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EMPLOYMENT VERIFICATION SYSTEMS—WHERE ARE WE AND WHERE ARE WE GOING?

*by Eileen M.G. Scofield, Newton J. Chu, Leigh N. Ganchan, and Austin T. Fragomen, Jr.**

States all over the country, as well as the federal government, are seeking to create and implement employment verification systems as a means of "correcting" the "illegal immigration" problem that currently exists in the United States. There is a perception by many that a simple magic wand can be waved over some large database, and it will immediately be able to tell employers who is legally in the United States and who is not. Unfortunately, for those of us who deal daily, if not hourly, with employment-related legal issues, particularly with regard to foreign born workers, we know and understand that databases created by the different government agencies not only fail to contain that information, but also fail to talk to each other. As a matter of fact, due to some of our privacy provisions, these systems may never talk to each other, but unfortunately, politicians continue to claim that employer verifications systems will solve the "illegal immigration" problem.

The following is a summary of a variety of issues related to this particular area—so widespread and broad that the authors have included a series of questions and then material seeking to answer these questions. Employment verification systems and the databases upon which they depend and the laws that seek to use them seem to change quite rapidly. Therefore, by the time of publication, some of this information may have already been amended. The authors, thus, recommend that you continue to look to the AILA InfoNet for updated and current information.

EMPLOYMENT VERIFICATION PROGRAM—WHERE ARE WE AND WHERE ARE WE GOING?

By way of background, right now under current federal law, the I-9 system of paperwork verification is the nation's sole mandatory employment eligibility verification program. There are, though, additional programs used to seek to verify work authorization. First is the Social Security Number Verification System (SSNVS); second, the Basic Pilot Program; and third, there is another program called SAVE, but it is not available to employers, only to government agencies.

The SSNVS is a Web-based version of other systems where employers can verify new employees' Social Security numbers against the Social Security Administration (SSA) database for preparing IRS W-2 forms. This system, though, specifically states that information provided by the SSA should not be used to verify an employee's immigration status.

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The Basic Pilot Program is a voluntary Web-based verification system. First introduced in 1996, it seeks to verify employment eligibility by using information provided by the employee on the I-9 form and runs a query through the SSA and U.S. Citizenship and Immigration Services (USCIS)/Department of Homeland Security (DHS) databases. The Basic Pilot Program system, when updated and current, works well. Unfortunately, though, if the program database cannot ascertain the legal status of the individual, based on all the documentation inputted or on the information inputted by the government, potential employees have to generally wait eight days or so to get the inconsistency resolved.

The SSA and DHS have sought to improve the Basic Pilot Program by increasing the accuracy of the existing Homeland Security records, expediting data entry for new lawful permanent residence and arriving nonimmigrants, and for valid work authorization. Data errors do continue to exist with Basic Pilot Program, and in cases where the answer cannot be secured immediately via the Internet, there are often delays in hiring and questions related thereto.

Looking forward, however, new legislation seeks to create a new and improved employment verification system. According to the Chairman's Mark, Comprehensive Immigration Reform Act of 2006, introduced February 28, 2006, Senator Arlen Specter (R-PA) has created a compilation of many of the pending immigration bills and consolidated them into a single act. Naturally, there will be a great deal of discussion, and perhaps this bill will be amended and/or passed before the AILA Annual Conference, but as of the writing of this article, the following is a summary of some of the key employer verification provisions of the bill.

Title III of this legislation, Increased Worksite Enforcement and Penalties, as under the Immigration Reform and Control Act of 1986,[1] prohibits the hiring, recruiting, or referring an alien with knowledge or with reason to know the alien's illegal status. In addition, a company that continues to employ an unauthorized alien on its own through contracts or subcontracts is subject to violation of the law.

Also, the proposed law states that in a civil enforcement context, if it has been determined that an employer has hired more than 10 unauthorized aliens within a calendar year, the rebuttal presumption is created that the employer knew or had reason to know that such aliens were unauthorized. The key point with regard to this section, though, is that an employer who voluntarily uses the electronic employment verification system (Basic Pilot Program) under current terms has a good faith defense to any of these charges.

This legislation creates a new certificate of compliance with regard to an employer's formal assurance that the employer is, in fact, in compliance with immigration laws or that it has developed a plan to come in compliance. This provision allows DHS to rely on an employer's self-assessment and self-certification, rather than launching a formal DHS investigation.

There is a new document verification system whereby employers must take reasonable steps to verify that employees are authorized to work and that the employer attests under penalty of perjury that they have verified the identity and work authorization of employees by examining the documents. Finally, there is a standard of compliance with regard to the examination of the documents. This standard is similar to the current standard already in place with regard to I-9 verification process.

Similarly, the employee has an obligation to attest in writing to be legally authorized to work in the United States. The employer must now retain a copy of the attestation made by any such employee.

Senator Specter wants the basic program to be converted into the electronic employment verification system (EEVS). Under section (d), the Commissioner of Social Security, the Secretary of Homeland Security, must implement an EEVS system via the existing Basic Pilot Program. The EEVS will work through both a toll-free number and an electronic media. The Secretary of Homeland Security will keep a record of inquiries and responses to allow for an audit capability. Under this system, EEVS should be a bit tighter and faster than the current basic program because the response must be made within three days and, again, like the basic program, during a tentative nonconfirmation period, the employer may not terminate the employee based on a lack of work authorization. There is language in the statute that requires the system to be operated with maximum reliability, ease of use, and by privacy safeguards. The SSA's portion of this program will continue to compare names with alien identification and authorization numbers to confirm or deny work authorization.

Section (d)(3) outlines the employer requirements with regard to participation in the EEVS.

[1] Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (partially codified in scattered sections of the INA) (IRCA).

Most importantly is to know that this EEVS will be a roll-out system. Within two years after enactment, employers with more than 5,000 employees must participate in the EEVS. All employers must participate within a five-year window. Eventually, under subsection d(6), an employer's failure to comply with the EEVS requirements shall be treated as a violation of the law, and such failure to comply shall be treated as presumed violations of the prohibition against the hiring of unauthorized aliens. So, therefore, within five years, all employers will be required to use the EEVS system, and the failure to do so will be a presumption of unauthorized employment of illegal aliens.

