

## AN OFFER THEY CAN'T REFUSE: CRAFTING AN EMPLOYER'S IMMIGRATION COMPLIANCE PROGRAM

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*"It's worse than dog-eat-dog. It's dog-doesn't-return-other-dogs'-  
phone calls."*—Woody Allen<sup>1</sup>

### I. INTRODUCTION

The controversial Comprehensive Immigration Reform Act of 2007<sup>2</sup> offered hope of a fresh start to not only millions of illegal aliens, but to many thousands of nervous U.S. employers as well. During and after the bill's debate, Immigration and Customs Enforcement (ICE) stepped up its efforts to crack down on illegal immigration and, significantly, the employment of unauthorized aliens.<sup>3</sup> Do these employers have reason to be nervous? Recent headlines from ICE news releases suggest "*absolutely*":<sup>4</sup>

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1. CRIMES AND MISDEMEANORS (Metro-Goldwyn-Mayer 1989).

2. S. 1368, 110th Cong. (2007).

3. See *Mexico's Calderon Protests U.S. Crackdown on Immigrants*, REUTERS, Sept. 2, 2007, <http://www.reuters.com/article/topNews/idUSN0231897420070902?feedType=RSS&feedName=topNews&rpc=22&sp=true> ("Last year, Immigration and Customs Enforcement agents deported 183,431 people amid stepped up raids on workplaces and homes nationwide."); Press Release, Dep't of Homeland Sec., Fact Sheet: Improving Border Sec. & Immigration Within Existing Law (Aug. 10, 2007), [http://www.dhs.gov/xnews/releases/pr\\_1186757867585.shtm](http://www.dhs.gov/xnews/releases/pr_1186757867585.shtm) ("Arrests by U.S. Immigration and Customs Enforcement for criminal violations have increased from 24 in FY 1999 to a record 716 in FY 2006. There have been 742 criminal arrests since the beginning of FY 2007 (through July 31), and there is anecdotal evidence that companies are taking notice and adjusting their business practices to follow the law."). Raids and arrests have increased dramatically in 2007. *Calderon Protests Crackdown*, *supra*; Press Release, Dep't of Homeland Sec., *supra*.

4. U.S. Immigration & Customs Enforcement, Worksite Enforcement: News Releases (2006-2007), <http://www.ice.gov/pi/investigations/worksite/newsreleases.htm> (listing the subsequently listed headlines as well as other worksite enforcement-related news releases, along with links to the individual reports). Immigration and Customs Enforcement provides a running

- Company executives sentenced for hiring illegal alien workers (San Diego, CA);<sup>5</sup>
- Wichita company and its officers plead guilty to knowingly hiring illegal aliens (Wichita, KS);<sup>6</sup>
- Company president, ten others, charged in worksite probe of Arizona drywall and stucco firm (Tucson, AZ);<sup>7</sup>
- Guilty Plea in government's probe of immigration violations at IFCO Systems (Albany, NY);<sup>8</sup>
- Three Executives of National Cleaning Company Indicted for Harboring Illegal Aliens and Evading Taxes (Grand Rapids, MI);<sup>9</sup>
- Fifty-five illegal aliens working for state janitorial contractor arrested by ICE (Tallahassee, FL);<sup>10</sup>
- Employers in Arkansas, Kentucky and Ohio hit with criminal charges in connection with illegal alien employment schemes (Washington, DC);<sup>11</sup>
- ICE executes federal criminal search warrants at Koch Foods and arrests more than 160 on immigration charges (Cincinnati, OH).<sup>12</sup>

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scorecard of its increasingly meaningful investigations and sanctions. *See id.* The headlines cited are just samples from reports released in 2006 and 2007. *Id.* ICE worksite probes frequently target restaurants, government contractors and the building trades. *See, e.g., id.*

5. Press Release, U.S. Immigration & Customs Enforcement, Company Executives Sentenced for Hiring Illegal Alien Workers (Mar. 28, 2007), <http://www.ice.gov/pi/news/newsreleases/articles/070328sandiego.htm>.

6. Press Release, U.S. Immigration & Customs Enforcement, Wichita Company and its Officers Plead Guilty to Knowingly Hiring Illegal Aliens (Aug. 31, 2006), <http://www.ice.gov/pi/news/newsreleases/articles/060831Wichita.htm>.

7. Press Release, U.S. Immigration & Customs Enforcement, Company President, Ten Others, Charged in Worksite Probe of Arizona Drywall and Stucco Firm (Mar. 9, 2007), <http://www.ice.gov/pi/news/newsreleases/articles/070309tucson.htm>.

8. Press Release, U.S. Immigration & Customs Enforcement, Guilty Plea in Government's Probe of Immigration Violations at IFCO Systems (July 16, 2007), <http://www.ice.gov/pi/news/newsreleases/articles/070716albany.htm>.

9. Press Release, U.S. Immigration & Customs Enforcement, Three Executives of National Cleaning Company Indicted for Harboring Illegal Aliens and Evading Taxes (Feb. 22, 2007), <http://www.ice.gov/pi/news/newsreleases/articles/070222grandrapids.htm>.

10. Press Release, U.S. Immigration & Customs Enforcement, 55 Illegal Aliens Working for State Janitorial Contractor Arrested by ICE (Aug. 30, 2006), <http://www.ice.gov/pi/news/newsreleases/articles/060830tallahassee.htm>.

11. Press Release, U.S. Immigration & Customs Enforcement, Employers in Arkansas, Kentucky and Ohio Hit With Criminal Charges in Connection With Illegal Alien Employment Schemes (July 21, 2006), <http://www.ice.gov/pi/news/newsreleases/articles/060721dc.htm>.

12. Press Release, U.S. Immigration & Customs Enforcement, ICE Executes Federal Criminal Search Warrants at Koch Foods and Arrests More than 160 on Immigration Charges (Aug. 28, 2007), <http://www.ice.gov/pi/news/newsreleases/articles/070828cincinnati.htm>.

Even the most ostrich-like employer understands that employing unauthorized workers breaks the law somehow. Doubtless, many wink at the practice; others simply look the other way. Were these employers' lawyers to set out the legal and financial consequences for them, however, those winks and sidelong glances would become wide-eyed horror.

