apparent problems and the documents appear genuine to the employer, the employer may accept the documents.<sup>38</sup> The completion of the Form I-9 gives the employer a "good faith" defense from subsequent allegations that he or she violated the IRCA. However, the IRCA imposes

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<sup>31</sup> S.C. Illegal Immigration Reform Act, S.C. Code §41-8-40; *see also supra* note 24.

<sup>32</sup> *Id.* at 41-8-50(D)(1).

<sup>33</sup> *Id.* at 41-8-50(D)(2).

<sup>34</sup> Smith, *supra* note 21.

<sup>35</sup> Pub. L. No. 82-414, 06 Stat. 163 (1952)

<sup>36</sup> 8 U.S.C.A. §1324a.

<sup>37</sup> *Id.*

<sup>38</sup> UCIS, *supra* note 29.



penalties against employers that “knowingly” hire or continue to employ unauthorized workers.<sup>39</sup>

As part of the I-9 process, employers are tasked with reviewing copies of documents presented to show identification and employment eligibility; however, employers cannot tell employees which documents to present.<sup>40</sup> An employee can choose from the most recent “List of Acceptable Documents” connected to the I-9 Form and present one document from List A, or one document from List B, and another document from List C.<sup>41</sup>

Employers that knowingly violate IRCA can be charged with the unlawful employment of undocumented workers. Such IRCA violations can result in the Federal Government bringing administrative, civil, and criminal actions against an employer.<sup>42</sup> Additionally, in 2008, the Federal Government increased the amount of civil penalty fines under IRCA.<sup>43</sup>

## V. ROLE OF STATES IN THE IMMIGRATION DEBATE & FEDERAL PREEMPTION

For companies with operations across the United States, the current patchwork quilt of state immigration laws makes compliance difficult if not impossible. What is sufficient in one state may or may not meet the standards of another state. How do companies limit the potential liability caused by these differing laws? Ultimately, the answer lies with the United States’ Congress. Immigration is a federal issue. States cannot grant asylum, H-1B visas, or green cards—only the federal government can determine if an individual will be allowed to remain and work in the United States. Yet, the states have been—and remain—active in this area.

In 2008, state legislatures considered approximately 1,305 immigration-related bills and passed at least 206 immigration laws and

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<sup>39</sup> 8 CFR § 274a.1(l)(1) (The term “knowing” may mean actual knowledge or constructive knowledge of certain facts and circumstances that make an employer aware that an employee may not be authorized to work in the United States).

<sup>40</sup> UCIS, *supra* note 29.

<sup>41</sup> *Id.*

<sup>42</sup> See 8 U.S.C. §1324a(e-f).

<sup>43</sup> See 73 F.R. 10130-10137 (February 26, 2008). Penalties range from \$375 to \$16,000 per worker for the unlawful employment, recruitment and referral of unauthorized workers.

resolutions nation-wide.<sup>44</sup> Even states currently without immigration laws are introducing legislation in record numbers.<sup>45</sup> One might ask why the states have such a heightened interest in immigration laws. The dramatic increase in state-sponsored legislation seems to correspond with the failure of the federal government to pass a comprehensive immigration reform bill in 2005 or 2006. Since that time, states have taken it upon themselves to regulate an area of law that was previously considered the exclusive authority of the federal government. This activity has not gone unnoticed.

Since 2007, there have been several court challenges to state and municipal immigration laws.<sup>46</sup> Most of the challenges were based on theories of federal preemption. In short, the challengers alleged that states did not have the right to pass laws related to immigration because this area was preempted by federal law.<sup>47</sup> Plaintiffs cited passage of the INA and IRCA as additional proof of Congress's intent to develop a comprehensive scheme governing all aspects of immigration, thereby excluding the states' ability to construct laws in this area. Following this line of reasoning, state immigration laws cannot stand because the entire field is controlled by the national sovereignty of the federal government and therefore preempted.<sup>48</sup> However, proponents of states'

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<sup>44</sup> See National Conference of State Legislatures, State Laws Related to Immigrants and Immigration in 2008, January 15, 2009, <http://www.ncsl.org/programs/immig/2008StateLegislationImmigration.htm>.

<sup>45</sup> *Id.* State immigration-related legislative activity doubled from 2005 to 2006; and in 2007, the activity was triple that of 2006.

<sup>46</sup> See *Arizona Contractors Ass'n v. Candelaria*, 534 F. Supp. 2d 1036 (D. Ariz. 2008), *aff'd*, 544 F.3d 976 (9th Cir. 2008); *Gray v. City of Valley Park*, 2008 WL 294294 (E.D. Mo. 2008); *Chamber of Commerce of the United States v. Henry*, 2008 WL 2329164 (W.D. Okla., 2008); *Lozano v. City of Hazelton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007).

