Opening Pandora’s Box: Immigration Issues Affecting Labor Lawyers

Authors
Wendy Castor Hess, Esq. – Goldblum & Hess*
Jonathan Grode, Esq. – Goldblum & Hess**

In Greek mythology, Pandora was the first woman on earth. Created by Zeus and the other Gods, she was endowed with many gifts, including beauty, speech, deceit and a great curiosity. Knowing that Pandora’s curiosity was greater than her obedience, the Gods gave her a box, telling her that it contained special gifts from them but sternly admonishing her not to open it. As to be expected, Pandora did open the box. Although she frantically tried to close it, her efforts were to no avail for the damage had already been done. The contents of the box, all of the evils of the world, had escaped and could not be contained.

Since November 6, 1986 and the requirement that every employer complete Form I-9, Employment Eligibility Verification, on behalf of all employees, each U.S. business owner unknowingly and unwitting opens that very same Pandora’s box on a daily basis, inviting into its workplace a host of “evils”, disguised in the form of federal and state agencies. To the side of such governmental agencies sits another potential “evil”—plaintiff’s attorneys, wearing the smile of a Cheshire cat, as they compute the financial possibilities of class action and/or RICO lawsuits. Next to them sits defense counsel, wondering how one piece of paper, one single action (or failure to act) by their client has cracked open a Pandora’s box that they did not know even existed, a box big enough to put their client out of business or, worse yet, into jail.

In addition to the cracking open of Pandora’s box by virtue of the mandatory requirement that employers complete Form I-9, employers who choose to hire foreign workers further crack open that very box. Certainly, when a company decides to hire a foreign worker, it is not a conscious effort to undercut the means of U.S. workers to find employment in the United States or a desire to acquire inexpensive labor. Rather, such hiring decisions are generally driven by a need to fill a void in the employer’s labor force. When done correctly, everyone benefits—the employer obtains the workers it requires, the foreign worker gains lawful status in the United States and the national economy continues to grow. However, due to the complexity of the ever-changing immigration laws, an area which is fraught with

---

1 Please note that this article is an updated and revised version of original publication by the authors: Representing Corporate Clients: A New Union Between Labor, Immigration and Criminal Counsel. The Labor Lawyer: A Journal of Ideas and Developments in Labor and Employment Law, Vol. 24, Number 2, p.223, Fall 2008.

* Wendy Castor Hess is founding partner in the Immigration law firm of Goldblum & Hess and a frequent national speaker on business immigration issues in both English and Spanish. Ms. Hess has been involved in the representation of both employers and foreign nationals since the passage of the Immigration Reform and Control Act (IRCA) in 1986. She is a past Chair of the Philadelphia Chapter of the American Immigration Lawyers Association (AILA), a former Attorney with the U.S. Department of Justice, Board of Immigration Appeals, a columnist for Al Dia Spanish Newspaper and serves as Immigration counsel to the Mexican Consulate in Philadelphia. Currently, she serves as Chair of the of the Immigration Committee for the Philadelphia Bar Association, as Co-Vice Chair of the Immigration Section of the Pennsylvania Bar Association and as President of HIAS Pennsylvania. She is listed in The International Who’s Who of Corporate Immigration Lawyers (www.whoswholegal.com) and in Best (Immigration) Lawyers in America (www.bestlawyers.com).

** Jonathan Grode is a Senior Associate at Goldblum & Hess with over 13 years of immigration experience and currently heads Goldblum & Hess’ Nonimmigrant Team and possesses significant experience dealing with DOL and DHS enforcement actions. Mr. Grode, who is Co-Chair of the American Bar Association’s (ABA) Labor and Employment Immigration Law Committee and Co-Chair of the New Members Division of AILA’s Philadelphia Chapter, teaches both Business Immigration Law and Advising Global Corporations as an Adjunct Professor at Temple University’s Beasley School of Law. He has published extensively and is a regular presenter at national and international ABA conferences as well as AILA seminars and meetings.
inconsistencies on both a policy and practical level, many employers who do seek to comply with the law ultimately wind up in violation of the same. For this reason, employers are in great need of legal guidance and diligent attention, whether it comes from labor counsel or immigration counsel. This article will summarize and “issue spot” areas that employment and labor counsel should be most aware of in order to assist clients in avoiding the perils that arise from fully opening Pandora’s treacherous box.

Until recently, labor and immigration counsel were both faced with the same dilemma: how to advise a corporate client to comply with the immigration laws without running afoul of any employment laws, especially those dealing with employment discrimination due to race/nationality when hiring and employing foreign workers. Now, however, in light of over a half a decade of criminal charges brought against employers as a result of hiring and/or contracting for the services of illegal foreign workers, spanning across two presidential administrations, a new “partner” has been introduced into this previously two person union: criminal counsel. The addition of this third party, and this third perspective, has become a necessary ingredient for those providing legal counsel to employers if they are to adequately and properly advise their clients in the post 9/11 world—in the new millennium of enhanced immigration violation enforcement.

Prior to delving into this complex cross-section of practice areas, some background into the interplay between employment and immigration law is required. While labor attorneys have always recognized and understood the need to advise employers to avoid any conduct which could be classified as potentially discriminatory under Title VII of the Civil Rights Acts or corresponding state law anti-discrimination provisions, the passage of the Immigration Reform and Control Act of 1986 (IRCA) on November 6, 1986, immediately brought issues of how to advise employers when employing foreign workers into the employment equation. Through IRCA and other immigration law provisions, discussed in detail below, employers not only face the burden of ensuring that their workforce contains no illegal foreign workers, but also confront penalties for engaging in discriminatory employment practices when attempting to decipher the legality of the foreign job applicant.