Employing unauthorized aliens cuts across an interlocked statutory framework providing non-exclusive penalties.<sup>13</sup> Failing to maintain adequate paperwork on employees can lead to substantial civil fines.<sup>14</sup> Getting cute by willful disregard of the workers' status can lead to criminal penalties.<sup>15</sup> Participating in document fraud—even passively—gets more serious still. Beyond risking significant jail time, an employer who knowingly “accepts or receives” false documents,<sup>16</sup> or harbors illegal aliens commits a RICO predicate felony<sup>17</sup>—bad news.

Beyond the black-and-white penal sanctions, other serious financial consequences will hit the client's upper management where it hurts: the checkbook.<sup>18</sup> More than just negative publicity, the employer must consider litigation costs—costs that ultimately may not be covered by insurance. How expensive will it be to combat government prosecution when a red-handed middle manager fingers upper management for tacit, if not active pressure to keep costs down by hiring illegals? With jail as the alternative, cost goes out the window. Will the employer have

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13. “[T]he fact that Congress has enacted two sections encompassing similar conduct but prescribing different penalties does not compel a conclusion that one statute was meant to limit, repeal, or affect enforcement of the other. Statutes may ‘overlap’ or enjoy a ‘partial redundancy,’ and yet be ‘fully capable of coexisting.’” *United States v. Kim*, 193 F.3d 567, 573 (2d Cir. 1999) (quoting *United States v. Batchelder*, 442 U.S. 114, 118, 122 (1979)) (finding employer subject to distinct penalties prescribed by two separate sections of the Immigration and Nationality Act for the same instance of harboring illegal aliens).

14. 8 U.S.C. § 1324a(e)(5) (2000) (fining between \$100 and \$1000 for each individual with respect to whom a violation occurred).

15. 8 U.S.C. § 1324a(f)(1) (providing for up to six months imprisonment if such conduct is viewed as a pattern or practice of violations); 8 U.S.C. § 1324(a)(1)(A)(iii) (2000) (providing up to a ten year sentence for violations). A § 1324(a)(1)(A)(iii) violation would require a court to find that the employer's conduct tended to “substantially . . . facilitate [the] alien's remaining in the United States illegally.” *Kim*, 193 F.3d at 572 (quoting *United States v. Lopez*, 521 F.2d 437, 440-41 (2d Cir. 1975)). This would likely require something above mere employment. *See Lopez*, 521 F.2d at 440-41 (finding a violation where the employer provided housing, transportation, and sham marriage ceremonies in order to facilitate employment).

16. 18 U.S.C. § 1546(a)

17. *See* 18 U.S.C. § 1961(1)(F) (2000) (defining §1324 violations as “racketeering activity”).

18. Press Release, Dep't of Homeland Sec., *supra* note 4 (“DHS will use existing authority to update civil fines for inflation in order to boost fines by about 25 percent, as much as is allowed under current law.”).

considered the expense of beating back a *civil* RICO action?<sup>19</sup> If the employer benefits from government contracts, will the company be able to remain in business?<sup>20</sup> Lastly, for the franchisee client, what will be the effect of a successful ICE prosecution on the client's franchise agreement?<sup>21</sup>

## II. THE LAW(S)

### A. *Employing Unauthorized Aliens: 8 U.S.C. § 1324a*

#### Section 274A of the Immigration and Nationality Act<sup>22</sup> ("the Act")

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19. Employers should avoid skepticism about the viability of these claims. *See, e.g.*, *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1285 (11th Cir. 2006) (citing *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002); *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374 (2d Cir. 2001)) (concluding that plaintiff employees had stated a viable RICO claim against employer); *Mendoza*, 301 F.3d at 1166 (reversing district court's finding that plaintiff employees lacked standing to pursue RICO claims); *Trollinger v. Tyson Foods, Inc.*, No. 4:02-CV-23, 2007 U.S. Dist. LEXIS 38882, at \*10, \*42-44 (E.D. Tenn. May 29, 2007) (citing *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 158-59 (2001)) (denying employer's motion to dismiss a civil RICO action brought by employees alleging a scheme to depress wages by hiring illegal immigrants); *Brewer v. Salyer*, No. CV F 06-01324 AWI DLB, 2007 U.S. Dist. LEXIS 36156, at \*2, \*23, \*31-34, \*38 (E.D. Cal. May 17, 2007) (denying all but one of employer's motions to dismiss employees' civil RICO claims which were premised on allegations that employer implemented a scheme of depressing wages by employing undocumented workers); *Hernandez v. Balakian*, 480 F. Supp. 2d 1198, 1200, 1206, 1212 (E.D. Cal. 2007) (citing *Mendoza*, 301 F.3d at 1168) (determining employees' RICO complaint alleging depressed wages as a result of the hiring of illegal aliens survived motion to dismiss).

20. Exec. Order No. 12,989, 61 Fed. Reg. 6091, 6092 (Feb. 13, 1996), *as amended by* Exec. Order No. 13,286, 68 Fed. Reg. 10,619, 10,623-24 (Feb. 28, 2003) (providing for the possibility of debarment from government contracts for organizations determined by the Attorney General to be out of compliance with Immigration and Nationality Act employment provisions).

21. Beyond provisions within the franchise contracts themselves, the statutes of some states permit termination of franchise agreements for convictions. *See, e.g.*, ARK. CODE ANN. § 4-72-202(7)(D) (2001) ("[Good cause for termination of a franchise includes a conviction of the franchisee in a court of competent jurisdiction of an offense, punishable by a term of imprisonment in excess of one (1) year, substantially related to the business conducted pursuant to the franchise."); CAL. BUS. & PROF. CODE § 20021(i) (West 1997) ("[During the course of the franchise, immediate, non-curable notice of termination is reasonable when t]he franchisee is convicted of a *felony or any other criminal misconduct which is relevant to the operation of the franchise.*") (emphasis added); 815 ILL. COMP. STAT. 705/19-(c)(3) (2006) ("[Good cause for termination includes when a franchisee] is convicted of a *felony or other crime which substantially impairs the good will associated with the franchisor's trademark, service mark, trade name or commercial symbol.*") (emphasis added); IOWA CODE § 523H.7(3)(h) (2007) ("[Termination without opportunity to cure available if t]he franchisee is convicted of a *felony or any other criminal misconduct* which materially and adversely affects the operation, maintenance, or goodwill of the franchise in the relevant market.") (emphasis added).