<sup>47</sup> *De Canas v. Bica*, 424 U.S. 351, 354 (1976) (The "[p]ower to regulate immigration is unquestionably exclusively a federal power.")

<sup>48</sup> In *De Canas*, the Supreme Court articulated three tests to determine whether federal law preempts a state or local statute relating to immigration. The tests for determining preemption are:

1. **Constitutional preemption:** Is the state or locality attempting to regulate immigration?

2. **Field preemption:** Did Congress intend to occupy the field and oust state or local power?

3. **Conflict preemption:** Does the state or local law stand as an obstacle to or conflict with federal law, making compliance with both the state and federal law impossible?

Any State statute, regulation, or local ordinance that fails any one of these three tests is preempted by federal law and therefore invalid. *Id.*

rights have convinced courts that Congress did not intend to preempt the entire scope of immigration.<sup>49</sup> Instead, they argue Congress intended to only preempt the “regulation of immigration”—defined as “essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”<sup>50</sup> In addition, successful defendants have also cited the savings clause in the IRCA as proof that Congress intended to allow the states to enact certain types of immigration-related laws. The IRCA’s savings clause expressly states that state or local laws are prevented from “imposing civil or criminal sanctions (other than through licensing or similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”<sup>51</sup> Special emphasis must be paid to the wording in the parentheses for it has become the supporting foundation for recent state and municipal immigration law achievements.<sup>52</sup> While some courts have looked at the legislative history of the IRCA for support of its decision to uphold state immigration laws,<sup>53</sup> the language in the IRCA’s savings clause itself has most effectively convinced courts that Congress intended for states to have the ability to regulate certain aspects of immigration within its borders. Accordingly, state immigration laws that suspend or revoke an employer’s business license for violating the IRCA requirements have seen success in the Courts.<sup>54</sup>

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<sup>49</sup> *Id.* at 355 (“... the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted by this constitutional power, whether latent or exercised.”).

<sup>50</sup> *Id.*

<sup>51</sup> 8 U.S.C.A. §1324a(h)(2) (2009).

<sup>52</sup> See generally *Arizona Contractors Ass’n v. Candelaria*, 534 F. Supp. 2d 1036 (D. Ariz. 2008), *aff’d*, 544 F.3d 976 (9th Cir. 2008); *Gray v. City of Valley Park*, 2008 WL 294294 (E.D. Mo. 2008); *Chamber of Commerce of the United States v. Henry*, 2008 WL 2329164 (W.D. Okla. 2008).

<sup>53</sup> See H. R. REP. No. 99-682(I) at 5662 (“The penalties contained in this legislation are intended to specifically preempt any state or local laws from providing civil fines and/or criminal sanctions on the hiring, recruitment or referral of undocumented aliens. They are not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation, or refusal to reissue a license to any person who has been found to have violated the sanctions provisions in this legislation. Further the Committee does not intend to preempt licensing or “fitness to do business laws,” . . . which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens”).

<sup>54</sup> For a complete analysis of state immigration laws and federal preemption, see Gary Endelman and Cynthia Lange, *The “Perils of*

At this early stage in judicial review of state and local immigration laws, it is too soon to tell which argument will ultimately prevail. There have been successes and losses on both sides. We may have to look to the United States Supreme Court or Congress to ultimately decide this issue. In the meantime, businesses now have to comply with an ever growing number of state and local immigration laws – some of which may have overlapping and sometimes contradictory requirements.

## VI. EFFECT ON BUSINESSES

In years past, companies did not have to meet multiple federal and state immigration law requirements; today things are different. The devastating impact of an ICE raid, the resulting loss of workers, and the potential negative media spotlight, have forced companies to take serious steps to prevent hiring undocumented workers. Historically, fines and possible deportation were the likely results of violating immigration laws in the United States. However, following September 11, 2001 and the creation of the Department of Homeland Security (“DHS”), a new focus on critical infrastructures and national security emerged. Under the Homeland Security Act of 2002, the authorities of the former Immigration and Naturalization Service (“INS”) were transferred to three new agencies: U.S. Citizenship and Immigration Services (“USCIS”), U.S. Customs and Border Protection (“CBP”), and U.S. Immigration and Customs Enforcement (“ICE”). The two agencies most involved in immigration compliance and enforcement matters are USCIS and ICE, respectively. USCIS is responsible for most work authorization documentation, the E-Verify program, and the Form-I-9, while the ICE, the largest investigative arm of DHS, is responsible for enforcing the provisions of the IRCA, including the employer penalty provisions contained in Section 274A. The shift in the agencies’ priorities from education, civil fines, and penalties to criminal charges aimed at employers who hire undocumented workers has impacted business the most.<sup>55</sup>

Over the past five years, ICE has dramatically increased its enforcement activities. In 2003, ICE collected a total of \$73,000 in

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*Preemption.” Immigration and the Federalist Paradox*, 13 BENDER’S IMMIGRATION BULLETIN 1217, (2008).

