

**SOCIAL SECURITY “NO MATCH”
NATIONAL ORIGIN DISCRIMINATION IN THE
IMMIGRATION AGE**

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TABLE OF CONTENTS

INTRODUCTION	1
I. IMMIGRATION REFORM AND CONTROL ACT – OVERVIEW.....	2
A. FORM I-9.....	2
B. PENALTIES	3
C. KNOWLEDGE.....	3
II. THE NO-MATCH REGULATION	4
A. DHS’S FIRST REGULATION.....	4
1. <u>The “no-match” safe harbor</u>	4
2. <u>The safe harbor for DHS notices</u>	5
3. <u>Other reasonable responses</u>	5
B. THE INJUNCTION	5
C. DHS’S “SECOND” REGULATION.....	6
D. THE FUTURE OF THE REGULATION	7
III. THE E-VERIFY PROGRAM.....	7
A. E-VERIFY ENROLLMENT.....	7
B. THE E-VERIFY PROCESS.....	8
1. <u>Initial Submission</u>	8
2. <u>SSA tentative non-confirmation</u>	9
3. <u>SSA referral</u>	9
4. <u>SSA resolution of SSA tentative non-confirmation</u>	10
5. <u>DHS resolution of SSA referral</u>	10
6. <u>DHS tentative non-confirmation and referral</u>	11
7. <u>DHS resolution of DHS tentative non-confirmation</u>	11
8. <u>Photo Screening Tool</u>	11
9. <u>Employer final action</u>	12
C. E-VERIFY WEAKNESS	12
1. <u>Unable to detect identity theft</u>	12
2. <u>No protection from ICE</u>	13
3. <u>Erroneous data</u>	13
D. ATTEMPTS AT IMPROVEMENT	13
E. FEDERAL LEGISLATION	14
1. <u>The SAVE Act</u>	14
2. <u>The NEVA</u>	15
F. STATE LEGISLATION	15
1. <u>The Arizona LAW Act</u>	15
2. <u>The Mississippi MEPA</u>	16
3. <u>The Illinois Right To Privacy In The Workplace Act</u>	17
G. THE OPT INCENTIVE	17
IV. CITIZENSHIP AND NATIONAL ORIGIN DISCRIMINATION.....	18
A. A RECIPE FOR DISASTROUS DECISION-MAKING.....	18
1. <u>Criminal fear</u>	18

2.	<u>Sudden disruption</u>	19
3.	<u>The Need For Education</u>	20
B.	CITIZENSHIP DISCRIMINATION UNDER THE IRCA	21
1.	<u>Citizens an intending citizens only</u>	21
2.	<u>Permissible IRCA citizenship discrimination</u>	22
3.	<u>IRCA charges and litigation</u>	22
4.	<u>Retaliation and document abuse</u>	25
5.	<u>Liability for immigration ignorance</u>	25
C.	TITLE VII NATIONAL ORIGIN DISCRIMINATION CLAIMS	29
1.	<u>National origin v. citizenship under Title VII</u>	29
2.	<u>The scope of “national origin”</u>	30
3.	<u>Unauthorized aliens under Title VII</u>	32
4.	<u>Immigration compliance as a legitimate non-discriminatory reason</u>	34
D	SECTION 1981	40
1.	<u>Race v. national origin</u>	40
2.	<u>Alienage discrimination</u>	41
3.	<u>Tension with IRCA</u>	42
3.	<u>Title VII Framework</u>	43
V.	CONCLUSION	44
	APPENDIX A:	1
	APPENDIX B	1

INTRODUCTION

Over the past year, the Department of Homeland Security (“DHS”) has continued to attempt to bring immigration compliance into the 21st century. Moving away from the document-based compliance paradigm embodied by the Form I-9 and its focus on physical document inspection, DHS has embraced a technology-driven, data-based approach to compliance, with a particular emphasis on Social Security numbers. The DHS’s shift has met with considerable resistance.

For example, on August 15, 2007, the DHS published a regulation requiring employers to take “reasonable steps” in response to a Social Security no-match letters¹ or risk a charge of “knowingly” employing unauthorized aliens. On August 29, 2007, the American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”) responded by filing suit against the DHS and ultimately won a temporary injunction from the United States District Court for the Northern District of California, effectively blocking implementation of the regulation. Unwilling to abandon the regulation, DHS published a supplemental proposed rule that attempts to address the bases for the district court’s temporary injunction and thus clear the way for the enforcement of the regulation.

At the same time, federal legislation has been introduced to require all employers to participate in the DHS’s E-Verify program. Participation in E-Verify requires an employer to verify each newly hired employee’s Social Security number against the records found in the Social Security Administration (“SSA”) database. Given concerns over the data inaccuracies that plagued E-Verify, separate federal legislation has been introduced that would replace E-Verify with a newly created Electronic Employment Verification System based on the National New Hire Directory.

While the federal debate over E-Verify and the use of Social Security numbers to ensure immigration compliance continues, individual states have begun to introduce their own legislation. Underscoring the divergence of views on the subject, Illinois recently made it illegal for employers to participate in DHS’s E-Verify program, while Arizona and Mississippi recently made it illegal for employers *not* to participate in E-Verify.

As the legislative wrangling over E-Verify and its surrogates rages on, the DHS continues to look for additional means for encouraging employers to adopt the E-Verify system. For example, on April 8, 2008, DHS issued a regulation that enables a foreign national student who graduates with a bachelor’s, master’s, or doctoral degree in a designated science, technology, engineering, or mathematics (“STEM”) degree program to obtain an additional 17 months of Optional Practical Training (“OPT”), but *only if* the student works for an employer that participates in E-Verify. The additional 17 months of OPT provides a partial solution to the now annual H-1B shortage by allowing the employer to employ the student while the employer makes multiple attempts to obtain an H-1B for the student. Given that the additional OPT is only available to employers who participate in E-Verify, it is very likely that many employers—particularly those in the high technology sector—will give serious consideration to enrolling.

All the while, Immigration Customs Enforcement (“ICE”) has continued to make headlines by arresting employer representatives who knowingly employ illegal aliens and referring them for

¹ The SSA generates no-match letters when the name and Social Security number reported for an employee on Form W-2 do not match the SSA’s records.

federal criminal prosecution. The threat of criminal prosecution has instilled a very personal and urgent need to ensure corporate immigration compliance in many hiring professionals. Unfortunately, amidst this maelstrom of immigration activity, there has been very little education on what employers should and should not do to ensure immigration compliance.

This paper will examine the DHS's Social Security no-match regulation and the E-Verify program in detail. This paper will also examine U.S. citizenship and national origin discrimination laws and provide practical suggestions for ensuring immigration compliance without running afoul of these discrimination laws.

I. IMMIGRATION REFORM AND CONTROL ACT – OVERVIEW

Section 1324a of the Immigration Reform and Control Act (“IRCA”) makes it unlawful for any person or entity to hire (or recruit or refer for a fee) an alien “knowing” that the alien is an “unauthorized alien” (*i.e.*, an alien not authorized to work in the U.S.) 8 U.S.C. § 1324a(a)(1)(a), (h)(3). Likewise, the IRCA makes it unlawful for any person or entity to continue to employ an alien “knowing” the alien is or has become an unauthorized alien. 8 U.S.C. § 1324a(a)(2).

A. Form I-9²

To ensure compliance with the prohibition against knowingly hiring an unauthorized alien, the IRCA requires that a Form I-9 be properly completed for each employee hired after November 6, 1986. 8 U.S.C. § 1324a(a)(2); 8 C.F.R. § 274a.1(c). At a very basic level, proper completion of Form I-9 involves the following:³

Section 1 – The employer must ensure the employee completes and signs Section 1 of Form I-9 at the time of hire,⁴ attesting to his or her status as a citizen, legal permanent resident, or work authorized alien. 8 C.F.R. § 274a.2(b)(1)(i)(A).

Section 2 – Within three business days of hire,⁵ the employer must ensure the individual presents one or more documents evidencing his or her identity and right to work in the United States. 8 C.F.R. § 274a.2(b)(1)(i)(B). The specific documents an individual may present are identified in the regulations and on the back of Form I-9. *See* 8 C.F.R. § 274a.2(b)(1)(v). Within those same three business days, the employer must physically examine the documents and verify on Form I-9 that they appear genuine and appear to relate to the individual presenting them. 8 C.F.R. § 274a.2(b)(1)(ii)(A).

² As of the writing of this paper, the June 5, 2007, version of Form I-9 is the most recent version. This version of Form I-9 removed five List A documents from the list of documents an employer may accept as proof of both identity and work authorization. The new form also added one List A document (Form I-766) and consolidated several others. In addition, the new form specified that an employee is not required to provide a Social Security number on Form I-9, unless the employer participates in E-Verify. For additional information, please see www.boulettegolden.com/html/form_i-9.html.

³ This paper provides a *very* basic overview of Form I-9. The regulations surrounding Form I-9 contain a number of specific requirements related to a number of unique situations and documents, the full discussion of which would far exceed the scope of this paper.

⁴ “Hire” is the actual commencement of employment for wages or other remuneration. 8 C.F.R. § 274a.1(c).

⁵ If the employment will be for less than three days, the employer must complete Section 2 at the time of hire. 8 C.F.R. § 274a.2(b)(1)(iii).

Section 3 – If an employee’s work authorization is subject to expiration, the employer must reverify the employee’s work authorization (on or before the date of expiration) by physically examining a document that shows either continuing work authorization or a new grant of work authorization. 8 C.F.R. § 274a.2(b)(1)(vii). An employer may complete Section 3 to reflect this reverification, or the employer may complete a new Form I-9 for the employee (provided the employer also retains the employee’s original Form I-9). *See* 8 C.F.R. § 274a.2(b)(1)(vii), (b)(2)(i).

An employer must retain an employee’s Form I-9 for three years from the date of hire or one year from the date of termination, whichever is later. 8 C.F.R. § 274a.2(b)(2)(i). An employer may, but is not required to, retain with the Form I-9 copies of the documents presented by the employee. 8 C.F.R. § 274a.2(b)(3). Subject to certain requirements, Form I-9 may be completed and stored electronically. 8 U.S.C. § 1324a(b)(1)(A)(ii), (b)(3); 8 C.F.R. § 274a.2(e)-(h).

B. Penalties

The IRCA authorizes fines of \$250 to \$2,000 per alien for initial violations of the knowingly hiring or continuing to employ prohibitions. 8 U.S.C. § 1324a (e)(4)(A)(i). For persons or entities previously fined one time under the IRCA, the penalty increases to \$2,000 to \$5,000 per alien, and for persons or entities previously fined more than once, \$3,000 to \$10,000 per alien. 8 U.S.C. § 1324a (e)(4)(A)(ii), (iii). Additionally, the IRCA authorizes the Attorney General to issue an order requiring compliance for up to three years or “to take such other remedial action as is appropriate.” 8 U.S.C. § 1324a (e)(4)(B). For paperwork violations, fines can range from \$100 to \$1,000. 8 U.S.C. § 1324a (e)(5).

C. Knowledge

The legal meat of IRCA compliance involves the standard for finding that an employer “knew” an alien was an unauthorized alien. As one might expect, “knowledge” includes actual knowledge. The term also includes “knowledge which may fairly be 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.” 8 C.F.R. § 274a.2(l)(1).

Such “constructive” knowledge may include, but is not limited to, situations where an employer: (1) fails to complete or improperly completes Form I-9; (2) has information available to it that would indicate that the alien is not authorized to work; or (3) acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf. 8 C.F.R. § 274a.2(b)(1)(1).

For a detailed discussion regarding the constructive knowledge concept under the IRCA, please see Appendix A to this paper.

II. THE NO-Match REGULATION

A. DHS's First Regulation

On August 15, 2007, the DHS published a new regulation addressing Social Security “no-match” letters.⁶ Under the DHS’s regulation—which was supposed to go into effect on September 17, 2007—an employer that receives a no-match letter must take “reasonable steps” in response to the letter or be deemed to have “constructive knowledge” of the unauthorized status of any employee who later turns out to be an unauthorized alien. 8 C.F.R. § 274a.2(b)(1)(1)(iii)(B).

1. The “no-match” safe harbor

The DHS’s no-match regulation establishes a series of “safe-harbor” steps an employer may take in response to a no-match letter and thus avoid a finding of constructive knowledge based on the no-match letter. 8 C.F.R. § 274a.2(b)(1)(2)(i). To take advantage of the safe harbor, the employer must follow the steps outlined below:

WITHIN 30 DAYS OF RECEIPT OF THE NO-MATCH LETTER

First, the employer must check its records to determine if the discrepancy was caused by a clerical error. 8 C.F.R. § 274a.2(b)(1)(2)(i)(A). If it was, the employer must correct the error with the SSA and verify that the corrected name and Social Security number match the SSA’s records. *Id.* The employer is advised to keep a record of the manner, date, and time of the re-verification with the SSA. *Id.* The employer is allowed to update the employee’s Form I-9 with the corrected information or, alternatively, have the employee complete a new Form I-9. *Id.* The employer is advised not to re-inspect documents, however. *Id.*

Second, if the employer determines that the no-match letter was not a result of an error in its records, the employer must “promptly” ask the employee to confirm that the name and Social Security account number in the employer’s records are accurate. 8 C.F.R. § 274a.2(b)(1)(2)(i)(B). If the information is inaccurate, the employer must correct its records, inform the SSA of the correction, and verify a match on the corrected information. *Id.* The employer is again advised to keep a record of the manner, date, and time of its re-verification with the SSA. *Id.*

Third, if the employee confirms that the employer’s information was accurate, the employer must “promptly” advise the employee of the date of receipt of the no-match letter and inform the employee that he or she must resolve the discrepancy with the SSA no later than 90 days after the receipt date of the no-match letter. 8 C.F.R. § 274a.2(b)(1)(2)(i)(B). The employer is not under any legal obligation to advise the employee on how to resolve the discrepancy with the SSA. *Id.* If the employee resolves the issue, the employer must update the employee’s Form I-9 as necessary to reflect any corrected information. *Id.*

⁶ The SSA generates no-match letters when the employee name and Social Security number reported on Form W-2 do not match the SSA’s records.

WITHIN 93 DAYS OF RECEIPT OF THE NO-MATCH LETTER

If the employee cannot resolve the issue with the SSA within 90 days of the no-match letter receipt date, the employer must have the employee complete a new Form I-9 within 93 days of the date the employer received the letter (*i.e.*, within three days of the 90th day following receipt of the letter). 8 C.F.R. §§ 274a.2(b)(1)(2)(i)(B), (b)(1)(2)(iii). When the employee completes the new Form I-9, the employer may not accept any document bearing the no-match Social Security number, and the employee must present a document with his or her photograph on it to establish his or her identity (or to establish both identity and authorization to work). *Id.* If the employee is able to provide such documentation, the employer must preserve the new Form I-9 with the old Form I-9. *Id.*

If the employee is unable to complete a new Form I-9 in compliance with the above, the employer must choose between terminating the employee or risking a “constructive knowledge” finding under the IRCA, if the employee turns out to be an unauthorized alien. *Id.*

2. The safe harbor for DHS notices

The new DHS regulation also calls for the employer to take “reasonable steps” in response to any DHS notice indicating that the immigration status document or employment authorization document presented or referenced by the employee in completing Form I-9 is assigned to another person, or that there is no agency record that the document has been assigned to any person. 8 C.F.R. §§ 274a.2(b)(1)(1)(iii)(C).

The “safe harbor” outlined for responding to the DHS notice consists of contacting the local DHS office (in accordance with the written notice’s instructions, if any) and attempting to resolve the question raised by the DHS about the immigration status document or employment authorization document within 30 days of the notice. 8 C.F.R. § 274a.2(b)(1)(2)(ii)(A). If the employer cannot resolve the matter with DHS within 90 days of receiving the DHS notice, then the employer is required to have the employee complete another Form I-9, following the procedure laid out above in the no-match safe harbor response (*i.e.*, not accepting the suspect document identified in the notice and requiring the employee to present a document bearing his or her photograph to verify identity). 8 C.F.R. § 274a.2(b)(1)(2)(ii)(B).

3. Other reasonable responses

The safe harbor responses outlined for SSA no-match letters and DHS notices are not the exclusive means for responding to information that an employee may not be authorized to work. *See* 8 C.F.R. §§ 274a.2(b)(1)(2)(i), (ii) (employer is “deemed” to have taken “reasonable steps” if the employer takes the actions outlined in the regulations). Moreover, the regulation does not establish “safe harbor” responses for other sources of information indicating that an employee may not be authorized to work (*e.g.*, an employee request that the employer seek labor certification for him or her).

B. The Injunction

On August 29, 2007, the AFL-CIO and others filed suit in the United States District Court for the Northern District of California, seeking to block implementation of the DHS’s no-match

regulation. *See* 73 Fed. Reg. 15,945 (March 26, 2008) (to be codified at 8 C.F.R. § 274a.1(l)). On August 31, 2007, the district court restrained the implementation of the regulation. *See* www.boulettegolden.com/N.D.CA_DHS_SSA_TRO.pdf. Notably, the SSA was prepared to send mismatch notices to some 140,000 employers regarding approximately 8,000,000 employees, prior to the entry of the order.⁷ *Id.*

On October 10, 2007, the district court extended its order restraining the implementation of the new regulation until the time of trial. www.boulettegolden.com/N.D. CA DHS Injunction.pdf. The court found that, in publishing the new regulation, the DHS had: (1) failed to supply a reasoned analysis to justify what the court viewed as a change in DHS's position on no-match letters (namely that a no-match letters could not in and of itself impart constructive knowledge that an employee was unauthorized to work); (2) exceed its authority by interpreting the anti-discrimination provisions of IRCA, which are the province of the Department of Justice, not DHS; and (3) violated the Regulatory Flexibility Act by not conducting a regulatory flexibility analysis. *See id.*

C. DHS's "Second" Regulation

On March 28, 2008, the DHS responded to the district court's temporary injunction by publishing a supplemental proposed rule. *See* 73 Fed. Reg. 15,945. According to the DHS, the supplemental proposed rule "clarifies certain aspects of the August 2007 Final Rule and responds to the three findings underlying the district court's injunction." *Id.*

Notably, the DHS's supplemental proposed rule does not actually change the substance of the August 2007 regulation. 73 Fed. Reg. 15,955 ("[T]he Department of Homeland Security proposes to repromulgate, without change, the regulations published at 72 FR 45611, as 8 CFR 274a.1(l)."). Instead, the preamble to the supplemental regulation attempts to: (1) establish the regulation is not inconsistent with DHS's prior position on no-match letters; (2) provide a reasoned analysis, in the event the regulation is inconsistent with DHS's prior position; (3) rescind conclusive references to the IRCA's anti-discrimination provisions found in the preamble to the August 2007 regulation; (4) establish the safe harbor rule was a voluntary provision designed to guide employers, not a mandate, such that no Regulatory Flexibility Act analysis was required; and (5) provide a Regulatory Flexibility Act analysis, in the event the safe harbor provision was in fact a mandate.

The DHS's recitation of the history of its position on no-match letters is worthwhile reading for those truly interested in the subject. *See* 73 Fed. Reg. 15,945 to 15,950. For most, however, it is sufficient to note that DHS has, at a minimum, changed the legacy position of the Immigration Naturalization Service ("INS") by asserting that a no-match letter can—in and of itself—impart constructive knowledge that an employee is not authorized to work, if an employer does not take "reasonable steps" in response to same. *See id.* Previously, INS had equivocated on the subject. *See id.*

⁷ The injunction did not affect Decentralized Correspondence (DECOR) from the SSA, which are designed to ensure an employee's earnings are properly credited for Social Security benefit purposes. Rather, the injunction only affected Employer Education Correspondence (EDCOR) no-match letters, which reflected the contents of the DHS's regulation.

D. The Future of the Regulation

It remains to be seen what will become of the DHS's no-match regulation. The period for comments on the supplemental proposed rule ended on April 25, 2008, and DHS has not yet attempted to re-implement the regulation following its receipt of comments. What is clear, however, is that the DHS is not going to abandon its attempts to tie immigration compliance to Social Security no-match letters:

Taking no action to clarify employers' responsibilities under INA section 274A, 8 U.S.C. 1324a, was considered. Taking no action, however, would not resolve any of the problems identified and addressed by this proposed rule. Employers will remain confused and unlikely to act to resolve no match letters in a manner consistent with their responsibilities under current immigration law, and will continue to face possible liability based in part on their failure to respond to no-match letters. Employers would continue to employ unauthorized aliens in violation of the INA.