22. 8 U.S.C. § 1324a (2000).

or “the Statute”) makes it unlawful “to hire . . . for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment.”<sup>23</sup> The Code of Federal Regulations defines “unauthorized” as meaning “with respect to employment of an alien at a particular time, that the alien is not at that time either (1) Lawfully admitted for permanent residence, or (2) authorized to be so employed by this Act or by the Attorney General.”<sup>24</sup> Significantly, the Act makes it unlawful “to continue to employ the alien . . . knowing the alien is (or has become) an unauthorized alien with respect to such employment.”<sup>25</sup>

Absent the element of knowledge, no violation can be found. According to the Code of Federal Regulations (“CFR”), “The term *knowing* includes having actual or constructive knowledge. Constructive knowledge is knowledge that may fairly be inferred through notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about a certain condition.”<sup>26</sup>

The CFR breaks down a non-exclusive list of instances where constructive knowledge may be imputed:

Examples of situations where the employer may . . . have constructive knowledge that an employee is an unauthorized alien include, but are not limited to, situations where the employer:

(i) Fails to complete or improperly completes the Employment Eligibility Verification Form, I-9;

(ii) Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf;

(iii) Fails to take reasonable steps after receiving information indicating that the employee may be an alien who is not employment

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23. § 1324a(a)(1)(A).

24. 8 C.F.R. § 274a.1(a) (2007).

25. § 1324a(a)(2) (emphasis added).

26. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,615 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a).

authorized . . . .<sup>27</sup>

Courts often cite the Ninth Circuit case, *Mester v. INS*,<sup>28</sup> as the benchmark for “constructive knowledge.”<sup>29</sup> In *Mester*, the employer had been cited for paperwork violations of the Form I-9 records provisions.<sup>30</sup> With the citations, INS agents delivered to the employer, Mester, a handwritten interview list of three employees suspected of green card fraud.<sup>31</sup> Mester did nothing in response, and the employees continued to work.<sup>32</sup> When cited with a cease-and-desist order, and a \$500 fine for each of six violations, the defendant employer Mester appealed the ALJ decision, arguing that lacking official notice from INS of green card fraud, he had no actual knowledge of his employees’ lack of authorization.<sup>33</sup>

The Ninth Circuit declined to bite. “Here, the employer was put on notice,” the court observed.<sup>34</sup>

Barry Mester received specific information that several of his employees were likely to be unauthorized. He made no further inquiry of the INS, and failed to take appropriate corrective action. The aliens turned out to be unauthorized. The knowledge element was satisfied; Mester had constructive knowledge, even if no Mester employee had *actual specific knowledge* of the employee’s unauthorized status.<sup>35</sup>

Mester had been put on notice of the potential green card fraud on September 3; on September 25, the employees were still on the job.<sup>36</sup> The Ninth Circuit declined to impose a bright-line rule,<sup>37</sup> but did defer to

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27. *Id.* at 45,623-24.

28. 879 F.2d 561 (9th Cir. 1989).

29. *See, e.g.,* *New El Rey Sausage Co. v. U.S. INS*, 925 F.2d 1153, 1157-58 (9th Cir. 1991) (citing *Maka v. U.S. INS*, 904 F.2d 1351, 1359 (9th Cir. 1990); *Mester*, 879 F.2d at 566-67) (using *Mester* and *Maka* to find employer had constructive notice that they were employing illegal workers when it received INS letter stating documents provided by employees were invalid); *Am. Fed’n of Labor v. Chertoff*, No. C 07-04472 CRB, 2007 WL 2972952, at \*7 (N.D. Cal. 2007) (discussing *Mester* to establish the sufficiency of constructive knowledge for culpability under § 1324a(a)(2)).

30. *Mester*, 879 F.2d at 564.

31. *Id.*

32. *Id.*

33. *Id.* at 565, 566.

34. *Id.* at 566.

35. *Id.* at 566-67 (citing *United States v. Jewell*, 532 F.2d 697, 700, 702-04 (9th Cir. 1976) (finding constructive knowledge arising out of a failure to investigate suspicious circumstances (‘deliberate ignorance’) is sufficient to impute culpability in certain criminal cases)) (emphasis added).

36. *Id.* at 566.

37. *See id.* at 567-68.

the ALJ's conclusion that a two-week delay in terminating an unauthorized employee amounted to a violation of the statute.<sup>38</sup>

Cases following *Mester* have also struggled with drawing lines among receiving knowledge, investigating and terminating the unauthorized employee.<sup>39</sup> For the employer who takes advantage of the new safe-harbor procedures, however, the newly issued DHS Final Rule provides unambiguous guidance:

An employer is prohibited from knowingly employing unauthorized aliens, so an employer may not continue to employ an individual if the employer obtains *actual* knowledge during the safe-harbor procedure that the individual is an unauthorized alien. If the employer does not obtain actual knowledge during the safe-harbor process, and instead merely has . . . *constructive knowledge* from the no-match letter, the employer may continue to employ the individual until all of the steps in the safe-harbor procedure are completed.<sup>40</sup>

### 1. Civil Penalties

Civil fines for employing or continuing to employ unauthorized aliens escalate dramatically, particularly for repeat offenders. For a first offense, the civil fines range from a relatively low \$275 to a maximum of \$2200 for each unauthorized alien.<sup>41</sup> A second offense nets the government from \$2200 to a maximum of \$5500 per alien.<sup>42</sup> After two

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38. *Id.* at 568.