<sup>55</sup> Between 2003 and 2008, ICE has increased its enforcement activities “ten-fold.” *See ICE continues to conduct raids across the U.S. – 18 foreign nationals arrested at a Colorado concrete plant*, BUSINESS IMMIGRATION MONTHLY (Masuda Funai Eifert & Mitchell Ltd.), August 4, 2008 at 3.

finest from employers nationwide and made 72 criminal arrests along with 445 administrative arrests.<sup>56</sup> By the end of 2007, ICE had collected over \$30 million in fines and made 863 criminal arrests along with 4,077 administrative arrests.<sup>57</sup> Undoubtedly, the agency's enforcement activities have dramatically expanded. Companies that are not aware of ICE's expanded efforts in worksite enforcement may find themselves the subject of a worksite inspection or investigation.

In 2005, the nation's largest retail chain, Wal-Mart, was embroiled in an investigation called "Operation Rollback,"<sup>58</sup> in which federal officials raided 61 Wal-Mart stores and arrested two-hundred fifty undocumented immigrants<sup>59</sup> working for a Wal-Mart contractor.<sup>60</sup> Despite the pomp and circumstance surrounding the raids, the Department of Justice declined to pursue criminal charges against the company, and Wal-Mart settled the four-year investigation by offering to enforce stronger immigration practices within the company and by paying an \$11 million civil fine to the Government.<sup>61</sup>

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<sup>56</sup> See U.S. Immigration and Customs Enforcement, Worksite Enforcement Fact Sheet, <http://www.ice.gov/pi/news/factsheets/worksite.htm> (last visited March 28, 2009).

<sup>57</sup> *Id.*

<sup>58</sup> "The basis of the claims against Wal-Mart is that the company, as a joint employer of the workers, "engaged in and profited from a nationwide fraudulent scheme designed to defraud the United States government." In the lawsuit, it is alleged that Wal-Mart "routinely makes use of the labor of undocumented immigrants" and that these workers "present a ready pool of easily exploited labor." Carol A Entelisano, *The Woes of WAL-MART: A Lesson In Independent Contractor Practices And Immigration Law (Non)Compliance*, <http://library.findlaw.com/2003/dec/29/133231.html> (last visited March 23, 2009).

<sup>59</sup> The largest number of arrests occurred in Texas and Pennsylvania stores. See "*Workers nabbed on immigration charges; executives facing subpoenas, U.S. official says*" CNN.COM, October 23, 2003, [http://money.cnn.com/2003/10/23/news/companies/walmart\\_worker\\_arrests/](http://money.cnn.com/2003/10/23/news/companies/walmart_worker_arrests/) (last visited March 23, 2009).

<sup>60</sup> *Id.*

<sup>61</sup> See AllBusiness, Wal-Mart Snnounces Settlement of Immigration Investigation, <http://www.allbusiness.com/retail-trade/miscellaneous-retail/4436237-1.html> (last visited March 24, 2009) ("While the civil consent decree and settlement documents stated that immigration officials found that independent floor cleaning contractors at various Wal-Mart stores had hired, recruited and employed undocumented workers, it also stated that "Wal-Mart did not have knowledge [of this practice], at the time the independent contractors initially were hired."").

As a direct result of this settlement, Wal-Mart immediately initiated changes to its master contract for services, requiring, among many things, that contractors certify they are using employment verification systems to screen employees.<sup>62</sup> In addition, the company launched a hotline to report suspected abuse, provided immigration compliance training to employees, and randomly audited contractors.<sup>63</sup> Today, the lessons learned by Wal-Mart and the subsequent actions taken by the company provide a shining example of a good immigration compliance program.

In 2006, ICE continued to increase its enforcement efforts. The raid on IFCO Systems North America and the subsequent arrest of nearly 1,200 undocumented immigrants and, most notably, several senior managers, caught the attention of employers everywhere. In December of that same year, ICE launched simultaneous raids at six Swift & Company meat plants throughout six states.<sup>64</sup> These raids resulted in the arrests of more than 1,200 undocumented immigrants. Of those, approximately 270 were criminally charged for identity theft or the use of fraudulent documents.<sup>65</sup>

In 2007, BMW's Greenville, South Carolina, plant was accused of hiring undocumented immigrants. The resulting media coverage and public comments focused on the company's hiring practices and accusations of knowledge. However, BMW did not hire any of the undocumented immigrants.<sup>66</sup> The undocumented immigrants were employees of the cafeteria services contractor, Eurest; no BMW employees were involved.<sup>67</sup> Details such as who is the actual employer are often lost in the search for a good story. Businesses have to protect themselves against this onslaught by being proactive and taking steps to protect their image and reputation with the community at large and within state and federal agencies.