There is no better case that exemplifies this dichotomy than the plight of Swift and Company, the world’s second largest meat producer. In 2001, Swift executed a settlement (for less than $200,000 and no admission of guilt) with the Department of Justice (DOJ) Office of Special Counsel for Immigration-Related Unfair Employment Practices after the agency brought a law suit against the company for damages in the amount of $2.5 million for discriminating against job applicants believed to be foreign. However, a mere five years later, Swift found it subjected to the largest employment immigration raid in the history of the United States. The raid resulted in the company losing 40% of its workforce because over 1,250 workers at six different facilities in six different states were almost simultaneously arrested

---

3 Under United States Immigration Law, it is impermissible for an employer to consider foreign appearance, accents or national origin when attempting to fill a vacant or newly created position. See Employment of Aliens, 8 C.F.R. § 274a.1(l)(3) (2008).  
for immigration violations and document fraud. Swift estimated that it suffered $45 million dollars in losses as a result of the federal enforcement action. Swift, in a mere half-decade, fell fate to a seemingly double standard executed by two independent federal offices. Fortunately, for Swift, due in large part to its participation in the former Basic Pilot Program, now called E-Verify, (discussed in detail below under Section III), neither civil nor criminal sanctions were levied against the company as a result of this historic raid. However, under the Obama Administration’s enhanced Immigration and Customs Enforcement (ICE) initiative, whereby the government is targeting employers of unauthorized workers, instead of primarily the workers themselves, a similar scenario today could have potentially resulted in severe criminal charges being levied against the company and its officers.

The restructuring of the Immigration and Naturalization Service (INS) into three divisions and the creation of ICE in March 2003, not only laid the foundation for enhanced enforcement actions against foreign workers such as the Swift raid in 2006, but for the first time witnessed concentrated efforts by the federal government to bring criminal sanctions against employers who either knew or possessed constructive knowledge that they employed or contracted for the services of illegal foreign workers. For example, in 2006 the IFCO Systems North America raid saw the detention of 1,000 foreign workers and, significantly, criminal charges and convictions against five IFCO managers. The intentions of the current ICE regime are best summarized by Julie Myers, then Assistant Secretary of DHS for ICE, who stated in the summer of 2007 that:

> Our current enforcement efforts far surpass the practices of the former Immigration and Naturalization Service, which involved lengthy paper reviews and nominal fines . . . . While these criminal investigations are complex and can take time, this approach makes penalties more than simply the cost of doing business. Violators face prosecution for federal crimes that include hiring illegal aliens, harboring illegal aliens, identity or document fraud and Social Security fraud. They face the very real possibility of consequences to their freedom as well as to their finances.

While under the Obama administration the number of worksite raids has decreased, the amount of enforcement activities against employers has increased dramatically. In fact, in 2008, only 135 of the 6,000 arrests related to worksite enforcement were employers. In 2010, that same number jumped to 180, an almost 50% increase from January 2009. Even the most recent data suggests that this trend has continued at an unprecedented pace. As of September 17, 2011, ICE had conducted over 3,000 employer investigations during fiscal year 2011 (Oct. 1, 2010 – Oct. 1, 2011) which signaled an over 150% increase from those same numbers from fiscal year 2008. Such investigations led to 331 “Final

---

11 Myers, supra note 12.
14 Statement of John Morton, Director, U.S. Immigration and Customs Enforcement, before the House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement: “Oversight Hearing on U.S. Immigration and Customs
Orders” with over $9 million in fines levied against employers. These figures dwarf those for 2008, where only 18 final orders were issued with fines totaling $675,000.\(^\text{15}\)

This ongoing change in federal enforcement policy has ushered in a new era with respect to advising employers when hiring foreign workers. In this new era, immigration and employment lawyers no longer best serve their clients under investigation for immigration violations by merely brokering deals to minimize financial harm. Rather, any deal must also contemplate potential criminal charges and factor in how clients may, if at all possible, be protected from facing the same. Thus, this is the dawn of a new union where an understanding of criminal liability is required to prevent corporate executives, directors, and human resources managers from jeopardizing their own freedom.

In light of this emerging enforcement environment, this article discusses in Section I the regulatory employment verification obligations currently held by almost all employers in the United States. Section II covers the civil liability for employers associated with violations of immigration laws. Section III addresses criminal liability and convictions recently levied against employers, the consequences of such federal law enforcement actions, and why it is imperative that criminal counsel be introduced into the employment law paradigm. Section IV discusses, in detail, which specific actions employers can take to insulate and protect themselves from civil and criminal liability in this era of enhanced immigration law enforcement. Section V discusses, recent state law initiatives, including currently pending and proposed legislation in the Commonwealth of Pennsylvania, that further complicates this paradigm. Finally, Section VI briefly addresses why immigration law reform is required to even the “playing field” for both employers and foreign workers in the future.

**Section I: Employer Obligations**

IRCA effectively shifted the burden of policing the legal status of the U.S. workforce from the government to the private sector. Codified under 8 C.F.R. § 274a, IRCA necessitates that all employers assume responsibility for ensuring the employment eligibility of their personnel hired after November 6, 1986.\(^\text{16}\) The specific requirements and procedures associated with hiring any worker are outlined in detail in 8 C.F.R. § 274a.2 entitled “Verification of Employment Eligibility.” It is the employer’s responsibility to request a set list of documents from prospective employees to verify that worker’s identity and ability to legally accept employment in the U.S. through the use of Form I-9.\(^\text{17}\) The documentation cited on list A of Form I-9, including but not limited to a U.S. passport or a Permanent Resident Card, establishes both identity and employment eligibility.\(^\text{18}\) By contrast, the documentation cited on list B, such as a driver’s license, establishes only identity\(^\text{19}\) and the documentation cited on list C, such as a birth certificate, establishes only employment eligibility.\(^\text{20}\) It is important to remember that in order to avoid any claims of potential employment discrimination, employers are not permitted to request specific documentation. Under 8 U.S.C.A. § 1324b, entitled Unfair Immigration-Related Employment Practices, employers with three employees or more are expressly prohibited from discriminating against employees in the verification process based on citizenship or national origin.\(^\text{21}\)

