CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

KEEPING TRACK: SELECT ISSUES IN EMPLOYER SANCTIONS AND IMMIGRATION COMPLIANCE

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By
Gary Endelman* and Cyrus D. Mehta**

The Form I-9, Employment Eligibility Verification, that was established under the Immigration Reform and Control Act of 1986 (IRCA)[1] is a deceptively simple form, but it involves a most complex process that an employer in the United States has to comply with when hiring any employee.[2] ¤274A(a)(1) of the Immigration and Nationality Act (INA) states that it is unlawful to hire, recruit or refer for a fee, a person who is not authorized to work in the US. Mandated by INA ¤274A(b), an employer must verify an employeeXs eligibility to work in the US and attest under penalty of perjury on Form I-9 that the employee submitted to the employer documents that establish both employment authorization and identity. Although this advisory does not cover the entire gamut of I-9 compliance, the authors focus on the most salient aspects that will assist the employer to remain compliant, along with a discussion of selected issues.

I-9 Basics

The Form I-9 contains three lists, A, B and C. List A allows an employer to verify a document establishing both employment and identity.[3] Documents that can be verified under List A of Form I-9 include:

- U.S passport (expired or unexpired) or passport card;
- Permanent Resident Card or Alien Registration Receipt Card (Form I-551);
- Foreign passport that contains a temporary I-551 stamp or temporary

I-551 printed notation on a machine-readable immigrant visa;
- Employment Authorization Document (unexpired) with photograph (Form I-766);
- Unexpired foreign passport, which includes a Form I-94 containing a nonimmigrant visa endorsement authorizing the employee to work; and Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands with Form I-94 or I-94A indicating nonimmigrant admission under the Compact of Free Association Between the US and the FSM and RMI.

If an employee presents a document that is included in List A, the employer must not ask for further documents to verify employment eligibility under the Form I-9.

Documents evidencing identity are listed under B include:[4]

- DriverXs license or State ID or ID of outlying possession of the US with photo or other information such as name, date of birth, gender, height, eye color and address;
- ID card issued by federal, state or local government agency or entities, provided it contains the same biographical information as above;
- School ID card with a photograph;
- Voter registration card;
- US military card or draft record;
- Military dependantXs ID card;
- US Coast Guard Merchant Mariner Card;
- Native American tribal document;
- DriverXs license issued by a Canadian government authority; and
- For persons under the age of 18 who are unable to present the above documents:
    - - A school record or report card;
    - - A clinic doctor or hospital record;
    - - A day care or nursery school record.

Unlike a document presented under List A, an employer cannot only accept a document listed under B. If the employee presents a document under List B, the employee must also submit a document listed under C, which provide for employment authorization, which include:[5]

- Social Security card (but does not include a card stating Tnot authorized for employmentУ);
- Certification of Birth Abroad issued by Department of State (DOS) (Form FS-545);
- Certification of Report of Birth issued by DOS (Form DS-1350);
- Original or certified copy of birth certificate issued by a State, county, municipal authority, or outlying possession of the US bearing an official seal;[6]
- Documentation evidencing authorization for employment in the US without a photo;
- Native American tribal document;
- US Citizen or resident citizen ID Card (Form I-197).

Part 1 of Form I-9 must be completed no later than at the time of hire, which requires the employee to state under penalty of perjury his or her name and address, date of birth, social security number (but this is optional), and most importantly, whether the employee is: a) a citizen of the US; b) a non-citizen national of the US; c) a lawful permanent resident (with a listing of the A#); or d) is an alien authorized to work in the US, with a listing of the Alien # or Admission # and the date of expiration of such authorization.[7]

The employer is required to verify the document under List A or List B and List C within three business days of hire.[8] If the employee is hired for less than three days, then the verification must take place at the time of hire.[9]

There is no requirement for the employer to photocopy the documents it has verified for the I-9, but if the employer does choose to photocopy documents, it must do so for everyone. The advantage in retaining photocopies is that if Section 2 has not been filled out correctly, but the documents that were verified were correct, as proved by the photocopies, the employer fill face lesser penalties for not completing the form properly. The retention of photocopies will also assist the employer in establishing an internal compliance program and to conduct self-audits. On the other hand, if the employer did not properly verify the documents, and retains photocopies of unacceptable or fraudulent documents, the photocopies will incriminate the employer even further in an enforcement action.