39. *See, e.g.,* *Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1012 (9th Cir. 2007) ("Allowing employers to place employees on leave without pay while problems or concerns with their immigration status are resolved protects lawful employees from discharges by employers who, concerned with liability under IRCA, would otherwise terminate those employees first and ask questions later." (citing *New El Rey Sausage Co. v. U.S. INS*, 925 F.2d 1153, 1157 (9th Cir. 1991)); *Getahun v. Office of Chief Admin. Hearing Officer*, 124 F.3d 591, 596 (3d Cir. 1997) ("The fact that DuPont Merck was performing its obligation to verify employment eligibility did not insulate it from a charge of document abuse."); *Mountain High Knitting, Inc. v. Reno*, 51 F.3d 216, 220 (9th Cir. 1995) ("[T]he no-match letter did not direct Mountain High Knitting to do anything except comply with its preexisting affirmative obligations under the Immigration Reform and Control Act . . . ." (citing *New El Rey*, 925 F.2d at 1158; *Mester*, 879 F.2d at 563)); *New El Rey*, 925 F.2d at 1158 ("We agree that a rule requiring immediate suspension or termination is problematic."); *United States v. Fragale*, No. 99-34, 1999 U.S. Dist. LEXIS 12616, at \*21-23 (E.D. Pa. Aug. 18, 1999) (noting the lack of a bright-line rule specifying how long an employer can lawfully delay terminating an employee after learning that the employee is an unauthorized alien) citing *New El Rey*, 925 F.2d at 1156; *Mester*, 879 F.2d at 567-68, 568 n.9)).

40. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,617 (Aug. 15, 2007) (emphasis added).

41. 8 C.F.R. § 274a.10(b)(1)(ii)(A) (2007).

42. *Id.* § 274a.10(b)(1)(ii)(B).

violations, the fines for all subsequent violations escalate to a minimum of \$3300 and a maximum of \$11,000 for each unauthorized alien.<sup>43</sup>

## 2. Criminal Penalties

Employing the unauthorized alien also invites criminal sanctions.<sup>44</sup>

Any person or entity which engages in a pattern or practice of violations [by employing unauthorized aliens] shall be fined not more than \$3000 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, notwithstanding the provisions of any other Federal law relating to fine levels.<sup>45</sup>

Critical to the criminal penalty is the existence of a “pattern or practice.” “The term *pattern* or *practice* means regular, repeated, and intentional activities, but does not include isolated, sporadic or accidental act.”<sup>46</sup>

Unlike § 1324(a)(3)(A) discussed below, criminal penalties under this subsection may be based upon constructive knowledge.<sup>47</sup> The Ninth Circuit has cautioned, however, that “the doctrine of constructive knowledge must be sparingly applied.”<sup>48</sup> Such an interpretation will not help the employer whose former workers tell ICE agents that the boss knew they were illegal.<sup>49</sup>

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43. *Id.* § 274a.10(b)(1)(ii)(C).

44. See Press Release, Dep’t of Homeland Sec., *supra* note 3 (“The Administration Will Continue To Expand Criminal Investigations Against Employers Who Knowingly Hire Large Numbers Of Illegal Aliens.”).

45. 8 U.S.C. § 1324a(f)(1) (2000) (emphasis added). In 1989, the U.S. District Court, District of Vermont erroneously declared, “[A] person found to be engaging in a pattern or practice of employing unauthorized aliens is subject to imprisonment for up to six months for each alien employed.” *United States v. Moreno-Duque*, 718 F. Supp. 254, 256 (D. Vt. 1989) (emphasis added). The court ignored the plain text of the statute it had just finished quoting. *Id.* at 256 n.1. Despite this aberration, the term of up to six months’ imprisonment is for “the entire pattern or practice”; the “per alien” penalty relates to the criminal fine alone. § 1324a(f)(1).

46. 8 C.F.R. § 274a.1(k).

47. Compare § 1324(a)(3)(A) (requiring “actual knowledge”), with § 1324a(f)(1) (imposing criminal penalties for a pattern or practice of violations of § 1324a(a)(1)(A), (a)(2)), *New El Rey Sausage Co. v. U.S. INS*, 925 F.2d 1153, 1157-58 (9th Cir. 1991) (finding liability under § 1324a(a)(2) via constructive knowledge), and *Mester Mfg. Co. v. INS*, 879 F.2d 561, 564, 567 (9th Cir. 1989) (citing *United States v. Jewell*, 532 F.2d 697, 700, 703 (9th Cir. 1976)) (applying a constructive knowledge standard to § 1324a(a)(2) violations).

48. *Collins Foods Int’l, Inc. v. U.S. INS*, 948 F.2d 549, 555 (9th Cir. 1991) (declining to find employer’s constructive knowledge of unauthorized employment).

49. See, e.g., Press Release, U.S. Immigration & Customs Enforcement, Corporate Executives Plead Guilty to Illegal Hiring Practices (Dec. 15, 2006), <http://www.ice.gov/pi/news/newsreleases/>



### 3. Form I-9

The Final Rule recently adopted by DHS<sup>50</sup> stresses that complying with Form I-9 regulations will afford “safe harbor” in limited circumstances.<sup>51</sup> Within 30 days of receiving written notice from DHS, employers must take steps to resolve an issue where an employee’s name and/or social security number fail to match the DHS or SSA databases.<sup>52</sup>

The nomenclature of safe harbor may give the employer a false sense of security; it means only that a “no match” letter will not be used as evidence of constructive knowledge.<sup>53</sup> The safe harbor thus hardly provides the silver bullet for which many hope. Form I-9 compliance will not launder an employer’s actual knowledge. As the Final Rule emphasizes, even a finding of constructive knowledge will be based upon “the totality of circumstances.”<sup>54</sup>

Beyond the safe harbor, Form I-9 compliance has another significant benefit for the employer: avoiding fines for “paper” violations. In addition to inspecting an employee’s documents properly, an employer must also retain the Form I-9 for each employee until three years after that employee’s hire or one year after termination, whichever

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articles/061215sandiego.htm (“This settlement and guilty plea clearly show[s] that employers who knowingly and blatantly hire illegal workers will pay dearly for such transgressions.”). In the case referred to by the press release, ICE agents arrested 16 unauthorized alien employees during the execution of search warrants. *Id.* Many of these stated that “they were unauthorized workers, that Golden State’s managers knew they were unauthorized workers and [that] Golden State hired them despite their illegal status.” *Id.* (emphasis added). The settlement required Golden State to forfeit \$4.7 million in profits and for two company executives to be fined. *Id.*

50. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a).

51. *Id.* at 45,613.

52. *Id.* at 45,624.

53. *Id.* at 45,614.