In 2009, especially in highly targeted industries, employers need to be proactive and make immigration compliance a high priority.

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<sup>62</sup> Francesca Jarosz, *Immigration: What's an Employer to Do?*, ABA BUSINESS LAW TODAY, November/December 2006.

<sup>63</sup> *Id.*

<sup>64</sup> See UCIS, ICE FISCAL YEAR 2007 ANNUAL REPORT: PROTECTING NATIONAL SECURITY AND UPHOLDING PUBLIC SAFETY (2007), [http://www.ice.gov/doclib/about/ice07ar\\_final.pdf](http://www.ice.gov/doclib/about/ice07ar_final.pdf).

<sup>65</sup> *Id.*

<sup>66</sup> WYFF, Workers at BMW Plant's Café Arrested, [www.wyff4.com/print/13762657/detail.html](http://www.wyff4.com/print/13762657/detail.html) (last visited May 21, 2009).

<sup>67</sup> Trevor Anderson, *Immigration Sting Nets 7 Food Workers at BMW*, HERALD-JOURNAL, July 27, 2007.

## VII. EFFECT ON SOUTH CAROLINA BUSINESSES

Almost a year prior to the effective date of South Carolina's immigration law, some businesses have decided to enroll and begin using E-Verify to check the employment eligibility of workers.<sup>68</sup> In addition, some law enforcement initiatives are targeting undocumented immigrants. Recently, in a "jail check" in Beaufort, South Carolina, 170 undocumented immigrants were identified.<sup>69</sup> These individuals may have been in jail on a traffic violation or something far worse, but now, they likely face deportation. These kinds of headlines will strike fear in the hearts of undocumented immigrants, causing many to flee South Carolina. But will they leave the country or simply move to another safe harbor state. The odds are in favor of the latter. Even so, overall the United States has seen a decrease in the number of undocumented immigrants in the country.<sup>70</sup>

Furthermore, South Carolina has a surprisingly small number of ICE agents: twenty-two in all.<sup>71</sup> These agents are responsible for enforcing all immigration laws in the state. With statistics showing from 35,000 to 75,000 undocumented immigrants in South Carolina, twenty-two agents cannot reasonably meet the immigration enforcement needs in the state. To address this issue, the SCIIRA allows local law enforcement to enforce immigration laws under the Section 287(g) program.<sup>72</sup> The 287(g) program is a part of ICE Agreements of Cooperation in Communities to Enhance Safety and Security ("ACCESS"), which comprises a bundle of services and programs aimed at local law enforcement officials. Specifically, the 287(g) program authorizes DHS to train and authorize state law enforcement officers to perform immigration enforcement activities.<sup>73</sup>

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<sup>68</sup> Dave Munday, *S.C. DOT Gets Jump on Reform*, THE POST AND COURIER, Aug. 2, 2008.

<sup>69</sup> *Jail Check Finds 170 Illegal Immigrants*, THE POST AND COURIER, Sept. 3, 2008, available at [http://www.postandcourier.com/news/2008/sep/03/jail\\_check\\_finds\\_illegal\\_immigrants52858/](http://www.postandcourier.com/news/2008/sep/03/jail_check_finds_illegal_immigrants52858/).

<sup>70</sup> Ohlemacher, *supra* note 10.

<sup>71</sup> Paul Alongi, *Illegal immigrants take toll on law enforcement*, THE GREENVILLE NEWS, January 14, 2008, at 2A.

<sup>72</sup> The Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009, added Section 287(g) to the INA in 1996.

<sup>73</sup> See UCIS, Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, [http://www.ice.gov/partners/287g/Section287\\_g.htm](http://www.ice.gov/partners/287g/Section287_g.htm) (last visited Aug. 18, 2008)(local law enforcement officers are

In South Carolina, DHS has trained law enforcement officers in two counties under the 287(g) program.<sup>74</sup>

## VIII. LOOKING AHEAD

As employers try to grapple with the issues of undocumented workers, increased penalties, state immigration laws, and ICE's heightened interest in worksite enforcement activities, the need to find a tool that will screen employees is crucial. Accordingly, many employers have started to use the verification systems managed by the federal government. These systems offer different details about employees and can give employers a heads up when there are problems in the workforce.