Although the employer is required to verify an employeeXs eligibility to work in

the US, he or she walks on thin ice. If an employer is careless with the verification process, and accepts documents that appear to be patently false, or employs a worker who is unable to submit documents under List A or List B and C, the employer faces the possibility of civil and criminal sanctions.[10] On the other hand, if the employer requires specific documents, or more or different documents than are required, or refuses to honor documents which on their face reasonably appear to be genuine, the employer runs the risk of violating the provision relating to Unfair Employment Practices if there is discriminatory intent.[11] Protected individuals under IRCA include US citizens or nationals, lawful permanent residents, refugees, asylees, and temporary residents who were granted legalization under INA ¤210(a) or $245A(a)(1). However, even those who are not protected under IRCAXs anti-discrimination provisions may seek redress under other anti-discrimination statutes such as Title VII.[12] If an employeeXs work authorization expires or DHS provides notification that the work authorization is insufficient, the employer must re-verify the I-9 or terminate the employee.[13] The I-9 must be retained for either 3 years after the date of hire or 1 year after termination, whichever is later.[14]

For further details, we strongly recommend that practitioners and their clients also review the USCISX M-274, *Handbook for Employers P Instructions for Completing Form I-9 (Employment Eligibility Verification Form)*, available at http://www.uscis.gov/files/form/m-274.pdf, *supra*.

TKnowingУ Requirement

Because of the proliferation of fraudulent documents that pass off as genuine to the untrained eye of the employer, the I-9 verification may not always deter the hiring of a person who is not authorized to work in the US. An employer can also be snared if during the course of an audit an Immigration and Customs Enforcement (ICE) Notice of Suspect Documents indicates that certain employees are not authorized to work because the documents presented belong to other people, there is no record of the alien registration numbers being issued, or the individual is not employment authorized according to DHS records or the personXs EAD has expired.

While INA ¤274A(a)(1)(A) clearly makes it unlawful to hire Tan alien *knowing* (emphasis added) the alien is an unauthorized alien,У an employer cannot bury

his or her sand in the ground like an ostrich, and ignore telltale signs that the person may indeed not be authorized. The regulations at 8 C.F.R. ¤274a.1(*l*)(1) defining TknowingУ includes TconstructiveknowledgeУ and defines the term as follows:

> The term knowing includes not only actual knowledge but also 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. Constructive knowledge may include, but is not limited to, situations where an employer:
>
> (i) Fails to complete or improperly completes the Employment Eligibility Verification Form, I-9;
>
> (ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or
>
> (iii) 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.

2) 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.

Yet, not all courts or administrative tribunals have found that an employer had knowledge that an alien was unauthorized to work in the US. In *Collins Food International, Inc. v. INS*,[15] a seminal case involving the application of constructive knowledge, an employer was sanctioned for knowingly hiring an alien as he made a job offer prior to checking the alienXs documents and because the employer did not verify the back of the social security card. The Ninth Circuit rejected the governmentXs charges under both the factual circumstances. First, there was nothing in the law or regulations that required

an employer to verify documents at the time of the job offer and prior to the hire of the alien. In fact, pre-employment questioning concerning the prospective employeeXs national origin, race or citizenship would expose the employer to charges of discrimination under Title Seven. Regarding the employerXs failure to properly verify the back of the social security card, the Ninth Circuit held that under INA ¤274A(b)(1)(A) an employer will have satisfied its verification obligation by examining a document which Treasonably appears on its face to be genuine.У There was also nothing in the statute that required the employer to compare the employeeXs social security card with the example in the handbook of the Immigration and Naturalization Service, and the Tcard that Rodriguez presented was not so different from the example that it necessarily would have alerted a reasonable person to its falsity.У Finally, the Ninth Circuit was concerned that if the doctrine of constructive knowledge was applied so broadly, the employer may be tempted to avoid hiring anyone with appearance of alienage to avoid liability.