73 Fed. Reg. 15,953.

III. THE E-VERIFY PROGRAM

The E-Verify program—previously known as the “Employment Eligibility Verification program” and before that the “Basic Pilot” program—is a product of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”). *See* IIRIRA, Pub. L. 104-208, 110 Stat. 3009, Title IV, Subtitle A. E-Verify is an online system that enables a participating employer to verify the Social Security number provided by an employee at the time of hire against the records of the SSA and DHS, thus reducing the chance of hiring an employee with a counterfeit Social Security card.

A. E-Verify Enrollment

An employer may enroll in E-Verify online at <https://www.vis-dhs.com/EmployerRegistration>. After selecting an enrollment method, the employer will be required to enter into a Memorandum of Understanding (“MOU”) with the Social Security Administration (“SSA”) and the Department of Homeland Security (“DHS”). 62 Fed. Reg. 48,309, 48,314 (Sept. 15, 1997); *see* www.uscis.gov/files/nativedocuments/MOU.pdf. The MOU imposes a number of obligations on the employer, including:

- The employer must use the system to verify *all* new hires at the enrolled site within three business days of hire;⁸
- The employer may *not* use the system to verify prospective or existing employees;

⁸ Although not specifically stated in the MOU, an employer is not required to enroll all of its hiring sites in E-Verify and may instead register only one or more hiring sites for E-Verify participation. *See, e.g.,* <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=0670d22fe2915110VgnVCM1000004718190aRCRD&vgnnextchannel=75bce2e261405110VgnVCM1000004718190aRCRD> (“Q: I am an employer with multiple hiring sites. Does every site need to enroll in E-Verify? No, you can choose which sites to enroll.”)

- The employer may only accept List B (identity) documents that contain a photograph;
- The employer must post notices supplied by DHS (presently consisting of two posters) in a prominent place that is clearly visible to prospective employees;
- The employer must become familiar with the E-Verify User Manual and complete the E-Verify tutorial before using E-Verify;
- The employer agrees to allow DHS and SSA to make periodic visits to the employer for the purpose of reviewing E-Verify-related records, *i.e.*, Forms I-9, SSA Transaction Records, and DHS verification records, which were created during the employer's participation in E-Verify; and
- The employer agrees to allow DHS and SSA to interview the employer and employees hired during the employer's use of E-Verify regarding their experience with E-Verify.

MOU ¶¶ II.C.1.-15.

As noted above, after the employer has entered into the MOU, the employer must become familiar with the E-Verify User Manual, and the employer representative who will be responsible for performing employment verification queries must complete the E-Verify Tutorial. MOU ¶¶ II.C.3., 4. The E-Verify User Manual is available at www.uscis.gov/files/natedocuments/E-Verify_Manual.pdf.

B. The E-Verify Process

A participating employer uses the E-Verify online system to submit information from each newly hired employee's Form I-9 within three business days of hire.⁹ IIRIRA § 403(a)(3); 62 Fed. Reg. at 48,312; MOU ¶ II.C.7.; *E-Verify User's Manual* ¶ 3.1. The GAO's high-level process flow for E-Verify may be found at <http://www.gao.gov/new.items/d07924t.pdf>.

1. Initial Submission

The initial submission may result in one of three responses:

- Employment Authorized – This indicates the employee is authorized to work.
- SSA Tentative Non-Confirmation – This indicates that the employee's Social Security information could not be verified. The employer must notify the employee of this response per the below.
- DHS Verification In Process – This indicates that employee's Social Security information matches SSA's records but that SSA has referred the matter to DHS for verification of actual work authorization. According to the E-Verify User's

⁹ The employer must complete the Form I-9, prior to initiating an E-Verify inquiry. *E-Verify User's Manual* ¶ 3.1.

Manual, DHS will usually verify within 24 hours, although in some instances it may take three (3) federal work days. In any event, the employer is advised to check E-Verify daily for status.

E-Verify User's Manual ¶ 3.3.1.; *see also* IIRIRA § 403(a)(4); *MOU* ¶ II.A.4.

According to the Government Accountability Office (“GAO”), approximately 92 percent of E-Verify queries result in immediate confirmation. *See Employment Verification: Challenges Exist in Implementing a Mandatory Electronic Employment Verification System, Before the H. Comm. on Ways & Means, Subcomm. on Social Security*, 110th Cong. 12 (2008) (testimony of the Government Accountability Office). According to the GAO, about seven percent of queries are not confirmed by the initial automated check and result in SSA tentative non-confirmations, while roughly one percent result in DHS tentative non-confirmations. *Id.*

With regard to the SSA tentative non-confirmations, United States Citizenship & Immigration Services (“USCIS”) officials have stated that the majority of erroneous tentative non-confirmations occur because employees’ citizenship status or other information, such as name changes, is not up to date in the SSA database, usually because the individual has not notified SSA of information changes. *Id.* at 12-13. For example, according to USCIS, when a legal permanent resident becomes a naturalized citizen, his or her citizenship status changes in DHS’s databases but not in SSA’s database, resulting in a tentative non-confirmation when the individual’s Social Security number is run through E-Verify. *Id.* at 13.

2. SSA tentative non-confirmation

If the information submitted via E-Verify does not match the SSA’s database, or if the SSA cannot provide verification within three federal work days, the employer will receive an SSA tentative non-confirmation. *E-Verify User Manual* ¶ 3.4; *see also* IIRIRA §§ 403(a)(4), 404(b).

Once the employer receives an SSA tentative non-confirmation, the employer must use the E-Verify system to print out a tentative non-confirmation notice (the “SSA Tentative Notice”) and meet with the employee “as soon as possible” to go over the notice. *E-Verify User Manual* ¶ 3.4; *see also MOU* ¶ III.A.1. The employee must indicate on the SSA Tentative Notice whether he or she is going to contest the tentative non-confirmation. *E-Verify User Manual* ¶ 3.4. After the employee indicates whether he or she is going to contest, the employee signs the SSA Tentative Notice. *Id.* The employer then completes the employer certification on the notice, places the original SSA Tentative Notice with the employee’s Form I-9, and provides the employee with a copy of the notice. *Id.*

3. SSA referral

If the employee does not contest the tentative non-confirmation, it automatically becomes a final non-confirmation. IIRIRA § 403(a)(4); *E-Verify User Manual* ¶

If the employee does contest the tentative non-confirmation, the employer must use E-Verify to initiate an SSA referral by completing and printing an E-Verify SSA referral form (the “SSA Referral Form”) for the employee. *E-Verify User Manual* ¶ 3.4.1.; *see also MOU* ¶ III.A.3. The employee has eight (8) federal workdays from the date of the SSA Referral Form to visit the

SSA to resolve the tentative non-confirmation. *E-Verify User Manual* ¶ 3.4.1.; *see also MOU* ¶ III.A.3.

The SSA Referral Form directs the employee to bring a variety of documents to the SSA and to have the SSA sign the SSA Referral Form. Following the employee's visit to the SSA, the employee must bring the signed SSA Referral Form back to the employer. *E-Verify User Manual* ¶ 3.4.1. The employer must then wait 24 hours before resubmitting the query through E-Verify. *Id.* If the employee does not provide the employer with a signed SSA Referral Form within ten (10) federal workdays, the employer must resubmit the query through E-Verify. *Id.*; *see also MOU* ¶ III.A.3.

4. SSA resolution of SSA tentative non-confirmation

The SSA has ten federal workdays to resolve a tentative non-confirmation. IIRIRA § 404(c); *see also* 62 Fed. Reg. at 48,312; *MOU* ¶ II.A.5. The SSA resolution of a tentative non-confirmation may result in one of three responses from SSA:

- Employment Authorized – This indicates the employee is authorized to work.
- SSA Final Non-Confirmation – This indicates that the SSA believes the employee is not authorized to work.
- DHS Verification In Process – This indicates that SSA has referred the matter to DHS for further review.

E-Verify User Manual ¶ 3.4.2.

5. DHS resolution of SSA referral

If the SSA refers the tentative non-confirmation to DHS, the DHS has ten federal workdays in which to resolve the referral. *See* IIRIRA § 404(c). The DHS resolution of the SSA referral may result in one of four responses:

- Employment Authorized – This indicates the employee is authorized.
- DHS Tentative Non-Confirmation – This indicates the DHS could not verify the employee was authorized to work. The employer must now provide the employee with a DHS tentative non-confirmation notice and give the employee the opportunity to choose whether to contest, as is explained in more detail below.
- DHS Tentative Non-Confirmation (Photo Tool Non-Match) – This indicates SSA and DHS have determined that the photo on the employee's document does not match the photo supplied by the E-Verify database. The employer must now provide the employee with a DHS tentative non-confirmation notice and give the employee the opportunity to choose whether to contest, as is explained in more detail below.

- Case In Continuance – This indicates the DHS needs additional time to resolve the case.

E-Verify User Manual ¶ 3.4.3.

6. DHS tentative non-confirmation and referral

If the DHS issues a DHS Tentative Non-confirmation Response (“DHS Tentative Notice”), the employer must provide the employee with the DHS Tentative Notice within three federal workdays. *E-Verify User Manual* ¶ 3.4.4.; *see also MOU* ¶ III.B.1. As with the SSA Tentative Notice, the employee must indicate on the DHS Tentative Notice whether he or she is contesting. *E-Verify User Manual* ¶ 3.4.4. The employer then gives the employee a copy of the notice and places the original notice with the employee’s Form I-9. *Id.*

If the employee chooses to contest the DHS Tentative Notice, the employer must use E-Verify to initiate a referral by completing a DHS referral form (“DHS Referral Form”) for the employee. *Id.*; *see also MOU* ¶ III.B.4. The employee has eight federal work days¹⁰ from the date of the DHS Referral Form to contact the DHS 1-800 number provided on the form. *Id.*

7. DHS resolution of DHS tentative non-confirmation

The DHS has ten federal workdays in which to resolve a DHS tentative non-confirmation. *See IIRIRA* § 404(c); 62 Fed. Reg. at 48,312; *MOU* ¶ II.B.8. The ultimate resolution of a DHS tentative non-confirmation may include:

- Employment Authorized – This indicates the employee is authorized to work.
- DHS Employment Unauthorized – This indicates the employee is not authorized to work.
- DHS No Show – This indicates the employee did not contact the DHS. This response has the same effect as a DHS Employment Unauthorized response.

E-Verify User Manual ¶ 3.4.4.

8. Photo Screening Tool

In 2007, E-Verify introduced the Photo Screening Tool to assist employers in determining whether certain documents produced during the Form I-9 process are legitimate. *E-Verify User Manual* ¶ 3.5.1. Through the Photo Screen Tool, employers are able to use a system query to match the photograph found on a Form I-551 Permanent Resident Card (*a.k.a.* “Green Card”) or a Form I-766 Employment Authorization Card with the photograph on record with USCIS. *Id.* The employer’s conclusion concerning whether the photographs match will lead to either a final confirmation of employment eligibility or a Tentative Photo Non-Match. *Id.* If the employer’s response leads to a Tentative Photo Non-Match, the employer must provide notice and the opportunity to contest same to the employee, much along the same lines as described above for

¹⁰ The actual DHS referral notice instructs the employee to contact DHS within three federal workdays.

DHS tentative non-confirmations. *Id.* Notably, the Photo Screening Tool is triggered only when a new hire produces a recent version of Form I-551 Permanent Resident Card (*a.k.a.*, the green card) or a Form I-766 Employment Authorization Card as his or her Form I-9 documentation. *Id.*

9. Employer final action

An E-Verify employer is prohibited from terminating an employee based on work authorization concerns while the E-Verify process is ongoing, absent an independent basis for “knowing” the employee is not authorized to work. *MOU* ¶ 10.

If at any stage in the process an employee receives either an SSA Final Non-Confirmation or a DHS Employment Unauthorized determination, the employer may terminate the employee and “shall not be civilly or criminally liable under any law for the termination, as long as the action was taken in good faith reliance on information provided through the confirmation system.” IIRIRA § 403(a)(4); 62 Fed. Reg. at 48,313; *MOU* ¶ 6; *E-Verify User Manual* ¶¶ 3.4, 3.4.4. If at any stage an employee chooses not to contest a tentative non-confirmation, the tentative non-confirmation becomes a final non-confirmation. *Id.*

If an employer decides to continue to employ an employee who has received an SSA Final Non-Confirmation or a DHS Employment Unauthorized Determination, the employer must notify DHS of the continued employment and be subject to a rebuttable presumption that it has knowingly employed an unauthorized alien. IIRIRA § 403(a)(4); *MOU* ¶ 6. Failure to notify DHS of the continued employment will subject the employer to a civil penalty of \$550 to \$1,100. *Id.*

C. **E-Verify Weakness**

E-Verify program suffers from a variety of weaknesses. *See, e.g., Employment Verification: Challenges Exist in Implementing a Mandatory Electronic Employment Verification System, Before the H. Comm. on Ways & Means, Subcomm. on Social Security, 110th Cong. (2008)* (testimony of the Government Accountability Office) available at <http://waysandmeans.house.gov/media/pdf/110/gao5608.pdf>; *see also Department of Homeland Security Report to Congress on the Basic Pilot Program* (June 2004) available at www.uscis.gov/files/nativedocuments/BasicFINALcongress0704.pdf.

1. Unable to detect identity theft

One of the most fundamental problems with E-Verify is the fact that it cannot detect identity theft (*i.e.*, the fraudulent use of a valid name and Social Security number), as was demonstrated by the 1,282 arrests resulting from the December 12, 2006, ICE raids on Swift, a user of E-Verify. *See also Employment Verification: Challenges Exist in Implementing a Mandatory Electronic Employment Verification System, Before the H. Comm. on Ways & Means, Subcomm. on Social Security, 110th Cong. 5 (2008)* (testimony of the Government Accountability Office).

2. No protection from ICE

The ICE raid on the six Swift plants also demonstrated that participation in the program is not a shield to an ICE raid, although E-Verify participation does create a presumption of good faith compliance with the IRCA. See *MOU* ¶ II.C.6. Of course, the IRCA already provides a good faith affirmative defense for employers who properly complete Form I-9. 8 U.S.C. § 1324a(a)(3).

3. Erroneous data

Moreover, many have expressed concern over the acknowledged inaccuracies in the SSA database. It is generally acknowledged that 17.8 million (or 4.1 percent) of SSA's records contain errors, and that 12.7 million (about 70 percent) of those records with errors relate to native-born U.S. citizens. Office of Inspector Gen., Soc. Sec. Admin., *Congressional Response Report: Accuracy of the Social Security Administration's Numident File, A-08-06-26100*, Appendix D (Dec. 18, 2006), available at <http://www.ssa.gov/oig/ADOBEPDF/A-08-06-26100.pdf>. According to the Cato Institute, these errors mean that mandatory E-Verify participation for all employers would result in roughly 11,000 tentative non-confirmations per day over the course of a year, assuming an average of 55 million new hires per year. Jim Harper, *Electronic Employment Eligibility Verification: Frank Kafka's Solution to Illegal Immigration*, Cato Institute (2008) available at <http://www.cato.org/pubs/pas/pa-612.pdf>.

Indeed, according to a recent GAO study, a mandatory E-Verify program would necessitate a significant increase in capacity at both USCIS and SSA to accommodate the estimated 7.4 million employers in the United States. *Employment Verification: Challenges Exist in Implementing a Mandatory Electronic Employment Verification System, Before the H. Comm. on Ways & Means, Subcomm. on Social Security*, 110th Cong. 3-4 (2008) (testimony of the Government Accountability Office). As of April 2008, more than 61,000 employers have registered for E-Verify, about half of which are active users. *Id.* (citing USCIS). Although DHS has not prepared official cost figures, USCIS officials estimated that a mandatory E-Verify program could cost a total of about \$765 million for fiscal years 2009 through 2012, if only newly hired employees are queried through the program, and about \$838 million over the same 4-year period, if both newly hired and current employees are queried. *Id.* (citing USCIS).

USCIS has estimated that it would need additional staff for a mandatory E-Verify program, but was not yet able to provide estimates for its staffing needs. *Id.* SSA has estimated that implementation of a mandatory E-Verify program would cost a total of about \$281 million and require hiring 700 new employees for a total of 2,325 additional work years for fiscal years 2009 through 2013. *Id.* (citing SSA).

D. Attempts At Improvement

On May 5, 2008, USCIS announced improvements to the E-Verify employment authorization program designed to reduce the false mismatch rate. Press Release, U.S. Citizenship and Immigration Services, USCIS Announces Enhancements to E-Verify Program (May 5, 2008). The May 5, 2008, announcement addressed the first two phases of an overall three-part enhancement for E-Verify aimed at decreasing the mismatch rate for naturalized citizens. *Id.*

Specifically, as of May 5, 2008, the E-Verify system now includes naturalization data, which should assist in confirming the citizenship status of naturalized U.S. citizens hired by E-Verify employers. *Id.* According to USCIS, naturalized citizens who have not updated their records with the SSA are the largest category of work-authorized persons who initially face an SSA mismatch in E-Verify. *Id.*

The May 5, 2008, announcement further indicates that E-Verify has been upgraded to include real time arrival data from the Integrated Border Inspection System (“IBIS”). *Id.* USCIS hopes that this additional data source will reduce the number of immigration status related mismatches for newly arriving workers who have entered the country legally. *Id.*

USCIS also announced that it plans to initiate citizenship status records information sharing with SSA to further prevent erroneous tentative non-confirmations. *Id.* According to USCIS, this effort will improve the efficiency of E-Verify by providing to SSA with the most accurate and timely citizenship status information available. *Id.* USCIS also announced its plans to enable the E-Verify system to check queries against Department of State passport records in the near future to further reduce mismatches. *Id.*

E. Federal Legislation

The growing consensus that Form I-9 is not sufficient to prevent the employment of unauthorized aliens, combined with the fact that E-Verify is scheduled to sunset on December 31, 2008, has produced a number of federal initiatives aimed at overhauling immigration compliance in the United States.

1. The SAVE Act

For example, the Secure America Through Verification and Enforcement Act of 2007 (the “SAVE Act”) would require all employers to verify all employees at all hiring sites using E-Verify. H.R. 4088, 110th Cong. § 201(b)(1) (2007). The dates for compliance are staggered based on employer size: (i) all Federal agencies, federal contractors, and employers with more than 250 employees in the U.S. would be required to verify all new hires using E-Verify within one year of enactment; (ii) employers with more than 100 employees in the U.S. would be required to verify all new hires within two years of enactment; (iii) employers with more than 30 employees in the U.S. would be required to verify all new hires within three years of enactment; and (iv) all employers would be required to verify all new hires and current employees within 4 years of enactment. *Id.* at § 201(b)(2)-(3). In addition, all employers would be required to verify all *current* employees using E-Verify within four years of enactment. *Id.* at § 201(b)(4).

The SAVE Act would make failure to E-Verify an employee equivalent to a failure to complete Form I-9 properly for the employee (*i.e.*, a “paperwork” violation) and would create a rebuttable presumption that the employer “knowingly” employed any person not verified through E-Verify (assuming that person was in fact an unauthorized alien). *Id.* at § 201(b)(6). On the flip side, the SAVE Act immunizes an employer against a charge of “knowing” employment, if the employer hired the unauthorized alien as the result of an E-Verify error and terminated the employee upon being informed of the error. *Id.* at § 201(b)(5). To put an end to the emerging patchwork of state legislation, *see infra*, the SAVE Act specifically prohibits any state from passing any law

prohibiting any employer from using E-Verify to verify the status of its employees. *Id.* at § 201(b)(7).

As of May 10, 2008, the SAVE Act had 152 co-sponsors. On March 11, 2008, Representative Thelma Drake (R-VA) filed a motion to discharge the various committees considering the SAVE Act to enable the measure to move forward. On May 5, 2008, the motion to discharge gained its 188th supporter, Representative Mark E. Souder (R-IN).

2. The NEVA

Going in a somewhat different direction, the New Employee Verification Act (“NEVA”) would require all employers to verify the employment authorization of all new hires through the to-be-created Electronic Employment Verification System (the “EEVS”) (which would be built as an enhancement to the existing National Directory of New Hires used by most states in connection with child support enforcement efforts). *See* H.R. 5515, 110th Cong. §§ 101(c)(1), 102(a)(1) (2008). Employers would be required to enroll in EEVS on a schedule established in accordance with Section 235(a)(4) of the Social Security Act (as amended by the NEVA), with all employers being enrolled within three years. *See id.* The NEVA would also require the SSA—in consultation with DHS—to create by regulation a biometric-based Secure Employment Eligibility Verification System (“SEEVS”), which employers would have the option of using as an alternative to completing Form I-9. *Id.* at §§ 101(d), 102(a)(1).

