

The Battle for 14 Percent: Who Are the Foot Soldiers and What Armor Do They Need?

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Law is not created in a vacuum, but it is a result of the political, social, and economic activities occurring at any place and time. Similarly, the enforcement of the law is also driven by social, economic, and political activities.

In 1986, Congress passed the Immigration Reform and Control Act (IRCA). The act contained three prongs: (1) It legalized the two to three million individuals who could document that they were in the United States illegally; (2) It created the I-9 employment verification system, whereby employers were deputized as de facto immigration officers, charged with verifying the identity and employment authorization of their workforce; and (3) It created the Office of Special Counsel in the U.S. Department of Justice to investigate and prosecute, in conjunction with existing agencies, discrimination based on national origin or citizenship.

Over the 20-plus years since the passage of the IRCA, the first prong was completed, and the second two prongs were enforced sporadically at best. Throughout these nearly 25 years, both Democrats and Republicans have made numerous attempts to pass new legislation to legalize individuals who are present in the United States illegally. However, the common cry against such action by most U.S. voters is that since the government has failed to enforce our borders and the employment verification process, voters do not trust that a new immigration reform will do anything but simply further increase illegal immigration to the United States.

In light of this opposition to any legalization of individuals who are in the United States illegally, the Obama administration has stepped up the employment verification enforcement component of the IRCA. It has become readily apparent that the foot soldiers are employers of

the individuals at issue. Contrary to prior administrations, the Obama administration has shifted its emphasis from removing individuals who are present in the United States illegally to investigating and finding, as well as prosecuting, U.S. employers and businesses who hire these workers. U.S. employers who do not have an employment verification program should not be surprised by any such government redress. The big surprise, though, will come to those employers who think that they currently have an employment verification system in place and that it will withstand government scrutiny.

A memorandum issued by the U.S. Immigration and Customs Enforcement (ICE) agency on April 30, 2009, states the following: "ICE must prioritize the criminal prosecution of the actual employers," and further notes, "In this context, 'employer' refers to someone involved in the hiring or management of employees. This includes owners, CEOs, supervisors, managers and other occupational titles."¹ Based on this memorandum, it is clear that border enforcement has moved away from the geographic line and into the human resources office.

The new focus on employers includes new guidelines, approaches, and interpretations. Employers should be aware of this evolving area of law and its imminent application to their operations and possibly reputation as well as their bottom line.

Because the Obama administration has effectively conscripted all employers into the "War on Terror," requiring them to fight in the battle against illegal immigration, this article will attempt to outline some of the battle tactics each employer is expected to know. While this immigration compliance boot camp will hopefully educate employers as to their new responsibilities, what follows

is intended to serve only as a guide. Employers will need to investigate each of these areas individually.

Uncle Barack Wants YOU!

In November 2009, Secretary of Homeland Security Janet Napolitano announced that, in a measure to counter the threat of terrorism, the Department of Homeland Security (DHS) would be forging new partnerships with international allies. These new partnerships involve information sharing with federal, state, and local law enforcement both at home and abroad. In addition, the DHS is planning a more strategic course to strengthen security along the southwestern border of the United States, including defensive measures, such as deploying additional personnel, and using new advances in technology, as well as preventive measures, such as working more closely with Mexico to prevent illegal border crossings.²

In conjunction with these activities, Secretary Napolitano and John Morton, assistant secretary of Homeland Security for U.S. Immigration and Customs Enforcement (ICE), have stressed another important prong of immigration policy: voluntary compliance by employers. DHS personnel have expressed excitement regarding voluntary compliance, but they have also indicated that investigations of employers believed to be noncompliant will continue as well. In fact, ICE will combine efforts to work closely with employers who seek to comply with the law with continued civil and criminal investigations. Specifically, ICE is looking to see that I-9s, E-Verify, and all other employer compliance steps are in order.

ICE has noted that, in 2009 alone, employers who did not comply with the policy were fined almost \$24 million, as compared to 2006, when no employers were fined. In addition, thus far in 2010, ICE has issued more than 1,600 subpoenas as well as audit notices to random employers, and these numbers continue to grow.³

In spite of other efforts—both at home and abroad—to ensure compliance with federal immigration laws, ICE's current policy indicates that employers must be wary and meticulous in ensuring their compliance with all immigration laws. Indeed, careful and strict compliance with all *procedural* requirements is the best line of defense when the "ICE man cometh." The remainder of this article will outline the tools employers need to obtain in order to meet their country's call as well as specific pitfalls and how they can be avoided.