Subsection (d)(8) protects from civil and criminal liability an employer who relies in good faith on the information provided through the EEVS confirmation system. This provision is extremely important when it comes to the ability to avoid class actions such as the one that has currently been brought against Mohawk and that was previously brought against Tyson Foods in Tennessee a few years ago.

Eventually, under subsection (d)(11), the Secretary of Homeland Security may establish and require fees for employers participating in EEVS. The fees will be designed to help recover the cost of the system. In addition, under another subsection, the Secretary of Homeland Security is required to provide a report to Congress within one year of enactment on the capacity, integrity, and accuracy of EEVS.

Under subsection (e) of this section, the law provides that Homeland Security can still seek evidence and documentation with regard to compliance under these provisions. DHS also can issue pre-penalty notices if it believes there has been a violation. Mitigation continues to include good faith compliance and participation in EEVS. The criminal penalties for pattern and practice hiring will be $10,000 for each unauthorized worker and imprisonment for up to six months or both. The Attorney General can bring a civil action to seek such penalties.

Finally, on a few last compliance issues, employers are prohibited from requiring prospective or current employees to post a bond against liability arising from the employer's violation of the section. The legislation bars noncompliant employers from eligibility for federal contracts and directs that all funds paid for civil penalties be placed into an employer compliance fund that shall be used for enhancing and enforcement of employer compliance. There are other miscellaneous provisions not addressed here.

THE I-9 FORM: CHANGING THE FORM BUT NOT THE RULE

In an attempt to assist employers with the I-9 document review mandate, IIRAIRA[2] provided for a reduction in the number of documents acceptable for the employment eligibility verification process. The goal of this provision was to establish a condensed list of easily identifiable documents, as opposed to the current list of some 30 documents. On September 30, 1997, Immigration and Naturalization Service (INS) published an interim rule, amending the documents acceptable under List A, but made no changes to Lists B and C. The interim rule eliminated four documents from List A: (1) certification of U.S. citizenship (Form N-560 or N-561); (2) certificate of naturalization (Form N-550 or N-570); (3) re-entry permit (Form I-327); and (4) refugee travel document. However, in spite of this rulemaking event, INS never changed the I-9 form to reflect the reduced list of acceptable List A documents. Given that most employers would remain unaware of the interim rule and would likely continue to rely on the list as it appears on Form I-9, INS indicated that it would not impose civil penalties on employers who mistakenly continued to accept the documents that had been removed by the interim rule.[3]

In February 1998, INS published a proposed rule that made sweeping changes to the I-9 form and employment verification procedures.[4] These changes provided solutions to many of the problems associated with employment eligibility verification and on the whole, would render the process much easier for employers. Unfortunately, this proposed rule has never been finalized.

USCIS (formerly INS) issued what was expected to contain the long-awaited revisions to Form I-9 in May 2005. However, the only detectable changes were the replacement of outdated references to the Department of Justice (DOJ) and INS with references to DHS, and the addition of a fourth box in section 1 where employees could choose to indicate that they are "nationals" of the United States.[5] On

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[2] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009 (IIRAIRA).

[3] Note that the USCIS website indicates "Interim changes made on September 30, 1997 are currently in effect." *http://uscis.gov/graphics/howdoi/faqeev.htm.*

[4] 62 Fed. Reg. 5287 (Feb. 2, 1998).

[5] This change may have been intended to address a deficiency in the I-9 form that allowed some individuals who

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June 21, 2005, DHS announced that it is "rebranding" the I-9 form to reflect the transfer from DOJ to DHS. Without explanation, DHS replaced the "new" I-9 form from May 2005 with a different version of the I-9 form that again combines U.S. "citizen or national" into a single selection, but that reflected none of the changes provided for in the 1997 and 1998, rulemaking events. The government continues to promise to introduce a new Form I-9 that incorporates substantive changes based on the previous rulemakings;[6] however, it is far from clear when this will happen.[7] With regard to the *Handbook for Employers*, intended to provide a step-by-step explanation of what employers must do to meet their employment eligibility verification responsibilities under the law,[8] USCIS has no current plans to update the information contained therein.[9]

falsely claimed U.S. citizenship to obtain Green Cards. However, as long as the I-9 form contains only three boxes to choose from, it appears the government will continue to favorably adjudicate otherwise approvable adjustment of status applications where the alien has checked the referenced "citizen or national" block of the I-9 in the absence of other specific evidence of a false claim to US citizenship. *See* "AILA/TSC Liaison Questions & Answers," *published on* AILA InfoNet at Doc. No. 01041902 (*posted* Apr. 19, 2001).

[6] Press Release, "DHS Issues Rebranded Form I-9" (June 21, 2005).

[7] GAO Report to Congress, Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts, GAO-05-813 (Aug. 2005) (recommending that DHS set a target time frame for completing the Department's review of the Form I-9 process and issuing final regulations on the process) (hereinafter GAO Report to Congress). In response to an AILA request to provide more underlying information regarding *Federal Register* Notices associated with changes to USCIS forms and regulations, USCIS has agreed to put a link in the notices that take the reader directly to the proposed or affected regulation or form. This might prove useful in monitoring future changes to the I-9 form. *See* "AILA-USCIS Liaison Meeting Minutes" (Sept. 22, 2005), *published on* AILA InfoNet at Doc. No. 05120941 (*posted* Dec. 9, 2005) (hereinafter AILA-USCIS Minutes, Sept. 22, 2005).

[8] INS *Handbook for Employers*, Instructions for Completing Form I-9 (M-274) (Nov. 21, 1991), available at *www.uscis.gov*.

[9] AILA-USCIS Minutes, Sept. 22, 2005, *supra* note 7. USCIS proposes that employers look to Office of Business Liaison employer bulletins for updated information. *See* USCIS Employer Information Bulletin 102, The Form I-9 Process in a Nutshell (Oct. 7, 2005) (noting that the bulletin's purpose is to supplement the 1991 version of the *Handbook for Employers* and the 1991 version of the Form I-9 and its instructions.).