It is important that employers understand that the proposed regulation describes the meaning of *constructive* knowledge and specifies ‘safe harbor’ procedures that employers could follow to avoid the risk of being found to have *constructive* knowledge . . . based on the receipt of a no-match letter . . . . An employer with actual knowledge . . . could not avoid liability by following the procedures described . . . . Further, DHS may find the employer had constructive notice from other sources . . . . Finally, it is important that employers understand that the resolution of discrepancies referenced in a no-match letter . . . does not, in and of itself, demonstrate that the employee is authorized to work in the United States.

*Id.*

54. *Id.* at 45,616 (“If, in the totality of the circumstances, other independent evidence exists to prove that an employer has constructive knowledge, the employer may still face liability.”).

is longer.<sup>55</sup> The practical effect of this provision requires the employer to maintain Form I-9's for all current employees. Failure to do so will result in a fine of "not less than \$110 and not more than \$1100 for each individual [employee whose records have not been properly maintained]."<sup>56</sup>

*B. Perjury: 18 U.S.C. § 1621*

The in terrorem effect of I-9 compliance should be buttressed by the penalty of perjury. By signing the I-9 form, the employer attests that the subject employee's documents were reviewed according to the criteria prescribed by statute.<sup>57</sup> Perjury carries with it a penalty of up to five years' imprisonment.<sup>58</sup> Significantly, were an employer to indirectly pressure a human resources employee to falsely attest to Form I-9 compliance, subornation of perjury imposes the same five year prison term.<sup>59</sup>

*C. Bringing in and Harboring Certain Aliens: 8 U.S.C. § 1324*

Ordinarily, the conduct most often associated with "harboring"—alien smuggling—would be unlikely to touch the laissez-faire employer of unlawful aliens.<sup>60</sup> However, the government could make out a harboring charge—another RICO predicate felony—for the rogue employer who not only hires, but assists with housing.

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55. 8 C.F.R. § 274a.2(b)(2)(i)(A) (2007).

56. *Id.* § 274a.10(b)(2) (emphasis added).

In determining the amount of the penalty, consideration shall be given to:

- (i) The size of the business of the employer being charged;
- (ii) The good faith of the employer;
- (iii) The seriousness of the violation;
- (iv) Whether or not the individual was an unauthorized alien; and
- (v) The history of previous violations of the employer.

*Id.*

57. 8 U.S.C. § 1324a(b)(1)(A) (2000).

58. 18 U.S.C. § 1621 (2000).

59. *See id.* § 1622 ("Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned not more than five years, or both.")

60. *But see* United States v. Zheng, 306 F.3d 1080, 1085 (11th Cir. 2002) (rejecting the argument that the scope of § 1324 is restricted to those who either utilize illegal labor in 'sweatshops' or those who are in the business of smuggling illegal workers into the United States).

#### *D. Harboring as Felony Hiring Practice*

For employers who doubt the seriousness of depending on an unauthorized workforce, reading § 1324(a)(3)(A) should convert the non-believers. Within the statutory proscriptions against “harboring” illegal aliens, § 1324 directs an even stiffer penalty at employers who knowingly and repeatedly hire unauthorized workers: “[a]ny person who, during any twelve-month period, knowingly hires for employment at least ten individuals with actual knowledge that the individuals are aliens . . . shall be fined under Title 18 [of the United States Code] or imprisoned for not more than 5 years, or both.”<sup>61</sup>

This section raises knowing employment of multiple illegal aliens to the level of a felony. While the civil fines for continuing to hire illegal aliens under § 1324a may impute constructive knowledge to the employer as discussed above, this particular section requires *actual* knowledge for conviction.<sup>62</sup> Violation of this section also constitutes a Racketeer Influenced and Corrupt Organizations (RICO) Act predicate felony.<sup>63</sup>

#### *E. Penalties for Document Fraud: 8 U.S.C. § 1324c*

Many of this section’s provisions apply to the illegal immigrant who utters false documents. Employers, however, who knowingly “accept, or receive . . . forged, counterfeit, altered, or falsely made document[s]” also violate the law.<sup>64</sup> In addition to a cease and desist order, the violating employer will also be penalized by a civil fine of “not less than \$250 and not more than \$2000 for each document that is the subject of a violation.”<sup>65</sup> For the employer previously subject to a cease and desist order, the fines increase to “not less than \$2000 and not more than \$5000 for each document that is the subject of a violation.”<sup>66</sup> Fines under this Statute are not exclusive and may result in significant cumulative penalties.

#### *F. Fraud and Misuse of Visas, Permits, and Other Documents:*

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61. 8 U.S.C. § 1324(a)(3)(A) (2000).

62. *Id.* (requiring “actual knowledge” that employees are illegal aliens in the language of the statute).

63. *See* 18 U.S.C. § 1961(1)(F) (2000) (defining § 1324 violations as “racketeering activity”).

64. § 1324c(a)(2).

65. § 1324c(d)(3)(A).

66. § 1324c(d)(3)(B).

*18 U.S.C. § 1546*

Lest the employer think a civil fine presents the only sanction for knowingly accepting false documentation, 18 U.S.C. § 1546 raises virtually the same offenses proscribed in section 274c of the Act to the level of a felony.<sup>67</sup> Regrettably, the section itself promotes some confusion.<sup>68</sup>

*Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by . . . fraud or unlawfully obtained . . . ;*

Shall be fined under this title or imprisoned not more than . . . 10 years (in the case of the first or second such offense, if the offense was not committed to facilit[ate] . . . an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.<sup>69</sup>

The confusion multiplies with the following section:

Whoever uses—

- (1) an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor,
  
- (2) an identification document knowing (or having reason to know) that the document is false, or

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67. See 18 U.S.C. § 1546(a) (2000).

68. See *United States v. Tyson Foods, Inc.*, No. 4:01-cr-061, 2003 U.S. Dist. LEXIS 20174, at \*11-12 (E.D. Tenn. Jan. 28, 2003) (“Section [sic] 1546(b) is manifestly ambiguous since it is capable of two completely different, reasonable interpretations”).

69. § 1546(a) (emphasis added).