Best Compliance Practices: Tell Me What You Want—What You Really, Really Want!

The DHS has emphasized certain best practices for employers to follow, and most employers should already have procedures in place for many of these. Recommended best practices include having a complete I-9 form for every employee, having a company I-9 policy, providing training to those employees in the field who are responsible for executing an I-9, and making this training available via the company's website. Additional recommended practices include arranging for independent external third parties to audit company I-9s regularly

or establishing an internal I-9 audit program performed independently of hiring personnel. The DHS "recommends" using the Social Security Number Verification Service (SSNVS) as well as enrolling in the E-Verify program. Further steps include having a compliance officer who has ultimate responsibility for the company's compliance with the ICRA.⁴

Whichever of these steps a company chooses to employ, the compliance program selected should include ethical standards, including all employees' commitment not only to abide by a code of conduct related to ethics but also to identify and report fraud. Policies should be in place to indicate top-down commitment as well as protocols for following up on calls from tip lines, complaint lines, and the like. Companies should have internal identification protocols in place regarding corrections, name changes, new identity or other data, and Social Security Number mismatches.

The New IMAGE of Compliance

These guideposts indicate the practices ICE prefers every company to have in place. However, it is important to remember that these are mainly suggestions, and many of them are not strictly required for compliance with the law. However, if a company is willing to implement many of these best practices, it may prove beneficial for the company to enroll in a new program: the ICE Mutual Agreement Between Government and Employers (IMAGE) program, another new facet of the current administration's approach toward employers.

By way of background, IMAGE is a program through which employers voluntarily submit to an audit by ICE, which then provides training that will assist companies in complying with immigration laws. More important, once an employer becomes a member of the IMAGE program, ICE has effectively "blessed" the employer's I-9 compliance policy, which can provide a measure of comfort and security to employers.⁵

Traditionally, IMAGE was used only in criminal or civil cases that involved high settlements, because the program includes an "opening of the kimono" of an employer's verification/hiring practices. Many employers are not readily equipped to implement IMAGE because of the additional administrative requirements the program imposes.

This being said, some employers might be interested in participating in IMAGE if they want a "seal of approval." Traditionally, most employers have not been interested in participating in the program, even though IMAGE membership includes two years of preclusion from ICE I-9 employment verification audits. In light of the recent increase in the number of audits, there might be benefits to enrolling.

Increased Scrutiny

The Obama administration has also changed its perspective with regard to presumptions about employers. The U.S. Citizenship and Immigration Service (USCIS)—the division of the Department of Homeland Security that

adjudicates, *inter alia*, nonimmigrant visa benefits—has substantially raised the bar in conjunction with filing nonimmigrant visas—such as L-1A, H-1B, O, TN, and E visas. In practice, eligibility for these visas is subjected to a standard of proof more akin to “beyond a reasonable doubt” than to the “preponderance of evidence” standard mandated by statute.

One example of a company (which has requested to remain anonymous) facing increased scrutiny involves an attempt to open a start-up office of an established European software company. The company was recruited by a Silicon Valley think tank consortium. When the European company sought to get an L-1A one-year nonimmigrant visa for the CEO, the case was denied, principally on the basis of two factors: (1) USCIS’s decision that a CEO is not necessarily a manager; and (2) the division’s review of the lease and the floor of the new office, after which USCIS determined, in its infinite wisdom, that office did not have sufficient square footage for a start-up office. This determination was made in spite of the fact that the European company already had more than three contracts with extremely large U.S. companies, which was clear evidence of the company’s business activities in the United States. Upon refile, USCIS again requested more data to prove the validity of the business, including a copy of the deed filed with the the Office of Public Records showing the owner of the building, a letter from the owner of the building confirming that the lease to the consortium of think tanks was a valid document, and a letter from the consortium confirming that the sublease was valid.