Like the SAVE Act, the NEVA would preempt state legislation on the subject. H.R. 5515, § 101. As of May 10, 2008, the New Employee Verification Act had 31 co-sponsors.

F. **State Legislation**

In a testament to federalism, the states have taken the last few years to experiment individually with immigration-related issues. Indeed, according to the National Conference of State Legislatures (“NCSL”), between January 1, 2008, and March 31, 2008, 179 bills addressing employment-related immigration issues were introduced in 31 state legislatures.¹¹ National Conference of State Legislatures, Overview of State Legislation Related to Immigrants and Immigration 6 (2008). As reported by the NCSL, these bills deal with a variety of issues in the employment arena, including employer sanctions for hiring unauthorized workers and address the use of federal employment eligibility verification systems (*e.g.*, E-Verify) by public agencies, private employers, and state contractors. *Id.*

1. The Arizona LAW Act

For example, on July 2, 2007, Arizona enacted the Legal Arizona Workers Act (the “LAW Act”), A.R.S. §§ 23-211 to 23-214 (Supp. 2007), which became effective on January 1, 2008. Among other things, the LAW Act requires all employers to verify all employees hired after

¹¹ Specifically, employment-related immigration legislation was introduced in Alabama, Alaska, Arizona, California, Colorado, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Mississippi, Nebraska, New Hampshire, New Jersey, New York, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, and West Virginia. Notably, Montana, Nevada, North Dakota, and Texas have no regular session in 2008, and North Carolina’s legislative session 2008 did not convene until May 13, 2008.

December 31, 2007, using E-Verify. A.R.S. § 23-214. For purposes of the LAW Act, an “employer” is defined to include any individual or type of organization that transacts business in this state, that has a license issued by an agency in this state and that employs one or more individuals who perform employment services in Arizona. A.R.S. § 23-211.4.

Business and immigration groups filed a series of suits in the United States District Court for the District of Arizona seeking to enjoin enforcement of the LAW Act. The suits were ultimately consolidated, and a trial on the merits was held on January 16, 2008. *See* Findings of Fact, Conclusions of Law, and Order, *Arizona Contractors et. al v. Terry Goddard et. al*, No. CV07-02496-PHX-NVW, U.S. District Court, District of Arizona (Feb. 7, 2008). On February 7, 2008, the Honorable Judge Wake denied the plaintiffs’ request for relief. *Id.*

Judge Wake found the LAW Act’s E-Verify enrollment requirement did not overburden employers. *Id.* pp.27-28. Judge Wake found that the average cost to set up E-Verify was \$125, with 85% of employers spending less than \$100. *Id.* p. 6. Judge Wake further found that the average annual cost to operate E-Verify was \$728, with 75% of employers spending less than \$100 annually. *Id.*

Judge Wake also found the E-Verify enrollment requirement was not inconsistent with federal purposes. *Id.* p. 28. Judge Wake bluntly noted that “the I-9 system has been thoroughly defeated by document and identity fraud, allowing upwards of eleven million unauthorized workers to gain employment in the United States labor force, with the number increasing at about a half a million a year.” *Id.* at p. 6. Judge Wake further found that “[f]ederal policy encourages the utmost use of E-Verify” and that the LAW Act was consistent with this policy. *Id.* p. 28.

Judge Wake also found that mandatory E-Verify participation did not deprive employers or employees of due process. Among other things, Judge Wake found the E-Verify process “is fair, prompt, interactive, and adequate.” *Id.* p. 31. Judge Wake noted that E-Verify “provides opportunity for the employee to be heard.” *Id.* Likewise, Judge Wake found that “[e]mployers who have not confirmed under E-Verify have one or two more chances for secondary verification of the employee’s status, thus affording adequate procedure to the employer.” *Id.* p. 33.

In short, Judge Wake rejected all of the arguments advanced by the plaintiffs and cleared the way for the enforcement of the LAW Act.

2. The Mississippi MEPA

On March 18, 2008, after the initial legal challenges to Arizona’s LAW Act had been cleared, Mississippi Governor Haley Barbour signed the Mississippi Employment Protection Act (“MEPA”) into law. Among other things, the MEPA requires Mississippi employers to enroll in E-Verify and use the system to verify all new hires. S.B. 2988, § 2(4)(b) (Ms. 2008). Under the MEPA, an “employer” is defined to mean any person or business that is required by federal or state law to issue a United States Internal Revenue Service Form W-2 or Form 1099 to report income paid to employed or contracted personnel in Mississippi. *Id.* at § 2(3)(a).

Under the MEPA, the state, all state contractors, and all employers with more than 250 employees must begin verifying new hires using E-Verify by July 1, 2008. *Id.* at § 2(7)(a).

Employers with more than 100 employees must begin using E-Verify for all new hires by July 1, 2009. *Id.* at § 2(7)(b). Employers with more than 30 employees must begin using E-Verify by July 1, 2010, and all employers must begin using E-Verify by July 1, 2011. *Id.* at §§ 2(7)(c)-(d). The penalties for non-compliance with the Mississippi law include the loss of licenses and the right to do business with the state. *Id.* at § 2(7)(e).

Interestingly, the MEPA also makes it a “discriminatory practice” for an employer to discharge an employee working in Mississippi who is a United States citizen or permanent resident alien while retaining an employee who the employing entity “knows, or reasonably should have known,” is an unauthorized alien hired after July 1, 2008, if that unauthorized alien is working in Mississippi in a job category that requires equal skill, effort and responsibility, and which is performed under similar working conditions, as defined by 29 U.S.C. § 206(d)(1), as the job category held by the discharged employee.¹² *Id.* at § 2(4)(d).

3. The Illinois Right To Privacy In The Workplace Act

On the other end of the spectrum, Illinois recently passed Section 12(a) of the Illinois Right to Privacy in the Workplace Act, which makes it unlawful for employers to enroll in any employment eligibility verification system, including E-Verify, until the SSA and DHS are able to make a determination on 99% of the tentative non-confirmation notices issued to employers within three days, unless otherwise required by federal law. 820 I.L.C.S. 55/12(a). According to DHS, the law would “effectively prohibit employers in the state from enrolling in the Department of Homeland Security’s E-Verify program.” Press Release, Department of Homeland Security, Statement by Department of Homeland Security Michael Chertoff on the E-Verify Lawsuit With Illinois, (Dec. 31, 2007).

On September 27, 2007, the DHS sued the State of Illinois in the United States District Court for the Central District of Illinois, seeking a declaration that the Illinois law was preempted by federal law. In response, Illinois agreed not to enforce its law until the court rules on DHS’s claims. *Id.* Meanwhile, the Illinois legislature is considering whether to change the law in an attempt to resolve the dispute with DHS. *See id.*

G. The OPT Incentive

On April 8, 2008, the DHS gave employers a reason to enroll in E-Verify *voluntarily* by issuing a regulation that enables an F-1 foreign national student to apply for an additional 17 months of Optional Practical Training (“OPT”), if: (1) the student graduates with a bachelor’s, master’s, or doctoral degree in a designated science, technology, engineering, or mathematics (“STEM”) degree programs; and (2) the student’s employer participates in E-Verify program. 8 C.F.R. § 214.2(f)(10)(C). Combined with the 12 months of OPT typically available to F-1 students, the

¹² It remains to be seen whether this provision of the MEPA runs afoul of the IRCA’s explicit pre-emption provision. 8 U.S.C. § 1324a(h)(2) (“The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”). The LAW Act avoided pre-emption by limiting enforcement to the suspension and revocation of business licenses. *See* A.R.S. §§ 23-212(A), (F); *see also* S.B. 2988, § 2(7)(e) (MS. 2008) (penalties for non-compliance include the loss of licenses and the right to do business with Mississippi).

new rule enables qualifying students to receive up to 29 months of post-graduation work authorization. *See id.*

The additional 17 months of OPT provides a partial, stop-gap solution to the annual H-1B shortage by allowing an E-Verify employer to continue to employ an F-1 STEM graduate while the employer makes multiple attempts to obtain an H-1B for the student. *See id.* Many employers—particularly those in the high technology sector—are likely to give serious consideration to enrolling in E-Verify, if for no other reason than to increase their ability to retain highly-educated foreign students with degrees in science, technology, engineering, and mathematics. Indeed, such employers may feel they must participate in E-Verify, if they are going to compete successfully for foreign national students who want to work in the U.S. following graduation.¹³

Notably, the interim OPT rule does not specifically require that the student work at one of the employer’s hiring sites that is actually enrolled in E-Verify. *See* 8 C.F.R. § 214.2(f)(10)(C)(3). Rather, the rule simply requires that “[t]he student’s employer is registered ... and a participant in good standing in the E-Verify program.” *Id.*; *see also* SEVP Policy Guidance 0801-01, Updates to Post-Completion Optional Practical Training (April 25, 2008) (requiring only that the employer be registered with E-Verify and in “good standing”). This had some employers wondering whether they can enroll a single hiring site in E-Verify and thereby enable all of their F-1 STEM employees to obtain the additional 17 months of OPT, even if those F-1 STEM employees do not work at the hiring site that is actually enrolled in E-Verify. On May 27, 2007, DHS issued a Q&A document confirming that the student must work at a hiring site enrolled in E-Verify to qualify for the 17 month OPT extension. Press Release, U.S. Citizenship and Immigration Services, Supplemental Questions & Answers: Extension of Optional Training Program for Qualified Students (May 27, 2008).

IV. CITIZENSHIP AND NATIONAL ORIGIN DISCRIMINATION

A. A Recipe For Disastrous Decision-Making

1. Criminal fear

As national awareness of the illegal immigration issue facing the United States has grown, ICE and the U.S. Attorney’s Office have continued to grab headlines by arresting and prosecuting one employer representative after another. *See, e.g.*, News Release, U.S. Immigration and Customs Enforcement, Jury convicts George’s Processing employee of harboring an illegal alien (Jan. 18, 2008) (employee involved in Form I-9 process convicted of knowingly hiring unauthorized workers); News Release, U.S. Immigration and Customs Enforcement, QSI supervisor, employee sentenced for knowingly hiring illegal aliens, (Nov. 19, 2007) (supervisor and employee sentenced to federal prison for 38 months and 10 months, respectively, for their roles in hiring unauthorized workers); *see also* Appendix B, *infra*.

Indeed, DHS and ICE have been very explicit regarding their intentions for employers who violate federal immigration laws knowingly:

¹³ Of course, if Congress raises the limit on the number of H-1B visas that may be issued each year, the additional 17 months of OPT will become less important to employers and students alike.

“Employers and workers alike should be on notice that the status quo has changed,” said Homeland Security Secretary Michael Chertoff. “These enforcement actions demonstrate that this department has no patience for employers who tolerate or perpetuate a shadow economy. We intend to find employers who knowingly or recklessly hire unauthorized workers and we will use every authority within our power to shut down businesses that exploit an illegal workforce to turn a profit.”

ICE Assistant Secretary Myers said, “ICE has no tolerance for corporate officers who harbor illegal aliens for their workforce. This nationwide enforcement action shows how we will use all our investigative tools to bring these individuals to justice, no matter how large or small their company.”

News Release, U.S. Immigration and Customs Enforcement, ICE Agents Arrest Seven Managers of Nationwide Pallet Company and 1,187 of the Firm’s Illegal Alien Employees in 26 States (Apr. 20, 2006).

2. Sudden disruption

In addition to the recently instilled fear of criminally prosecution, all employers share a well founded concern over the business disruption that can result from the sudden loss of workers in response to an ICE raid (or the fear of an ICE raid). As the then-acting Deputy Director of USCIS succinctly explained in his 2006 congressional testimony,

[O]ne of the primary reasons for a human resources manager to push participation in [a voluntary program for employee verification] was to avoid that moment when INS would come in and raid the place and take away half the workers, and make it impossible to make any kind of production. That’s the kind of event that gets the human resources manager fired, and that’s the kind of event that they would try to plan against.

Immigrant Employment Verification and Small Business: Hearing Before the Subcomm. on Workforce, Empowerment, & Gov’t Programs of H. Comm. On Small Business, 109th Cong. (2006) (statement of Robert Divine, Acting Deputy Director, USCIS, Department of Homeland Security).

Swift and its ongoing battle with unauthorized aliens provide an excellent example of this practical concern. Swift has long since engaged in virtually every available means of screening out and detecting unauthorized aliens in its workplace. For example, although less than one-tenth of one percent of employers participate in E-Verify, Swift has participated in the program since 1997. *Problems in the Current Employment Verification and Worksite Enforcement System: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary, 110th Cong. (2007) (testimony of John W. Shandey, Senior Vice President of Human Resources, Swift & Company) (hereinafter “Shandey Congressional Testimony”).*

To supplement E-Verify, Swift also implemented a hiring process improvement program called the Swift Employee, Eligibility, Identification, Verification Program (“EEIVP”). *Id.* In the

simplest of terms, Swift's EEIVP enhanced its new hire interviewing and information evaluation procedures to enable it to better detect identity fraud in a non-discriminatory way. *Id.* Part of the EEIVP involves an internal IT program that flags an applicant that was previously employed or denied employment at another Swift location, so that the data provided in that application may be compared against the data provided in the current application. *Id.*

In 2006, Swift even went so far as to reach out directly to ICE in search of "information, meetings, and a collaborative way of apprehending and removing all potential illegal workers and criminals in order to minimize disruption to the company, communities and livestock producers." *Id.* ICE rebuffed Swift's efforts, citing an "ongoing criminal investigation." *Id.* On the morning of December 12, 2006, the "ongoing criminal investigation" materialized in the form of ICE raids on six Swift production facilities and the arrest of 1,282 Swift employees. News Release, U.S. Immigration and Customs Enforcement, "U.S. Uncovers Large-Scale Identity Theft Scheme Used By Illegal Aliens to Gain Employment at Nationwide Meat Processor" (Dec. 13, 2006).

Notably, the U.S. government never accused or charged Swift or any current or former member of Swift management with any wrongdoing in connection with the raids, presumably because it was apparent Swift had done nothing wrong. *See Shandey Congressional Testimony.* Nevertheless, Swift estimates that the business disruption caused by the ICE raid cost it \$30 million. *Id.* This is in addition to the impact the raids had on the communities in which Swift operates:

The raid [on the Cactus, Texas facility] devastated this Panhandle community. Signs in English and Spanish advertise apartments for rent; business struggle to get back on their feet; streets are empty as residents fear setting foot outside their homes. ...

Swift Raid in Cactus, Texas, *The Dallas Morning News* (Feb. 11, 2007).¹⁴

3. The Need For Education

Increasing awareness of the illegal immigration issue, heighten concerns about potential criminal prosecution, fear of imminent business disruptions, and growing uncertainty regarding employers' actual obligations with respect to immigration compliance have coalesced into the perfect recipe for disastrous decision-making. *See, e.g.,* Roberto Lovato, Electronic Dragnet for Undocumented Nets Citizens, *New America Media*, April 8, 2008 (Tyson Foods, an E-Verify employer, reported as having told Fernando Tinoco, a naturalized citizen, that it was terminating his employment approximately two hours after he started working, because his Social Security number was "fake").

¹⁴ Adding a final touch of irony to Swift's situation is the fact that the Department of Justice sued Swift in 2001 for \$2.5 million for allegedly going *too far* in trying to determine whether applicants were authorized to work in the United States. *Id.* Ultimately, Swift settled the claim for \$187,500 without any finding or admission of any form of wrongdoing. News Release, U.S. Department of Justice, "Department of Justice Announces Settlement Agreement with Swift & Company Regarding Workplace Discrimination Claims" (Nov. 4, 2002); *Shandey Congressional Testimony.*

Indeed, even the legally trained may inadvertently make disastrous decisions when faced with an immigration issue. For example, the Seventh Circuit publicly and specifically relied on what appear to be overtly discriminatory assumptions in upholding a trial court’s decision to admit evidence of workers’ living conditions and language capabilities as part of a perjury trial against a manager who testified he did not “know” the workers were unauthorized. *U.S. v. Fawley*, 137 F.3d 458, 467 (7th Cir. 1998) (“Finally, going to Fawley’s knowledge of Klehm’s employees, Fawley stated under oath that only four of the 25 employees working at the nursery with him actually spoke English.”) Attempting to minimize the seemingly racist nature of its reasoning, the Seventh Circuit promptly dug itself a deeper hole:

We do not mean to suggest that because Klehm employed Spanish-speaking people, we thus assume that that they were illegally in this country. On the contrary, considered along with the totality of the other evidence (i.e., testimony regarding Fawley’s knowledge of false immigration papers and the use of aliases on payroll checks), it is the fact that *so many* of Klehm’s employees spoke Spanish rather than English that leads us to the conclusion that a knowledgeable person should have been put on notice that these people were in all probability illegal aliens.

Id. at 467 n.4 (emphasis in original).

Having perceived the need for basic education on U.S. discrimination laws as they relate to immigration compliance, this section of the paper discusses the various U.S. laws that prohibit citizenship and national origin discrimination and provides practical tips for employers seeking to discharge their immigration obligations without violating the law.

B. Citizenship Discrimination Under the IRCA

Unlike Title VII of the Civil Rights Act of 1964 (“Title VII”), the IRCA specifically prohibits citizenship discrimination.¹⁵ Compare 8 U.S.C. § 1324b(a)(1)(B) (prohibiting citizenship discrimination) with *Espinoza v. Farah Mfg. Co.*, 94 S. Ct. 334, (1973) (Title VII’s prohibition on “national origin” discrimination does not include a prohibition on “citizenship” discrimination).

1. Citizens an intending citizens only

The IRCA’s prohibition on citizenship discrimination only applies to citizens and legal permanent residents, legal temporary residents, asylees, and refugees who are intending citizens. See 8 U.S.C. § 1324(a)(3) (defining “protected persons”). A legal permanent resident, legal temporary resident, asylee, or refugee who fails to apply for naturalization within six months of becoming eligible to do so (as the result of a period of legal permanent residency) is not an intending citizen and is not entitled to protection from citizenship discrimination. *Id.* (excluding such persons from the definition of “protected persons”). Similarly, a legal permanent resident, legal temporary resident, asylee, or refugee who applies for naturalization on a timely basis but

¹⁵ The IRCA—which applies to any employer with four or more employees—also prohibits national origin discrimination, but only if the employer is not subject to Title VII. 8 U.S.C. § 1324b(a)(2)(B).

is not naturalized as a citizen within two years of the date of the application¹⁶ is not an intending citizen and is not entitled to protection from citizenship discrimination, unless the individual can establish that he or she is in fact actively pursuing naturalization. *Id.*

2. Permissible IRCA citizenship discrimination

The IRCA's citizenship discrimination provisions do not apply to discrimination that is required to comply with law, regulation, or executive order, or that is required by a federal, state, or local government contract. 8 U.S.C. § 1324b(a)(2)(C). Likewise, the ICRA's citizenship discrimination provisions do not apply to any discrimination the U.S. Attorney General determines to be "essential" for an employer to do business with an agency or department of the federal, state, or local government. *Id.* Finally, the IRCA's citizenship discrimination provisions do not prohibit an employer from preferring a citizen or national of the U.S. over an intending citizen, if the two individuals are "equally qualified." 8 U.S.C. § 1324b(a)(4).

3. IRCA charges and litigation

a. *Charge processing*

Citizenship discrimination is a type of "unfair immigration-related employment practice" prohibited by the IRCA, and charges of same are filed with the Office of Special Counsel ("OSC"). 8 U.S.C. § 1324b(b); *see also* 28 C.F.R. § 44.300. An unfair immigration-related employment practice charge must be filed within 180 days of the alleged unfair employment practice. 8 U.S.C. § 1324b(d)(3).

An unfair immigration-related employment practice charge based on alleged national origin discrimination cannot be filed, if a charge based on the same set of facts has been filed with the Equal Employment Opportunity Commission ("EEOC") under Title VII, unless the charge is dismissed as being outside the scope of Title VII. 8 U.S.C. 1324b(b)(2). Likewise, no charge respecting an employment practice may be filed with the EEOC under Title VII, if a charge regarding such employment practice has been filed under the IRCA based on the same set of facts, unless the charge is dismissed as being outside the scope of the IRCA.¹⁷ *Id.*

b. *Charge investigation*

The OSC must investigate each charge received and, within 120 days of the date of the receipt of the charge, determine whether there is reasonable cause to believe the charge is true and whether to bring a complaint with respect to the charge before an administrative law judge ("ALJ").

¹⁶ Time consumed in USCIS processing of the intending citizen's naturalization application is not counted toward the 2-year period. 8 U.S.C. § 1324b(a)(3)(B)(ii).