The facts in *Collins Food International* ought to be contrasted with situations where an employer has been notified by the government after a visit to its premises that certain employees are suspected to be unlawful aliens and is asked to take corrective action.[16] Thus, in *US v. El Rey Sausage*, where the INS found several employees using improper or borrowed alien registration numbers, and the INS warned in a letter that unless these individuals provide valid employment authorization they will be considered unauthorized aliens, and the employer simply accepted the word of the aliens as to their legal status, the Ninth Circuit found constructive knowledge. Therefore, it is one thing when an employee who is untrained accepts a false document, as in *Collins Food International,* and quite another when an employer receives notice from ICE that certain employees may not have proper work authorization. Yet, even under these circumstances, an employer should still give the employee an opportunity to explain the allegation, and if such an employee insists that the documentation is valid, the employer must communicate this to ICE and inform that the employer will continue to employ the worker but if ICE disagrees, it should inform employerXs counsel immediately.[17] Of course, if the employer gains knowledge of the employeeXs unlawful status through a genuine confession, then the employer must terminate the employee immediately. Any termination must be effectuated in a non-discriminatory manner. Even if 8 C.F.R. ¤274a.1(c)(1)(iii)(A) attributes an employer with constructive knowledge if

the employee requests sponsorship through a labor certification, it should not be automatically assumed that the individual is not authorized to work in the US. Such an employee could possess a valid employment authorization as one who has been granted withholding of removal or temporary protected status, which without a sponsorship through the employer, may not provide him or her with any opportunity to obtain permanent residence.[18]

With regards to a social security Tno-matchУ letter, the issue of whether the employer is deemed to have constructive knowledge continues to remain fuzzy. The DHS promulgated a rule in 2007 that would have imputed constructive knowledge to an employer who received either a Tno-matchУ letter from the Social Security Administration (SSA) or a DHS notice.[19] The rule would have provided a safe harbor to an employer if it took the following steps to remedy the no-match within 90 days. The employer first checks its own records to determine whether there is a typographical error or similar clerical error. If itXs not the employerXs error, the employer asks the employee to confirm the information. If the employee says that the information is incorrect, the employer must correct its records and send the correct information to the SSA. If the employee insists that the information he or she gave to the employer is correct, the employer must request the employee to resolve the discrepancy with the SSA. If the employer is unable to verify with the SSA that the erroneous information has been corrected within 90 days, the employer must allow the employee to present new verification documents without relying on the documents that created the mismatch. The regulation was stayed as a result of a challenge in federal court,[20] and the rule was finally rescinded.[21]

In light of the vacuum resulting in the rescinding of this regulation, what guidance can employers rely on? Paul Virtue, former General Counsel of the INS, issued a letter stating that a no-match letter from the SSA did not, standing on its own, provide notice to the employer that the employee is not working without authorization in the US.[22] However, in the same letter, Mr. Virtue stated that a subsequent action or inaction by the employer, after receipt of such a letter, would be viewed under the Ttotality of circumstancesУ in determining whether the employer possessed constructive knowledge of whether the employee was authorized or not in the US. Notwithstanding, employers must not be too hasty in terminating employees if they receive no match letters. A

recent decision, *Aramark Facility Services v. Service Employees International*,[23] is a case in point. There, the employer upon receiving no-match letters from the SSA gave its affected employees three days from the post mark of its letter to either get a new social security card or a receipt from the SSA that it has obtained a new one, and if the employee produced a receipt, the employee had 90 days to submit the new card. Those employees who could not comply with this demand were fired, but were told that they could be rehired if they obtained the correct document. Moreover, the employer did not have any specific basis to believe that the employees who were the subject of the no match letters were not authorized to work, and each of these employees had properly complied with the I-9 verification requirements at the time of their hire. The Ninth Circuit had to decide whether to set aside an arbitratorXs award under a narrow exception that the award violated public policy in ordering back pay and reinstatement as the firings were without cause. AramarkXs main argument under the public policy exception was that if it continued to employ these workers it would be sanctioned for knowing that they were not authorized to work in the US. The Ninth Circuit disagreed with the district courtXs decision setting aside the arbitratorXs award and held that the mere receipt of no-match letters from the SSA without more did not put Aramark on constructive notice, and forcefully stated that by its own admission the SSA has acknowledged that T17.8 million of the 430 million entries in its database (called TNUMIDENTУ) contain errors, including about 3.3 million entries that mis-classify foreign-born U.S.citizens as aliens.У[24] The Ninth Circuit, which relied on *Collins Food International*, further noted that employers do not face any penalty from SSA, which lacks an enforcement arm, for ignoring a no-match letter. Furthermore, the Ninth Circuit also gave short shrift to AramarkXs second argument that the employeeXs reaction to the notification to take corrective action imputed constructive knowledge on the ground that the arbitrator found no proof of any employee having undocumented status as well as to the fact that the employerXs demand to take corrective action was even more demanding than the DHSXs proposed 2007 regulations. Finally, the Ninth Circuit refused to upset the arbitratorXs award in failing to consider that Aramark had offered to rehire the workers if they came back with the corrected document even after the time frame that it had stipulated in its notification to its employees.