(3) a false attestation,

for the purpose of satisfying a requirement of section 274A(b) of the Immigration and Nationality Act, shall be fined under this title, imprisoned not more than 5 years, or both.<sup>70</sup>

On the face of the statute, it would appear that an employer knowingly accepting a false employment document would be subject to either ten years under § 1546(a) or five years under § 1546(b). In *United States v. Tyson Foods, Inc.*, however, the district court confronted the interpretation as one of first impression.<sup>71</sup> That case presented the court with the question of whether a Social Security card constituted an “identification document” within the meaning of 18 U.S.C. § 1546(b).<sup>72</sup> Labeling the section “manifestly ambiguous,”<sup>73</sup> and “far from transparent,”<sup>74</sup> the court examined § 1028 of Title 18, and concluded that a Social Security card is not an “identification document” within the meaning of § 1546.<sup>75</sup>

Query whether the *Tyson* controversy over the meaning of “identification document” even mattered. As noted above, § 1546(a) prohibits an employer’s use or acceptance of *any* false document prescribed by statute or regulation for entry into or *as evidence of authorized stay or employment*.<sup>76</sup> Accepting a Social Security card (evidence of authorized employment), knowing it to be bogus, would be punishable by *up to ten years* under § 1546(a), rather than the five years provided in § 1546(b).<sup>77</sup> Although the court in *Tyson* rejected the government’s § 1546(b) argument, it nonetheless denied the defendants’ motion to dismiss under § 1546(a), incorporating an opaque reference to “the reasons expressed by the government in its response in opposition.”<sup>78</sup>

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70. § 1546(b).

71. *Tyson*, 2003 U.S. Dist. LEXIS 20174, at \*4.

72. *Id.* at \*3.

73. *Id.* at \*12.

74. *Id.* at \*15.

75. *Id.* at \*16-24.

76. See 18 U.S.C. § 1546(a) (2000).

77. Compare 18 U.S.C. 1546(a) (2000 & Supp. V 2005), with 18 U.S.C. § 1546(b) (2000).

78. *Tyson*, 2003 U.S. Dist. LEXIS 20174, at \*25. A PACER search of the docket yielded no insight as to the counts referred to by the court.

*G. Racketeer Influenced and Corrupt Organizations:  
18 U.S.C. § 1961 et seq.*

The ill-advised client may scoff at the seriousness of knowingly employing unauthorized aliens. Explaining the significance of the Racketeer Influenced and Corrupt Organizations (RICO) statute should get the client's attention. The federal government originally conceived RICO as a measure to combat the "legitimate" business associated with organized crime.<sup>79</sup>

RICO is a unique animal; an analysis of RICO elements could easily swamp the thrust of this article. The statute requires the existence, among other things, of an "enterprise," as well as a "pattern of racketeering activity."<sup>80</sup> A criminal RICO prosecution also requires the existence of any number of enumerated felonies.<sup>81</sup> Garden variety predicate felonies supporting such a prosecution include: arson, robbery, bribery, extortion, dealing in obscene matter, dealing in a controlled substance, theft from interstate shipments, embezzlement from pension and welfare funds, mail fraud, wire fraud, and many others.<sup>82</sup> Of interest to the unenlightened employer are some other predicate felonies: any act which is indictable under section 274 of the Immigration and Nationality Act, as well as violations of 18 U.S.C. § 1546 noted above.<sup>83</sup>

Criminal penalties for RICO violations are stiff—imprisonment for up to twenty years.<sup>84</sup> The statute also provides for forfeiture of assets used in the enterprise.<sup>85</sup>

Section 1964 also provides for a civil RICO action.<sup>86</sup> The same section imposes treble damages and attorneys' fees for prevailing parties.<sup>87</sup> Recent case law suggests that the plaintiffs' bar, historically

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79. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) ("It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.").

80. 18 U.S.C. § 1962.

81. See *id.* § 1961.

82. *Id.*

83. *Id.*

84. *Id.* § 1963(a); see also WILLIAM E. KNEPPER & DAN A. BAILEY, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS § 8.07(1) (7th ed. 2004) (discussing criminal liability for officers and directors under RICO).

85. See 18 U.S.C. § 1963(a).

86. See *id.* § 1964.

87. *Id.* § 1964(c).

the lightest sleeper in the land, is waking up.<sup>88</sup>

Establishing the proximate causal nexus between predicate act and injury presents a significant hurdle for plaintiffs pursuing civil RICO claims.<sup>89</sup> A new sub-species of claims, however, has gained momentum. American workers employed by companies hiring unauthorized aliens have brought civil RICO actions against their employers alleging that employing illegal aliens depresses the wages of the legitimate workers.<sup>90</sup> The bad news for rogue employers is that these actions have survived the pleading requirements of the Federal Rules of Civil Procedure.<sup>91</sup> The defendant-employer could now face years' worth of treble damages applied to hundreds of plaintiffs. The employer will likely take cold comfort in the admonition that "[w]hether [the] Plaintiff can prove these allegations is a subject for discovery and a motion for summary judgment."<sup>92</sup>

Civil RICO can also make plaintiffs out of competitors. In *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*,<sup>93</sup> the defendant's competitor brought a civil RICO action, alleging injury

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88. See, e.g., *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277 (11th Cir. 2006) (per curiam) (denying employer's motion to dismiss on the grounds that plaintiff employees lacked standing to pursue RICO claims); *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002) (reversing district court's finding that plaintiff employees lacked standing to pursue RICO claims); *Trollinger v. Tyson Foods, Inc.*, No. 4:02-CV-23, 2007 U.S. Dist. LEXIS 38882 (E.D. Tenn. May 29, 2007) (denying employer's motion to dismiss civil RICO action brought by employees alleging scheme to depress wages by hiring illegal immigrants); *Brewer v. Salyer*, 2007 U.S. Dist. LEXIS 36156 (E.D. Cal. May 17, 2007) (employees' complaint alleging depressed wages as a result of hiring illegal aliens survived motion to dismiss); *Hernandez v. Balakian*, 480 F. Supp. 2d 1198 (E.D. Cal. 2007) (employees' complaint alleging depressed wages as a result of hiring illegal aliens survived motion to dismiss).

89. "A plaintiff must make a different showing of proximate cause—one that is more often more difficult to make—when bringing suit under the RICO statute than when bringing a common-law cause of action." *Lerner v. Fleet*, 459 F.3d 273, 278 (2d Cir. 2006). Explaining its *ratio decidendi* of an earlier decision, the court in *Lerner* noted, "In *Lerner I*, we concluded that the plaintiffs' injuries were not proximately caused by the defendants' racketeering activity, not that their injuries were not proximately caused by the defendants' conduct." *Id.* at 285.