¹⁷ The provision precluding an IRCA charge if there is a pending EEOC charge based on the same facts is limited to a charge "respecting an unfair immigration-related employment practice described in subsection (a)(1)(A) of this section [prohibiting national origin discrimination]." 8 U.S.C. § 1324b(b)(2). The provision precluding an EEOC charge if there is a pending IRCA charge based on the same facts is not explicitly limited to national origin discrimination claims. *See id.* ("No charge respecting an employment practice may be filed with the Equal Employment Opportunity Commission under such title if a charge with respect to such practice based on the same set of facts has been filed under this subsection, unless the charge is dismissed under this section as being outside the scope of this section.")

8 U.S.C. § 1324b(d)(2). In addition, the OSC may, on its own initiative, conduct investigations respecting unfair immigration-related employment practices and, based on such an investigation, file a complaint before an ALJ. *Id.*

During an investigation, the OSC may propound interrogatories, requests for production of documents, and requests for admissions. 28 C.F.R. § 44.302(a). In addition, the OSC is entitled to “reasonable access” to examine the evidence of any person or entity being investigated. 8 U.S.C. § 44.302(b). In particular, the respondent must permit the OSC access during normal business hours to such of its books, records, accounts, and other sources of information, as the OSC may deem pertinent. *Id.*

c. Charge resolution

If the OSC believes an unfair immigration-related employment practice has occurred, the OSC may file a complaint before an ALJ within 120-days of the charge. *See* 8 U.S.C. § 1324b(e). If the OSC decides not to file a complaint before an ALJ, the OSC must notify the person making the charge of the decision not to file such a complaint during such period. 8 U.S.C. § 1324b(d)(2). In such a case, the person making the charge may file a complaint directly before an ALJ within 90 days of receiving notice from OSC that it does not intend to file a complaint. *Id.*

d. Administrative law judge hearing

A complaint alleging an unfair immigration-related employment practice must be brought before an ALJ who is specially designated by the Attorney General as having special training respecting employment discrimination and, to the extent practicable, before ALJs who only consider cases under IRCA. 8 U.S.C. § 1324b(e)(2).

Once a complaint of an unfair immigration-related employment practice is brought before an ALJ, the ALJ will serve the respondent a copy of the complaint and notice of hearing before the judge at a place therein fixed, not less than five days after the serving of the complaint. 8 U.S.C. § 1324b(e)(1). Any such complaint may be amended by the ALJ conducting the hearing, or upon the motion of the party filing the complaint (in the ALJ’s discretion), at any time prior to the issuance of an order based thereon. *Id.* The respondent shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. *Id.*

The charging party shall be considered a party to any complaint before an ALJ based on the charging party’s charge. 8 U.S.C. § 1324b(e)(3). Likewise, the charging party will be considered a party to any subsequent appeal from the complaint based on the charging party’s charge. *Id.* In addition, the ALJ may allow any other person to intervene in the proceeding and to present testimony. *Id.*

Like the OSC, the ALJ is entitled to “reasonable access” to examine evidence of any person or entity being investigated. 8 U.S.C. § 1324b(f)(2). In addition, the ALJ may compel the attendance of witnesses and the production of evidence at any designated place or hearing by subpoena. 8 U.S.C. § 1324b(f)(2). In case of contumacy or refusal to obey a subpoena, an appropriate district court of the United States may issue an order requiring compliance with such subpoena and any failure to obey such order may be punished by such court as contempt. *Id.*

e. Remedies and penalties

If, upon the preponderance of the evidence, the ALJ determines any person or entity named in the complaint has engaged in an unfair immigration-related employment practice, the ALJ states his or her findings of fact and issues an order requiring such person or entity to cease and desist from such unfair immigration-related employment practice. 8 U.S.C. § 1324b(g)(2). In addition, the ALJ's order may require the person or entity:

- To comply with the requirements of 8 U.S.C. § 1324a(b) with respect to individuals hired (or recruited or referred for employment for a fee) during a period of up to three years;
- To retain for a period of up to three years the name and address of each individual who applies, in person or in writing, for hiring for an existing position, or for recruiting or referring for a fee, for employment in the United States;
- To hire individuals directly and adversely affected, with or without back pay;
- To pay a civil penalty of not less than \$250 and not more than \$2,000 for each individual discriminated against;¹⁸
- To post notices to employees about their rights under this section and employers' obligations under 8 U.S.C. § 1324a;
- To educate all personnel involved in hiring and complying with the IRCA about the requirements of the IRCA;
- To remove a false performance review or false warning from an employee's personnel file; and
- To lift any restrictions on an employee's assignments, work shifts, or movements.

8 U.S.C. § 1324b(g)(2)(B).

Back pay liability is limited to a maximum of two years prior to the date of the filing of the charge with the OSC. 8 U.S.C. § 1324b(g)(2)(C). Moreover, interim earnings or amounts earnable with reasonable diligence reduce the back pay otherwise allowable. *Id.* In addition, no order shall require the hiring of an individual as an employee or the payment to an individual of any back pay, if the individual was refused employment for any reason other than discrimination on account of national origin or citizenship status. *Id.* Finally, the ALJ may allow the prevailing party, other than the United States, a reasonable attorney's fee, if the losing party's argument is without reasonable foundation in law and fact. 8 U.S.C. § 1324b(h).

¹⁸ In the case of a person or entity previously subject to a single order under 8 U.S.C. § 1324b(g), the administrative law judge may order a civil penalty of not less than \$2,000 and not more than \$5,000 for each individual discriminated against. 8 U.S.C. § 1324b(g)(2)(B)(iv). In the case of a person or entity previously subject to more than one order under 8 U.S.C. § 1324b(g), the judge may order a civil penalty of not less than \$3,000 and not more than \$10,000 for each individual discriminated against. *Id.*

f. Appeal

Within 60 days of a final order, any person aggrieved by the final order may seek a review of the order in the United States court of appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business. 8 U.S.C. § 1324b(i)(1). Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment shall be final, subject to review by the Supreme Court. 8 U.S.C. § 1324b(i)(2).

4. Retaliation and document abuse

It is also an unfair immigration-related employment practice for a person or other entity to intimidate, threaten, coerce, or retaliate against any individual for the purpose of interfering with any right or privilege secured under 8 U.S.C. § 1324b or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under 8 U.S.C. § 1324b. 8 U.S.C. § 1324b(a)(5).

“Document abuse” is another unfair immigration-related employment practice under the IRCA. *See* 8 U.S.C. § 1324b(a)(6). Document abuse occurs when an employer requests more or different documents than are required for Form I-9 compliance, or refuses to honor documents tendered that on their face reasonably appear to be genuine, if the employer acted with “the intent of discriminating against an individual” on the basis of national origin or citizenship. *Id.*

Underscoring the concern over discrimination during the Form I-9 process, CIS regulations explicitly state that knowledge that an individual is unauthorized to work cannot—indeed must not—be inferred on the basis of any form of discriminatory assumption:

Knowledge that an employee is unauthorized may not be inferred from an employee’s foreign appearance or accent. Nothing in this definition should be interpreted as permitting an employer to request more or different documents than are required under section 274(b) of the Act or to refuse to honor documents tendered that on their face reasonably appear to be genuine and to relate to the individual.

8 C.F.R. § 1324a.1(k)(2).

As unfair immigration-related employment practices, IRCA retaliation and document-abuse claims are subject to the same charge and litigation procedures as outlined above for citizenship discrimination claims.¹⁹ *See* 8 U.S.C. §§ 1324b(a)(5), (6) (defining retaliation and document-abuse immigration-related unfair employment practices).

5. Liability for immigration ignorance

United States v. Marcel Watch Corp. provides an object lesson on how immigration ignorance can create discrimination liability under the IRCA.

¹⁹ The civil penalty that may be imposed for a finding of document abuse differs from the civil penalty range allowed for prohibited discrimination or retaliation. *See* 8 U.S.C. § 1324b(g)(2)(B)(iv)(IV) (civil penalty range for document abuse is \$100 to \$1,000).

a. Misunderstanding citizenship

Rosita Martinez (“Martinez”) was a U.S. citizen born in Puerto Rico. *United States v. Marcel Watch Corp.*, 1990 WL 512157, *3 (O.C.A.H.O. 1990). On October 5, 1988, the New York Department of Labor (“NYDOL”) referred Martinez to Marcel Watch to apply for an unskilled job as a packer. *Id.* at *5. Dan Bob (“Bob”), a Marcel Watch representative, asked Martinez for her birth certificate, Social Security card, and green card. *Id.* Martinez informed Bob that she was an “American” and did not have a green card. *Id.* Martinez then presented Bob with her birth certificate, Social Security card, and New York voter registration card. *Id.* Bob continued to insist that Martinez produce a green card, while Martinez continued to tell him she was a citizen. *Id.*

After roughly twenty minutes of Bob insisting on a green card and Martinez explaining that she was a citizen, Marcel Drucker (“Drucker”), President of Marcel Watch, came out of his nearby office and told Bob that Martinez was from Puerto Rico and, therefore, a U.S. citizen. *Id.* at *6. Nevertheless, Bob continued to insist that Martinez produce a green card. *Id.* Ultimately, Drucker told Bob to sign Martinez’s NYDOL referral card to take back to NYDOL, and Martinez left Marcel Watch without being hired. *Id.*

After Martinez left Marcel Watch, she contacted the NYDOL and explained what had happened. *Id.* at *7. The NYDOL contacted Bob and asked why Martinez had not been hired. *Id.* Bob told the NYDOL that he did not hire Martinez because she could not show him a green card. *Id.* The NYDOL informed Bob that persons born in Puerto Rico were U.S. citizens and did not need green cards. *Id.*

Subsequently, the NYDOL referred another candidate to Marcel Watch for the packer position. *Id.* This applicant was also from Puerto Rico. *Id.* After significant back and forth between Bob and the NYDOL over the issue of whether the applicant needed a green card, Bob eventually agreed to interview the applicant. *Id.* Ultimately, Marcel Watch hired the second candidate. *Id.* On October 27, 1988, Martinez filed a charge of citizenship discrimination against Marcel Watch with the OSC. *Id.* The OSC filed a complaint against Marcel Watch with an appointed ALJ on February 13, 1989. *Id.* at *4.

b. Citizenship v. national origin

As a threshold matter, Marcel Watch asserted that Martinez’s real claim was for national origin discrimination, not citizenship discrimination:

Respondent argues that “[t]he alleged insistence by Dan Bob that green cards were needed by Puerto Rican applicants is not evidence of discrimination against citizens, but rather discrimination against one class of citizens, namely Puerto Ricans.” Marcel Br. at 6-7. This claimed difference in treatment among U.S. citizens is said to support the claim that Ms. Martinez is entitled to relief, if any, only on the basis of national origin.”

Id. at *8.

Marcel Watch had more than fifteen employees and was thus covered by Title VII. *Id.* at *9. As a result, Marcel Watch was not subject to the IRCA’s prohibition on national origin discrimination. *Id.* (citing 8 U.S.C. § 1324b(a)(2)(B)). Accordingly, if Martinez’s claim was one of national origin discrimination rather than citizenship discrimination, the administrative law judge had no jurisdiction to hear it. *Id.*

Based on a review of the facts, it certainly seems that Martinez’s claim against Marcel Watch was for national origin discrimination, not for citizenship discrimination. *Compare id.* at *4-*8 (employer insisting that U.S. citizens from Puerto Rico produce green cards without making similar demands of other U.S. citizens and ultimately refusing to hire a candidate from Puerto Rico based on a mistaken belief that she was *not* a citizen) *with Espinoza*, 94 S. Ct. at 340 (holding that Title VII did not cover citizenship discrimination but noting that “it would be unlawful for an employer to discriminate against aliens because of ... national origin—for example, by hiring aliens of Anglo-Saxon background but refusing to hire those of Mexican or Spanish ancestry.”). The ALJ, however, rejected Marcel’s argument, holding that Martinez’s claim was one of both national origin and citizenship discrimination and that he had jurisdiction over the citizenship discrimination claim. *Id.* at *10.

c. EEOC overlap

With respect to the overlap between Martinez’s claim of IRCA citizenship discrimination and Martinez’s pending charge of national origin discrimination before the EEOC, the ALJ determined that the IRCA’s prohibition on overlapping charges was inapplicable:

I find against Respondent also on the question of whether the prohibition against overlap between Title VII and Section 102 of IRCA impacts [sic] on this case. It is to me absolutely clear that the prohibition speaks only to exclusivity with respect to claims of national origin discrimination “based on the same set of facts.” 8 U.S.C. § 1324b(b)(2). ... Indeed, by citing subsection (a)(1)(A), the overlap provision refers only to national origin discrimination.

Id. at *10-11.

d. Title VII analytical framework

Turning to the merits, the ALJ began his analysis of Martinez’s citizenship discrimination claim by correctly noting that “Title VII disparate treatment jurisprudence provides the analytical point of departure for [citizenship discrimination cases under the IRCA].” *Id.* at *11. The ALJ then held that Marcel Watch’s insistence that Martinez produce a green card was (somehow) “direct” evidence of citizenship discrimination. *Id.* at *13. (“This is so because when Martinez was referred for the unskilled packer job for which the Department deemed her qualified, she was rejected for employment on the basis of her citizenship status, in that Marcel Watch refused to accept that she was a U.S. citizen born in Puerto Rico.” *Id.* Indeed, the ALJ went so far as to hold that “insistence on a green card for Puerto Ricans ... is facially discriminatory in violation of 8 U.S.C. § 1324b.” *Id.*

The administrative law judge did not analyze further how Marcel Watch’s refusal to hire Martinez based on its mistaken belief that she was *not* a citizen constituted “direct” evidence that

Marcel Watch refused to hire Martinez *because she was a citizen*. See *id.*; cf. *Auguster v. Vermillion Parish School Board*, 249 F.3d 400, 405 (5th Cir. 2001) (to constitute direct evidence, a statement must relate to the protected class of the plaintiff, be proximate in time to the employment decision at issue, be made by an individual with authority over the decision, and relate to the employment decision at issue). Instead, the ALJ simply stated, “Intent to exclude her from employment for that reason, not motive to discriminate, satisfies the statutory command against knowing and intentional discrimination.”²⁰ *Id.*

In any event, the ALJ went on to mix and match Title VII concepts, holding that the OSC had made out a “prima facie” case of discrimination with the foregoing “direct” evidence and then turning its attention “to the explanation or justification by the employer for the presumptively discriminatory action or practice.”²¹ *Id.* at *14-15. The ALJ also held that Marcel Watch had the burden of showing that it would have made the same decision in the absence of its unlawful motive.²² *Id.* at *15.

Marcel Watch argued that it rejected Martinez as part of its effort to comply with its obligations under the IRCA. *Id.* The ALJ dismissed this argument out of hand, relying on somewhat cryptic reasoning:

As already discussed, motivation for compliance with IRCA, however, is not at issue. A discriminatory act occurred when Dan Bob insisted that citizen-candidate Martinez produce a green card as proof of her eligibility to be employed.

Id.

Notwithstanding its rejection of Marcel Watch’s stated reason, the administrative law judge then engaged in what appeared to be a pre-text analysis:

Where a respondent offers a legitimate business reason for the challenged practice the complainant has an opportunity to establish that respondent’s proffered reason was a pretext for discrimination. Upon failure by the complainant to do so, the McDonnell/Burdine discrimination presumption drops out. Here, I am persuaded

²⁰ Although not particularly consistent with this stated rationale, it is at least possible the ALJ felt a mistaken belief that someone born in Puerto Rico had to have a green card was simply too gross a misunderstanding of U.S. nationality to be believed. Cf. *Amburgery v. Corhart Refractories Corp.*, 936 F.2d 805, (5th Cir. 1991) (ADEA) (citation omitted) (“Everyone can make a mistake—but if the mistake is large enough, we may begin to wonder whether it is a mistake at all.”); but see *Zamora v. Elite Logistics, Inc.*, 478 F.3d 1160, 1177 (10th Cir. 2007) (*en banc*) (McConnell, J., concurring) (collecting cases) (even if employer was mistaken in thinking that it needed to verify employee’s Social Security number to comply with the IRCA, a mistaken belief can be a legitimate reason for an employment decision and is not necessarily pretextual).

²¹ Under a proper Title VII analysis, the *prima facie* case / burden shifting analysis is employed only if the plaintiff is *unable* to produce direct evidence of discrimination. See, e.g., *Alvarado v. Texas Rangers*, 492 F.3d 605, 611 (5th Cir. 2007).

²² If the plaintiff is able to produce direct evidence of discrimination, the burden shifts to the employer to show it would have made the same decision regardless of discrimination. See, e.g., *Reilly v. TXU Corp.*, 2008 WL 724025, *3 (5th Cir. 2008). If the plaintiff is unable to produce direct evidence and is instead able to make out only a *prima facie* case of discrimination, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions. *Id.* at *4.

that however noteworthy may have been Marcel Watch's intentions to comply with employer sanctions mandates, the failure to hire Ms. Martinez emanated from insistence on a precondition to employment not compelled by IRCA. There is no evidence that Marcel Watch imposed on all job candidates, citizen and otherwise, the same precondition imposed on Ms. Martinez.

Id.

e. The net result

Ultimately, the ALJ found Marcel Watch violated the intentional citizenship discrimination prohibition found in the IRCA by intentionally imposing a precondition—presentation of a green card—on Martinez, who was in fact a citizen. *Id.* The ALJ evidently did not feel it was necessary for the OSC to prove that Marcel Watch intentionally imposed the precondition on Martinez *because* she was a citizen. *See id.* Moreover, despite the fact that the administrative law judge seemed believe that Marcel Watch in fact imposed the green card condition on Martinez based on its belief that Martinez was *not* a citizen, the ALJ rejected that reason as a defense, because IRCA did not *in fact* require Martinez to present a green card. *Id.*

C. Title VII National Origin Discrimination Claims

Overzealous attempts to ensure IRCA compliance may also subject an employer to claims of discrimination under Title VII of the Civil Rights Act of 1964.

1. National origin v. citizenship under Title VII

In *Espinoza v. Farah Mfg. Co.*, Cecilia Espinoza (“Espinoza”), a legal permanent resident, brought suit against Farah Manufacturing Company (“Farah”), challenging Farah’s long-standing policy of not employing aliens (*i.e.*, non-citizens). *Espinoza v. Farah Mfg. Co.*, 94 S. Ct. 334, 335 (1973). The Supreme Court ultimately concluded that Farah’s claim was one of citizenship discrimination, not national origin discrimination. *Id.* at 340. The Court further held that Title VII’s prohibition on national origin discrimination does not include a prohibition on citizenship discrimination. *Id.*; *see also Vasilescu v. Black & Veatch Pritchard, Inc.*, 155 F. Supp. 1285, 1291 (D. Kan. 2001) (comments about Canadians could not support a national origin claim, where the plaintiff was a Canadian citizen but actually from Romania).

During its analysis, the Supreme Court made a number of interesting observations regarding the distinction between national origin and alienage:

- The term ‘national origin’ on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came. *Id.* at 336 (footnote omitted).
- The only direct definition given the phrase ‘national origin’ is in the following remark made on the floor of the House of Representatives by Congressman Roosevelt, Chairman of the House Subcommittee which reported the bill: ‘It means the country from which you or your forebears

came. ... You may come from Poland, Czechoslovakia, England, France, or any other country.’ *Id.* at 337 (citation omitted).

- The deletion of the word ‘ancestry’ from the final version [of Title VII] was not intended as a material change, suggesting that the terms ‘national origin’ and ‘ancestry’ were considered synonymous. *Id.* (citation omitted).
- So far as federal employment is concerned, we think it plain that Congress assumed that the ban on national-origin discrimination ... did not affect the historical practice of requiring citizenship as a condition of employment. *Id.* at 338 (citations omitted).

Although Title VII does not prohibit citizenship discrimination, the Supreme Court noted that Title VII would prohibit an employer from imposing a citizenship requirement as part of a “wider scheme” of unlawful national origin discrimination. *Id.* In this sense, the Court explained, “Title VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin. *Id.* (citing *Griggs v. Duke Power Co.*, 91 S. Ct. 849, 853 (1971)). The Court provided the following example:

Certainly it would be unlawful for an employer to discriminate against aliens because of race, color, religion, sex, or national origin—for example, by hiring aliens of Anglo-Saxon background but refusing to hire those of Mexican or Spanish ancestry.

Id. at 340.

2. The scope of “national origin”

The *Espinoza* Court’s use of broad terms such as “Anglo-Saxon” and “Spanish ancestry” in reference to “national origin” served as the touchstone for subsequent courts pondering the scope of the term “national origin” under Title VII.