### A. SOCIAL SECURITY NUMBER VERIFICATION SYSTEM ("SSNVS")

The Social Security Number Verification Service (SSNVS) is an online system which allows employers to check SSA's database to determine whether a current or former employee's name and social security number ("SSN") match records maintained by the SSA. The system cannot be used to check the status of potential hires or contractors.<sup>75</sup> In addition, the system does not verify the employment authorization of employees, and any information obtained through the system cannot be used by employers to determine employment eligibility.<sup>76</sup> To use the SSNVS, employers insert data captured on the Form I-9 into the system (name, SSN, date of birth, gender). Following a review of the information, employers receive results from the system.

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trained in identifying and processing criminal aliens for removal and investigating criminal immigration violations).

<sup>74</sup> *Id.* (Beaufort County and York County have active Memorandum of Agreements with DHS).

<sup>75</sup> See SOCIAL SECURITY ADMINISTRATION, SOCIAL SECURITY NUMBER VERIFICATION SERVICE (SSNVS) Handbook 5 (2008), <http://www.ssa.gov/employer/ssnvsHandbook.pdf>.

<sup>76</sup> *But see* Safe-harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45611 (Aug. 15, 2007) (DHS proposed No-Match rule that allows for the possible use of no-match letters to prove constructive knowledge that an employer is aware that an employee is not authorized to work in the United States). In 2007, this rule was challenged in California and it is currently still the subject of ongoing litigation. AFL-CIO, United States Chamber of Commerce, et al. v. Chertoff, 552 F. Supp 2d 999, (N.D. Ca. 2007).



Depending on the data, an employer can receive one of the following results: 1) Verified (SSN matches SSA's records), 2) Failed Verification (could mean different things depending on the reason for failure)<sup>77</sup>, or 3) Deceased (SSN matches SSA's records but the records indicate that the person is deceased).

Employers that receive the Verified result feel a sense of assurance that the person they are employing is authorized to work in the United States. However, that is not the purpose of the system, and is far from accurate or fool-proof since the system will not detect persons using the lawful identity of another. In that instance, the Verified result is true, but it does not reflect the actual status of the person employed. In addition, the Failed Verification result can mean several different things. There could be some fraud involved or an inaccurate name or date of birth for a person lawfully authorized to work in the United States.<sup>78</sup>

#### B. E-VERIFY (FORMERLY "BASIC PILOT")

E-Verify is a voluntary web-based employment verification system operated by USCIS.<sup>79</sup> The program uses information from DHS and SSA databases to determine if an employee is authorized to work in the United States.<sup>80</sup> The system is free and allows employers to check the employment eligibility of new hires only. E-Verify must be

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<sup>77</sup> See *supra* note 75 (There are several possible reasons for a "Failed Verification" code such as the following: 1) the SSN was never in the system, 2) name and date of birth match but the gender does not match, 3) name and gender match but the date of birth does not match, 4) name matches but the gender and date of birth do not, 5) name does not match, and 6) system did not verify for other reasons.).

<sup>78</sup> *Id.* The SSNVS Handbook recommends a series of steps to employers that receive a Failed Verification code. The agency advises employers to re-check their employment records and look for errors, advise employees to go to their local SSA office to resolve the errors and document all efforts to get corrected data.

<sup>79</sup> While currently a voluntary system, some States, such as Arizona, Rhode Island, South Carolina and Oklahoma, have enacted State laws which require private and public employers to use the system to meet and maintain business licensing requirements.

<sup>80</sup> Information input into E-Verify is compared against 444 million records in the SSA database and 60 million records in the DHS system. See Homeland Security, E-Verify Program Information, [www.dhs.gov/xprevprot/programs/gc\\_1185221678150.shtm](http://www.dhs.gov/xprevprot/programs/gc_1185221678150.shtm) (last visited March 28, 2009).

used within the first three days of hiring.<sup>81</sup> Employers that use E-Verify also receive the benefit of a rebuttable presumption that they the employer has not “knowingly hired an unauthorized alien.” While not a safe harbor, this presumption affords employers some degree of protection from violations under §274 of the INA.

To utilize the system, an employer must register with USCIS and enter into a memorandum of understanding with the Federal Government.<sup>82</sup> Once registered, an employer may use information obtained from the I-9 to check the status of new hires. The system reviews the information placed in the system and returns three possible results: “Employment Authorized,” “Tentative Non-Confirmation,” or “DHS Verification in Process.”