90. See, e.g., *Tyson Foods*, 2007 U.S. Dist. LEXIS 38882; *Brewer*, 2007 U.S. Dist. LEXIS 36156; *Hernandez*, 2007 U.S. Dist. LEXIS 36156.

91. See, e.g., *Tyson Foods*, 2007 U.S. Dist. LEXIS 38882, at \*33-44.

92. *Brewer*, 2007 U.S. Dist. LEXIS 36156, at \*43. Moreover, § 1968 provides an exhaustive list of information the government may acquire from the defendant pursuant to a civil investigative demand. 18 U.S.C. § 1968. Whatever the costs attendant to such a demand, the employer can rest assured of two things: (1) it will be at the employer's expense; and (2) it will not be cheap. See also *KNEPPER & BAILEY, supra* note 85, § 17.11 ("[A] decision in the *Brand Name Prescription Drugs Antitrust Litigation* required a defendant corporation to search at its [sic] own expense 'at least 30 million pages of e-mail data stored on its backup tapes' to produce documents responsive to a discovery request.") (citing *Brand Name Prescription Drugs Antitrust Litig.*, 1996 U.S. Dist. LEXIS 9538, at \*6 (N.D. Ill. July 8, 1996)).

93. 271 F.3d 374 (2d Cir. 2001).

from being under-bid for contracts and customers based on Colin's practice of illegal hiring.<sup>94</sup> The Second Circuit vacated the judgment dismissing the complaint, expressly finding that the allegations satisfied the proximate cause pleading requirements.<sup>95</sup>

The costs of even *defeating* a civil RICO case can be substantial; they comprise just another expensive thread in the fabric of hiring unauthorized workers.

*H. Unfair Immigration-related Employment Practices:  
8 U.S.C. § 1324b*

Compounding the employer's worries is a charge of unfair immigration-related employment practices. Here, the employer looking to avoid a lawsuit gets mixed signals. On the one hand, the CFR provides:

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.<sup>96</sup>

At least in the Ninth Circuit, however:

[T]he inability to speak English is a factor, among others, which may be considered in determining a defendant's knowledge that a person is in the United States illegally. An inability to speak English, if combined with other evidence, may allow the inference that Defendants had knowledge that an applicant was an illegal alien.<sup>97</sup>

The statute itself provides that an employer may not attempt to satisfy § 1324a(b) by asking an employee for "more or different documents than are required" or by "refusing to honor documents tendered that on their face reasonably appear to be genuine."<sup>98</sup>

Violating § 1324b may result in civil penalties ranging from \$250

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94. *Id.* at 378.

95. *Id.*

96. 8 C.F.R. § 274a.1(2) (2007).

97. *Hernandez v. Balakian*, 480 F. Supp. 2d 1198, 1208 (E.D. Cal. 2007) (citing *United States v. Holley*, 493 F.2d 581, 582-83 (9th Cir. 1974)).

98. 8 U.S.C. § 1324b(a)(6) (2007).



to \$2000 for a first offense, increasing to a range of \$3000 to \$10,000 for subsequent offenses,<sup>99</sup> as well as an award of attorneys' fees for a prevailing party.<sup>100</sup>

The law appears to create some tension. On one side, the statute proscribes constructive knowledge of unauthorized employment; on another, at least in the Ninth Circuit, the law permits a possible inference of illegal status owing to an employee's inability to speak English; on yet another side, employers are prohibited from asking employees for different documentation to establish authorization. Employers may be rightly frustrated with such a turbid legal scheme.

The solution is to follow the Form I-9 regulations to the letter. If the employer follows the regulations, an otherwise facially valid document that later proves to be bogus cannot be used against the employer as evidence of constructive knowledge. Where the employer has other indicia of an employee's unauthorized status, however, the safe harbor provisions will require the employer to investigate. This investigation may include a check of the Social Security Administration's (SSA) database. If that search yields a "no-match," the employee should be given a reasonable period of time to demonstrate that the no-match results from a clerical error, or a name change not yet reflected in the SSA files. If the employee cannot remedy the no-match in a reasonable time, the employee should then be terminated or, at least, placed on unpaid leave pending resolution of the issue.

*I. Executive Order No. 12989: Immigration Compliance and Government Procurement<sup>101</sup>*

Businesses depending upon government contracts likewise run great risks by employing unauthorized workers. By presidential order, businesses found to employ unauthorized workers may be "debarred" from government contracts. The order provides:

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99. *Id.* § 1324b(g)(2)(B).

100. *Id.* § 1324b(h).

101. *See* Exec. Order No. 12,989, 61 Fed. Reg. 6,091 (Feb. 13, 1996), *amended by* Exec. Order No. 13,286, § 19, 68 Fed. Reg. 10,623 (Feb. 8, 2003).

It remains the policy of this Administration to enforce the immigration laws to the fullest extent, including the detection and deportation of illegal aliens. In these circumstances, contractors cannot rely on the continuing availability and service of illegal aliens, and contractors that choose to employ authorized aliens inevitably will have a less stable and less dependable work force than contractors that do not employ such persons.

*Id.*

Whenever the Secretary of Homeland Security or the Attorney General determines that a contractor or an organizational unit thereof is not in compliance with the INA employment provisions . . . the [Secretary of Homeland Security or the Attorney General] or the head of the appropriate contracting agency shall consider the contractor . . . for debarment as well as for such other action as may be appropriate . . . .<sup>102</sup>

The one-year debarment period can be extended for additional one-year periods.<sup>103</sup> Interestingly, the order sets the threshold at “not in compliance.” Once DHS or the Justice Department makes such a determination—unreviewable in debarment proceedings<sup>104</sup>—the contractor may be debarred even if no criminal conviction or guilty plea follows.<sup>105</sup>

For an organization that depends, even in part, on government contracts, employing unauthorized workers could push the company out of business.