For example, in *Kanaji v. Children’s Hosp. of Philadelphia*, the U.S. District Court for the Eastern District of Pennsylvania relied on the Supreme Court’s example to conclude that a plaintiff could assert a Title VII claim for national origin discrimination based on his “direct African descent” without identifying a particular country of origin. *Kanaji v. Children’s Hosp. of Philadelphia*, 276 F. Supp.2d 399, 404 (E.D. Pa. 2003). As the court explained:

By suggesting that a refusal to hire people of “Spanish-speaking background” would constitute discrimination on the basis of “national origin,” or that insisting on an “Anglo Saxon background” as a condition of employment is also prohibited, it is clear that the Supreme Court would not require that one’s “national origin” be linked directly to a specific country or nation. Rather, this implies that the term “national origin” must embrace a broader class of people, and that the term is better understood by reference to certain traits or characteristics that can be linked to one’s place of origin, as opposed to a specific country or nation.

Id. at 401-02.

The court then went on to make its own interesting observations regarding the state of “national origin” jurisprudence:

- [T]he regulation was amended in 1980 to replace “country of origin” with “place of origin” in order to discourage “reference to a sovereign nation.” *Id.* at 402 (citation omitted).
- In support of this amendment, the Federal Register cites to *Roach v. Dresser Industrial Valve and Instrument Division*, 494 F. Supp. 215 (D. La. 1980), where the court rejected an argument that “Cajuns” cannot assert national origin claims because their place of origin, Acadia, is not and never was a country. *Id.* at 402 n.4.
- “Distinctions between citizens solely because of their ancestors are odious to a free people whose institutions are founded upon the doctrine of equality, and we decline to accept the argument that litigation of this sort should be governed by the principles of sovereignty.” *Id.* (citation omitted).
- “Differences in dress, language, accent and custom associated with a non-American origin are more likely to elicit prejudicial attitudes than the fact of the origin itself. ... An individual’s speech, dress, and mannerisms are his present; his ancestral origin is his past. Only through the medium of characteristics does ancestral origin become apparent in the present.” *Id.* at 402 (citation omitted).
- “We think unlawful discrimination must be based on [the plaintiff’s] objective appearance to others, not his subjective feelings about his own ethnicity. Discrimination stems from a reliance on immaterial outward appearances that stereotype an individual with imagined, usually undesirable, characteristics though to be common to members of the group that shares the superficial traits. It results in a stubborn refusal to judge a person on his merits as a human being.” *Id.* at 402-03 (citation omitted).

The court then went on to collect a series of cases allowing members of various groups to assert claims for national origin discrimination based on their association with those groups. *Id.* at 404 (citing *Dawavendewa v. Salt River Project Agric. Improvement and Power Dist.*, 154 F.3d 1117, 1119-20 (9th Cir. 1998) (discrimination on the basis of membership in the Hopi Indian tribe constitutes national origin discrimination); *LaRocca v. Precision Motorcars, Inc.*, 45 F. Supp.2d 762 769 (D. Neb. 1999) (listing “numerous nationalities” that fall within the purview of Title VII national origin claims, including “Alaskan,” “American Indian,” “Gypsy,” and “Slavic”); *Roach*, 494 F. Supp. 215 (Cajuns may assert Title VII claim for national origin discrimination)); *see also Alvarado v. Shipley Donut Flour & Supply Co., Inc.*, 526 F. Supp.2d 746, 755 (S.D.Tex. 2007) (Mexican, not just Hispanic, is a race within the meaning of Title VII).

The Seventh Circuit Court of Appeals has noted, however, that the Supreme Court’s statement in *Farah* does not necessarily lead to the conclusion that Title VII supports a discrimination claim based on an unspecified national origin:

To say you hire only people of “Anglo-Saxon” background is implicitly anti-Semitic, anti-black, anti-Irish, anti-Spanish, etc., even if you don’t add “and no one who is a native Spanish speaker [even if he’s fluent in English].” But it is different if you say you hire only people born in the United States. That would be the test case of discrimination on the basis of unspecified national origin (“foreignness”).

Nair v. Nicholson, 464 F.3d 766, 767-68 (7th Cir. 2006).

On the other hand, the Seventh Circuit noted, the Supreme Court’s holding in *Farah* that Title VII does not prohibit citizenship discrimination does not necessarily preclude national origin discrimination based on an unspecified foreign origin:

A defendant might be indiscriminate in his hostility to persons born abroad who retain traces of foreignness in their accent or appearance or manners. One can be hated not because one isn’t a U.S. citizen—maybe he is a U.S. citizen—but because he’s not a native-born American.

Id. at 767.

The Seventh Circuit ultimately left the issue unresolved, finding the plaintiff had been treated badly by her fellow co-workers because of her incessant complaining, not her unspecified national origin. *Id.* at 768. Still, taken together, *Espinoza*, *Nair*, and *Kanaji* illustrate the potentially broad scope of Title VII’s “national origin” prohibition, notwithstanding the fact that Title VII does not reach “citizenship” discrimination.

3. Unauthorized aliens under Title VII

Like citizens, lawfully admitted aliens are protected under Title VII. *Espinoza*, 94 S. Ct. at 340 (“We agree that aliens are protected from discrimination under the Act.”); *see also* 42 U.S.C. § 2000e-2(a)(1) (making it unlawful to fail or refuse to hire, to discharge, or otherwise to discriminate against “any person”). The seemingly broad language of *Espinoza* notwithstanding,²³ there is some question as to whether an *unauthorized* alien is entitled to the protections of Title VII.

In 1984, the Supreme Court held that the protections of the National Labor Relations Act (“NLRA”) were applicable to illegal aliens. *Sure-Tan, Inc. v. NLRB*, 104 S. Ct. 2803, 2808-10 (1984). At the time of the *Sure-Tan* decision, the Immigration National Act (the “INA”) did not prohibit the employment of unauthorized aliens, a fact central to the court’s holding:

²³ Given the context in which *Espinoza*’s statement regarding “aliens” is made, it is entirely possible the Court intend only to refer to non-citizens. *See Espinoza*, 94 S. Ct. at 340 (emphasis supplied) (“Finally, petitioners seek to draw support from the fact that Tit. VII protects all individuals from unlawful discrimination, *whether or not they are citizens of the United States*. We agree that aliens are protected from discrimination under the Act.”)

The INA enforces “at best evidence of a peripheral concern with employment of illegal entrants.” For whatever reason, Congress has not adopted provision in the INA making it unlawful for an employer to hire an alien who is present or working in the United States without appropriate authorization. ... Moreover, Congress has not made it a separate criminal offense for an alien to accept employment after entering this country illegally.

Id. at 2808-09 (citations omitted).

Notwithstanding its finding that unauthorized aliens were covered by the NLRA, the *Sure-Tan* Court held the National Labor Relations Board (the “NLRB”) was limited in the remedies it could pursue for unauthorized aliens under the NLRA. *Id.* at 2813-14. For example, any order of reinstatement had to be conditioned upon proof of the employees’ legal entry into the U.S. *Id.* at 2814. Similarly, with respect to backpay, the Court held, “[T]he employees must be deemed ‘unavailable for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States.’” *Id.* The Court noted that these limitations were appropriate, even if they lead to “[t]he probable unavailability of the [NLRA’s] more effective remedies. *Id.* at 2815.

After Congress enacted IRCA and made it unlawful for an employer to knowingly employ an unauthorized alien and made it criminal for an alien to use forged documents to obtain employment, the Supreme Court revisited the issue of unauthorized aliens under the NLRA. *See Hoffman Plastic Compounds v. NLRB*, 122 S. Ct. 1275, 1283 (2002). In the eyes of the Court, the changes wrought by the IRCA were significant:

We ... conclude that allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed by in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations. However broad the Board’s discretion to fashion remedies when dealing only with the NLRA, it is not so unbounded as to authorize this sort of an award.

Id. at 1284-84.

Given that *Hoffman Plastic Compounds* was only challenging the backpay award (it did not challenge the other sanctions the NLRB had imposed as a result of *Hoffman*’s illegal treatment of the unauthorized alien), the *Hoffman* Court did not have to address the more fundamental question of whether an unauthorized alien was still protected under the NLRA, following the passage of the IRCA. *See id.* at 1285. The D.C. Court of Appeals, however, recently held that unauthorized aliens are in fact protected under the NLRA, notwithstanding the IRCA. *Agri Processor Co., Inc. v. N.L.R.B.*, 514 F.3d 1, 8 (D.C. Cir. 2008).

With respect to Title VII, the lower courts to address the issue squarely have reached conflicting results, although the majority find unauthorized aliens are in fact covered by Title VII. *Compare Egbuna v. TimeLife Libraries, Inc.*, 153 F.3d 184, 188 (4th Cir. 1998) (en banc) (per curiam) (unauthorized alien was not “qualified” for employment and thus could not bring failure to hire

claim under Title VII); *Gomez v. Honeywell Int'l, Inc.*, 510 F. Supp.2d 417, 421 (W.D. Tex. 2007) (dicta) (“[The ADEA] does apply to non-citizens working within the United States, so long as they are authorized for employment within the United States.”); *with Rivera v. NIBCO, Inc.*, 364 F.3d 1057, (9th Cir. 2004) (upholding trial court protective order barring discovery into the immigration status of Title VII plaintiffs, finding that *Hoffman* does not apply to Title VII cases); *Incalza v. Fendi North America, Inc.*, 479 F.3d 1005, 1010-12 (9th Cir. 2007) (allowing legally admitted non-immigrant whose employment was terminated after his work authorization lapsed to proceed with Title VII claim, noting that the employer could have placed the employee on temporary leave and petitioned to change his status from E-1 to H-1B instead of terminating him); *EEOC v. The Restaurant Co.*, 490 F. Supp.2d 1039, 1047, 1050 (D. Minn. 2007) (unauthorized alien could pursue Title VII sexual harassment and retaliation claims and employer’s insistence that the unauthorized alien produce valid work authorization documents could constitute an adverse employment action for retaliation purposes); *Gomez*, 510 F. Supp.2d at 419, 423-24 (allowing a Mexican national who was not a U.S. citizen to proceed with a Title VII claim despite limit on extra-territorial application of Title VII, because facts suggested plaintiff’s place of employment may have been in the U.S. rather than Mexico, without mentioning whether plaintiff was an unauthorized alien); *Escobar v. Spartan Security Service*, 281 F. Supp.2d 895, 897 (S.D. Tex. 2003) (finding unauthorized worker who had since become authorized was able to bring Title VII claim for sexual harassment—which did not require a showing that he was “qualified”—and seek reinstatement, although *Hoffman* precluded any award of backpay); *cf. Agri Processor Co. v. NLRB*, 514 F.3d 1, 3 (D.C. Cir. 2008) (NLRA continues to protect unauthorized aliens).

Not surprisingly, the EEOC has taken the unqualified position that unauthorized aliens are entitled to Title VII’s protections, even if *Hoffman* limits the remedies they may obtain. Equal Employment Opportunity Commission, *Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws* (2002) (“The Supreme Court’s decision in *Hoffman* in no way calls into question the settled principle that undocumented workers are covered by the federal employment discrimination statutes and that it is as illegal for employers to discriminate against them as it is to discriminate against individuals authorized to work.”)

4. Immigration compliance as a legitimate non-discriminatory reason

The question of whether unauthorized aliens are protected by Title VII would seem to be less important in cases where the employer discovers that the individual is an unauthorized alien prior to taking action (*e.g.*, refusal to hire, decision to fire) and then takes action on that basis. In such cases, the employer has what would appear to be an unassailable legitimate non-discriminatory reason to use in answering a claim of alleged discrimination: compliance with federal law. *See, e.g., Anderson*, 156 F.3d at 180 (“If an employer refuses to hire a person because that person is in the country illegally, that employer is discriminating on the basis not of alienage but of noncompliance with federal law.”).

As is often the case, however, things are rarely as simple as they seem. First, the legitimate non-discriminatory reason analysis has no application to “harassment” claims. *See, e.g., The Restaurant Co.*, 490 F. Supp.2d at 1047 (unauthorized alien could pursue Title VII sexual harassment); *Escobar*, 281 F. Supp.2d at 897 (unauthorized worker who had since become

authorized was able to bring Title VII claim for sexual harassment). Second, a court might conclude there were alternatives available to the employer that could have resolved the individual's work authorization issues. *See Incalza*, 479 F.3d at 1010-12 (allowing legally admitted non-immigrant whose employment was terminated after his work authorized lapsed to proceed with Title VII claim, noting that the employer could have placed the employee on temporary leave and petitioned to change his status from E-1 to H-1B instead of terminating him). Third, an unauthorized alien plaintiff might be able to point to other employees known to be unauthorized aliens who were not terminated, thus suggesting the employer's stated reason is pre-textual. *Cf. Zamora*, 478 F.3d at 1167 (noting that there was no evidence to suggest that the employer had ever treated similarly situated employees who were not Hispanic or Mexican-born any differently in concluding that plaintiff had not shown reason to be pre-textual).

Fourth, incredibly misguided attempts at IRCA compliance may actually be seen as "direct" evidence of discrimination, rather than evidence of a legitimate non-discriminatory reason for having the action at issue. *See Marcel Watch*, 1990 WL 512157, *15 (rejecting employer's claim that it was trying to comply with the IRCA and holding that the employer's insistence that a U.S. citizen born in Puerto Rico produce a green card was "direct evidence" citizenship discrimination); *cf. Amburgery*, 936 F.2d at 814 (citation omitted) ("Everyone can make a mistake—but if the mistake is large enough, we may begin to wonder whether it is a mistake at all.").

Although the *Marcel Watch* case involved a fairly egregious misunderstanding of immigration law, even subtle mistakes made while attempting to ensure immigration compliance can lead to potential liability under Title VII. Take, for example, the case of *Zamora v. Elite Logistics, Inc.*

Elite Logistics, Inc. ("Elite") operated a grocery warehouse in Kansas City, Kansas. *Zamora*, 478 F.3d at 1162. In June 2000, Elite's workers went on strike, requiring Elite to hire approximately 300 replacement workers in just a few weeks' time to maintain operations. *Id.* As a result of its frenzied hiring practices, Elite failed to follow its normal protocols for verifying the employment authorization of its 300 new workers. *Id.*

In August 2001, Elite hired Ramon Zamora. *Id.* Zamora was a Mexican citizen who had been a legal permanent resident of the U.S. for over a decade. *Id.* When Elite hired Zamora, Zamora truthfully disclosed on Form I-9 that he was a legal permanent resident and presented his alien registration card (a suitable List A document that establishes both identity and employment eligibility), as well as his social security card (an acceptable List C document that establishes employment eligibility). *Id.*

In December 2001, Elite received a tip that INS was going to investigate warehouses in the area. *Id.* at 1162-63. Concerned about its IRCA compliance efforts during its June 2000 hiring rush, Elite hired two independent contractors, Datasource and Verifications, Inc., to verify the Social Security numbers of all 650 of Elite's employees. *Id.* at 1163. The contractors uncovered evidence that 35 Elite employees had presented Social Security numbers that were questionable. *Id.* Zamora was one of these 35 employees. *Id.*

Over the next few months, Elite's human resources manager, Larry Tucker, scheduled meetings with each of the 35 employees to discuss the issue. *Id.* Tucker presented each affected

employee with an “Important Memorandum,” written in Spanish and English, that explained that the employee had ten days to produce adequate documentation of his or her right to work in the United States:

It is required by federal law that all employees produce documents, which establish their identity and/or employment eligibility to legally work in the United States when they are hired. This eligibility can be established with a U.S. Passport, a Certificate of Citizenship or Naturalization; or with a combination of other documents, such as a state driver’s license, state or federal ID card, U.S. Social Security card and/or a certified copy of a birth certificate, issued by a state of the United States.

It has come to our attention that the documents you provided us previously are questionable. Therefore, we are asking that you obtain proper documentation, or you may not be permitted to continue working here. Please bring proper evidence of your identity and employment eligibility no later than five o’clock p.m. on Monday, May 20, 2002, to the Department of Human Resources, or you may be terminated. Thank you.

Id.

At the bottom of the form was a section called “Eligibility Documentation,” which stated:

I understand and agree that until and if I provide documents, which establish my identity and/or employment eligibility to legally work in the United States, Elite Logistics may not be able to continue permitting me to work. I also understand and agree that I have until five o’clock p.m. on Monday, May 20, 2002, to produce this documentation.

Id.

Tucker met with Zamora on May 10, 2002. *Id.* Zamora signed and dated the return memorandum that same day and was permitted to continue working.²⁴ *Id.* Notwithstanding the memorandum, Zamora did not present Elite with the requested documents by May 20, 2002. *Id.* Tucker met with Zamora again on May 22, 2002, and told him that he could not “come to work anymore until [he] got a different social security number,” effectively suspending him pending resolution of the issue. *Id.* at 1163-64. Zamora left Tucker’s office and returned the same day with a document from the SSA.

The SSA document Zamora gave Tucker on May 22, 2002, showed wage earnings for the years 1978-85 for an “R. Zamora” under Zamora’s Social Security number. *Id.* at 1164. Tucker was concerned by the SSA statement because: (1) it reported wages beginning in 1978 and Zamora

²⁴ In the first week of the investigation, Tucker met with five of the affected employees. The very next day, those five employees, along with five whom Tucker had not yet notified, “disappeared.” *Id.* at 1173, n.6. Ultimately, out of the 35 employees identified as having potential work authorization issues, Zamora was the only one who provided Elite any documentation in response to the memorandum. *Id.* at 1163, n.5. All of the other employees quit. *Id.*

had stated that he had not received a Social Security number until 1980 or 1981; (2) it had been mailed to an address in Washington, which Zamora had scratched out and replaced with his handwritten Missouri address; and (3) it reflected a birth date that was different from the birth date Zamora had reported to Elite. *Id.* In light of these discrepancies, Tucker informed Zamora that the document did not resolve the issue with his Social Security number. *Id.*

Zamora testified that he also presented Tucker with a naturalization certificate (a document which evidences identity and work authorization for purposes of Form I-9) during this same meeting. *Id.* at 1169-70. Tucker denied that Zamora ever presented a naturalization certificate. *Id.* at 1170 n.3. Viewing the evidence in the light most favorable to Zamora, the Tenth Circuit assumed that Zamora had in fact presented Tucker with a naturalization certificate during the meeting. *Id.* at 1170.²⁵

On May 23, 2002, Zamora provided Tucker a statement from the SSA indicating that the Social Security number he was using was in fact his. *Id.* at 1164. Tucker informed Zamora that Elite would verify the statement with the SSA. *Id.* Elite called the SSA and verified the authenticity of the document. *Id.* After verifying the SSA document, Elite called Zamora and asked him to return to work on May 29, 2002. *Id.*

On May 29, 2002, Zamora went to Tucker's office and handed him a letter stating, "Before I could consider going back to work I need from you two things: (1) an apology in writing, and (2) a complete explanation of why I was terminated. Please send a response to my home." *Id.* Tucker refused to apologize and told Zamora to leave the premises and that he was fired.²⁶ *Id.* Zamora sued Elite, claiming that Elite discriminated against him on the basis of his race and national origin in violation Title VII by suspending him on May 22, 2002, and by firing him on May 29, 2002.²⁷ *Id.*

The United States District Court for the District of Kansas granted Elite summary judgment on both claims. *Id.* at 1160. A divided panel of the Tenth Circuit reversed the district court. *Id.* On rehearing *en banc*, the Tenth Circuit affirmed the district court's summary judgment on the termination claim, nine to five. *Id.* at 1160, 1165. The Tenth Circuit was evenly divided on Zamora's discriminatory suspension claim. *Id.* at 1165. Pursuant to Tenth Circuit procedure, the *en banc* court vacated the prior panel's decision and reinstated the judgment of the district court in favor of Elite. *Id.* at 1165.

In discussing Zamora's termination claim, the Tenth Circuit assumed that Zamora made a *prima facie* case of discrimination under *McDonnell Douglas*. *Id.* Zamora conceded Elite had asserted a legitimate, non-discriminatory reason for firing Zamora—namely, that Tucker believed Zamora would not return to work unless Tucker apologized, and Tucker refused to apologize. *Id.* The case thus turned on whether Zamora had established that Elite's stated reason for terminating Zamora was a pretext for race and national origin discrimination. *Id.*

²⁵ The concurrence noted, however, that the naturalization certificate itself was not introduced into evidence and was not part of the record. *Id.*

²⁶ Tucker testified that he may have told Zamora to "[j]ust get the hell out." *Id.* at 1164.