If an employer receives an “Employment Authorized” result from E-Verify, the employer can presume an employee is authorized to work in the United States. But if an employer receives a “Tentative Non-Confirmation” or “DHS Verification in Process” response, the employer should notify the affected employee and offer him an opportunity to go to either SSA or USCIS to clear up their records. An employee has eight days to call a toll-free number to contest the authorization finding. During this time, employers should refrain from taking any employment action against an employee. DHS will typically resolve the contested case within three business days, but the agency has up to ten days from the time of the referral to respond.<sup>83</sup> Once the review is completed, DHS will issue one of three responses to the employer: “Employment Authorized,” “DHS Employment Unauthorized” or “DHS No Show.”<sup>84</sup> Employers should resolve the contested cases by approving employees that receive the Employment Authorized response and treating the DHS Employment Unauthorized

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<sup>81</sup> Since the program can only be used for new hires, employers are restricted from checking the employment eligibility of current workers, but the recent Federal Acquisition Regulation (“FAR”) that allows Federal Government contractors and sub-contractors to use the system for both new hires and current employees performing work under a Government contract. See Federal Acquisition Regulation, 73 FR 33374-33381, (June 12, 2008). This rule was slated to go into effect on January 15, 2009, but due to pending litigation, implementation of this rule has been delayed until May 21, 2009.

<sup>82</sup> As of January 8, 2009, more than 100,000 employers were participating in E-Verify; See Press Release, USCIS, 100,000 Employers Use E-Verify Program, (January 8, 2009), [http://www.uscis.gov/files/article/e-verify100K\\_8jan09.pdf](http://www.uscis.gov/files/article/e-verify100K_8jan09.pdf).

<sup>83</sup> See UCIS, E-VERIFY USER MANUAL 3.3.7 (2008) (E-Verify Responses after Employee Referral to DHS).

<sup>84</sup> *Id.*

or DHS No Show responses as Final Non-Confirmations.<sup>85</sup> Once an employer receives a Final Non-Confirmation, the employer should terminate the employee or face a possible presumption that they knowingly employed an undocumented worker.<sup>86</sup>

### C. IMAGE

The ICE Mutual Agreement between Government and Employees ("IMAGE") program is a voluntary employment verification tool for employers. IMAGE is jointly-managed by ICE and USCIS. The purpose of the program is to "assist employers in targeted sectors to develop a more secure and stable workforce and to enhance fraudulent document awareness through education and training."<sup>87</sup> To participate in the IMAGE program, employers must agree to implement a set of "best employment practices" including the following: 1) use E-Verify for all new hires; 2) establish an internal immigration compliance training program with particular focus and emphasis on completing the Form I-9, detecting fraudulent documents, and using E-Verify; 3) only allow properly trained individuals to verify employment eligibility and authorization and include a secondary review as part of the verification process; 4) schedule annual I-9 audits; 5) create and implement self-reporting procedures that will notify ICE of violations or deficiencies discovered during the verification process; 6) develop procedures for responding to SSA no-match letters; 7) establish a company tip line to allow employees to report allegations of possible unauthorized employment; 8) ensure safeguards are put into place to prevent the use of the verification process for unlawful discrimination; 9) evaluate your contractors and subcontractors ability to meet the IMAGE best employment practices; and 10) submit an annual report of the IMAGE program's effectiveness to ICE.<sup>88</sup> In June 2008, an "associate member" category was added to the IMAGE program. The associate membership allows employers to phase in certain aspects of the best employment practices, including deferring the I-9 audit

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<sup>85</sup> *Id.*

<sup>86</sup> See UCIS, E-VERIFY MEMORANDUM OF UNDERSTANDING (Oct. 10, 2008), <http://www.uscis.gov/files/natedocuments/MOU.pdf>, Article II(C)(6), ("Employer[s] must notify DHS if they continue to employ a worker after receiving a final non-confirmation... Employer[s] are also subject to civil penalties ranging from \$500 to \$1000 for each failure to notify DHS.").

<sup>87</sup> See U.S. Immigration and Customs Enforcement, IMAGE <http://www.ice.gov/partners/opaimage/index.htm>. (last visited March 28, 2009).

<sup>88</sup> *Id.*

requirements and the annual reporting requirements for up to two years.<sup>89</sup>

## IX. PITFALLS AND SHORTCOMINGS IN VERIFICATION SYSTEMS

As briefly discussed above, the currently offered verification systems are far from perfect. They represent an improvement over the Form I-9 paper review system, but they lack the reliability and substance that is needed to help employers more effectively weed out undocumented workers.

Many critics of the verification databases operated by the federal government, particularly E-Verify, argue that the systems are not reliable and should not be used as a basis for determining eligibility to work in the United States. E-Verify is known to have a significant number of errors due to human transmission of data, confusion over spellings of last names, and the use of hyphenated last names.<sup>90</sup> These errors are more commonly seen in data related to foreign-born employees.<sup>91</sup>

Document fraud and identity theft are also issues of concern. Despite the existence of multiple verification systems and increased governmental enforcement, fraud continues to be a problem for employers. Document fraud may take many forms ranging from the use of stolen identity documents, to fraudulent birth certificates, to fraudulent or stolen Social Security cards, or other fraudulent employment authorization documents. To further exacerbate the issue, today's verification systems may not catch fraud that results from workers using valid identification documents of a person authorized to work in the United States.