---

\(^\text{15}\) Id. 
\(^\text{16}\) Employment of Aliens, 8 C.F.R. § 274a (2008). 
\(^\text{17}\) Id. § 274a.2(b)(1). 
\(^\text{18}\) Id. § 274a.2(b)(1)(v)(A). 
\(^\text{19}\) Id. § 274a.2(b)(1)(v)(B). 
\(^\text{20}\) Id. § 274a.2(b)(1)(v)(C). 
Importantly, Form I-9 requires two separate attestations as to the veracity of the employee’s identity and eligibility to work. The first section requires the employee to attest, under penalty of perjury of law, that he/she is a citizen, lawful permanent resident, or alien authorized to work in the U.S. temporarily and must be completed by the employee at the time of hire. The second section requires the employer to attest that it has examined the original (physical) documents presented by the employee to verify identity and eligibility to work. Such verification and completion of the employer’s section must occur and be completed within three days of the employee’s start date. If the employee submits a document to evidence his/her eligibility for employment and this particular document indicates employment authorization for a finite period of time (such as an Employment Authorization Card associated with completing a degree course of study), in most instances, the employer is required to note the date of expiration on Form I-9 and re-verify the employee’s eligibility at such time.

Employers are required to retain the employee’s Form I-9 for three years from the date of hire or one year after the employee’s last day of work, whichever is later. The actual Form I-9 may be stored manually or by microfilm, microfiche, or electronically. Under IRCA, specific exemptions from completing Form I-9 exist for employers of independent contractors and sporadic domestic workers. However, as recent investigations and settlements reflect, employers are not protected from sanctions and liability if they are aware that the contractors they are using are not authorized to legally work in the U.S.

Even after the employer has completed Form I-9 for its new employee, the employer is not by any means immune from or relieved of its duty to ensure the legality of its workforce. There are two primary circumstances where an employer’s duty to further facilitate the discovery of a worker’s eligibility for employment is subsequently required. As discussed above, IRCA places an affirmative responsibility on employers to ensure that their workforce is in valid status and remains in valid status. If an employer either learns directly, or constructively that a particular employee may not possess employment eligibility, it may trigger an obligation to re-verify the Form I-9 or terminate the employee. Constructive knowledge in the employment verification context is defined at 8 C.F.R. § 274a.1(j) as follows:

[K]nowledge 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

---

23 8 C.F.R. § 274a.2(b)(1)(i)(B).
24 8 C.F.R. §§ 274a.2(b)(1)(ii), (iv). Note that if the employment is for less than a three-day duration, this secondary document inspection must occur at the time of hire. See id. § 274a.2(b)(1)(iii).
25 8 C.F.R. § 274a.2(b)(1)(vii). Please note: The re-verification requirement does not apply to those workers who presented conditional or regular permanent resident cards (green cards).
26 8 C.F.R. § 274a.2(c)(2).
27 8 C.F.R. § 274a.2(b)(2)(ii).
28 8 C.F.R. § 274a.1(l).
30 8 C.F.R. § 274a.2(b)(1)(vii) (2008); Id. § 274a.1(l)(1).
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 [from the employee, him/herself or a government agency such as DHS or the SSA].

Within the constructive knowledge framework, there is a second affirmative responsibility on the employer after the initial completion of Form I-9 is revealed – that is the failure “to take reasonable steps after receiving information indicating that the employee may be an alien who is not employment authorized.”32 Social Security “no-match” letters, once again33, are the most common-place notice provided by a government agency in this regard and are generated when the name of the employee and the Social Security Number (SSN) associated with that employee do not comport with the Social Security Administration (SSA) database. The Justice Department has released an FAQ for employers regarding the return of no-match letters, stating in part, that the receipt of a no-match letter in and of itself does not constitute constructive knowledge, but how and when such information does remains unclear.34 At this point and in light of the fact that the DHS regulations pertaining to an employer’s affirmative responsibilities under the temporarily instituted “safe-harbor” procedures were repealed, it is also unclear what an employer’s current duties are when a no-match letter is issued.35 However, it is safe to assume that the SSA now seeks more than the simple responsibility of ensuring that there are no typographical errors on the SSA documentation and terminating the employee if she/he was unable to resolve the discrepancy. As discussed below, under the best practices section, incorporating at least some of the concepts provided under the safe-harbor procedure will afford some protection and help mitigate any unintentional violations. This approach is corroborated by the FAQ from the Justice Department, which states that, the employer, after reviewing the employee’s personnel file, should advise the employee to contact her/his local SSA office and give a reasonable period of time for the employee to address the inconsistency.36

Similar affirmative actions by the employer are also mandated if notification is received from DHS that a worker does not possess employment authorization; however, such communication from this agency is far less frequent than from the SSA at the height of the no-match era, where it is estimated that each year “more than 100,000 no match letters [were] issued.”37 Irrespective of the enhanced criminal immigration violation enforcement actions executed by ICE under the Obama administration, as described above and discussed further below, from a regulatory perspective, the burden on employers to monitor and ensure that they employ a completely legal workforce is more onerous than ever and

---

31 8 C.F.R. § 274a.1(l) (2008). Note that the filing of an Application for Alien Labor Certification on behalf of an unauthorized foreign worker with the U.S. Department of Labor is deemed constructive knowledge of said status. Furthermore, the mere request by a foreign worker to file an Application for Alien Labor Certification is also considered constructive knowledge of same.
32 Id.
33 From Fall 2007 through Spring 2011, the SSA ceased issuing no match letters based on litigation surrounding amendments to the regulations found at 8 C.F.R. § 274a.1(1)(2)(i)(A) which attempted to codify the no match process and related employer obligations.
36 See Frequently Asked Questions About Name/Social Security Number “No-Matches”. www.justice.gov/crt/about/osc/pdf/publications/SSA/FAQs.pdf (last visited Feb. 5, 2012). Please note: this FAQ suggests that 120 days is a reasonable period of time for letting an employee address the no-match letter. However, this is not a regulatory requirement and should not be relied upon as strict guidance from the government.
expected to continue to grow. The responsibilities of today’s employers in the U.S. are certainly a far cry from the pre-IRCA days where an employer could have a workforce comprised of illegal workers without any consequence.38