CITIZENS VERSUS NATIONALS—NATIONALITY ISSUES FOR FORM I-9 PURPOSES

Form I-9 asks the potential employee to attest, under penalty of perjury, that he or she is a citizen or national of the United States.[10] The answer for most U.S. citizens is easy, but how many people or employers (let alone lawyers) know what a "national" of the United States is? The question rarely comes up unless you have clients who hail from, or employ, people from the Pacific basin.

Nationality Basics

According to the U.S. State Department (DOS), "[v]ery few persons fall within this category since, as defined by the INA, all U.S. citizens are U.S. nationals but only a relatively small number of persons acquire U.S. nationality without becoming U.S. citizens."[11] The answer to this baffling question on Form I-9 can be found if you read §101(a)(21–22) and §308 of the INA[12] together. Section 101(a)(21) defines the term "national" as a "person owing permanent allegiance to a state.[13] State is defined in the INA as any of the 50 states, plus the District of Columbia, Puerto Rico, Guam, and the Virgin Islands.[14] Section 101(a)(22) of the INA sets forth that all U.S. citizens are also nationals of the United States. However, a national is also "a person who, though not a citizen of the United States, owes permanent allegiance to the United States."[15] Further, INA §308 confers U.S. nationality, but not U.S. citizenship, on persons born in or having ties with "an outlying possession of the United States."[16] The

[10] Form I-9 (rev. Nov. 21, 1991), Section 1.

[11] U.S. State Department website, *http://travel.state.gov/law/citizenship/citizenship_781.html.*

[12] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (*codified as amended at* 8 USC §§1101 *et seq.*) (INA).

[13] The term "national" means a person owing permanent allegiance to a state.

[14] The term "State" includes the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands.

[15] The term "national of the United States" means: (A) a citizen of the United States; or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

[16] INA §308:

> Unless otherwise provided in section 301 of this title, the following shall be nationals, but not citizens of the United States at birth:

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statute sets forth the requirements that one needs to meet in order to be determined to be a national of such outlying possessions. According to INA §308, the persons eligible for this status, in addition to those mentioned above, include persons born abroad to two American noncitizen national parents, or persons born abroad to one alien parent and one noncitizen national parent. The statute also includes a residency requirement of the parents of the child prior to birth in order to transmit such nationality.[17]

Additional research reveals that the only "outlying possessions" as defined in INA §101(A)(29) are American Samoa and Swains Island.[18] Since there are no other statutes that define any other territories or any of the states as outlying possessions, we are limited to these two areas. However, the United States has a number of other insular possessions, such as Wake Island, which according to case law, are not foreign territory.[19] Apparently by inadvertence, these islands are not within the designation of "outlying possessions" as defined in the INA even though aliens coming from these areas ostensibly are not coming from a foreign port or place. However, they are excluded from the definition of the United States for immigration purposes, even though they are not regarded as foreign.

Proof of Nationality

If you determine that your client is a "national" but not a U.S. citizen, what do you advise your client to do? If you research this area of law, you will learn that INA §341(b) provides that you can make an application to the Secretary of State for a Certificate of noncitizen National Status. If you present sufficient proof of nationality, but noncitizen status, you would then take an oath of allegiance much like any petition for naturalization.[20]

However, if you inquire with DOS, you will learn that since the it has received so few requests for such certificates, it never created such a noncitizen national certificate. DOS will then direct those who would ordinarily be eligible for the nonexistent certificate to "apply for a U.S. passport that would delineate and certify their status as a national but not a citizen of the United States." DOS would instruct you as follows: "If a person believes he or she is eligible under the law as a non-citizen national of the United States and the person complies with the provisions of 8 USC 1452(b)(1) and (2), he/she may apply for a passport at any Passport Agency in the United States." When applying, applicants must execute a Form DS-11 and show documentary proof of their noncitizen national status as well as their identity.[21]

Quasi-Nationals

There also are other persons eligible to work in the United States who are not citizens or nationals, but subject to certain treaties, are eligible to live, work, and travel within the United States indefinitely. No, these are not citizens of Canada or Mexico, but Pacific Islanders such as the citizens of the

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(1) A person born in an outlying possession of the United States on or after the date of formal acquisition of such possession;

(2) A person born outside the United States and is outlying possessions of parents both of whom are nationals, but not citizens, of the United States, and have had a residence in the United States, or one of its outlying possessions prior to the birth of such person;

(3) A person of unknown parentage found in an outlying possession of the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in such outlying possessions; and

(4) A person born outside the United States and its outlying possessions of parents one of whom is an alien, and the other a national, but not a citizen, of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than seven years in any continuous period of ten years—

(A) during which the national parent was not outside the United States or its outlying possessions for a continuous period of more than one year, and

(B) at least five years of which were after attaining the age of fourteen years.

The proviso of section 301(g) shall apply to the national parent under this paragraph in the same manner as it applies to the citizen parent under that section.

[17] *See U.S. v. Shiroma*, 123 F. Supp. 145 (D. Hawaii 1954).

[18] The term "outlying possessions of the United States" means American Samoa and Swains Island.

[19] Wake Island is not foreign territory. *See U.S. v. Paquet*, 131 F. Supp. 32 (D. Hawaii 1955), *Petition of Willess*, 146 F. Supp. 216 (D. Hawaii 1956) (however, Wake Island was deemed foreign for purposes of naturalization benefits).

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[20] INA §341(b)(1): "A person who claims to be a national, but not a citizen, of the United States may apply to the Secretary of State for a certificate of non-citizen national status. Upon—(1) proof to the satisfaction of the Secretary of State that the applicant is a national, but not a citizen, of the United States."