²⁷ Zamora did not assert a discrimination claim under IRCA. *Id.* at 1175.

The majority determined Zamora failed to present sufficient evidence establishing a disputed issue of fact as to whether Elite’s stated reason was pretextual. *Id.* at 1167. The majority held—and Zamora conceded—Elite had no legal obligation to apologize to Zamora. *Id.* at 1167. The majority further concluded that, based on the undisputed facts known to Tucker, he could have reasonably believed that Zamora was not going to return to work unless Tucker apologized. *Id.* at 1166. Finally, the majority found no evidence to suggest that Tucker had ever treated similarly situated employees who were not Hispanic or Mexican-born any differently. *Id.* at 1167.

While the majority in the *Zamora* Title VII case was relatively brief in its analysis of whether there was any evidence that Elite’s stated concern for IRCA compliance was actually a pre-text for national origin discrimination against Zamora, the concurrence and the dissent spent considerable time on the issue. An examination of their opposing views provides guidance on the question of how an employer should respond to information indicating that an employee may lack work authorization.

Elite’s rationale for requiring additional documentation from Zamora was its stated desire to avoid the civil and criminal penalties available for violations of § 1324a(a)(2), and it characterized its treatment of Zamora as a “good faith—even if flawed—attempt to comply” with the IRCA. *Zamora*, 478 F.3d at 1173 (McConnell, J., concurring). In concluding Elite’s reason was not a pretext for discrimination, the concurrence focused on the threat “constructive knowledge” holdings (*see* Appendix A, *infra*) pose to companies. *Id.* at 1177. In light of these holdings, the concurrence felt Tucker’s “diligence” in seeking resolution of all reported Social Security number discrepancies was within the bounds of reasonableness. *Id.*

As the concurrence noted, even if Tucker was mistaken in thinking that he needed to verify the Social Security number to comply with the IRCA, a mistaken belief can be a legitimate reason for an employment decision and is not necessarily pretextual. *Id.* (collecting cases). The concurrence also pointed out that the relevant inquiry is not whether the employer’s proffered reasons “were wise, fair, or correct, but whether the employer honestly believed those reasons.”²⁸ *Id.* (quoting *Stover v. Martinez*, 382 F.3d 1064, 1076 (10th Cir. 2004)).

By contrast, the dissent focused on Tucker’s testimony that he was concerned with the discrepancies regarding Zamora’s Social Security information, not his work authorization. *See id.* at 1191 (Lucero, J., dissenting):

A: My concern with Mr. Zamora was could I find a document or a couple of documents that had the birthdate he was using, the name he was using, and the social security number he was using that verified this is truly his.

* * *

²⁸ The concurring opinion also noted the lack of any evidence of discriminatory animus (such as racist comments, or different treatment of Hispanic employees vis-à-vis non-Hispanic employees) and briefly touched on the same decision-maker defense (noting that Tucker, who suspended and terminated Zamora, was the same person who had offered Zamora his job back just days before). *Id.* at 1181 (citing *Antonio v. Sygma Network, Inc.*, 458 F.3d 1177, 1183 (10th Cir. 2006)).

Q: So would it be fair to say that the problem with the social security number is that it points to a potential that, in fact, he is not entitled to work in this country?

A: What I had was a social security number that indicated three different people may have used that number at three different points in time. I wanted to ascertain with certainty that that number belonged to Mr. Zamora.

Q: So it wasn't really a concern whether he is entitled to work in this country, it was a concern about is he using the correct social security number?

A: Yes sir.

Id. at 1178 (McConnell, J., concurring).²⁹

According to the dissent, this testimony established that Elite's claim that it was concerned with IRCA compliance was pretext. *Id.* at 1189 (Lucero, J., dissenting). The concurrence responded by noting that "Mr. Tucker never testified that he was unconcerned with IRCA compliance in general, only that his concern related to Mr. Zamora's SSN rather than any other issues surrounding 'entitlement to work in this country.'" *Id.* at 1178-79 (McConnell, J., concurring). Indeed, according to the concurrence, Tucker's concern with Zamora's Social Security number was consistent with Elite's stated concern over IRCA compliance:

[A]n increasingly common form of IRCA fraud entails the presentation of valid documents that belong to someone else. Thus, while SSNs are initially used to confirm employment eligibility under the IRCA (rather than identity), when an employer learns that a Social Security number has been used by multiple persons, the employer might reasonably be concerned that an employee is not who he purports to be—in other words, that the SSN the employee presents does not match the identity he presents. Consequently, the question relevant to this case is not really one of "eligibility" under the IRCA, but rather of the match between identity and proof of eligibility.

Id. at 1179 (McConnell, J., concurring).

The dissent also noted that the memorandum Tucker gave to Zamora stated that a certificate of naturalization would show work authorization. *Id.* at 1191 (Lucero, J., dissenting). The dissent suggested that Tucker then "violated" Elite's "written policy" when he refused to accept the naturalization certificate when Zamora presented it and noted that an employer's violation of its own written policies can be evidence of pretext. *Id.* at 1191-92.

For its part, the concurrence pointed out that the memorandum said that Zamora's Social Security number was "questionable" and gave him ten days "to try to resolve *the discrepancy.*" *Id.* at 1180 (McConnell, J., concurring) (emphasis supplied by concurrence). In short, the concurrence concluded that Elite had not contradicted its written policy in any way that would

²⁹ Tucker's testimony was actually provided in the opinion by the concurrence, so as to put it in "context."

give rise to an inference of pretext. *See id.* Still, the vigorous dispute over the issue between the concurrence and the dissent, demonstrates the importance of being specific about what exactly an employee must provide to address the employer’s concern.

The dissent also pointed to Zamora’s testimony that Tucker had accused him of identity theft as sufficient to support an inference of discrimination. *Id.* at 1192 (Lucero, J., dissenting). As noted above, the concurrence viewed Tucker’s “diligence” as reasonable in light of the “constructive knowledge” theories advanced by the regulations and the decisions of other circuit courts. *See id.* at 1197 (McConnell, J., concurring). By contrast, the dissent suggested the accusation and the nature of Tucker’s response (“Get the hell out”) as evidence of a discriminatory animus. *See id.* at 1187, 1193.

Ultimately, the concurrence concluded that the larger “context” of IRCA compliance meant the issues identified by the dissent did not support an inference of pretext, while the dissent felt the consideration of “context” amounted to an impermissible inference drawn in favor of Elite. *Compare id.* at 1181-83 (McConnell, J., concurring) *with id.* at 1193 (Lucero, J., dissenting). Although the concurrence’s view seems to have been the unstated position of the majority opinion (given the ultimate outcome of the case), the vigorous dissent, the *en banc* split on the question of Zamora’s suspension, and the fact that the original circuit panel reversed the grant of summary judgment in favor of Elite all underscore the care employers should take when questioning employees about their work authorization.

D SECTION 1981

1. Race v. national origin

It is well established that 42 U.S.C. § 1981 (“Section 1981”) prohibits discrimination based on race in employment. *See, e.g., Johnson v. Railway Expressway Agency, Inc.*, 95 S. Ct. 1716, 1720 (1975) (footnote omitted) (“Although this Court has not specifically so held, it is well settled among the federal Courts of Appeals—and we now join them—that s 1981 affords a federal remedy against discrimination in private employment on the basis of race.”). Likewise, even prior to the addition of Section 1981(c), the Supreme Court had specifically held that Section 1981 prohibited race discrimination in employment by private actors. *See, e.g., Patteson v. McLean Credit Union*, 109 S. Ct. 2363 (1989); *St. Francis College v. Al-Khazraji*, 107 S. Ct. 2022 (1987); *Runyon v. McCrary*, 96 S. Ct. 2586 (1976).

Equally well established is the fact that Section 1981 does not prohibit national origin discrimination. *St. Francis College*, 96 S. Ct at 2028 (“If respondent on remand can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin, or his religion, he will have made out a case under § 1981.”). Unfortunately, the exact distinction between “race” and “national origin” is *not* well established. *See id.* at 614 (J. Brennan, concurring) (“[T]he line between discrimination based on ‘ancestry or ethnic characteristics,’ and discrimination based on ‘place or nation of ... origin,’ is not a bright one.”).

According to the Supreme Court, in passing Section 1981, “Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination

solely because of their ancestry or ethnic characteristics.” *Id.* at 613; *but compare id.* at 613 (Section 1981 does not prohibit national origin discrimination) *with Espinoza*, 94 S. Ct. at 337 (citation omitted) (“The deletion of the word ‘ancestry’ from the final version [of Title VII] was not intended as a material change, suggesting that the terms ‘national origin’ and ‘ancestry’ were considered synonymous.”). Notably, according to the Supreme Court, a distinctive physiognomy is not essential for a group to qualify as a race. *St. Francis College*, 107 S. Ct. at 613.

Moreover, according to the Supreme Court, the prevailing understanding of the term “race” when Section 1981 became law is more relevant than any current understanding of “race”:

Petitioner’s submission rests on the assumption that all those who might be deemed Caucasians today were thought to be of the same race when § 1981 became law in the 19th century; and it may be that a variety of ethnic groups, including Arabs, are now considered to be within the Caucasian race. The understanding of “race” in the 19th century, however, was different. Plainly, all those who might be deemed Caucasian today were not thought to be of the same race at the time § 1981 became law.

Id. at 2026-27 (footnote omitted).

Indeed, the Supreme Court’s collection of cases of encyclopedia citations could be read to support the notion that all of the following are races within the meaning of Section 1981: Finns, Basques, Hebrews, Arabs, Semitic, Swedes, Norwegians, Germans, Greeks, Italians, Spanish, Mongolians, Russians, Jews, Hungarians, Scandinavian, Chinese, Latin, Anglo-Saxon, Mexicans, blacks, Mongolians, Gypsies. *See id.*

The seeming breadth of the Supreme Court’s reasoning in *St. Francis College* has left lower courts somewhat confused about the exact contours of Section 1981’s established prohibition on race discrimination. *See, e.g., Von Zuckerstein v. Argonne Nat’l Laboratory*, 984 F.2d 1467, 1472 (2nd Cir. 1993) (“[W]hat is not clear from the Court’s brief exposition is when the place or nation of origin, which would not be actionable under section 1981, determines ancestry or ethnic characteristics, which would be actionable.”); *Gainey v. Kingston Plantation*, 2008 WL 7096916, *6 (D.S.C. 2008) (construing *St. Francis*, 107 S. Ct. at 613) (holding that, “Jamacian” is a national origin, not a race, unlike “Arab,” which is a race).

2. Alienage discrimination

Whatever the precise scope of Section 1981’s prohibition on “race” discrimination, it is important to note that Section 1981 also prohibits discrimination against an individual because he or she is not a citizen, at least with respect to state actors. *See, e.g., Anderson v. Conboy*, 156 F.3d 167, 178 (2nd Cir. 1998); *see also Duane v. GEICO*, 37 F.3d 1036, 1043 (4th Cir. 1994) (holding that Section 1981—prior to the addition of Section 1981(c)—prohibited discrimination on the basis of alienage by both state and private actors); *Bhandari v. First National Bank of Commerce*, 829 F.2d 1343, (5th Cir. 1987) (holding that Section 1981—prior to the addition of Section 1981(c)—prohibited discrimination on the basis of alienage only by state actors, not private actors); *Chacko v. Texas A&M University*, 960 F. Supp. 1180, (S.D. Tex. 1997) (Canadian non-immigrant was a “member of a protected class under § 1981,” because she was a

non-citizen); *cf. Graham v. Richardson*, 91 S. Ct. 1848, 1855 (1971) (using Section 1981 to invalidate state welfare laws that either denied benefits to non-citizens or subject them to residency requirements to which citizens were not subjected); *Takashi v. Fish & Game Comm.*, 68 S. Ct. 1138, 1143-45 (1948) (using Section 1981 to invalidate a California law that banned the issuance of commercial fishing licenses to “any person ineligible to citizenship”); *Alvarado*, 526 F. Supp.2d at 755 (reserving the question of whether a citizenship claim was cognizable under Section 1981, because the parties did not raise the issue).

With the addition of Section 1981(c)—which specifically provides that the rights protected by Section 1981 are protected impairment by nongovernmental discrimination and impairment under color of state law—it seems virtually certain that Section 1981 now also prohibits discrimination on the basis of alienage by private actors, just as it does with respect to state actors.³⁰ *Anderson*, 156 F.3d at 179 (Section 1981(c) establishes that Section 1981’s prohibition on alienage discrimination extends to private actors); *see also Duane*, 37 F.3d at 1043 (holding that Section 1981, prior to the addition of Section 1981(c), prohibited discrimination on the basis of alienage by both state and private actors); *Cheung v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 913 F. Supp. 248, 251 (S.D.N.Y. 1996) (addition of Section 1981(c) establishes that Section 1981 prohibits alienage discrimination in employment by private actors).

3. Tension with IRCA

To the extent Section 1981’s prohibition on alienage discrimination in employment applies to unauthorized aliens, it is in considerable tension with the IRCA’s prohibition on the employment of unauthorized aliens. *Cf. Bhandari*, 829 F.2d at 1345 (emphasis in original) (“[I]f § 1981 has been correctly interpreted by *Guerra v. Manchester Terminal Corp.* to protect all aliens, legal and *illegal*, from employment discrimination, then it necessarily follows that the 1986 Immigration Act either ‘repeals’ § 1981 to the extent that it has been read to protect *illegal* aliens from employment discrimination or remits illegals to whatever their § 1981 remedies may be, while denying them any under the 1986 Act.”). Without directly addressing this issue, at least one court of appeals has attempted to side-step the problem:

The only purported conflict that appellees identify is the fact ... that the IRCA expressly exempts “illegal” aliens from coverage whereas Section 1981 does not. Thus, according to appellees, applying Section 1981 to claims of private alienage discrimination would “lead to the absurd result of holding liable under Section 1981 employers who refuse to hire undocumented aliens in order to comply with IRCA Section 1324a.” We disagree. If an employer refuses to hire a person

³⁰ State actors must also contend with the Equal Protection Clause. *See, e.g., Sugarman v. Dougall*, 93 S. Ct. 2842, 2947 (1973) (citation omitted) (“[A]n alien is entitled to the shelter of the Equal Protection Clause.”) Indeed, classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close scrutiny. *Graham*, 91 S. Ct. at 1852 (citations omitted) (“Aliens as a class are a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate.”) Accordingly, a state classification in employment based on alienage will prompt an examination of “the substantiality of the State’s interest in enforcing the statute in question, and to the narrowness of the limits within which the discrimination is confined.” *Id.* A proper discussion of the application of the Equal Protection Clause to aliens in employment is beyond the scope of this paper. Suffice it to say, “Employment discrimination based on alienage is generally prohibited by the 14th Amendment [and] Section 1983 is the statutory vehicle for remedy of 14th Amendment violations.” *Ramirez v. Sloss*, 615 F.2d 163, 168 n.5 (1980) (summarizing *Sugarman*).

because that person is in the country illegally, that employer is discriminating on the basis not of alienage but of noncompliance with federal law.

Anderson, 156 F.3d at 180.

The Second Circuit's coy reasoning notwithstanding, it seems likely that courts will inevitably be forced to decide whether Section 1981's use of the phrase "all persons" means exactly what it says, thus prohibiting alienage discrimination in private employment, even with respect to unauthorized aliens. As the Fifth Circuit stated in frustration,

The extreme difficulty of this task stems in great part from the Court's initial rejection, in *Jones [v. Alfred Mayer Co.]*, of what seems the natural interpretation of § 1981: that it directs States and Territories to grant each and every group of humans, no matter how defined or classified, the same rights in their courts and under their laws as they grant white citizens—no more, no less. This natural construction be rejected another is not easily found, much as though a student had been told that any answer was acceptable as the sum of two plus two except four and directed to find another suitable one.

Bhandari, 829 F.2d at 1345 (footnote omitted).

3. Title VII Framework

Section 1981 claims use a framework very similar to the Title VII framework. *See, e.g., Jenkins v. Methodist Hospitals of Dallas, Inc.*, 478 F.3d 255, 260-61 (5th Cir. 2007). To survive summary judgment, a Section 1981 plaintiff must establish a *prima facie* case of intentional discrimination, by demonstrating: (1) he or she is a member of a class protected by Section 1981; (2) the defendant had the intent of discriminating on against him or her on the basis of membership in that class; and (3) the discrimination concerned the making or enforcing of a contract.³¹ *Id.*

Once the plaintiff establishes a *prima facie* case, the defendant must articulate a legitimate, non-discriminatory reason for the complained of action. *Id.* at 261. Once the defendant has articulated such a reason, the burden shifts back to the plaintiff to show either that the proffered reason was not true but is instead a pre-text for discrimination or that the reason, although true, was only one reason for the action and that the plaintiff's membership in the protected class was another "motivating factor" for the action. *Id.* To meet the motivating-factor prong, the plaintiff must show that his or her membership in the protected class "actually played a role in the [decision-making] process and had a determinative influence on the outcome." *Id.* (citation omitted).

³¹ Section 1981 also prohibits retaliation. *See* 42 U.S.C. § 1981(b). In fact, Section 1981(b) has been held to prohibit retaliation against anyone who opposes discrimination suffered by others in violation of Section 1981. *See Hujmphries v. CBOCS West, Inc.*, 474 F.3d 387, (7th Cir. 2007) (collecting cases) ("[T]he great weight of authority is that individuals who suffer retaliation for opposing the racial discrimination suffered by others have standing to assert retaliation claims under Section 1981.").

What remains to be seen is how the courts will handle an employer that decides not to hire any person who is not a citizen, legal permanent resident, legal temporary resident, asylee, or refugee. Is such an employer engaged in overt “alienage” discrimination, or does the fact that the employer is willing to hire certain aliens (*e.g.*, legal permanent residents) mean the employer has simply relied on a characteristic that correlates strongly with the “alienage” protected class such that the employer is entitled to defend its action through the assertion of a legitimate non-discriminatory reason for its rule (*e.g.*, the expense and uncertainty associated with hiring persons with temporary or conditional work authorization).

V. CONCLUSION

Form I-9 has failed of its essential purpose, and it seems obvious that the nature of immigration compliance in the United States will change in a fundamental way in the very near future. In all likelihood, the change will represent a shift away from the document-based compliance system of old, in favor of a data-based immigration compliance system built around electronic employment verification tools. As the United States makes this shift, uncertainty regarding new legal requirements will place a premium on sound legal counsel and informed decision-making.

Employers who prepare for the transition by remaining informed and adopting thoughtful immigration-related policies and processes will likely navigate the transition with relative ease, although any employer that has become truly dependent upon unauthorized aliens will find the transition treacherous, regardless of how well it prepares.

Employers who do not prepare will likely find the transition very difficult, as they rush to implement untested employment processes based on imperfect information and make hasty decisions in an attempt to bring themselves in line with what they perceive as a new world of immigration compliance requirements. As errors are made, lawsuits will follow, and the contours of illegal national origin and citizenship discrimination will be re-explored in courts throughout the country.

Finally, assuming the new compliance system lives up to its technological potential, the Congress and the Court will likely be called upon to re-evaluate the United States’ relationship with its unauthorized aliens, as the U.S. begins to experience the full impact of an effective immigration compliance system.

This paper is not intended as legal advice.

APPENDIX A:

KNOWLEDGE UNDER THE IRCA

A. Failing To Complete or Properly Complete Form I-9

There are two basic types of IRCA violations with respect to Form I-9 and the employment of unauthorized aliens: (1) paperwork or “technical” violations resulting from a failure to complete Form I-9 properly; and (2) substantive violations of the IRCA’s prohibition on the knowing hire or employment of unauthorized aliens. *Compare* 8 U.S.C. § 1324a(e)(5) (establishing fines for “paperwork” violations related to Form I-9) *and* § 1324a(e)(4) (establishing fines for substantive violations for the knowing employment of unauthorized aliens).

For example, if an employer fails to complete a Form I-9 for an employee who is a U.S. citizen, the employer has committed a paperwork violation, even though the employee is in fact authorized to work. *See* 8 U.S.C. § 1324(a)(1)(B) (making it unlawful to hire “an individual” without completing Form I-9). The employer has not, however, committed a substantive violation, because the individual is in fact authorized to work. *See* 8 U.S.C. § 1324(a)(1)(A) (only prohibiting the employment of an individual known to be an “unauthorized alien”).

However, if an employer fails to complete a Form I-9 for an employee who turns out to be an unauthorized alien, the USCIS’s constructive knowledge regulation transforms the employer’s failure to complete Form I-9 properly into “constructive knowledge” that the individual is an unauthorized alien, meaning that the employer has committed both a paperwork violation (failing to complete Form I-9 properly) *and* a substantive violation (employing an individual “known” to be an unauthorized alien). *See* 8 C.F.R. § 274a.2(b)(1)(1).