The case is still pending with USCIS. Even though such zealous enforcement of immigration benefits should certainly follow the law, when USCIS overscrutinizes such cases, the process can demoralize investors who would otherwise seek to start businesses and create employment opportunities in the United States. This increased enforcement scrutiny will increase the cost of bringing foreign workers to the United States for legitimate business purposes.

Avoiding the F-word

As everyone who has ever been audited knows, the F-word (“Fraud” for those not in the know) can be particularly damning. In keeping with its new enforcement policy, ICE has developed a variety of fraud units to ascertain better which employers might be violating the law. In addition, the Department of Homeland Security has created the Fraud Detection and National Security Division (FDNS) within USCIS. This unit uses its own employees, as well as private detectives, to make surprise visits to worksites.

In order to be as well prepared as possible for any such visits, employers would be wise to designate an employment compliance officer and establish an investigation response plan. This response plan must include guidance to front-line workers, such as individual receptionists and security officers, who must be given appropriate instruction upon initiation of any government investigation.

E-Verify—the Future is Here

Everyone has heard of the E-Verify program, which promises employers the opportunity to receive confirmation of an individual’s employment eligibility. This section discusses several developments in the E-Verify sphere.

Administrative Espionage

Executives within the E-Verify program have announced that more than 170,000 employers have signed up for E-Verify, including more than 9,000 federal contractors. Statistics for 2008 show that more than 8.5 million queries have been run on new hires. According to E-Verify data, 96.9 percent of these new hires were authorized within 24 hours, 2.8 percent were found to be ineligible for employment, and 0.3 percent received tentative nonconfirmations but were later confirmed as being authorized for employment.⁶ These data relate to all queries and will naturally vary depending on industry and workforce.

E-Verify is also promising additional future enhancements. The long-awaited photo tool will be available for designated agents as well as all employers. A second upcoming “positive” feature of E-Verify is the promised ability for all U.S. citizens and permanent residents to access the E-Verify database and confirm that their data are correct before an employer does so. Although this is largely a positive feature, the publication of these data also presents significant issues related to the privacy of an individual’s data.

Regardless of individual feelings on that subject, it is clear that E-Verify provides a simple, speedy way for employers to receive confirmation that a person is authorized to work. And new enhancements will soon make verification more certain than ever before. However, there is a darker side to E-Verify that the federal government does not publicize as readily. What most employers do not know is that using E-Verify could set them up for a compliance audit by ICE.

Specifically, E-Verify supports something called the “compliance management and tracking system” (CMTS), which is essentially a compliance check that uses a little publicized backdoor into E-Verify. CMTS was established in June 2009 to track and manage noncompliance with immigration law, and it regularly generates reports on irregularities, such as multiple uses of a single Social Security number in E-Verify. The system will also report the names of employers who prescreen employees, employers who terminate employees as a result of tentative nonconfirmation, and employers who run queries through E-Verify more than three days after a hire.

E-Verify has confirmed that, in the fourth quarter of FY2009, 1,000 letters regarding noncompliance actions had been sent to employers.⁷ However, this is only the tip of the proverbial iceberg. Even though a compliance notice from E-Verify may not seem so problematic, employers should be aware of a Memorandum of Agreement between USCIS (which runs E-Verify) and ICE: USCIS will report specific instances of misconduct to ICE.⁸ With ICE able to play “Information Please” with E-Verify, CMTS could be critical in triggering a compliance

audit. This is particularly troubling in light of E-Verify's plans to expand CMTS using increased automation to allow monitoring for additional violations and stepping up E-Verify compliance efforts in conjunction with ICE. So far, there are not many reports of such referrals, but the DHS has expressed interest in increasing information sharing in the future.⁹

With regard to the Federal Acquisition Regulation (FAR) and the E-Verify program, efforts are being made to continue to sign up employers under E-Verify. The FAR now requires any government contracts or subcontracts to contain a clause requiring that all employees assigned to the contract be verified through E-Verify. E-Verify in conjunction with FAR is known as "FAR E-Verify." These participating contractors and subcontractors are required to enroll in E-Verify within 30 days of being awarded the contract or subcontract. In addition, FAR E-Verify users also have the option to run their entire existing workforce through E-Verify (with limited exceptions).¹⁰

One point to stress to employers who choose to execute a new I-9 form in conjunction with the FAR E-Verify is that the employer must continue to use the I-9 form that has the expiration date of Aug. 31, 2012, and the accompanying list rather than using an earlier version of the I-9 form and list. This form and list are ways to gather accurate data that is entered into the E-Verify database, and using the most current form and list will result in less likelihood of receiving a tentative nonconfirmation from E-Verify.