[21] *http://travel.state.gov/law/citizenship/citizenship_781.html.*

Republic of the Marshall Islands, the Federated States of Micronesia, and Palau. These Pacific Islands may enter the United States and its territories and possessions, engage in employment, and establish residence (as nonimmigrants), without a nonimmigrant visa or a labor certification.[22]

Originally, these were Pacific islands controlled by Japan. At the conclusion of World War II, the United States acquired rights of dominion over these islands that were called the Pacific Trust Territory. The United States did not have full sovereignty over the Pacific Trust Territory even though it was clearly an American occupancy much like the Philippines.[23] Additionally, for immigration purposes, the Trust Territory was not a part of the United States and was regarded as a foreign port or place, and many Hawaiian court decisions have followed this analysis.[24]

During the past 20 years, the United States has conducted negotiations to resolve numerous issues and to terminate the Trusteeship Agreement. The ultimate goal of the United States was to provide autonomy for the inhabitants of the Trust Territory and allow them to decide their own future political status. Currently, there are agreements with four separate island groups within the Trust Territory. In 1986, these agreements were approved by Congress, and, thereafter, the United Nations declared that the United States had fully discharged its obligations under the original Trusteeship Agreement.[25]

The 1986, action created three new Associated States known as the Federated States of Micronesia (FSM), the Republic of the Marshall Islands (RMI), and the Republic of Palau (RP). The United States drafted and concluded Compacts of Free Association with each of these three new nations. These Compacts set forth the political, economic, military, and other terms of their relationship with the United States. Only the Republic of Palau has yet to approve its Compact. The most pertinent feature of these Compacts for immigration and employment law purposes is that it allows citizens of the three countries the right to enter, reside, and be employed in the United States indefinitely.[26]

In 1976, the fourth island group in the former Trusteeship, the Northern Mariana Islands, elected to become the Commonwealth of the Northern Mariana Islands. In the signed Covenant of Political Union, it conferred U.S. citizenship on the indigenous inhabitants of the Marianas and prescribes limited applicability of the immigration and nationality laws of the United States. As set forth in §302 of Pub. L. No. 94–241, certain inhabitants of the Commonwealth of the Northern Mariana Islands, who became U.S. citizens by virtue of Article III of the Covenant, are eligible to opt for noncitizen national status.[27]

More recently, on December 7, 2003, President George W. Bush signed legislation approving the amended Compacts of Free Association (CFA) with FSM and RMI. These Compacts went into effect on May 1, 2004 for RMI, and June 30, 2004, for FSM. After those dates, RMI and FSM citizens will no

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[22] 8 CFR §212.1(d), §1212.1(d), *as amended*, 66 Fed. Reg. 37429, 37432 (July 18, 2001). This provision gives effect to provisions of §141(a) of the Compact between the United States of America and Marshall Islands and the Federated States of Micronesia, 48 USC §1901 note, and of §141(a) of the Compact between the United States of America and Palau.

[23] *See U.S. v. Shiroma*, 123 F. Supp. 145 (D. Hawaii 1954).

[24] *See Application of Reyes*, 140 F. Supp. 130 (D. Hawaii 1956); *Aradanas v. Hogan*, 155 F. Supp. 546 (D. Hawaii 1957); *see also Matter of A–*, 7 I&N Dec. 128 (1956).

[25] Presidential Proclamation 5564 (Nov. 3, 1986), *reproduced in* 63 *Interpreter Releases* 1069–70 (Nov. 19, 1986); North, "Sweeping Immigration Changes for U.S. Territories," 64 *Interpreter Releases* (Jan. 12, 1987).

[26] 8 CFR §212.1(d), §1212.1(d):

Citizens of the Freely Associated States, formerly Trust Territory of the Pacific Islands.

> Citizens of the Republic of the Marshall Islands and the Federated States of Micronesia may enter into, lawfully engage in employment, and establish residence in the United States and its territories and possessions without regard to paragraphs (14), (20) and (26) of section 212(a) of the Act pursuant to the terms of Pub. L. 99-239. Pending issuance by the aforementioned governments of travel documents to eligible citizens, travel documents previously issued by the Trust Territory of the Pacific Islands will continue to be accepted for purposes of identification and to establish eligibility for admission into the United States, its territories and possessions.

[27] Section 302 of Pub. L. No. 94-241:

> Any person who becomes a citizen of the United States solely by virtue of the provisions in Section 301 [applying to those born in or residing in the Northern Mariana Islands] may within six months after the effective date of that Section or within six months after reaching the age of 18 years, whichever date is later, become a national but not a citizen of the United States by making a declaration under oath before any court established by the Constitution or laws of the United States or any other court of record in the Commonwealth in the form as follows 'I _____ being duly sworn, hereby declare my intention to be a national but not a citizen of the United States.'

longer be exempt from passport requirements for travel to the United States and therefore require passports for entry. However, the amended Compacts preserved the right for RMI and FSM citizens to nonimmigrant admission without visa and allowance of employment eligibility. While 8 CFR §274a.12(a)(8), §1274a.12(a)(8), requires citizens of RMI and FSM to obtain an employment authorization document (EAD) as evidence of their eligibility to work in the United States, these new Amended Compacts now provide that a person admitted to the United States from the FSM or RMI under the CFA "shall be considered to have the permission of the Government of the United States to accept employment in the United States."

Thus, for Form I-9 purposes, an unexpired RMI or FSM passport with unexpired I-9 evidencing admission under the compact (or the compact as amended) shall be considered to be documentation establishing identity and employment authorization under "List A" documents. Therefore, citizens of FSM and the RMI no longer need an EAD to work in the United States. However, because the Republic of Palau has not yet approved the amended Compact, citizens of RP will continue to need to apply for and receive an EAD to work in the United States.[28]

WHAT CONSTITUTES NOTICE OF UNAUTHORIZED EMPLOYMENT?

An employer is liable under IRCA for knowingly hiring a foreign national who is unauthorized to work, or for continuing to employ a foreign national after learning that he or she is not work-authorized. The employer's liability is not limited to those situations in which it has actual knowledge of an employee's lack of work authorization. The employment authorization regulations define knowledge to include "not only actual knowledge but also knowledge which may be fairly inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition."[29]

The following scenarios are instances in which constructive knowledge may be found under current regulations:

- The employer does not complete Form I-9;
- The employer does not properly complete Form I-9, such as where the employer fails to enter an expiration date for an EAD;
- The employer fails to reverify the foreign national's employment eligibility after an employment eligibility document has expired.[30]

More difficult are the situations in which the employer obtains information that may indicate the employee is not authorized to work in the United States. In such situations, the employer generally has a duty to inquire further about the employee's status, while taking care not to run afoul of IRCA's employment discrimination provisions. Though not every constructive notice scenario can be described in this article, some commonly arising situations are as follows:

- The employee submits conflicting documentation during initial verification;
- The employee submits documents that appear to be forged or tampered;
- The employee states that he or she is work-authorized until a specific date, but presents acceptable documentation that does not include the expiration date of the authorization;
- The employer receives information from government enforcement personnel that an employee's documentation may not be valid;
- The employer receives information through other workplace sources that an employee is not authorized for employment, *e.g.*, through a verification service such as the Basic Pilot program or through information from another employer.