1. Section 1 – Employee attestation

There is little nuance to the employer’s obligation to ensure that the employee completes Section 1 at the time of hire: the employer must ensure that the employee provides his or her personal information and verify that he or she is a citizen, legal permanent resident, or work-authorized alien. 8 C.F.R. § 274a.2(b)(1)(i)(A); *see also* Form I-9, Section 1. If an employee fails to verify his or her status and ultimately proves to be unauthorized, the employer may be charged with constructive knowledge. 8 C.F.R. § 274a.2(b)(1)(1).

2. Section 2 – Document inspection

Unlike Section 1, there are considerable questions regarding the nature and extent of an employer’s Section 2 obligation to inspect the employee’s work authorization documents.³²

In *Collins Foods Int’l v. U.S. Immigration and Naturalization Service*, 948 F.2d 549 (9th Cir. 1991), the INS argued and the administrative law judge (“ALJ”) found that Collins Food International (“Collins”) had constructive knowledge that one of its employees, Armando Rodriguez, was an unauthorized alien because: (1) Ricardo Soto Gomez, a Collins employee,

³² As noted earlier, the regulations at 8 C.F.R. § 1324a(b) contain numerous technical rules for the inspection of a wide variety of documents under a wide variety of circumstances not discussed explicitly in this paper.

extended an offer of employment to Rodriguez over the phone before inspecting his work authorization documents; and (2) Soto failed to inspect the back of Rodriguez's Social Security card or to compare it to the sample Social Security card provided in the INS's Handbook for Employers.³³ *Id.* at 551. The Ninth Circuit reversed. *Id.*

With respect to the offer of employment via telephone, the Ninth Circuit noted that nothing in the IRCA prohibits an employer from offering an individual a job prior to inspecting his or her documents. *Id.* To the contrary, CIS regulations specifically allow an employer up to three business days after an employee begins work to inspect the employee's documents. *Id.* at 552. Moreover, the Ninth Circuit noted that requiring an employer to explore a candidate's work authorized status before an offer of employment could expose the employer to charges of discrimination. *Id.*

The inspection of Rodriguez's Social Security card presented a somewhat closer issue. First, Rodriguez's name was misspelled "Rodriquez" on the front of the card. Second, the Social Security card was laminated, which invalidates the card for work authorization purposes. Third, the back of the Social Security did not contain all of the language found on the Social Security example provided in the INS Handbook for Employers. *Id.* at 553-54. The Ninth Circuit addressed each of these issues in turn.

a. *No obligation to scrutinize*

The Ninth Circuit began by noting that the IRCA requires only that a Form I-9 document "reasonably appear[] on its face to be genuine." *Id.* at 553 (citing 8 U.S.C. § 1324a(b)(1)(A)). Accordingly, the fact that Collins did not notice the misspelling of Rodriguez's name on the face of the card was not an IRCA violation, because "at a glance the card on its face did not appear to be false." *Id.* Likewise, the fact that the Social Security card was laminated did not render Collins's inspection of the document insufficient, because "[t]he information that Social Security cards are invalid if laminated is rather obscurely presented: it is found on the reverse side of the example in the INS handbook." *Id.* at 554 n.15.

b. *No obligation to compare to samples*

Finally, the court held that Collins was under no obligation to compare Rodriguez's Social Security card to the example provided in the INS's Handbook for Employers:

Although the verification requirement of the statute requires only that the document "reasonably appear[] on its face to be genuine," the ALJ held that Collins Food did not satisfy its verification obligation because Soto did not compare the back of Rodriguez' social security card with the example in the INS handbook. We can find nothing in the statute that requires such a comparison. Moreover, even if Soto had compared the card with the example, he still may not have been able to discern that the card was not genuine. The handbook contains but one example of a Social Security card, when numerous versions exist. The card Rodriguez presented was not so different from the example that it necessarily

³³ As of the writing of this paper, the most recent version of the Handbook for Employers (M-279) is dated November 1, 2007, and is available at www.uscis.gov/files/nativedocuments/m-274.pdf.

would have alerted a reasonable person to its falsity. Collins Food, through its employee Soto, did all that it was required to do by statute to satisfy its verification obligation.

Id. at 553-54 (footnotes and citations omitted).

Indeed, the Ninth Circuit went on to note that the General Accounting Office (“GAO”) specifically pointed to INS’s failure to include all versions of acceptable documents in its Handbook for Employers to support its finding that employers are not in a position to verify documents. *Id.* at 554 n.14. The Ninth Circuit reminded INS that Congress intended to minimize the burden and the risk placed on the employer in the document verification process:

The Judiciary Committee Report on the statute shows that Congress did not intend the statute to cause employers to become experts in identifying and examining a prospective employee’s employment authorization documents. The Judiciary Committee Report states that “[i]t is not expected that employers ascertain the legitimacy of documents the verification process.” The Report goes on to say that “[t]he ‘reasonable man’ standard is to be used in implementing this provision and the Committee wishes to emphasize that documents that reasonably appear to be genuine should be accepted by employers without requiring further investigation of those documents.”

Id. (footnotes and citations omitted).

c. *No obligation to become an expert*

Although recent changes in political thinking on the subject of unauthorized employment may cause employers to hesitate before placing too much reliance on some of the language found in *Collins Food*, the fact remains that employers are not expected to become experts in document examination. See 8 U.S.C. § 1324a(b)(1)(A) (“If an individual provides a document or combination of documents that reasonably appears on its face to be genuine and that is sufficient to [verify the individual’s identity and authorization to work], nothing in this paragraph shall be construed as requiring the person or entity to solicit the production of any other document or as requiring the individual to produce such another document.”); cf. 8 U.S.C. § 1324a(b)(6) (“[A] person or entity is considered to have complied with a requirement of this subsection notwithstanding a technical or procedural failure to meet such requirement if there was a good faith attempt to comply with the requirement”).

Indeed, an employer that attempts to become an expert in document inspection faces considerable risk. *Accord*, 8 U.S.C. § 1324b(a)(6) (refusal to accept facially valid document, or insisting on additional documents, constitutes unlawful “document abuse” if done with an intent to discriminate); *Zamora v. Elite Logistics, Inc.*, 478 F.3d 1160, 1176-93 (10th Cir. 2007) (*en banc*) (Title VII claim) (considering whether employer’s continued concern over discrepancies related to employee’s Social Security number after employee presented a certificate of naturalization constituted evidence of discrimination); *Burgess v. Jaramillo*, 914 S.W.2d 246, 250 (Tex. App.—Ft. Worth 1996, no writ) (defamation claim against public official) (noting that the IRCA “does not authorize employers to become ‘junior agents’ of the Immigration and

Naturalization Service” in affirming denial of official immunity to government official who continued to question an employee about her Social Security number after she presented a valid legal permanent resident card).

B. Information Indicating The Alien Is Not Authorized To Work

Properly completing Form I-9 creates a rebuttable presumption that the employer did not hire the individual knowing that he or she was an unauthorized alien. 8 U.S.C. § 1324a(a)(3). Proper completion of Form I-9 does not, however, provide a defense to a claim of continuing employment, if the employer learns information indicating that the individual is an unauthorized alien following completion of the form. *See* 8 U.S.C. § 1324a(a)(3) (limiting defense to violation of hiring provision); *Mester Mfg. Co. v. Immigration and Naturalization Service*, 879 F.2d 561, 569 n11 (9th Cir. 1989) (noting same).

Information regarding an individual’s work authorized status may come from the government, a voluntary internal audit, the individual him or herself, or any of a number of other places. Whatever the source, a review of the cases shows that the manner and speed with which the employer responds to this information will usually dictate whether the employer is deemed to have constructive knowledge that its employee was an unauthorized alien.

1. The nature of the employer’s response

On March 16, 1988, INS Special Agent Brian Cecil telephoned New El Rey Sausage Company (“New El Rey”) and informed management about the requirements of the IRCA, including an employer’s obligations with respect to Form I-9. *New El Rey Sausage Co., Inc. v. U.S. Immigration and Naturalization Service*, 925 F.2d 1153, 1154 (9th Cir. 1991). A few days later, INS issued a notice of inspection to New El Rey, informing the company that Agent Cecil would inspect New El Rey’s I-9 forms on April 1, 1988. *Id.*

The INS audit found numerous deficiencies in New El Rey’s paperwork and revealed that the alien registration numbers provided for nine employees were either nonexistent or had been issued to someone else. *Id.* at 1155. In light of its findings, INS issued New El Rey a letter, which stated as follows:

This letter is to inform you that, according to the records of INS, the alien registration cards submitted to you were found to pertain to other individuals, or there was no record of the alien registration number being issued. Unless those individuals can provide valid employment authorization from INS, they are to be considered unauthorized aliens, and are therefore not authorized to be employed in the United States. ...

Id.

After word of the letter got out, seven of the employees identified in the letter left New El Rey. *Id.* New El Rey asked the remaining two employees if their documents were valid. *Id.* The employees insisted that they were work-authorized. *Id.* New El Rey took them at their word and allowed them to remain employed. *Id.* In response, INS filed a complaint against New El Rey,

charging it with two counts of knowingly continuing to employ unauthorized aliens in violation of the IRCA. *Id.*

a. *A weak response leads to constructive knowledge*

An ALJ found New El Rey guilty of knowingly continuing to employ unauthorized aliens in violation of the IRCA. *Id.* INS's Office of the Chief Administrative Hearing Officer ("CAHO") affirmed. *Id.* The ALJ and CAHO concluded that New El Rey had constructive knowledge of the aliens' unauthorized status within the meaning of the IRCA's "knowing" standard. *Id.* at 1157.

On appeal, the Ninth Circuit agreed, holding that "[n]otice that the documents are incorrect places the employer in the position it would have been if the alien had failed to produce the documents in the first place: it has failed to adequately ensure that the alien is authorized." *Id.* at 1158. According to the Ninth Circuit, the INS's letter provided this notice by stating, "Unless those individuals can provide valid employment authorization from INS, they are to be considered unauthorized aliens, and are therefore not authorized to be employed in the United States. ..." *Id.* at 1159.

b. *No specific response is required*

New El Rey argued that the INS letter did not place it on notice that its employees were unauthorized aliens, because it failed to provide sufficient information about what steps New El Rey should take to comply with the statute. *Id.* The Ninth Circuit disagreed and explained the nature of and basis for the imposition of constructive knowledge on New El Rey:

New El Rey is not being fined for its failure to take specific required steps, but for its failure to take any steps sufficient to demonstrate a good faith attempt to comply with the statute.

Id.

Notably, the Ninth Circuit confirmed that an employer is not required to suspend or terminate an employee while it investigates, provided it is in fact taking some reasonable steps to investigate:

We agree that a rule requiring immediate suspension or termination is problematic. In fact, even the INS concedes that "so long as the employer investigates the situation in a timely way, there seems to be no reason for an employer to suspend the worker during the investigation." But although the ALJ suggested that suspension would be "appropriate," New El Rey's failure "in good faith to acquire some additionally independent and more "specific" corroboration of Vasquez' and Guzman's obviously self-serving representations" made its acts unreasonable.

Id. at 1158.

c. *The response must be reasonable*

Having lost its primary argument, New El Rey resorted to arguing that its response to the letter was adequate for IRCA purposes. *Id.* at 1159. The Ninth Circuit was unimpressed:

New El Rey’s argument that it took sufficient steps to investigate its employees’ status is meritless. In response to the INS Letter insisting that the employees “provide valid employment authorization,” New El Rey merely asked its employees whether their cards were valid. Once Guzman and Vasquez said yes, New El Rey relied on their self-serving statements without requiring anything further from the employees, apparently assuming the INS must have made a mistake. Yet it failed to contact the INS to tell it of the discrepancy.

Id.

2. The timeliness of the employer’s response

As noted by the Ninth Circuit above, one of the key elements in determining whether an employer had constructive knowledge is the timeliness with which it responds to the information: “so long as the employer investigates the situation in a timely way, there seems to be no reason for an employer to suspend the worker during the investigation.” *Id.*

There is no settled rule on just how quickly an employer must respond to information suggesting that an employee may lack work authorization. *See id.* at 1157 (refusing to establish a “blanket rule” on timeliness). According to the Ninth Circuit, a reasonable time frame should take into account “the certainty of the information providing the knowledge of unauthorized status, and steps taken by the employer to confirm it.” *Mester*, 879 F.2d at 568 n.9.

That said, most reported decisions seem to involve employers who respond within one to two weeks. *See New El Rey*, 925 F.2d at 1157, n.6 (holding that a six day delay was not a violation, under the circumstances of the case, but that a 21 business day delay would be);³⁴ *Mester*, 879 F.2d at 568; *cf. Zamora*, 478 F.3d at 1163 (Title VII case) (employer memorandum allowing employee ten days to produce written documentation of work authorized status as part of internal audit).³⁵ As discussed in greater detail below, the DHS no-match regulation envisions an initial response within 30 days and a final resolution within 90 days. 8 C.F.R. § 274a.2(b)(1)(2)(ii)(A) (establishing a “safe harbor” for employers who respond to Social Security no-match letters within 30 days and reach final resolution of any Social Security mismatch within 90 days).

C. Reckless And Wanton Disregard

Even if an employer does not actually know that an employee is not authorized to work, and even if the employer is not itself presented with evidence to suggest an employee is not

³⁴ Ironically, New El Ray was arguing that six days of noncompliance should have constituted a violation, because one of its procedural arguments was that INS had failed to issue a timely citation. *Id.* at 1156-57.

³⁵ Of course, months passed between the time that Elite learned that the Social Security information presented by its employees was suspect and its distribution of the actual memorandum. *Zamora*, 478 F.3d at 1173 n.6. The delay was the direct result of Elite’s concern of a mass exodus among its employees. *Id.*

authorized to work, an employer's irresponsible approach to IRCA compliance can be sufficient to impute knowledge to the employer. Likewise, an employer who recklessly disregards its IRCA obligations by abdicating responsibility for ensuring work authorization can be liable for violations of § 1324a.

In *U.S. v. Mark Carter d/b/a Dixie Industrial Service Co.*, INS issued a citation against the employer for four separate charges of I-9 paperwork violations (covering dozens of employees) and one charge of knowingly hiring and knowingly continuing to employ unauthorized aliens (covering three employees). *U.S. v. Mark Carter d/b/a Dixie Industrial Service Co.*, 1997 WL 602725 (OCAHO 1997).

Carter owned Dixie Industrial Service Co. ("DISCO"), a sole proprietorship that provided on-premises industrial insulation services for its customers, mostly oil refineries. *Dixie*, 1997 WL 602725 at *2. A crew of DISCO employees was working on site at Kodiak Industries on November 18, 1994, when INS agents conducted a survey at Kodiak. *Id.* INS apprehended several of DISCO's employees because they were found to be unauthorized aliens. *Id.* INS ultimately issued a five-count Complaint against DISCO and its owner, Mark Carter. *Id.* at *2-3. Four of the Complaint's five counts focused on DISCO's alleged I-9 paperwork violations with respect to dozens of employees. *Id.* Count I of the Complaint alleged that Carter hired three unauthorized aliens knowing that they were not authorized to work in the U.S. and continued to employ them knowing that they were, or had become, unauthorized. *Id.* at *2.

Carter formed DISCO in October 1994, and hired several employees that had worked for Dixie Company, an unrelated company owned by Carter's brother. *Id.* at *9. Carter hired Manuel Ramirez, also a former employee of Dixie Company, to be a foreman for DISCO. *Id.* Carter delegated the responsibility of completing I-9 forms to his foremen, including Ramirez. *Id.* He testified at trial that he delegated I-9 compliance to his foreman for several reasons, including the fact that they were Hispanic and he assumed that, as Hispanics, they would have greater knowledge of the I-9 form than he did. *Id.* at *14. Carter never determined whether the foreman knew how to complete the form. *Id.* at *10.

On Count I, the only disputed issue at trial was whether Carter knew the employees lacked work authorization. *Id.* It was undisputed that Carter himself did not have any actual knowledge of their work authorization. *Id.* INS argued, however, that Carter had either constructive or imputed knowledge. *Id.*

The ALJ found that constructive knowledge includes "facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition." *Id.* at *11. In analyzing constructive knowledge, the ALJ examined several cases, including *Mester*, *Collins*, and *New El Rey*, that discussed an employer receiving information from INS that cast doubt on the authorization of certain employees, and found liability where the employer failed to take steps to reverify the employment authorization of those employees. *Id.* at *11-12. The ALJ also noted other OCAHO cases where constructive knowledge was found in the absence of INS notification, including *U.S. v. Valdez*, 1989 WL 433882 (OCAHO 1989) and *U.S. v. Cafe Camino Real, Inc.*, 1991 WL 531736 (OCAHO 1991).

In *Valdez*, the ALJ found that the employer's failure to prepare an I-9 form, though insufficient in and of itself to constitute knowledge, provided circumstantial evidence of constructive (if not actual) knowledge when coupled with the employer's conscious avoidance of acquiring knowledge as to the identification and status of her employees. *Valdez*, 1989 WL 433882 at *10. In *Cafe Camino Real*, the employer allowed a friend to bring another employee into the workforce as a busboy, the friend had actual knowledge that the busboy was not authorized to work, and the employer did not complete a Form I-9. *Cafe Camino Real*, 1991 WL 531736 at *7. Based on these facts, the ALJ in *Cafe Camino Real* found that the employer's conduct constituted "recklessness and wanton disregard" for its legal obligations, sufficient to charge the employer with constructive knowledge of the busboy's unauthorized status as well as the friend's actual knowledge. *Id.*

After surveying these decisions, the ALJ in *Dixie* found that Carter's actions in delegating his Form I-9 obligations to Ramirez constituted "reckless and wanton disregard" and gave rise to constructive knowledge for purposes of the IRCA. *Dixie*, 1997 WL 602725 at *14. The ALJ noted the following factors in finding such disregard:

- Carter never determined whether the foreman knew how to complete the I-9 form;
- Although Carter specifically discussed the importance of the I-9 form with his foreman, he never discussed procedures for its completion (at least not until after the INS inspection); and
- Ramirez's English was so limited that he could not understand the instructions on the I-9 form (which are not available in Spanish). In fact, Ramirez needed a Spanish interpreter to testify at trial and could not read the I-9 form while on the witness stand, even though he admitted he had been practicing reading the I-9 form in preparation for the hearing.

Id. at *13-14.

The ALJ found that even though there was "some effort to verify the employment eligibility" of the three individuals and the fact that employers are not "strictly liable for the hiring of unauthorized aliens," DISCO could not "delegate the hiring process to an individual who cannot read or understand the employment verification process." *Id.* at *14.

D. Imputed Knowledge

In the alternative, if Carter did not have constructive knowledge of the three aliens' unauthorized status, the INS argued, the evidence showed that Ramirez had actual knowledge³⁶ and that his actual knowledge was imputed to Carter. *Id.* at *15. While his testimony was not entirely consistent on this point, Carter argued that Ramirez did not have the power to hire and, therefore, his knowledge could not be imputed to Carter. *Id.* The ALJ found that Ramirez's authority to hire *vel non* was not dispositive:

³⁶ Ramirez testified that he knew that all three were unauthorized to work. *Id.* at *15. Indeed, they were all related to him. *Id.*

[T]he fact remains that Manuel Ramirez completed the I-9 forms for the three employees, and that Mr. Carter gave him the authority to do that. The person who completes section two of the I-9 form and verifies documentation does so on behalf of the employer. The person who completes section two swears, on behalf of the employer, that he or she has examined the noted documentation, that it appears to be genuine and to related to the individual presenting it, and that to the best of his or her knowledge, the employee is authorized to work in the United States.

Id.

Based on these facts, the ALJ held that the knowledge of the person who completes Section Two of the Form I-9 is imputed to the employer, regardless of whether that person made the actual decision to hire the employee. *Id.*

APPENDIX B

CRIMINAL PROSECUTIONS

A. New Attitude

As the Fischer Homes and IFCO prosecutions illustrate, there has been a definite shift in the government's stance on criminal IRCA prosecutions:

“Employers and workers alike should be on notice that the status quo has changed,” said Homeland Security Secretary Michael Chertoff. “These enforcement actions demonstrate that this department has no patience for employers who tolerate or perpetuate a shadow economy. We intend to find employers who knowingly or recklessly hire unauthorized workers and we will use every authority within our power to shut down businesses that exploit an illegal workforce to turn a profit.”