Other E-Verify Woes

Even though E-Verify is a useful tool for verifying eligibility for employment, it still does not fully protect employers from employing those who truly do not have legal status in the United States. Individuals using stolen or forged documents with correct data can still slip through cracks in the system, for instance. If, in fact, an employer is employing an unauthorized individual, the mere fact that the individual cleared E-Verify does not actually shield the employer. As such, it is essential for each employer to maintain an I-9 policy and other features discussed previously in this article; these measures will serve as a defense in enforcement proceedings.

Another point of concern involves the need to reverify individuals under E-Verify. This rule regarding reverification under E-Verify does not coordinate with the I-9 reverification rules, under which re-verification is necessary for a returning ex-employee, but if the employee's documentation on the I-9 form is still valid at the time the person is rehired, that individual can be rehired without a new I-9 form.¹¹ The E-Verify program, on the other hand, requires complete reverification every time an individual returns to work, even if a new I-9 form is not required. Because this distinction seems contrary to common sense, it is often ignored by employers, and systems must be put in place to ensure that all verifications are properly completed.

Some additional specific issues arise when FAR E-Verify is triggered. For example, there is significant uncertainty

surrounding the definition of "commercial off-the-shelf services."¹² Resolution of this issue rests largely with the procurement officer for the agency that issued the federal contract that contained the E-Verify clause. Therefore, if it is unclear as to whether or not the product has been modified so as to fall under the FAR, final resolution of that decision rests with the procurement officer.

Another important point with regard to E-Verify and FAR is the employer's options for using E-Verify for the entire workforce. An employer has options with regard to when to elect to verify the employment eligibility of the entire workforce, and there are different windows, such as a 90-day window for verifying the eligibility of existing assigned workers and a 180-day window for optional verification of the entire workforce. These two windows could easily create a false impression that these two decisions must be executed within 270 days. This would be an unfortunate misinterpretation.

We have privately sought clarification on this issue. In response, the E-Verify program explained that, should the employer select the 90-day option for existing assigned workers, the process must be completed within 90 days. If, however, at any time after that 90-day period has elapsed—but, under the federal contract, 50 days, 100 days, 150 days, or 200 days later—the company decides that it would be easier, for whatever reason, to verify the eligibility of the entire existing workforce, that selection can be made. Once that selection is made in E-Verify, from that date of selection, the employer has 180 days to run all employees through E-Verify. Once that selection has been made, however, it cannot be reversed and the process must be completed. This clarification with regard to the selection and timing of the 180-day period is particularly helpful in multiple-contract situations, in which employers simply want to change their processes or something else.

The E-Verify FAR unit is also developing another fraud function, which is not necessarily related to the misuse of E-Verify by a valid employer but is based on invalid use. E-Verify FAR is generating a small unit to verify the existence, operation, and legitimacy of those employers who sign up for E-Verify. The unit will be looking for taxpayer identification numbers, names of corporate officers, and the like to be sure that entities who have signed up for E-Verify are not in fact data mining for legitimate names and numbers to use in an illegal manner.

E-Verify Usage Issues

Recently, Weststat reviewed how employers are actually using E-Verify.¹³ The review discovered the following information:

- 16 percent of the users did not complete the tutorial;
- 16 percent of employers use E-Verify to prescreen applicants, which is a violation of E-Verify and can result in investigations by the Office of Special Counsel or other offices within the U.S. Department of Justice;
- 20 percent of employers took adverse action at the wrong time in the E-Verify process;

- 9 percent of employers received a tentative nonconfirmation but failed to give notice to the employee of their election to contest or not to contest;
- 7 percent of employers discouraged an employee who sought to challenge a tentative nonconfirmation.

Even though the E-Verify program has no official enforcement arm, the Office of Special Counsel and, more broadly, the U.S. Department of Justice have appointed themselves watchdogs of the E-Verify process. To combat some relatively widespread violations, the agencies intend to produce training videos for employers as well as employees. The Office of Special Counsel and the Department of Justice are operating under questionable legal authority in this sphere, and, unless the intent element is met, it will be important for E-Verify users to monitor these agencies' activities in case enforcement in this sphere is ever increased.