A crucial issue for employers who obtain information that would indicate an employee's lack of work authorization is how to go about following up with the worker. Under prior law, requests for more or different documents during the I-9 verification procedure or refusals to honor acceptable documentation could be considered an unfair immigration-related employment practice, whether or not the employer's action was based on a good faith effort to comply with IRCA's employer sanctions provision. The 1996, revisions to IRCA modified this provision and provide that an employer's request for more documents or refusal to honor tendered documents is not unlawful unless made for the purpose or with the

[28] USCIS Employer Information Bulletin 106 (Mar. 16, 2005).

[29] 8 CFR §274a.1(l)(1).

[30] *Id.*

intent of discriminating against an individual on the basis of national origin or citizenship status.[31]

When following up situations such as those listed above, the employer should adhere to some general guidelines. The employer should never specify which documents it wants to see to establish identity or work eligibility. It should never require presentation of a document issued by USCIS, either during verification or reverification procedures. If the employee specifies an expiration date for his or her employment eligibility, but offers an employment eligibility document that does not contain an expiration date (*e.g.*, a Social Security card), the employer should not request additional information or documents. If an employee has presented acceptable documentation for verification purposes, the information should be reverified only if the employee has listed an expiration date for employment eligibility on Form I-9. During the reverification, the employer should not require the employee to furnish a document issued by USCIS that shows an extended expiration date, and should accept any document offered by the employee, as long as it appears on the list of acceptable I-9 documents. Further reverification procedures should be conducted only if, upon initial reverification, the employee presents an EAD with an expiration date.

Where the employer receives information that raises the possibility of unauthorized employment, further investigation must be handled carefully. In general, the employer should not make further inquiries about employment eligibility, or request or require additional documentation based on mere rumor or hearsay, without more. Information received from the government may require further investigation. For example, if information is received from U.S. Immigration and Customs Enforcement (ICE) that the employee has not properly completed Form I-9 (*e.g.*, where an inaccurate alien registration number has been provided), follow-up is required. Further inquiry is required when the employee offers a document that contains obvious signs of forgery or tampering, or where the name or descriptive information contained in the document does not relate to the employee. Likewise, follow-up is required where the employee presents a receipt showing an application for an acceptable I-9 document.

In general, the employer must develop a consistent approach to dealing with situations in which there is a duty to inquire further. Employers should remember that they are not expected to ferret out all unauthorized workers from the workplace. Therefore, when an employee presents documents evidencing employment eligibility from an acceptable list of documents, those documents are prima facie proof of the employee's eligibility to work in the United States. Absent clear evidence to the contrary, such as notification from enforcement personnel that the documents are invalid or a contradictory statement from the employee or obvious fraud, the employer need not inquire further about the employment eligibility of the employee.

Employers also should be aware of recent cases indicating that using third-party contractors to hire unauthorized workers may not shield them from IRCA liability. In 2005, in a widely publicized case, Wal-Mart Stores agreed to an $11 million settlement arising out of allegations that it had knowingly used the services of undocumented workers hired by independent contractors.[32] More recently, the Supreme Court has agreed to hear *Mohawk Industries, Inc. v. Williams*,[33] in which a class of workers at a carpet and rug manufacturing company has filed a civil lawsuit under the Racketeer Influenced and Corrupt Organizations (RICO) statutes, alleging that its employer, Mohawk, had conspired with a staffing agency to hire undocumented Chinese foreign nationals to take the place of legally authorized workers and had formed a racketeering enterprise to that end. Oral argument before the Court was held on April 26, 2006.

DEALING WITH SOCIAL SECURITY ISSUES

The most common Social Security issue that arises in the context of employment eligibility verification is the Social Security Administration (SSA) "no match" letter. No-match letters are periodically sent to employers to inform them that employee name and Social Security Number (SSN) information does not match the SSA's records. The typical no-match letter, titled "Employer Correction Request," generally explains that discrepancies exist between SSA's database and employee information provided by the employer on the W-2 form, and requests that employers respond to the letter with corrections "within 60 days." A list of mismatched SSNs is typically attached to the letter, along with information on making corrections. Receipt of a no-match letter raises immigration issues that should

[31] INA §274A(b)(6); 28 CFR §44.200(a)(3).

[32] *See* "Wal-Mart to Pay $11 Million in Lawsuit on Illegal Workers," *N.Y. Times*, Mar. 19, 2005.

[33] *Mohawk Industries Inc. v. Williams*, 411 F.3d 1252, *cert. granted*, 126 S. Ct. 830 (2005).

be carefully heeded by employers. In particular, an SSN mismatch may raise IRCA compliance issues, in particular, whether the affected employee is in fact authorized to work in the United States. Receipt of the no-match letter should not by itself prompt an employer to suspect that the affected employee is working without authorization. However, agency guidance suggests that employers who receive no-match letters have an obligation under INA §274A to follow up with affected employees.[34]

The SSA no-match makes clear that it "makes no statement about your employee's immigration status." Employers are further warned that the letter is not, by itself, a basis for taking any adverse action against an employee, such as termination, suspension, or discrimination. Legacy INS shared this view, stating in a 1997 letter that notice of a discrepancy between wage reporting information and SSA records does not by itself put the employer on notice that the employee is not authorized to work, and is not actual notice of an employer's lack of work authorization.[35]

Receipt of an SSA no-match letter should not be ignored, however; employers should take reasonable steps to try to resolve discrepancies. With respect to the possibility of unauthorized employment, the no-match letter should be considered with other circumstances to determine whether there is actual or constructive notice that an employee is not authorized to work. For example, in addition to the no-match letter, the employer may also receive information from another source, such as another employee, that a worker identified in the no-match letter is in fact not authorized to work. In such a case, the totality of circumstances might rise to actual or constructive notice of unauthorized employment.