Section II: Civil Liability

The civil liability penalties associated with a failure to comply with the obligations outlined in 8 C.F.R. § 274a are cited with specific detail in subsection 10.39 Either the DHS or an administrative law judge can assess civil penalties.40 When determining a penalty against an employer, “a finding of more than one violation in the course of a single proceeding or determination [is] counted as a single offense.”41 “However, a single offense will include penalties for each unauthorized [foreign worker], who is determined to have been knowingly hired.”42 The following charts provide a simple guide to the civil fines that can be levied against employers:

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Hiring Unauthorized Aliens First Offense</td>
<td>$275 ≤ $2,200 / unauthorized alien</td>
<td>$375 ≤ $3,200 / unauthorized alien</td>
</tr>
<tr>
<td>Hiring Unauthorized Aliens Second Offense</td>
<td>$2,200 ≤ $5,500 / unauthorized alien</td>
<td>$3,200 ≤ $6,500 / unauthorized alien</td>
</tr>
<tr>
<td>Hiring Unauthorized Aliens More than 2 Offenses</td>
<td>$3,300 ≤ $11,000 / unauthorized alien</td>
<td>$4,300 ≤ $16,000 / unauthorized alien</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Form I-9 Violation</td>
<td>$100 ≤ $1,000</td>
<td>$110 ≤ $1,100</td>
</tr>
</tbody>
</table>

With respect to Form I-9 violations, in determining the size of the penalty the following factors are considered: 1) the size of the employer’s business; 2) the good faith efforts of the employer; 3) the seriousness of the violation; 4) whether or not the individual was an unauthorized worker; and, 5) the history of previous violations by the employer.43

Section III: Criminal Liability: A Brave New World

As discussed above, with the separation of investigative and adjudication functions within the Immigration Service through the dissolution of INS and the creation of the U.S. Citizenship and Immigration Services (USCIS) and ICE, a new enforcement mandate was enacted. This clear ICE mandate – to find, arrest and remove those who are illegally present in the United States and to punish those employers who hire them – requires ICE to stretch beyond the civil penalties outlined in Section II above and utilized primarily by INS for close to twenty years after the passage of IRCA. Instead, ICE has turned to the use of criminal sanctions in order to create a deterrence effect on employers and to ensure the curtailment of illegal employment.

39 Penalties, 8 C.F.R. § 274a.10(b) (2008).
40 Id.
41 Id.
42 Id.
43 Id. § 274a.10(b)(2)(i)-(v).
While employers facing criminal charges were almost unheard of prior to the creation of ICE, the Obama administration has taken over right where the Bush administration left off by increasing the number of worksite investigations and targeted efforts against employers. In fiscal year 2010 (running from Oct. 1, 2009 to Oct. 1, 2010), ICE brought criminal charges against 180 business owners, managers and supervisors including HR personnel, which represented over a 50% increase from the previous fiscal year and an almost 100% increase over the number of similar arrests in 2007.44 While this may not seem staggering from a statistical perspective, it does represent a dramatic up tick over previous levels and serves as a strong indicator of what employer’s should expect and prepare themselves for in the years to come.

This aggressive targeting, generally through long and careful criminal investigations based on concrete evidence rather than random spot-checking, has forced both immigration and employment counsel to sit up and quickly contact criminal counsel. Something as simple and seemingly innocuous as an Office of Fraud Detection and National Security (FDNS) site visit for an approved H-1B visa petition could possibly ignite a full-fledged ICE investigation if suspicious behavior is detected.45 A call from a disgruntled employee, that previously may have been ignored by DHS can now serve as the touchstone for not only an agency wide enforcement effort but also an interagency wide enforcement effort, especially if the employee also files Wage and Hour violation charges with the U.S. Department of Labor.46 Clearly, regardless of how or why an investigation into corporate employment practices occurs, this tactical change has necessitated that company management change their hiring and documentation procedures. While in the past the threat of civil sanctions was almost a cost of doing business in certain industries, today’s threat of criminal charges and custodial sentences has fostered the need for risk adverse behavior that places individual indemnification far above perceived profit margins.

Indeed, ICE is quite proud of its ever-increasing enforcement record signaling its importance and impact as a deterrent mechanism. The ICE website contains an entire section dedicated to news releases detailing ICE activities with sortable tables that allows users to view various enforcement activities, including those levied against employers.47 As an illustrative example of the increased criminal actions brought against employers (worksite), the following is a partial list of ICE workplace violations during the first six months of fiscal year 2012:

<table>
<thead>
<tr>
<th>DATE</th>
<th>LOCATION</th>
<th>TITLE</th>
</tr>
</thead>
<tbody>
<tr>
<td>2/22/2012</td>
<td>ATLANTA, GA</td>
<td>3 Atlanta business owners sentenced in tax, immigration fraud case</td>
</tr>
</tbody>
</table>