One particularly hot-button item concerns national origin discrimination. Recently, the Office of Special Counsel has received additional funding and hired five trial lawyers to combat this problem. Moreover, the increased use of E-Verify—whether voluntarily or under FARs—has not only created fertile ground for possible missteps by employers regarding its application but also provided a larger list of employers for the Office of Special Counsel to investigate.

Recently, a large U.S. employer with federal contracts (who wishes to remain anonymous) used E-Verify under FAR to verify its entire existing workforce. As a result, 0.0002 percent of the workforce followed up with the Office of Special Counsel and queried the use of the E-Verify program. It appears that only a negligible number of those follow-up queries involved a worker who was legally authorized. Yet, that percentage was great enough for the Office of Special Counsel to open up an independent investigation of the entire company's hiring practices, I-9 verification system, E-Verify processes, and so forth. With a threshold that low, it is apparent that the use of E-Verify, even with an insignificant error rate, can and will result in investigations by the Office of Special Counsel and possibly other government agencies.

Old Standards, New Outlook: I-9 Compliance, Violations, and Fines

With so much involved in using the E-Verify program, it is possible that employers may forget—or place less importance on—I-9 compliance, and this would be a mistake. Even though it is an old policy, the I-9 is the best defense an employer has against charges of knowingly employing or harboring unauthorized workers.

Since the I-9 is so well known and understood, it is not necessary to dwell on the procedural aspects in great length. However, two important side issues deserve attention: storage and accuracy.

Storage Woes

Recent legislation has enabled employers to store executed I-9 forms in electronic format or to use a mixed

filing system (some forms in hard copy and some in electronic format). Even though this appears to be a fantastic opportunity for employers, the gift of electronic storage comes with several compliance-related strings. Though these requirements are contained within the Code of Federal Regulations (8 C.F.R. 274A.1), they are written in a confusing (and sometimes contradictory) manner. Due to the added fact that they are not widely publicized among employers, employers are often left vulnerable to unintentional pitfalls.

For example, in order to use electronic storage, employers must be able to document various features of their storage systems. Employers must be able to document how the electronic records are created and stored, but this is not the end of the process. Several other features that are not as obvious must be documented as well. For example, employers can be compelled to produce documentation describing how the system ensures the integrity, accuracy, and reliability of the stored records. Similarly, employers must be able to show which features prevent and detect the unauthorized or accidental creation, alteration, or deletion of stored documents. Storage systems should also have inspection procedures, must include the ability to produce legible paper copies, and must also have an indexing system.

Other features of electronic storage that must be documented include data security, such as backup and recovery features. The employer is also required to have an "audit trail" system that tracks access to the records involving creation, alteration, or deletion of a record. The audit trail should provide the name of the person accessing the record as well as the time, date, and actions taken. There is still some question as to whether ICE has the authority to demand production of these audit trails, but in any event, documentation of the audit trails should always be maintained.

In light of these complicated requirements, an employer's best practice is to have a written policy outlining all the features of data creation, storage, and security. In addition, if an employer elects to use a third-party commercial vendor, the employer would be wise to examine the vendor's processes thoroughly. Employers should never assume that vendors' services comply with immigration law just because the vendors' systems appear thorough.

Ultimately, if employers are unable to produce the required documentation regarding the electronic storage system when demanded, the ICE auditor might deem the employer to be in violation of immigration law and impose substantial fines. In such instances, it is often irrelevant whether the employees are in fact authorized to work in the United States, as these audits frequently focus on form and ignore substance.

Learning Through Technical Mistakes

One feature that has been observed in recent I-9 audits involves the focus on technical and procedural failures in completion of the I-9 form. These are often harmless errors that do not actually affect an individual's eligibility

to work in the United States but, instead, simply allow an ICE auditor to impose a fine for noncompliance with the law.