Follow-up activity should be considered carefully. Receipt of a no-match letter does not authorize the employer to demand that the employee show his or her EAD or other immigration document. In fact, once an employer has received an employee's status documents for initial completion of Form I-9, rechecking immigration documents is prohibited by IRCA. Employees should be given an opportunity to rectify errors in their name or SSN, since mismatches are commonly due to name changes after marriage or divorce, as well as clerical errors. However, follow-up activity may yield information constituting actual or constructive notice of unauthorized employment. In such cases, further review of the employee's work eligibility is warranted, but any such investigation must be conducted in a consistent, nondiscriminatory manner, as discussed above.

THE CHANGING ROLE OF THE DRIVER'S LICENSE

The state driver's license is one of the most frequently selected List B identity documents when it comes to completing Form I-9. However, the REAL ID Act of 2005[36] may change that by making it difficult, if not impossible, for many individuals to obtain a state driver's license. The REAL ID Act provides that as of May 2008, a state driver's license cannot be accepted by federal agencies for any official purpose unless it meets the requirements of the Act. This would likely include the "official federal purpose" of the use of a driver's license to complete Form I-9.

Once the 1998 proposal[37] is in place, there will only be three List B identity documents, one of which is a state-issued driver's license.

Driver's license applicants must present documents that prove their identity, date of birth, citizenship or immigration status, Social Security number, legal name, and physical residence. Then, the Department of Motor Vehicles (DMV) must verify the authenticity of these documents (which include birth certificates, court documents, Social Security cards, U.S. and foreign passports, immigration documents, and other proof of physical residence, such as utility bills and bank statements) with the agency that issued them. Verification whether electronic or manual is likely to be slow. Denials, delays, and repeated trips to the DMV will be the norm. Certain nonimmigrants must receive only temporary licenses that will have to be renewed more often. Accordingly, even U.S. citizens may encounter difficulties trying to obtain their driver's licenses in a timely manner to complete an I-9 for a new job.

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[34] *See* letter from William Ho-Gonzalez, Office of the Special Counsel for Unfair Immigration-Related Employment Practices, U.S. Department of Justice, to Carl G. Borden, (Dec. 16, 1993).

[35] *See* letter from INS General Counsel David A. Martin, to Bruce R. Larson (Dec. 23, 1997), *reproduced in* 76 *Interpreter Releases* 203 (Feb. 9, 1998).

[36] Division B of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005).

[37] 62 Fed. Reg. 5287 (Feb. 2, 1998).

On February 10, 2006, the Texas Department of Public Safety (DPS) changed the list of acceptable documents for issuance of a Texas driver's license. One particularly vexing consequence of this change resulted in the refusal of driver's license to many foreign nationals even though they were in valid nonimmigrant visa status, such as holders of J-1, H-1B, and F-1 visa statuses (except those with work authorization cards). After focused advocacy efforts of various interested groups (NAFSA: Association of International Educators and AILA), state officials provided temporary relief in the form of a DPS memo advising that DPS supervisors may accept a valid foreign passport with a valid visa or valid I-94 card.[38] The memo also provided a general reminder that in Texas, any person who has never had a Social Security card, or who is not eligible to obtain one, can sign a waiver with the Department and be issued a license. Although it may be changed based on future REAL ID implementation, for now the Texas DMV Commission plans to post for public comment its recommended language for a new administrative rule that will allow the combination of documents respective to legal status to be presented for identification. The posting of the rule will also allow for further comment prior to any final acceptance.

CATCH IT IF YOU CAN: THE INTERNAL AUDIT

One of the most rewarding situations an attorney can have is being involved preparing a large corporation for an I-9 audit. Imagine being locked up in a room for days with several human resource managers sorting through thousands of Form I-9s. The relatively simple and straightforward Form I-9 can create the most horrific of nightmares when you review them carefully for legal compliance. As we instruct all corporate clients, it is imperative to conduct an I-9 self-audit on an annual basis at the very minimum. The Form I-9 is deceptively simple, but fraught with potential problems. The Form's potential problems multiply when employers use different managers or employees with varying degrees of training to complete them. If you can save your client potentially thousands of dollars in civil monetary penalties, while teaching management to correctly complete Form I-9, your reward will be having a very satisfied client.

What Is Involved in a Self-Audit

The authors recommend that you follow a procedure that would mirror a government compliance audit. An audit begins with a request to see not only the I-9s, but also the payroll records for the company that lists all current and terminated employees within a certain period of time. The auditor will then determine what I-9s should be made available for inspection.

Therefore, once you obtain the list of the employees, it is important to first make sure that you have an I-9 for all current employees. These I-9s should be kept in a separate file outside of the employees' personnel files—the reason is that I-9s are only kept for inspection by ICE officials or Department of Labor audit teams and should not be available for everyone to see. From an employment law perspective, the I-9 contains information that, if alleged to be used to make an adverse employment decision, could create the foundation of protected category discrimination. Federal and state laws uniformly prohibit discrimination based on age, ethnicity, national origin, citizenship status, and race, and an I-9 form contains information that could be used in a discriminatory manner.

Once you match up all the I-9s with the employee names, you will learn which I-9s are missing. You will also learn which I-9s are for terminated employees. I-9s for terminated employees should be segregated and placed in separate folders or binders. Since I-9s are required to be kept for employees for three years from the date of hire, or one year after termination, whichever is longer, those I-9s that do not fall within these time periods should be destroyed. Additionally, the authors find it useful to write a destruction date on the top of terminated employees' Forms I-9.

Once the binders for current and terminated employees are established, the authors generally recommend following a procedure to systematically inspect each individual I-9 to check for errors and omissions. This includes checking the completion date of the I-9 along with the hire date, and looking for expired or temporary work authorizations that require reverification.

Self-audits are a great training tool, as errors or omissions will indicate specific procedural problems, and can determine areas for additional training of personnel.

Common Mistakes in Preparing Form I-9

Section 1:

- The Employee did not sign or date the form

[38] Memo in possession of the authors.