---

44 See News Release, ICE, LA-area Furniture Company Executive Gets Prison Time for Hiring Illegal Workers (March 8, 2011).
45 USCIS created FDNS in 2004. Over the past seven years, the Vermont Service Center alone has transferred over 20,000 cases to FDNS. While most of these investigations are random and often do not result in any further action by USCIS or ICE, the fact that government inspectors will visit listed worksites is cause for concern. See White, Bob & Pivec, Marc Practice Pointer: FDNS Commences Audit of H-1B Program, Including Unannounced Site Visits to H-1B Employers and Their Clients. AILA InfoNet Doc. 09100123 (posted Oct. 1, 2009) for more information about the role and function of FDNS and how employers can best protect themselves during a site visit.
47 U.S. Immigration and Customs Enforcement, Worksite Enforcement News Releases, http://www.ice.gov/news/releases/index.htm (last visited Feb 26, 2012). Note that such list does not take into account many workplace violations that were found as a result of a “consent” agreement entered into between employers and ICE.
48 Id. Please note: the title section column will link to the original news release published by ICE.
What employers must realize is that there are far more vehicles for criminal prosecution that exist in the employment of unauthorized workers than simply the misdemeanor charges found at 8 C.F.R. § 274a.10(a), as the chart above clearly indicates. 8 C.F.R. § 274a.10(a) contains penalties that amount to nothing more than a maximum fine of $3,000 for each violation and no more than six months imprisonment for engaging in a pattern or practice in violation of this regulation.49 However, with the increased zeal of ICE activity, employers and those who provide them legal counsel must be aware of the fact that felony charges such as “harboring certain aliens,”50 document fraud,51 racketeering,52 and money laundering53 are not only possible, but certainly a logical consequence for violations that may not even be deemed egregious by legacy INS standards.

The nuances of the manner in which the government is now using these criminal proceedings against employers is very complex and, as a result, it is not only advisable to immediately engage the services of criminal counsel when charges are actually levied against an employer, but importantly when employers continually attempt to ensure workplace compliance. While the standard mens rea for most of these offenses requires that the employer “knew or recklessly disregarded” that it employed undocumented workers, which can be difficult to prove beyond a reasonable doubt, the enhanced mechanism for evidencing constructive knowledge addressed above makes the threat of felony charges something that cannot and should not be ignored. As discussed in Section IV below, today’s climate of increased enforcement activity necessitates that employers take proactive measures to ensure that they employ and contract for the services of only employment authorized workers.

---

49 8 C.F.R. § 274a.10(a) (2008).
A full treatise on the criminal sanctions associated with the employment of unauthorized foreign workers is required to truly apprise those that counsel employers on the nuances of this emerging field. However, it is recommended that when faced with an ICE action (or even DOL Wage and Hour investigation), employers attempt to cooperate fully with the government to avoid additional investigation into the practices outside of immigration compliance and mitigate any violations that have occurred. Merely being aware of the felony “harboring” charges that can be brought against an employer lends perspective to the severity of the consequences that could befall an employer who hires an undocumented worker. The elements of a “harboring” offense, in pertinent part, apply when a person (or entity):

- Knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

- Knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;

- Engages in any conspiracy to commit any of the preceding acts.

In essence, “harboring” in the employment context can be as simple as hiring and employing a foreign worker while knowing or recklessly disregarding the fact that he/she is unauthorized as well as contracting workers under the same circumstances. The maximum penalty associated with a violation of the harboring regulations is five years imprisonment for each alien harbored, unless “the offense was done for the purpose of commercial advantage or private financial gain,” in which case the maximum penalty is ten years imprisonment. Clearly, the “cost of doing business” has increased tremendously through ICE’s use of criminal sanctions, and the best way to cut expenditures and even save liberty is through proper planning.

Section IV: What Employers Can and Should Do to Attempt to Insulate Themselves From Both Criminal and Civil Liability

In this present and increasingly troubling enforcement climate, all employers are subject to ICE scrutiny. However, some, more than others, fall within targeted areas of heavier scrutiny and hence...
continue to be the focus of ICE investigations and workplace enforcement actions (as indicated by the chart above). These employers include, but are not limited to, those engaged in agriculture, construction, hospitality, manufacturing, landscaping, restaurants, agencies that provide temporary services, as well as the companies that utilize such services. Some of the investigations that have yielded the largest prosecutorial and alien capture rate are a result of crime tips received from the following sources:

1. The DOL Wage and Hour Division;
2. The Office of Federal Contract Compliance Programs;
3. The Office of Special Counsel for Immigration Related Unfair Employment Practices;
4. The Social Security Administration;
5. A Competitor;
6. A disgruntled current or ex-employee;
7. A union representative, especially if the employer is a non-union shop in a unionized industry; and
8. An arrested employee who gives information to ICE, especially one where the employer refuses to pay back wages, including accrued vacation time, or even “drive time”, which results in over time.61

What has become clear is that in an atmosphere in which employers are now charged with policing the legal status of their employees, the ability of an employer to protect itself against the myriad of possible criminal and civil charges becomes a daunting task. Even the most careful of employers is at risk as many of the documents presented by employees as evidence of their ability to lawfully accept employment in the U.S. are fraudulent. These forged documents are so “good” that sometimes even ICE agents have difficulty telling the real from the false.62 Absent forensic training, employers are not generally capable of vetting the good documents from the bad. For example, an employer may have perfectly documented Forms I-9, attached to which are copies of the original documents examined to establish work eligibility and on their face, the documentation appears to be valid. However, when ICE appears at the door of the company, seizes half of the workforce, and the company’s workflow and productivity are disrupted, the question arises: How could this have been avoided?

Some immigration attorneys who have worked within the field for many years are capable, with the assistance of the ICE manual, of distinguishing proper documentation from forged documentation.63 For example, a Permanent Resident Card presented by a prospective worker stating that the “U.S. Department of Justice” issued it in 2006, when the department had already ceased that function, would be a sure indicator that such an identification was not a truthful and valid document. In addition, a Permanent Resident Card where the foreign national’s picture faces the wrong direction, or the fonts used on the Permanent Resident Card differs within the same document would be another clue that the document offered as evidence of work eligibility was not valid. Some employers, in an effort to protect their places of business, are going the “extra mile” and utilizing outside agencies and counsel to teach them how to better identify fraudulent immigration documents as well as to create specific internal human resources policies reflecting the guidance received in this regard. The importance of seeking

---

62 This is even a problem with the E-Verify system as it has often been asserted that there is no true mechanism for enforcing worksite compliance when an employee uses documents gained as a result of identity theft. See Press Release Press Release, USCIS, “USCIS launches Photo Screening Tool for E-Verify Program,” (Sept. 25, 2007).
proper guidance and creating a strong action plan is imperative when considering the Swift Meatpacking dilemma described above, for overly scrutinizing and mislabeling documentation offered to establish employment eligibility may result in an unlawful discrimination lawsuit.