ICE Assistant Secretary Myers said, “ICE has no tolerance for corporate officers who harbor illegal aliens for their workforce. This nationwide enforcement action shows how we will use all our investigative tools to bring these individuals to justice, no matter how large or small their company.”

News Release, U.S. Immigration and Customs Enforcement, “ICE Agents Arrest Seven Managers of Nationwide Pallet Company and 1,187 of the Firm's Illegal Alien Employees in 26 States” (Apr. 20, 2006).

More specifically, the government is now taking a much more literal read of the IRCA's criminal provisions, particularly as they relate to transporting, harboring, concealing, and shielding from detection unauthorized aliens.

B. Pattern or Practice

The IRCA contains a criminal provision that is specifically aimed at employers:

Any person or entity which engages in a pattern or practice of violations of subsection (a)(1)(A) [knowingly hiring] or (a)(2) [knowingly continuing to employ] of this section shall be fined not more than \$3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both. ...

8 U.S.C. § 1324a(f)(1).

Prosecutions under § 1324a are relatively rare and typically involve fairly outrageous patterns of conduct by an employer. For example, in *U.S. v. Fragale*, the defendant, Michael J. Fragale, was the owner of two businesses that grew, sold, and packed mushrooms. *U.S. v. Fragale*, 1999 WL 816254 (E.D. Pa. 1999) (unreported). On April 3, 1998, INS called Fragale and informed him that they would be conducting an I-9 audit on April 17, 1998. *Id.* at *1.

After conducting the Form I-9 audit, INS concluded that many of the documents were “highly suspect” or “obviously fraudulent.” *Id.* at *2. INS obtained a search warrant for the premises, and informed the Pennsylvania State Police that they would be executing the warrant; the police apparently tipped off Fragale, who in turn instructed his workers not to come to work on the day of the search. *Id.*

When INS executed the warrant, the warrant itself listed 19 individuals who INS believed to be without work authorization, but INS was able to arrest only seven aliens because most did not come to work (pursuant to Fragale’s instructions). *Id.* Two months later, INS executed another search warrant (this time without informing the state police first) and was able to arrest 39 unlawful aliens working on that day. *Id.* Of the 39 arrested, 16 had been listed on the original search warrant as individuals INS believed to be unauthorized. *Id.*

In addition to the steps Fragale took to prevent the INS from successfully executing its function, the following additional evidence was entered with respect to Fragale’s lack of regard for U.S. immigration law:

- Shortly before the INS’s audit, the foreman of the mushroom-picking company informed Fragale that less than ten percent of the approximately 35 employees had valid work authorization;
- At or about the same time, the company’s controller told Fragale that she believed many employees were not authorized to work and that she would not sign I-9 verifications for those employees; and
- At least one employee testified that, in April 1998, he told Fragale that his work authorization had expired four years earlier.

Id. at *1-2.

Considering the foregoing evidence, the district court concluded that the government had proven that the defendant knowingly and willfully continued to employ aliens after learning they were not authorized to work in the U.S. *Id.* at *5.

C. Harboring and Transporting

The general criminal provisions of IRCA apply to “any person” who:

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

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

8 U.S.C. § 1324(a)(1)(A)(ii), (iii).

In addition, IRCA makes it a crime to engage in a conspiracy to commit such acts, or to aid or abet the commission of such acts. 8 U.S.C. § 1324(a)(1)(A)(v). Persons who are found to have engaged in such violations for the purpose of commercial advantage or private financial gain are subject to, *for each alien*, up to 10 years in prison and fines up to \$500,000. 8 U.S.C. § 1324(a)(1)(B)(i); 18 U.S.C. § 3571. If the violation causes serious bodily injury to a person, the maximum sentence is 20 years; a violation resulting in death can result in life imprisonment. 8 U.S.C. § 1324(a)(1)(B)(iii), (iv). Vessels, vehicles, and aircraft used in the commission of violations are subject to forfeiture, as are the proceeds of any such violation. 8 U.S.C. § 1324(b)(1).

Any person who, during any 12-month period, knowingly hires at least 10 individuals with actual knowledge that the aliens are both unauthorized to work and have been brought into the U.S. illegally, can be subject to fines up to \$500,000 and imprisonment up to five years. 8 U.S.C. § 1324(a)(3)(A).

1. Prosecutorial discretion

As the IFCO and Fischer Homes cases reveal, the government has begun to eschew criminal “pattern and practice” prosecutions under § 1324a in favor of “harboring” charges under § 1324, much to the chagrin of the supervisors and managers who suddenly find themselves criminal defendants.

In fact, many defendants argue that the government should be forced to prosecute under § 1324a, which is clearly intended for employers, instead of § 1324, which seems to be targeted at those in the business of smuggling aliens into the U.S.:

The Appellees assert that the language of § 1324 restricts its application to individuals who are in the business of smuggling illegal aliens into the United States for employment or those who employ illegal aliens in “sweatshops.” We disagree. Section 1324 applies to “[a]ny person” who knowingly harbors an illegal alien. Although § 1324 and § 1324a appear to cover some of the same conduct, “the fact that Congress has enacted two sections prescribing different penalties does not compel a conclusion that one statute was meant to limit, repeal, or affect enforcement of the other.”

U.S. v. Zheng, 306 F.3d 1080, 1085 (11th Cir. 2002).

Apart from the plain “any person” language of § 1324, circuit courts have concluded that the evolution of the law, particularly as evidenced by the IRCA, demonstrates that § 1324 was intended to apply to employers:

Both § 1324 and the current version of § 1324(a)(i)(A)(iii) were adopted in 1986 as part of the Immigration Reform and Control Act of 1986 (IRCA). IRCA was a major immigration reform initiative designed to “deter aliens from entering [the United States] illegally.” Describing “[e]mployment [a]s the magnet that attracts aliens here illegally,” the House Report stated that the purpose of the legislation

was [“]to close the back door on illegal immigration so that the front door on legal immigration may remain open. The principal means of closing the back door, or curtailing future illegal immigration, is through employer sanctions.

U.S. v. Kim, 193 F.3d 567, 573 (2nd Cir. 1999) (citations omitted).

In support of this evolutionary theory of U.S. immigration law, the Second Circuit has noted that § 1324, which was originally enacted in 1952, contained a proviso stating that “for the purposes of this section, employment (including the usual and normal practices incident to employment) shall be deemed to constitute harboring”—that is until the IRCA repealed the proviso in 1986. *Id.* at 573-74.

2. Plain meanings

a. *Harboring*

In short, the courts have agreed that the government is entitled to read § 1324 somewhat literally. For example, in *U.S. v. Kim*, the defendant, Myung Ho Kim, owned Sewing Masters, Inc., a New York City garment manufacturing business. *Id.* at 570. INS began an investigation of the company in 1995 (prior to Kim’s purchase of the company) which continued until 1997. *Id.*

In late 1995, Kim showed Wilson Mendez a list of alien employees who reportedly lacked work authorization and instructed Mendez to fire them. *Id.* Mendez did as he was told, but several of the terminated employees continued to report to work. *Id.* For those employees, Kim instructed Mendez to “tell them if they want to stay, tell them to bring new papers . . . papers with different name[s].” *Id.* Kim added, “don’t you ever tell them I told you to tell them that, because if Immigration finds out I can go to jail.” *Id.*

One of the employees to whom Mendez relayed these instructions was Nancy Farfan. *Id.* Farfan, a native of Ecuador, had entered the U.S. illegally in 1993. *Id.* When Farfan was hired by Sewing Masters’ predecessor, she was put in charge of I-9 compliance, duties which she retained after Kim became the owner. *Id.* Shortly after Mendez’s first efforts to fire unlawful employees, Mendez, at Kim’s instruction, told Farfan to collect “green cards and Social Security cards for everybody, including those who were going to use a different name.” *Id.* At Kim’s direction, Farfan completed new I-9 forms for all workers who had submitted documents bearing new names, including herself. *Id.* at 571.³⁷ Farfan’s new documents were made out in the name “Nancy Ortiz.” *Id.*

As part of INS’s investigation, Sewing Masters was required to complete an INS-supplied “Employer Eligibility Verification Form Investigative Inspection Worksheet.” Kim directed Farfan to complete the document, and indicate on the document that “Nancy Farfan no longer existed there.” *Id.* Accordingly, Farfan listed “Nancy Ortiz,” SSN 142-10-1145, as having been hired on January 8, 1996, and listed “Nancy Farfan,” SSN 152-90-8342, as having been terminated on January 12, 1996. *Id.* Kim submitted this document to INS. *Id.* INS sent Kim a letter indicating that several of the listed employees, including Mendez and Farfan (and “Nancy

³⁷ Farfan also authored an internal document that showed how the new names corresponded to the old. *Id.* at 571.

Ortiz”), has submitted invalid documents. *Id.* Kim told Farfan that she needed to get her papers “fixed,” and that she couldn’t work under the name “Nancy Ortiz” anymore. *Id.* Farfan purchased new counterfeit documents for herself under the name “Blanca Ortiz,” and filled out a new I-9 under that name. *Id.* Kim subsequently paid her as “Blanca Ortiz.” *Id.*

In addition to arguing (unsuccessfully) that he should have been tried under § 1324a instead of § 1324, Kim argued that his unlawful employment of Farfan did not constitute “harboring.” *Id.* at 572. The Second Circuit disagreed:

[H]arboring, within the meaning of § 1324, encompasses conduct tending substantially to facilitate an alien’s remaining in the United States illegally and to prevent government authorities from detecting his unlawful presence. Such facilitation may be attempted through a wide range of conduct. In *Lopez*, we noted that a number of such acts, including providing unlawful aliens with housing, transportation, and sham marriage ceremonies, and assisting them in obtaining employment. In *United States v. Smith*, ... we upheld the conviction of an employer under a 1917 precursor to § 1324 ... where the defendant had instructed undocumented aliens that, if questioned, they should deny that they were aliens and say they were from New York State. We concluded that this constituted “harbor[ing,]” for the employees were thus “sheltered from the immigration authorities and shielded from observation to prevent their discovery as aliens.”

Id. at 574 (citations omitted).

Against this backdrop, the Second Circuit found that Kim knew or recklessly disregarded the unlawful status of Farfan and took steps designed to help her remain in his employ, undetected by INS. *Kim*, 193 F.3d at 574-75. Accordingly, the court affirmed his conviction under § 1324. *Id.*

b. *Transporting*

Courts also provide a literal reading to the “transportation” prohibition contained in § 1324(a). However, transportation of an alien who has entered or remained in the U.S. in violation of law is a crime (under the plain language of the statute) only if the transportation itself is “in furtherance of” the violation of law. *See* 8 U.S.C. § 1324(a)(1)(A)(ii).

The “violation of law” to which the provision refers is the illegal alien’s continued illegal presence in the United States. *United States v. 1982 Ford Pick-Up*, 873 F.2d 947, 950 (6th Cir.1989). Courts have differed in their approaches to the interpretation of this provision, none of which are particularly literalistic.

For example, in *United States v. Moreno*, the Ninth Circuit focused on the *effect* the act of transportation had upon the unauthorized aliens’ unlawful presence. *United States v. Moreno*, 561 F.2d 1321, 1323 (9th Cir. 1977). “[W]here transportation of such an alien occurs, there must be a direct or substantial relationship between that transportation and its furtherance of the alien’s presence in the United States.” *Id.* The Ninth Circuit stated that courts must look to the “time, place, and overall impact” of the prohibited transportation in assessing whether it was “in

furtherance” of the alien’s illegal presence. *Id.* The Ninth Circuit held that, where transportation of an illegal alien is “only incidentally connected to the furtherance of the violation of law,” then it is “... too attenuated to come within the boundaries of § 1324(a)(2).”³⁸ *Id.* at 1322.

Applying this rationale, the Ninth Circuit court found that Moreno, a foreman required as part of his job to transport workers he knew to be unauthorized aliens from one job site to another, did not violate the statute, because “his transportation of aliens was only incidentally connected to the furtherance of the violation of the law, if at all.” 561 F.2d at 1322.

The court explained its reasoning:

A broader interpretation of the transportation section would render the qualification placed there by Congress a nullity. To do this would potentially have tragic consequences for many American citizens who come into daily contact with undocumented aliens and who, with no evil or criminal intent, intermingle with them socially or otherwise. It could only exacerbate the plight of these aliens and, without adding anything significant to solving the problem, create, in effect judicially, a new crime and a new class of criminals.

561 F.2d at 1323.

Without explicitly adopting or rejecting the Ninth Circuit’s reasoning in *Moreno*, The Fifth Circuit reached a different result with respect to the “transportation” prosecution of John Shaddix, a plant operation who picked up and ultimately offered employment to two hitchhikers who were unauthorized aliens:³⁹

It is not necessary to follow the Ninth Circuit in disposing of the present case because this case presents facts that clearly indicate that defendant's acts were in furtherance of the aliens' violation of the law. Although defendant employer was not implicated in the aliens' illegal entry into this country, his offer of employment to and voluntary transportation of aliens whom the jury concluded he knew had entered the country illegally within the last three years sufficiently furthered their illegal presence in this country to constitute a violation of [§ 1324(a)(1)(A)(ii)].

U.S. v. Shaddix, 693 F.2d 1135, 1139 (5th Cir. 1982).

The Sixth Circuit, on the other hand, rejected *Moreno*’s approach outright:

On its own terms ... it seems that *Moreno* was wrongly decided. In *Moreno* the defendant knowingly transported illegal aliens to a job site where they had established employment. This employment supported these illegal aliens

³⁸ Section 1324 was amended repeatedly following *Moreno*, such that what was then section 1324(a)(2) is now section 1324(a)(1)(A).

³⁹ The jury heard evidence that Shaddix called Henry Leal, an investigator for the local County Attorney’s office, and asked him if he knew of any “Mexicans” or “wets” looking for work. *Shaddix*, 693 F.2d at 1136-37. After Leal warned him not to fool with such matters, Shaddix drove the countryside until he found the two hitchhikers. *Id.* at 1138.

financially, provided them with the daily necessities of life and gave them hope for the future. No one could reasonably suggest that there was no “direct or substantial relationship between the transportation and its furtherance of the alien's presence in the United States” *id.*, since this language focuses on the effect of the transportation not upon its purpose.

This only serves to demonstrate the fact that the *Moreno* approach is unable to distinguish between someone who knowingly smuggles illegal aliens across the country from someone who knowingly gives an illegal alien a ride to a shelter for the homeless. While appealing to common sense on a rhetorical level, the *Moreno* approach fails to draw any sort of principled distinction “between acts performed with the purpose of supporting or promoting an alien's illegal conduct, and acts which are incidental to or merely permit an individual to maintain his existence, albeit his existence occurs in this country and he is not duly admitted here.” The reason for this failure is because the approach focuses on the effect of the transportation of the illegal alien and not upon its purpose.

1982 Ford Pick-Up, 873 F.2d at 950-51 (citations and footnote omitted).

Interestingly, the Sixth Circuit endorsed a reading of “in furtherance of such violation of law” that traced back to a different Ninth Circuit case, *United States v. Gonzalez-Hernandez*, 534 F.2d 1353, 1354 (9th Cir.1976). In *Gonzalez-Hernandez*, the Ninth Circuit held the government must show the “appellant acted willfully in furtherance of the alien's violation of the law.” *Id.* That is, a person must act so as to deliberately assist an alien in maintaining his or her illegal presence. *1982 Ford Pick-Up*, 873 F.2d at 951 (construing *Gonzalez-Hernandez*, 534 F.2d at 1354).

The Fifth Circuit adopted this intent-based approach in *United States v. Merkt*, 764 F.2d 266 (5th Cir.1985). Stacey Merkt was a refugee worker who was stopped by the border patrol while en route to the San Antonio INS office with two illegal aliens from El Salvador in her vehicle. *Id.* at 272. She was charged with criminal transportation. *Id.*

In reversing the conviction, the Fifth Circuit noted that “[w]illful transportation of illegal aliens is not, per se, a violation of the statute. ...” *Id.* at 272. Indeed, because the statute prohibits only an intentional act, it is the government's burden “to establish the defendant's state of mind ... like every other element of the alleged crime, beyond a reasonable doubt.” *Id.* In discerning intent, the Fifth Circuit held that a court or a jury should “consider all evidence it finds credible about [the defendant's] intentions, direct as well as circumstantial.” *Id.*

Under this approach, a court may look to see whether the defendant was compensated for the transportation and what efforts the defendant took to conceal or harbor the unauthorized aliens. *1982 Ford Pick-Up*, 873 F.2d at 951 (citing *United States v. Perez-Gomez*, 638 F.2d 215, 218-19 (10th Cir.1981)). A court may also consider whether the unauthorized aliens were friends, co-workers, or companions of the defendant, or merely human cargo that was being shipped. *Id.* (citing *United States v. Salinas-Calderon*, 585 F.Supp. 599, 602 (D.Kan.), *rev'd on other grounds*, 728 F.2d 1298 (10th Cir.1984)).

Ultimately, the Sixth Circuit in *1982 Ford Pick-Up*—which was a forfeiture case under § 1324(b)—held that the government failed to demonstrate that the defendant willfully transported an illegal alien with the specific intent of supporting the alien's illegal presence:

The government failed to prove such a purpose in this case nor can it be found anywhere in the record. Indeed, the record indicates that the Mendozas' actions were quite innocent. The Mendozas made no attempt to hide their passengers or otherwise conceal the fact that they were illegal aliens. The Mendozas received no financial remuneration for helping their passengers move to Kentucky. These people, while undoubtedly illegal aliens, were also friends, relatives and former co-workers of the Mendozas. They sought transportation to Kentucky in hopes of finding employment, not in order to escape prosecution or otherwise evade the law. The purpose of the Mendozas' transporting the aliens from Texas to Kentucky was not to support their illegal presence, though that may have been the ultimate effect of their actions. Their purpose was to promote the well-being of friends and relatives by helping them obtain employment. Consequently, the government may not obtain a forfeiture of the Mendozas' vehicles.

1982 Ford Pick-Up, 873 F.2d at 951-52.

c. *Intent required?*

The Sixth's Circuit "in furtherance of" reasoning was specifically adopted and applied to a 8 U.S.C. § 1324(a)(1) transportation case in *U.S. v. Moreno-Duque*, 718 F.Supp. 254 (D. Vt. 1989). In that case, Ivan Moreno-Duque was driving two of his employees, Pilinio Zavalari-Quevedo and Walter Larrea-Jarrin whom he knew to be unauthorized aliens, from one job site to another. *Id.* at 255. As the court explained, the basic facts of the case were not in dispute:

Defendant concedes that he was transporting the two aliens in interstate commerce, knowing them to be illegally in the country. While proof of this was essential to the government's case in chief, it is not relevant to the issue here. Both the defendant and the government agree that defendant was transporting the aliens from one job site to another. As construction workers, the aliens were being transported in the usual and normal course of their employment. There was no evidence to suggest that defendant's purpose in transporting the aliens was in any way related to their entry into the country, to efforts to conceal their unlawful presence, or efforts to avoid detection by law enforcement authorities. Quite simply, the evidence revealed, and the government concedes, that defendant was transporting the two aliens to a place of employment, as their employer and for the purpose of the employment.

Id. at 256.

In concluding that the government had failed to make its case against the foreman, the court explicitly adopted the Sixth Circuit's reasoning in *1982 Ford Pick-Up*:

We agree with the Sixth Circuit's conclusion that a violation ... requires proof that the purpose of the transportation was to further the violation of law. In other

words, the government must prove that the defendant specifically intended by means of the transportation to advance or assist the alien's violation of law, not merely that the effect of the transportation was to allow the alien to remain in the United States. Upon reflection, it seems clear that this reading of the law is mandated as a matter of statutory interpretation, as penal statutes must be strictly construed. Focusing the inquiry on the purpose of the transportation makes it clear that what defendant did in this case was no more culpable than what defendants Moreno and Merkt did in their cases.

Id. at 259.

Indeed, after examining the legislative history of the law and the IRCA, the court opined that the intent requirement should be applied to the other criminal provisions of § 1324(a):

[W]e believe that the harboring provision in 8 U.S.C. § 1324(a)(1)(C) would still require more than mere knowing employment of an illegal alien to satisfy its intent criteria. Likewise, we conclude that 8 U.S.C. § 1324(a)(1)(B) also requires more than mere knowing employment and employment-related transportation of illegal aliens to satisfy all of its essential elements, for we cannot say that Congress intended the incongruous result of treating some employers as felons, and others as misdemeanants, merely on the basis of whether or not their business involves transportation.

Id., but see *Kim*, 193 F.3d at 574-75 (applying literal reading of harboring).