The Department of Justice's Office of Special Counsel for Immigration-Related

Unfair Employment Practices recently issued the following do's and don'ts for employers on Social Security Number "no-match" letters, which provide useful nuggets on what one can do and one cannot do when an employer receives a no-match letter.

DO:

- Recognize that name/SSN no-matches can result because of simple administrative errors.
- Check the reported no-match information against your personnel records.
- Inform the employee of the no-match notice.
- Ask the employee to confirm his/her name/SSN reflected in your personnel records.
- Advise the employee to contact the SSA to correct and/or update his or her SSA records.
- Give the employee a reasonable period of time to address a reported no-match with the local SSA office.
- Follow the same procedures for all employees regardless of citizenship status or national origin.
- Periodically meet with or otherwise contact the employee to learn and document the status of the employee's efforts to address and resolve the no-match.
- Submit any employer or employee corrections to the SSA.

DON'T:

- Assume the no-match conveys information regarding the employee's immigration status or actual work authority.

- Use the receipt of a no-match notice alone as a basis to terminate, suspend or take other adverse action against the employee.
- Attempt to immediately re-verify the employee's employment eligibility by requesting the completion of a new Form I-9 based solely on the no-match notice.
- Follow different procedures for different classes of employees based on national origin or citizenship status.
- Require the employee to produce specific documents to address the no-match.

- Ask the employee to provide a written report of SSA verification.[25]

What Is E-Verify?

Start at the USCIS E-Verify website.[26]

E-Verify allows employers to run online employment authorization checks against Social Security Administration and DHS databases using Social Security Numbers and alien registration numbers. When an employer elects to participate in the program and verifies work authorization under E-Verify, a rebuttable presumption is created that it has not knowingly hired an unauthorized alien. Enrollment in E-Verify only goes so far; it does not guarantee a Tsafe harborУ from worksite enforcement, however. An employer can still be raided or otherwise held liable for employer sanctions despite enrollment in E-Verify. Moreover, E-Verify does not protect against identity theft.

The National Conference of State Legislatures has compiled a user-friendly FAQ on E-Verify that is an excellent ready reference tool. [27] Beyond that, USCIS put together an easy to follow power point slide show that explains the basics of the program.[28] Recently, USCIS also launched an E-Verify newsletter.[29]

The decision to enroll in E-Verify is strictly voluntary for most employers, save for those employers who come under the coverage of various State E-Verify laws or who are federal contractors. Employers who voluntarily participate may also elect to terminate their participation at any time. E-verify began as a pilot program under the Illegal Immigration Reform and Immigrant Responsibility Act and but has been expanded and extended since then. Most recently, the FY10 Homeland Security spending bill (H.R.2892), extended the E-Verify program through September 30, 2012.[30]

Employers can register for E-Verify on-line at the DHS website.[31] The nature and scope of the participation is set by a Memorandum of Understanding between the Employer, DHS, and SSA. Employers with multiple locations may elect to sign up all of their locations or only select locations.[32]

E-Verify is NOT a substitute for the Form I-9 which must be completed first before enrollment in E-Verify. While the I-9 is required for all employees, E-Verify is used for new hires rather than current employees, unless they are working directly under a federal contract with an E-Verify clause.

When an Employer signs up for E-Verify it makes certain basic promises. What are they?

They are set forth in the Memorandum of Understanding:

(1) that it will not initiate electronic verification until after the employee has been hired and the Form I-9 completed; (2) that it will verify all, not just some, of its new employees; (3) that it will display posters in public and clearly visible locations announcing the E-Verify enrollment and providing warnings against employment discrimination; (4) that it will not discipline, terminate or otherwise act in an adverse manner against an employee while the SSA or DHS is processing a verification request; specifically, no action must be initiated in response to a tentative non-confirmation unless the employer learns definitively from another source that the employee is unauthorized; (5) that it will allow both DHS and SSA to examine its employment records and (6) that it will use the information only to verify the identity and work authorization of newly hired employees and not for any other purpose.

You can join or quit the program at any time. DHS may also terminate E-Verify employer eligibility should it determine conclusively that the employer Thas substantially failed to comply with its obligationsУ under the program.

Are there any situations where participation in E-Verify is mandatory?