Methods that employers can and should utilize in order to attempt to insulate themselves from both criminal and civil liability include:

1. **Creating an internal company human resources policy** to prescreen employees prior to hiring which consists of:

   - Creating an employment application that screens for legal status, ensuring that the application clearly states that any false information, particularly as it relates to immigration status/ability to legally accept employment in the U.S., will be absolute grounds for immediate termination.\(^{64}\)

   - Dedicating one person or department at the company responsible for completion and retention of all Forms I-9 and establishing a uniform company-wide policy regarding what documents should be retained as proof that an employee’s status was verified. While one person may hold principal responsibility for performing this task, the “I-9 Manager,” it is important to also train a back-up person in the event that the I-9 Manager is not available and documentation must be produced quickly in the event of an ICE audit.\(^{65}\)

   - Ensuring that the I-9 Manager receives proper training and has a source to go to (such as counsel) when questions arise. For example, it is imperative that this employee knows and understands what to do in the event that a no-match letter is received from the SSA.\(^{66}\)

   - Establishing and ensuring that the employer has a re-verification ticker system in place for all provided I-9 documentation with an expiration date, such as a nonimmigrant visa classification.

   - If there are many branches of the company located within the same geographic area, establishing, if at all possible, a system where names which

---

\(^{64}\) Note that pursuant to INA § 274B(a), it is permissible to ask whether the individual is a U.S. citizen, legal permanent resident (LPR) or has the right to work in the U.S. and the ability to provide such documentation within three days of hire.

\(^{65}\) It is imperative to not allow the employer to delegate the I-9 verification or re-verification process to work site managers who lack a complete understanding of the requirements and system and/or are too busy to pay proper attention to the I-9 process. It is equally imperative that the employer knows not to request specific documents but instead allows the employee to choose which documents to show when completing Form I-9, in accordance with 8 C.F.R. § 274(a), and does not treat one employee differently from another (i.e. Requesting that Latino employees show only a “green card” or U.S. birth certificate but telling “white” employees that they only need to show a driver’s license and social security card).

\(^{66}\) Such training should consist of teaching the I-9 Manager to have an “open eyes” and “open door” policy designed to weed out document fraud. For example, if an employee admits to the I-9 Manager that he/she is using fraudulent documents, such admission should not be covered up. Instead, the employee should be immediately terminated, the personnel file documented accordingly and all those in the hiring chain alerted to this individual’s inability for future employment absent a cure of his/her illegal status. In addition, the employer should institute a policy to deal with “tips” received from anonymous sources that assert that certain employees are not legally permitted to work in the U.S. Investigations of such tips require a careful and delicate balance of an employee’s rights versus the employer’s need to know and protect itself from allegations of I-9 violations or even worse, a full-blown workplace enforcement action.
appear on any social security no match list are shared with other HR offices to ensure that unauthorized workers are not jumping from one division to another when they are terminated due to fraudulent documents/lack of documents.

- Reviewing all completed Forms I-9 for accuracy one month after the time of hire to ensure no errors have occurred in the original completion of the Form. If an error is discovered ensuring that it is corrected and the I-9 Form is initialed and dated accordingly (never back dated).

- Reviewing all personnel files for individuals requesting the employer to pursue labor certification on his/her behalf. In such case, the I-9 Manager should pay particular attention to the I-9 record for if the employee has required sponsorship, but the I-9 file indicates that he/she is a U.S. citizen or a legal permanent resident (LPR), the employer is now on notice that there is a discrepancy in the records and the employee’s status is in question.67

- If the employer uses temporary employment agencies, corporate counsel should draft strongly worded indemnification agreements regarding the use of unauthorized workers and conduct due diligence investigations into the reputation and attestations made by the agency.68

2. Creating an outside audit procedure. As all of the above cases and empirical evidence indicates, company owners, supervisory personnel, and their HR managers are being held liable, in criminal as well as in civil lawsuits, for the failure to correctly complete Form I-9 and/or knowingly hiring/continuing to hire unauthorized workers. Thus, company owners should not assume that their I-9 Manager, however well-meaning, is correctly completing and retaining Forms I-9 on behalf of the company. For this reason, it is critical that company owners review, at least on a yearly basis, all Forms I-9 with both their I-9 Manager and immigration/labor counsel. An outside audit should be performed well before a letter arrives from ICE or a “visit” occurs. During such audit, counsel should ensure that the Forms I-9 were properly and fully completed and copies of the documents used to satisfy the I-9 requirements are attached to the individual Forms I-9. Counsel should then examine these documents to ensure that they are indeed, legally permitted documents. In the face of an ICE investigation, keeping and having readily available complete copies of all documents offered to demonstrate I-9 employment eligibility not only demonstrates to the agency that the employer utilized additional means to ensure the legality of its workforce, but also, in some respects, limits employer liability.

3. Utilizing government programs such as E-Verify, IMAGE, or SSNVS. Authorized by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) in 1996, E-Verify