For example, a technical or procedural failure could include an employee's completion of the first section of the I-9 form on a day after the first day of employment or an omission of a date in some blank space of the I-9 form. Depending on the amount and frequency of these errors, ICE can impose fines ranging anywhere from \$110 to \$1,100 per occurrence. The agent or auditor will divide the number of violations by the number of employees for whom a Form I-9 should have been prepared to obtain a percentage of the violations discovered. This percentage provides a base fine amount depending on whether this is a first offense, a second offense, or a third or greater offense. In evaluating these fines, ICE does not ultimately care whether the individual was, in fact, authorized to work in the United States, but again focuses on form over substance.

Conclusion

This entire discussion clearly shows that the responsibility to enforce immigration laws now rests squarely on the shoulders of all employers. Regardless of whether or not it is appropriate, the Obama administration's position on this issue considers each employer in the country to be the best line of defense against illegal immigration. However, increased scrutiny and heightened security compliance obligations might have the unwanted effect of "defending" the country against *legal* immigration and foreign investment as well. And as a typical armchair general, the administration is content to sit back and issue orders, and show no concern over the business and financial casualties that may result.

However, by understanding what is expected, businesses can rise to meet this challenge. By paying careful attention to procedure, by ensuring that internal policies are compliant with immigration law, and by understanding and avoiding common pitfalls, businesses can avoid becoming casualties. Although the policy resembles a

scorched earth policy, careful preparation is the watchword, and meticulous execution is the key to survival. **TFL**

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Endnotes

¹Nancy M. Forman, Memorandum on Workforce Enforcement Strategy, April 30, 2009, available at www.ice.gov/doclib/foia/dro

[policy memos/worksite enforcement strategy4 30 2009.pdf](#) (last visited Sept. 20, 2010).

²See, e.g., Prepared Remarks by Secretary Napolitano on Immigration Reform at the Center for American Progress, Nov. 13, 2009, at www.dhs.gov/ynews/speeches/sp_1258123461050.shtm.

³Eileen M.G. Scofield and Dawn M. Laurie, *ICE, the Audit, and the Employer: What to Expect. Immigration Practice Pointers*, American Immigration Lawyers Association (2010), available at www.aila.org/content/fileviewer.aspx?docid=31230&linkid=218244 (last visited Sept. 20, 2010). See also ICE Assistant Secretary John Morton Announces 1,000 New Workplace Audits to Hold Employers Accountable For Their Hiring Practices at www.ice.gov/pi/nr/0911/091119washingtondc2.htm (last visited Sept. 20, 2010).

⁴See ICE, Best Hiring Practices at www.ice.gov/partners/employers/worksite/besthire.htm.

⁵For more information on IMAGE, see ICE IMAGE FAQ at www.ice.gov/partners/opdimage/image_faqs.htm.

⁶2008 E-Verify Statistics, available at www.uscis.gov; (go to E-verify Homepage, go to About the Program, go to Statistics and Reports (last visited Sept. 20, 2010).

⁷U.S. Immigration and Customs Enforcement, ICE Assistant Secretary John Morton Announces 1,000 New Workplace Audits to Hold Employers Accountable for Their Hiring Practices, Nov. 19, 2009, available at www.ice.gov/pi/nr/0911/091119washingtondc2.htm (last visited Sept. 20, 2010).

⁸Memorandum of Agreement Between U.S. Citizenship and Immigration Services and U.S. Immigration and Customs Enforcement Regarding E-Verify Program Information Sharing (December 2008), available at www.uscis.gov/files/nativedocuments/USCIS-ICE-E-Verify%20MOA.pdf (last visited Sept. 20, 2010).

⁹See Testimony of Michael Aytes, Priorities Enforcing Immigration Law (April 2, 2009), available at www.uscis.gov, go to E-Verify, go to About the Program, go to E-Verify Pressroom (last visited Sept. 20, 2010).

¹⁰Federal Acquisition Regulation 22.18 (48 C.F.R. 22.18).

¹¹8 C.F.R. 274A(c).

¹²Generally, "commercial off-the-shelf services" are defined as commercial items sold in substantial quantities in the commercial marketplace and offered to the government in the same form in which they are sold in the commercial marketplace. Subcontractors for such services are not required to participate in E-Verify. FAR 22.1802 (48 C.F.R. 22.18).

¹³See Findings of the E-Verify Program Evaluation, available at www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf (last visited Sept. 20, 2010).