- The Employee did not complete Section 1 on the date of hire
- The Employee did not check one of the three boxes regarding status
- The Employee checked the wrong box
- The Employee did not list an Alien Number, Admission Number, or expiration date

Section 2:

- The Employer did not sign Section 2
- The Employer did not date Section 2
- The Employer did not fill in the date of hire
- The Employer did not complete Section 2 within three business days of hire
- The Employer photocopied the employee's documents but did not complete the form
- The Employer signing the Form is not the same person who saw the original documents
- The Employer accepted unacceptable documents (*e.g.*, hospital birth certificates, foreign birth certificates)
- The Employer accepted documents that did not "reasonably relate" to the employee (*e.g.*, different names, dates of birth)
- The Employer accepted too many documents (items on list A, B, and C), which can lead to a discrimination charge against the Employer
- The Employer keeps copies of documents for some employees, but not all (there is no requirement to keep copies, but the Employer's policy should be consistently applied for all employees)

Section 3: The Employer Did Not Reverify Form I-9 When Required

- The Employer did not complete the information required in Section 3
- The Employer did not sign Section 3

Self-Audit Corrections

The authors advise employers not to use "white-out" to make corrections on Forms I-9. Such forms are originally completed containing certifications by both the employee and employer. Thus, a later modification must be additionally signed or initialed and dated by the person making the correction, whether it be the employee or employer. An additional notation such as "corrected during self-audit, date" has been accepted by federal auditors.

APPLICATION QUESTIONS—IS IT SAFE TO ASK THAT?

A significant cause for concern for employers is the issue of pre-hire inquiries into a job applicant's work-authorized status and need for future immigration sponsorship. The Department of Justice's Office of Special Counsel (OSC) has issued some guidelines on these issues.[39]

Pre-Hire Inquiries Generally

In general, an employer may institute a policy that limits hiring to those persons with current employment authorization. Under IRCA, the employer need not consider for employment any person who is not already work-authorized. OSC maintains that an employer may permissibly ask a job applicant whether he or she is currently authorized to work in the United States. If the applicant answers in the affirmative, the employer should not inquire into the basis of the employment eligibility, *i.e.*, whether the employee is a U.S. citizen, lawful permanent resident, or a nonimmigrant foreign national with time-limited work authorization. If the applicant answers in the negative, the employer can permissibly inquire further regarding the applicant's current immigration status.[40] Such pre-hiring inquiries should have minimal risk, because an individual who answers "no" to the question, whether he or she is authorized to work in the United States, is not protected against discrimination under IRCA. Nevertheless, the employer should inquire further about immigration status only if its policy contemplates hiring some persons without current employment authorization (*i.e.*, those who will require the employer's sponsorship). Otherwise, the employer can safely eliminate all such persons from employment consideration without any further inquiry.

Pre-Hire Inquiries and Limited Hiring Policies

Some employers wish to institute policies that limit hiring to those persons who have protected status under citizenship discrimination laws, *i.e.*, U.S. citizens, lawful permanent residents, temporary residents, refugees, and asylees.[41] Such policies are

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[39] *See, e.g.*, Office of Special Counsel Opinion Letter of April 20, 1993 (concerning pre-employment inquiries by employers); U.S. Equal Employment Opportunity Commission Opinion Letter of June 17, 1993 (concerning pre-employment inquiries and prehiring completion of Form I-9).

[40] *See, e.g.*, Office of Special Counsel Opinion Letter of August 6, 1998.

[41] 28 CFR §44.101(c).

generally permitted, but employers may not limit hiring to a subgroup of the protected class, *i.e.*, U.S. citizens and permanent residents only.[42]

The type of pre-hire inquiry discussed above is appropriate when an employer has a policy of recruiting any individual, regardless of current employment eligibility, or if the employer is willing to hire any individual with current employment eligibility. The inquiry is not sufficient, however, if the employer wants to limit hiring to those persons who are protected individuals under IRCA's citizenship discrimination provision. In asking questions to distinguish between those persons protected by IRCA and those who are not, the employer must keep in mind that OSC has not given the same type of explicit approval to such inquiries. In addition, the employer must be sensitive at all times to avoid national origin discrimination. The Equal Employment Opportunity Commission (EEOC) has not given a definitive opinion on the national origin discrimination implications of such inquiries. Because the EEOC reviews employer policies for disparate impact, and is not limited to cases in which it can establish intentional discrimination, the employer must review such inquiries carefully with employment counsel before instituting a limited hiring policy. In all cases, the employer should not ask the question "Are you a U.S. citizen?" The employer may not permissibly distinguish between U.S. citizens and other protected individuals under IRCA. Obtaining this information before the hiring decision is made leaves the employer open to discrimination charges by rejected job applicants.

Pre-Hire Sponsorship Inquiries

Another pre-hire concern of employer is whether the prospective employee will require sponsorship for an employment visa either at the time of hire or in the future. This information is important because it affects cost and timing issues that must be considered in the hiring decision. Merely asking a prospective employee whether he or she is currently work-authorized will not elicit the necessary information to make this determination, since the authorization may be temporary and require future sponsorship for extensions. In such circumstances, OSC has endorsed the following set of questions: (1) "Are you legally authorized to work in the United States?" and (2) Will you now or in the future require sponsorship for employment visa status (*e.g.*, H-1B status)?"[43] OSC does not recommend that applicants be asked to specify their citizenship status in the context of the employment authorization process. Questions such as "Explain the basis of your current employment authorization" should be avoided because a rejected applicant may rely upon such an inquiry to allege later that the employer considered the information in making the hiring decision, and discriminated based on citizenship status.[44]

DEFENDING AGAINST INVESTIGATIONS

ICE's approach to worksite enforcement operations has markedly changed, ostensibly on account of widespread use of counterfeit documents[45] that make it difficult for ICE agents to prove that employers knowingly hired unauthorized workers, and set and collect fine amounts from employers.[46] Most indicative of this change is the dramatic decrease in the number of notices of intent to fine[47] issued to employers for knowingly hiring unauthorized workers or improperly completing Forms I-9.[48] Therefore, as a response to these difficulties, ICE now considers the pursuit of civil settlements with employers preferable to the administrative fines process.