---

68 Such indemnification agreements may include language requiring the temporary employment agency to allow the employer to inspect its Forms I-9s upon request. ICE has informally stated (and through its agreement with Wal-Mart formally required) that this would be a helpful procedure to evidence a company’s full compliance with the immigration laws. Be aware, however, that this is a hot issue in both immigration and labor law because it is an argument that works both for and against the employer. While arguably mitigating against an immigration violation, it potentially shifts the burden of I-9 compliance onto an employer who does not have control over the employees of the contractor/temporary agency. See ICE, Wal-Mart Reach $11 Million Settlement, supra note 24.
went online in 2004 and is currently a voluntary electronic employment eligibility verification system operated by DHS in partnership with the SSA. It is designed to ensure all of an employer’s workers’ names and social security numbers match and that all of an employer’s non-citizen workers are authorized for employment. In theory, good-faith participation in E-Verify will indemnify an employer from potential civil and criminal liability with respect to the hiring of illegal workers. In some respects, E-Verify shifts the burden of employment verification back to the government. However, the E-Verify program does not come without detriment as even the DHS itself admits that about five percent of all workers who are checked by the system cannot automatically establish that they are authorized to work, and two percent of authorized workers do not receive an automatic “green light.” Although the E-Verify system has mechanisms in place where flagged workers are provided the opportunity to rectify unintentional mismatches without the threat of losing their employment, the time, effort, and attention required to correct such an error can be costly and frustrating. Furthermore, creating an electronic trail certainly makes potential ICE preliminary investigations into employer worksite compliance more accessible – which is tantamount to inviting the proverbial fox into the chicken coop. Finally, E-Verify, for all of its promised benefits, still does not alleviate all of the problems associated with identity fraud.

In registering for E-Verify, an employer must execute a Memoranda of Understanding (MOU), which creates obligations for the employer with both DHS and SSA. These obligations, in part, necessitate that once a participating member of E-Verify, the employer will verify the employment eligibility of all new hires within three days of hire. In addition, and problematically, the E-Verify system is not permitted to be used to check the status of existing employees or prospective employees.

It is clearly the hope and intention of the government that E-Verify will replace the current I-9 system in the not-so-distant future, as evidenced by the fact that most immigration reform bills introduced in the summer of 2007 before the House and Senate included provisions that would have mandated the use of E-Verify by all employers. However, notwithstanding the failed enactment of any immigration reform bill during 2007, under certain circumstances, today’s employers may not have a choice as to whether or not they use E-Verify. These circumstances include the following:

- Federal contracts which increasingly are requiring E-Verify registration as a prerequisite to the granting/awarding of a contract. In fact, as a result of the

---

71 Id.
Executive Order by President Bush dated June 9, 2008 amending Executive Order 12989, all federal departments and agencies contracting with private employers must ensure that the employer is registered and actively participating with E-verify. 76

- Companies whose foreign workers hold degrees in the fields of science, technology, engineering, and mathematics and wish or need (because of H-1B visa unavailability) to obtain a 17-month extension of the employee’s optional practical training after the completion of a corresponding course of study, must be enrolled in E-Verify. 77

- In 41 states, almost 200 bills related to worksite enforcement have been proposed over the past seven years. With the recent Supreme Court decision validating Legal Arizona Workers Act which uses E-Verify as a means of punishing employers for repeatedly hiring undocumented workers, the “Pandora’s Box” of state enforcement legislation has been opened. Over half of the states in the union have some laws requiring the use of E-Verify. 78

In addition, there are numerous circumstances where, even though not necessitated by law, an employer will choose to enroll in E-Verify such as if:

- An employer wishes to be 100% compliant with all laws and does not want to risk any liability;
- An employer suspects that ICE has been watching its premises and wants to attempt to mitigate against any employer sanctions;
- An employer falls within a targeted industry and is concerned that it will be the next headline in the newspaper; and/or
- An employer is unsure whether it is properly completing its I-9 forms and wants “free” assistance, despite the fact that the source of such assistance will come from “Big Brother.”

Ultimately, E-Verify is the future of employment verification in the United States. Despite the concerns cited above and the fact that the technology utilized, at this point, may not be able to handle nationwide use by all employers, this program stands as the best means of not only ensuring an employment authorized workforce, but also limiting an employer’s exposure to civil and criminal liability.

Another method used by ICE to ensure employer compliance is the ICE Mutual Agreement Between Government and Employers (IMAGE) program, which was enacted in 2007 and stands as a mechanism for instituting what ICE considers “best-practices” for the hire and retention of workers. Essentially, this program takes E-Verify one step further by allowing ICE to “enter” the worksite, instead of having its electronic hiring records available remotely. Under this program, ICE reviews with an employer its hiring practices, conducts a full I-9 audit and provides training through a local IMAGE coordinator that includes lessons on fraudulent document detection as well as measures for avoiding employment discrimination. Furthermore, an employer participating in the IMAGE program is required to enroll in E-Verify and carry out eight additional “best practices” similar to the company hiring policy suggestions listed above. Once an employer commits to the program, the participant will be deemed “IMAGE Certified,” a designation that ICE states could “lessen the likelihood that your company is found in violation” and “may be considered a mitigating factor in the determination of civil penalty (fine) amounts should they be levied.” To date, there are no implementing regulations regarding IMAGE and very few full-fledged participants, although whenever a new company is added to the program, ICE is sure to make such information quickly available to the public. However, the true benefits and detriments associated with participating in this program are unknown. Regardless, it is fair to assume that an employer that becomes IMAGE Certified will have a more willing government partner should an investigation or raid occur in the future, but at the same time might alienate its workforce in the process.

Finally, the Social Security Number Verification Service (SSNVS) is a third means by which employers can better ensure that they comply with all federal regulations regarding employment. This service is an on-line and phone-based Social Security Number verification system that was started in 2004 and allows an employer to check to see if an employee’s SSN matches the name provided. However, unlike E-Verify, SSNVS’s purpose is to solely “verify current and former employees for wage reporting (W-2) purposes” and cannot be used for vetting the legality of new hires. Using the phone-based system an employer can check up to ten SSN numbers in one call, and using the on-line verification system, an employer can verify up to 250,000 names within one business day. If an employer elects to utilize this system, it is recommended that it