Currently, employers are not expected to be document experts. Even with increasing technological advancements, detecting fraudulent documents remains extremely difficult for employers. ICE has investigated current document fraud trends and publicized the

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<sup>89</sup> *Id.*

<sup>90</sup> Error rates for non-citizens are as high as ten percent. See Ogletree Deakins, *To E or Not to E? Should an Employer Use E-Verify?*, Sept. 24, 2008, <http://www.ogletreedeakins.com/publications/index.cfm>.

<sup>91</sup> *Pros and Cons of Using E-Verify to Determine Employment Eligibility*, LABOR AND EMPLOYMENT LAW UPDATE, (Squire, Sanders & Dempsey, LLP) August 20, 2008, at 7, available at [www.lexology.com/library/document/ashx?g=70fdd675-cff2-47cf-819d-68f6f453350#page=7](http://www.lexology.com/library/document/ashx?g=70fdd675-cff2-47cf-819d-68f6f453350#page=7)

information so that employers can prevent themselves from inadvertently facilitating this type of illegal activity.<sup>92</sup> To address identity fraud concerns, DHS added a photo screening tool to the E-Verify system in 2008. This tool allows employers to view certain immigration photographs (Employment Authorization Documents and Permanent Residence Cards) and compare these photographs to the new hire. Similar plans to link visa and passport photographs are underway.<sup>93</sup> It is believed that these additions to the system will quickly alert employers to identity or document fraud thereby preventing unauthorized workers from entering the workforce.

## X. RECOMMENDATIONS TO BUSINESSES

With state and federal laws changing, as well as increased fines and enforcement efforts, businesses must become more knowledgeable and increase their understanding of immigration laws. Past practices will no longer pass muster – indeed, reliance on such actions poses significant threats to businesses. Still, employers must balance the need for more accuracy against potential discrimination lawsuits, loss of eligible workers, and possible co-employment allegations.

### A. USE VERIFICATION SYSTEMS TO VALIDATE THE EMPLOYMENT ELIGIBILITY OF NEW HIRES

While not perfect, the current Federal employment verification systems will help weed out a significant number of undocumented immigrants from the workforce. Over the past year, several enhancements to the E-Verify system have already increased its effectiveness.<sup>94</sup> In addition, there are plans to expand the E-Verify

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<sup>92</sup> UCIS, KNOW YOUR WORKFORCE: THE KEY TO IMMIGRATION COMPLIANCE, WORKSITE ENFORCEMENT ADVISORY (Feb. 2008), [http://www.ice.gov/doclib/pi/news/newsreleases/articles/wse\\_advisory\\_v27.pdf](http://www.ice.gov/doclib/pi/news/newsreleases/articles/wse_advisory_v27.pdf).

<sup>93</sup> Eventually USCIS plans to use the photo screening tool to link all Form I-9 identity documents to the E-Verify system. See *Electronic Employment Verification Systems: Needed Safeguards to Protect Privacy and Prevent Misuse: Hearing Before the Subcomm. On Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. On the Judiciary*, 110<sup>th</sup> Cong. (2008) (statement of Jonathan Scharfen, USCIS Acting Director).

<sup>94</sup> *Id.* Enhancements include an automated registration process, system changes to reduce typographical errors, a photo screening tool process, establishment of a Monitoring and Compliance unit, automatic system checks against USCIS naturalization records, addition of real time arrival information

photo screening process and several agencies are in discussions about setting up data sharing initiatives.<sup>95</sup> These efforts will increase the reliability and effectiveness of E-Verify.<sup>96</sup> Accordingly, employers that utilize this system and other similar verification systems should experience reduced undocumented workers in the active workforce and in the job applicant pool. Potential undocumented workers will be discouraged from applying for jobs with employers that use a federal employment verification system. This reduction will help minimize an employer's exposure to business interruption issues resulting from ICE raids.

#### B. *DON'T TRY TO CONTRACT OUT YOUR PROBLEMS*

Employers are not required to complete or retain I-9 forms for contract workers. Contractor employers are responsible for retaining these records for their employees. However, employers may be found liable under the IRCA if the employer is found to have known (or have reason to know) that contract employees were not authorized to work in the United States.<sup>97</sup> Therefore, employers should know their contractors and not turn a blind eye to concerns or suspicious behavior exhibited by contract workers.

To be more precise, employers must examine the past record of potential contractors and be particularly cautious when entering into contractual relationships in areas that are well-known to have high concentrations of undocumented immigrants. Liability for hiring unauthorized employees cannot be avoided by using a contractual arrangement. In fact, if the contract relationship is used in part to avoid such liability, the government may be able to assert the very existence of the contract arrangement as evidence of wrongdoing, and an

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from the Integrated Border Inspection System and a new toll free number for employees to call to contest tentative non-confirmations.