Employers are now more likely to face a full-scale federal investigation including criminal search warrants authorizing seizure of business, financial and personnel records, as well as computers maintained by the

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[42] 28 CFR §44.200(b)(2). *See also* Office of Special Counsel Opinion Letter of September 20, 1988.

[43] *See, e.g.*, Office of Special Counsel Opinion Letter of August 6, 1998.

[44] *Id.*

[45] In its 1997 report to Congress, the U.S. Commission on Immigration Reform noted that the widespread availability of false documents made it easy for unauthorized aliens to obtain jobs in the United States. In 1999, GAO reported that large numbers of unauthorized aliens have either fraudulently used valid documents that belong to others or presented counterfeit documents as evidence of employment eligibility. GAO, "Significant Obstacles to Reducing Unauthorized Alien Employment Exist," GAO/GGD-99-33 (Apr. 1999) (citing GAO, "Immigration Reform: Employer Sanctions and the Question of Discrimination," GAO/GGD-90-62 (Mar. 29, 1990)).

[46] GAO Report to Congress, *supra* note 7.

[47] 8 CFR §274a.9(d) (the proceeding to assess administrative penalties under §274A of the INA is commenced when the Service issues a Notice of Intent to Fine (NIF) on Form I-763.) Upon service of the NIF, an employer has 30 days to contest the NIF and to ask for a hearing before an Administrative Law Judge (ALJ).

[48] *See* GAO Report to Congress, *supra* note 7, noting a decline in the number of notices of intent to fine from 417 in FY 1999 to three in FY 2004.

employer.[49] ICE agents conducting the worksite enforcement operation also are likely to be accompanied by enforcement agents from other federal agencies, as well as state and local law enforcement officers.[50] At the close of the investigative phase, employer sanctions efforts are more likely to be driven by a U.S. Attorney in Federal District Court than the traditional ICE agent and trial attorney before an administrative law judge.[51]

The nature of sanctions and settlement agreements is also changing. Employers who plead guilty to criminal immigration charges can face significant criminal forfeiture sanctions.[52] Criminal forfeiture occurs when, after the owner is convicted of a crime, it is demonstrated that the property has a sufficient relationship to the criminal activity to justify depriving the owner of his or her property rights.[53] Since criminal forfeiture is justified as a criminal punishment (it is imposed in a criminal proceeding directed against an individual for his or her alleged misconduct), a defendant in a criminal forfeiture prosecution is entitled to all the procedural protections associated with the criminal process.[54] Immigration counsel would be well-advised to work closely with qualified criminal counsel under these circumstances.

Even where the United States concludes that federal criminal proceedings are not appropriate, the terms of the ensuing civil settlement agreement can be comprehensive. Settlement amounts are reaching unprecedented levels.[55] ICE widely publicized its conclusion of a consent decree that directed the employer to pay $11 million through the U.S. Attorney's Office to the Treasury Forfeiture Fund.[56] The government also seeks wide-ranging injunctive relief designed to ensure a partnership aimed at effective enforcement of these immigration laws. Consent decrees can include permanent injunctions from knowingly hiring, recruiting, and continuing to employ aliens who are not legally authorized to work within the United States; and directives to employers to establish a means to verify that independent contractors also are taking reasonable steps to comply with immigration laws in their employment practices and cooperate truthfully with any investigation of these matters, to train employees of their legal obligations to prevent the knowing hiring, recruitment, and continued employment of unauthorized aliens while complying with pertinent antidiscrimination laws, to establish an internal corporate policy and procedures for employment eligibility verification, and to cooperate in any ongoing investigations of other employers involved in the case.[57]

Heartened by the large forfeiture amounts and comprehensive decrees, ICE is likely to continue to pursue this approach to worksite enforcement and sanctions. In fact, ICE emphasizes that it will continue to conduct important enforcement operations at traditional worksites, especially where the agency suspects egregious criminal employer violations or cases in which there is a nexus to other violations such as alien smuggling, alien harboring, money laundering, fraud, or some form of worker exploitation.[58]

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[49] Press Release, "Homeland Security Secretary Michael Chertoff Announces Six-Point Agenda for Department of Homeland Security" (July 13, 2005), *published on* AILA InfoNet at Doc. No. 07071365 (*posted* July 13, 2005).

[50] "120 arrested on immigration violations at Wal-Mart site," S. Armour & D. Leinwand, USA TODAY, Money section (Nov. 17, 2005) (ICE was assisted by the U.S. Department of Labor, the Social Security Administration, Pennsylvania State Police and the Schuylkill County sheriff); ICE News Release, "56 Illegal Aliens Arrested By ICE at Construction Site" (Feb. 22, 2006) (Carthage Police Department and Jasper County Sheriff's Department assisted ICE with executing this criminal search warrant).

[51] Press Conference with Secretary of Homeland Security Michael Chertoff, Assistant Secretary for Immigration and Customs Enforcement Julie Myers, and U.S. Attorney Glenn Suddaby (Apr. 20, 2006); see "News Release: DHS unveils comprehensive immigration enforcement strategy for nation's border," *published on* AILA InfoNet at Doc. No. 06042160 (*posted* Apr. 21, 2006).

[52] Contractors who actually hired the laborers for work inside stores for the world's largest retailer agreed to plead guilty to criminal immigration charges and together pay an additional $4 million in fines.

[53] T. Reed, *American Forfeiture Law: Property Owners Meet The Prosecutor*, Cato Policy Analysis No. 179 (Sept. 29, 1992).

[54] *Id.*

[55] The $11 million civil settlement alone is approximately four times larger than any other single payment received by the government in an illegal alien employment case. C. Bartels, "Wal-Mart Escapes Criminal Charges in Case," ABC News Online, Money section (Mar. 18, 2005).

[56] *Id.* Federal officials said the fine money would go to the Treasury Forfeiture Fund and will be spent on "promoting future law enforcement programs and activities in this field by U.S. Immigration and Customs Enforcement."

[57] ICE News Release about terms of Wal-Mart settlement agreement.

[58] ICE Fact Sheet, Oct. 20, 2005.