---

81 See DHS Press Release, supra note 70.
83 Tony Weigel, IMMIGRATION DAILY, Thinking Twice About Partnering With ICE - An Analysis Of ICE's "Best Hiring Practices" and IMAGE, http://www.ilw.com/articles/2007,0130-weigel.shtm (last visited Nov. 25, 2008) (“One North Carolina employer of note, Smithfield Foods, Inc., volunteered for the IMAGE program. In conducting its review, the employer uncovered Social Security Number mis-matches, issued letters to its affected employees, and then terminated about 50 workers for failing to clear up the problems within 14 days. The next day the employer suffered a walk-out by about 1,000 employees in protest, in part due to these actions. The employer negotiated to re-hire the workers and gave them 60 days to clear up the mismatched Social Security Numbers.”).
86 See SSNVS, Information and Instructions to Verify Social Security Numbers Online, supra note 75. Misuse of this program could subject the employer to The Privacy Act of 1974, 5 U.S.C. § 552a (2008), sanctions.
87 Id.
follow the SSA “no match” regulations in light of any discovered incongruence in an employee’s records.\textsuperscript{88}

Regardless of whether or not an employer feels comfortable utilizing government sponsored programs for ensuring the legality of its workforce, it is imperative that all employers take some action to fulfill this important obligation. The worst thing an employer can do is to ignore the issue and hope that ICE will not come to the door. The cost of a simple I-9 audit conducted by outside counsel is a fraction of the expense that could be thrust upon an employer as a result of a government investigation.

**Section V: State-Based Immigration Enforcement Initiatives**

The fact that the federal government has failed to pass any meaningful immigration legislation for over 15 years has created frustration for many states and hence the increase in state-based immigration enforcement legislation, despite valid constitutional arguments involving preemption. Not surprisingly, states react to the perceived needs of their population and if immigration enforcement, whether right or wrong, tops public perception as a key agenda issue, it is understandable that politicians will attempt, through legislation, to address these concerns. It is no secret that, federal government must come to grips with and address the growing number of undocumented workers in the United States and offer a solution that corrects deficiencies in our immigration laws, while at the same time enhancing our ability to protect our borders. It is also no secret that efforts to complete this herculean task will continue to be met with political posturing, especially in an election year. Still, for now, employers and labor lawyers alike must face the fall-out of Congress’ inability/refusal to address the immigration issue: the varying state laws pertaining to the regulation of immigration that have changed the face of doing business in many states and require counsel to constantly keep current with the nuances of every jurisdiction in which the employer intends to do business.

States such as Arizona and Alabama are leading the charge with respect to immigration specific legislation and the impact of such legislation has had wide-spread repercussions on many areas not contemplated by the legislatures of these states, especially the requirements placed on all business owners and immigrants. Such obligations range from requiring all employers to use the E-Verify system for all employees to Alabama’s draconian provision whereby if an employer knowingly hires an unlawful foreign worker, that business could lose its license to operate in the state.\textsuperscript{89} These bills contain harsh penalties for noncompliance and could not only be problematic for the specific employer, but also for the economy of the state and the country. For example, the Perryman Group estimates that if all unauthorized immigrants were to leave Arizona, the cost to its economy would be approximately $26 billion in economic activity and over 140,000 jobs.\textsuperscript{90} In Alabama, the losses could also be significant, where it is estimated that $1.1 billion in gross state product is at stake.\textsuperscript{91}

While the Commonwealth of Pennsylvania has yet to pass its own immigration enforcement legislations, there are a few bills that are gaining momentum and could become a reality in the near future. SB 9, introduced by Senator Scarnati (Senate District 25) would require presentation of specified government-


\textsuperscript{89} AL House Bill 56.

\textsuperscript{90} The authors thank Judith Bernstein-Baker, Esquire of HIAS Pennsylvania for sharing her research regarding these bills. Summaries of the bills were also made available by the Pennsylvania Immigration Citizenship Coalition (PICC), Community Legal Services (CLS) and HIAS Pennsylvania. The contributions of these three organizations are also gratefully acknowledged by the authors.

\textsuperscript{91} Id.
issued IDs as a condition of receiving a wide range of public benefits and services in the United States. While this law, in and of itself, is not targeted specifically at employers, it could push foreign workers from the Commonwealth, lowering the supply of much needed labor in certain industries. HB 439, introduced by Congressman Mustio (Congressional District 102) which passed the House on November 15, 2011 and now committed to the Senate State Government Committee, has a far greater and immediate impact on employers. This bill would require use of E-Verify as well as a termination of professional and business licenses of any employer who employs undocumented workers.

The passage of the ill-thought out HB 439 would turn Pennsylvania into the Alabama of the North with respect to immigration enforcement actions. For this reason, business leaders and their counsel across the Commonwealth would be wise to take a stand against such legislation so that this overly aggressive posture can be tempered. Regardless of whether or not this proposed law will become reality, the fact that it has passed through the State Congress is a harbinger of what is to follow and the general mentality of the Commonwealth’s political leaders. Therefore, it is more important than ever that employers examine their immigration policies and practices to ensure compliance.

Section VI: Conclusion

In the new millennium of enhanced employment verification enforcement, the burden on employers is greater than ever and Pandora’s box has been opened even wider than any employer could possibly have anticipated. Additionally, with increased enforcement and criminal sanctions against employers, especially those in the supervisory chain and HR managers, an increased responsibility has been levied against those that provide advice to our nation’s employers. As a result, immigration and labor counsel must be willing to utilize the skills and knowledge provided by adept criminal counsel in order to fully apprise employers of their civil and criminal liability as well as to advise them how to amend their practices in order to remain in full compliance with all employment verification regulations. Strong employer hiring policies and government-provided tools such as E-Verify should prove to be beneficial in this regard.

It is only by combining all of the above resources that Pandora’s box can truly be closed. Moreover, it also important to remember that even when Pandora’s box was fully opened and its evils spouted forth, one last but forgotten element remained at the very bottom of that box: the element of hope. It is with this hope that labor and immigration counsel, working together, with criminal counsel in readiness on the sidelines can tightly close and seal that proverbial Pandora’s box, thus safeguarding their mutual clients from adverse governmental action.

---

92 See: http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?year=2011&sid=0&body=S&type=B&bn=9
93 http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?year=2011&sid=0&body=H&type=B&bn=439
94 Id. See supra note 90.