Yes, consider the following: (1) employers who have been found to have violated the employer sanctions or anti-discrimination provisions of IRCA may be compelled to join; (2) employers who hire F-1 students in science, technology, engineering and mathematics (STEM) fields of study and wait a 17 month extension of optional practical training once the initial 12 months of OPT has expired; and (3) employers with federal contracts that include a clause requiring the contractors to use the E-Verify program for all new hires as well as current employees working in direct support of the federal contract; (4)

employers who are subject to state E-Verify laws, usually due to state contracts..

Can you tell me more about the 17 month STEM OPT Extension?

On April 8, 2008, the DHS published an interim final rule allowing for a 17-month extension of Optional Practical Training (OPT) for college graduates in science, technology, engineering and mathematics (STEM) disciplines.[33] The rule requires employers to be registered in the E-Verify program at the specific location of employment as a condition of the OPT extension. The STEM graduate must file a Form I-765, along with the I-765 filing fee, asking for a renewal of work permission before the expiration of the initial OPT extension. The I-765 must include the employer's E-Verify identification number or a valid E-Verify Client Company Identification Number if an outside vendor or agent handles the verification. It is important to remember that, if the STEM graduate is already working for the employer before the 17-month extension request is filed, the employer may not run the graduate's information through E-Verify. Why? Because verification of existing employees is prohibited under the E-Verify rules and applying E-Verify to existing employees unless required to do so by federal contract can be considered a discriminatory act.

Do federal contractors have to sign up for E-Verify?

On June 6, 2008, President George W. Bush issued Executive Order (EO) 13465, which amended President Clinton's Executive Order 12989, dated February 13, 1996 banning federal contracts with employers who violated IRCA. The new EO requires businesses entering into a contract with an agency or department of the federal executive branch to use E-Verify.[34]

In November 2008, DHS published a rule that would implement the Executive Order 13465.[35] The regulation, which is an amendment to the Federal Acquisition Regulations (FAR), ordered government contracting officers to include an E-Verify clause in certain federal contracts as applied to new hires within three days of hire and existing employees directly assigned to work on the federal contract. The contracts have to last more than 120 days with a value over $100,000. Subcontracts must also have an E-Verify clause, if the value of

the subcontract is over $3,000. It does not matter if the performance period of the subcontract is less than 120 days.

Initially, the requirement was to become effective on January 15, 2009. The US Chamber of Commerce and several business groups went into federal court to invalidate the FAR E-Verify regime but ultimately lost in August 2009.[36] Consequently, the rule went into effect on September 8, 2009.

Since then, federal contractors must enroll in E-Verify within 30 days of the contract award date. E-Verify applies to all new hires, whether employed on a federal contract or not, and existing employees directly working on these contracts . It is up to the federal contracting agency, not the private employer, to insist upon insertion or adoption of the E-Verify clause. Contractors are responsible, however, for ensuring that certain covered subcontracts include the E-Verify clause where necessary. That this is so reflects the extent to which the demands of US immigration law trump the traditional Thands offУ attitude that contract law has always displayed. How can such assurances of I-9 compliance be provided and at what cost? Will the failure to provide them be grounds for contract termination or should any prudent federal contractor now insist upon indemnity for breach of I-9 warranties? As the authors conclude *infra,* the need to ask such questions, not to mention the absence of ready answers, eloquently illustrates the exquisite interdependence between immigration law and the wider economy. This is particularly so now that President Obama has decided to focus less on mass raids that terrorize the undocumented and more on criminal and civil prosecution of employers who hire those that lack permission to work.[37]

Remember that E-Verify would not apply for work that will be performed outside of the U.S.; (3) if the contract lasted less than120 days; or (4) contained only Tcommercially available off-the-shelfУ (COTS) items or for items that would be COTS but for minor modifications. A COTS item is a commercial item that is sold in substantial quantities on the open market and is sold to the government in the same way or with slight changes. Food and agricultural products are typical illustrations of COTS items.

In general, the rule applies only to contracts awarded after the effective date of

the rule. Current federal contracts will not be affected unless they are extended, renewed, or otherwise amended.

Only the corporate entity that enters into the contract with Uncle Sam is covered, not its parent or affiliate companies.

For the first time, rather than being discriminatory, the verification of existing employees is not only allowed but required if they are assigned to and directly performing work under a covered federal contract.

Who are these employees?

First, they must be hired after the I-9 requirement became the law on November 6, 1986; anyone hired before then is grandfathered for E-Verify purposes. It does not matter how much time the existing employee so designated spends on contract-related activities, if there are large gaps between such involvement or if most of their job has nothing to do with t