<sup>95</sup> *Id.*

<sup>96</sup> U.S. Citizenship and Immigration Services, *supra* note 82 ("Currently, approximately 96.1 percent of qualified employees are cleared automatically by E-Verify, and 99.6 percent of all work-authorized employees are verified without receiving a tentative nonconfirmation or having to take any corrective action").

<sup>97</sup> See 8 U.S.C.A. § 1324a(4) (2009) ("... a person who uses a contract, subcontract, or exchange . . . to obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien . . . shall be considered to have hired the alien for employment . . .")

employer may be treated as having knowingly hired undocumented workers.<sup>98</sup>

### C. *AVOID THE CO-LIABILITY TRAP*

In this day and age, employers are keenly aware of ICE's new found interest in the employer. They are concerned about the potential impact of hiring unauthorized workers and the negative media spotlight that could bring onto a company. To address these issues, some employers have decided to review the I-9s of contract employees and act more like an employer when dealing with contract workers. This approach is a mistake and will not help alleviate the problems caused by hiring unauthorized workers. Instead, this approach exposes an employer to possible co-employment and co-liability charges.

If employers are concerned about the employment eligibility of contract workers, they should take preventative steps to ensure that the contracting company is aware of the specific standards they require for anyone working at a company site. For example, some third-party companies offer verification and training services for employers. These services include performing background checks, criminal record checks, credit checks, and employment eligibility and authorization checks on contract workers before they step foot on the company's property.<sup>99</sup> These preventative steps help flag any potential worker that fails to meet the specific criteria required by the company or contractors. By allowing a third-party to conduct the checks, the company maintains the proper distance and does not overstep any boundaries when dealing with contractors. This system is also very helpful to ensure that contractors have received the proper training required to perform specific tasks at the worksite.

### D. *MAKE COMPLIANCE A CONTRACT REQUIREMENT*

Employers should review their contract language and make sure they have adequately covered compliance with immigration laws. Some businesses have taken an additional step and required contractors to certify that they are using a federally-sponsored employment

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<sup>98</sup> *Id.*

<sup>99</sup> In some instances, contract workers cannot report to an employer's worksite until they have completed all steps related to employment authorization and training. Once these steps are completed, contract workers are issued a special badge that indicates they are approved to work at a particular site.

verification system, such as E-Verify, as part of the contract. This certification clause is often linked to a company's right to audit the contractor.

Employers can also experience significant costs while working to resolve immigration violations. To help offset some of these costs, employers should insist that indemnification and insurance clauses allow employers to recover any costs related to ICE raids and subsequent business interruption issues including but not limited to costs related to securing new workers.

#### *E. CHECK UP ON CONTRACTORS*

Employers should perform random audits to check on whether contractors are following the immigration requirements included in the business contracts. These audits may be conducted by internal staff or may be outsourced to private companies. If outsourced, private companies generally enter into contracts with an employer's contractor to gain access to the contractor's employment records. These records are then checked against the E-Verify database. In addition, private companies evaluate and review all I-9 paperwork for errors. The results of the audit are reported back to the contractor and the contractor is given a reasonable period of time to correct the errors or validate the verification results. Aggregated results from the audits can be reported back to the employer, but the information should not reveal personally identifiable information about any contract worker.

#### *F. DON'T PLACE CONTRACT WORKERS IN CRITICAL BUSINESS POSITIONS*

Employers should not contract out positions that are critical to business operations. In the event of an ICE raid, employers want to be assured that critical business operations will not be negatively impacted by the possible removal of workers. If employers have assigned critical business roles to contractors, they should make sure that these workers have gone through a reputable employment verification process.

#### *G. GIVE EMPLOYEES AN OPPORTUNITY TO REPORT ABUSE*

Employers should establish an anonymous hotline to report potential employment and immigration violations. If employees are given an opportunity to report concerns or misconduct, they can be the best sources of information for the employer. If an employer learns of an issue through this process, he should take appropriate steps to



address the concern directly with employees and indirectly through the contract employer if contract workers are involved.

## XI. CONCLUSION

In today's environment, businesses face many challenges. Employers must remain aware of issues that may impact their daily lives. ICE and other DHS agencies will continue to focus on making enforcement efforts a priority in the new administration. Accordingly, to guard against business interruption and protect their company from the harmful effects of an ICE raid, companies should take steps to screen employees and contract workers before they become a part of the work force.

# **SYMPOSIUM PAPERS**

***THE INS AND OUTS OF THE MODERN PORT:  
WHERE DO WE GO FROM HERE?***

Presented on February 27, 2009 at the University of South  
Carolina School of Law