### J. Franchise Law

As noted above, the risks to a franchisee caught in the ICE cross-hairs exceed those of the independent company/employer. A common feature of franchise agreements is a right to terminate for cause, including conviction, a guilty plea, or misconduct that impairs the goodwill of the franchise.<sup>106</sup> A recent decision that should give the

102. *Id.* § 4(a). “The head of the contracting agency may debar the contractor or an organizational unit thereof based on the determination . . . that it is not in compliance with the INA employment provisions. Such determinations shall not be reviewable in the debarment proceedings.” *Id.* at § 4(b).

103. *Id.* § 4(d). “The period of the debarment shall be for 1 year and may be extended for additional periods of 1 year . . . if the contractor continues to be in violation of the INA employment provisions.” *Id.*

104. *See id.* § 4(b).

105. *See* 8 U.S.C. § 1324(a)(e).

106. *See, e.g.,* ARK. CODE ANN. § 4-72-202(7)(d) (2001) (defining “good cause” for termination to mean “conviction of the franchisee in a court of competent jurisdiction of an offense, punishable by a term of imprisonment in excess of one (1) year, substantially related to the business conducted pursuant to the franchise”); CAL. BUS. & PROF. CODE § 20021 (West 1997) (stating that if during the period in which the franchise is in effect the franchisee is convicted of a felony or any other criminal misconduct relevant to the operation of the franchise, “*immediate notice of termination without an opportunity to cure* shall be deemed reasonable . . . .”) (emphasis added); 815 ILL. COMP. STAT. ANN. 705/19(c)(3) (2006) (permitting termination when franchisee “is convicted of a felony or other crime which substantially impairs the good will associated with the franchisor’s trademark, service mark, trade name or commercial symbol”) (emphasis added); IOWA CODE ANN. § 523H.7(3)(h) (2007) (allowing for termination without opportunity to cure where “[t]he franchisee is convicted of a felony or any other criminal misconduct which materially and

franchisee pause is *Karimi v. BP Products North American, Inc.*<sup>107</sup>

In *Karimi*, the United States District Court for the Northern District of Georgia denied a preliminary injunction sought by a gas station owner who contested the termination of his franchise agreement by the franchisor.<sup>108</sup> The franchisee had pled guilty to the misdemeanor offense of continuing to employ unauthorized aliens.<sup>109</sup> The court found that, “by employing illegal aliens, in violation of federal law, the [franchisee] breached . . . three provisions of the [Dealer Supply Agreement].”<sup>110</sup> The court further agreed with the franchisor, declaring, “*the knowing employment of illegal aliens by a franchisee, particularly when that illegal act has become the subject of a criminal conviction, is a significant act that ‘detracts from and disparages the franchiser’s public image.’*”<sup>111</sup>

With the government’s ability to promote high-profile arrests, one can expect franchise operations to feel the effects of increased ICE worksite enforcement. Furthermore, franchisees often conduct operations from multiple locations. This adds extra dimensions to the dangers for the franchisee. First, while the franchisee itself may be a relatively small operation, the franchise’s brand name, whether it be a hotel, restaurant or gas station, may give an ICE arrest a newsworthy headline. Second, a franchisee’s web of multiple locations can lead an inspection in one location to the owner’s other operations. Third, should an ICE inspection yield unauthorized workers at multiple locations, the specter of “pattern or practice” and its criminal sanctions may come to haunt the franchise owner.

Last, and decidedly not least, the personal ramifications of losing the franchise could be still more catastrophic. For the small business, financing and promissory note terms likely consider a loss of franchise rights as an act of default. Will the owner have pledged his or her home as security for a loan to purchase a fast food restaurant? Could hiring unauthorized workers lead to a business owner losing his or her home? These are the stakes and it is the lawyer’s job to explain them to the

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adversely affects the operation, maintenance, or goodwill of the franchise in the relevant market”) (emphasis added).

107. No. 1:06-CV-00902-JEC, 2006 U.S. Dist. LEXIS 25665 (N.D. Ga. May 2, 2006).

108. *See id.* at \*1, \*11.

109. *Id.* at \*6. The franchisee had originally been indicted on felony counts of “conspiracy to” and “actually encouraging and inducing aliens” to reside unlawfully in the United States. *Id.* at \*6 n.2 (citing *United States v. Karimi*, No. 1:04-CR-554-RWS (N.D. Ga. Sept. 13, 2005)).

110. *Id.* at \*7. “[P]laintiff’s conviction of knowingly continuing to employ unauthorized aliens is an event that is relevant to the franchise relationship.” *Id.* at \*10.

111. *Id.* at \*8 (emphasis added).

client.

### III. CRAFTING AN EMPLOYER'S IMMIGRATION COMPLIANCE PROGRAM

Few services provide better value for the dollar than an attorney's designing and implementing an effective compliance program for a law firm's clients. Case law and DHS regulations acknowledge the import of an employer's good faith efforts. "An 'effective program to prevent and detect violations of law' may produce dramatic reductions in the penalties,"<sup>112</sup> in the event statutory violations occur.<sup>113</sup>

For companies with hundreds or thousands of employees and stratified management, the question of constructive knowledge can be uncomfortable.

[I]t is to be expected that some courts will consider compliance standards when assessing liability and determining penalties in civil actions. The failure to establish such a compliance program is likely to have serious consequences for any corporation, especially those having 50 or more employees, and may result in claims and litigation against the company's directors and officers for neglecting their responsibilities in this respect.<sup>114</sup>

Busy executives may be far removed from the hiring process; they may not work with many employees on a day-to-day basis. These same employers, may, however, hear rumblings from the field. For employers with significant numbers of unskilled workers, as for example in the hospitality industry and the building trades, the rumblings should be taken seriously. Illegal aliens may find themselves questioned by ICE agents for reasons unrelated to work. Can an employer guarantee that a bus boy's traffic infraction won't lead to an ICE investigation?<sup>115</sup>

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112. KNEPPER & BAILEY, *supra* note 85, § 17.07[1].

113. *See, e.g.*, DHS Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611 (Aug. 15, 2007) (to be codified at 8 C.F.R. Part 274a). "DHS fully considers all of an employer's attempts to verify employment authorization status and to employ only authorized workers in determining whether to pursue sanctions. All of these good faith efforts militate against such sanctions." *Id.* at 45,618; *see also* *New El Rey Sausage Co., Inc. v. U.S. INS*, 925 F.2d 1153, 1158 n.10 (noting the ALJ's conclusion that New El Rey's failure to contact a lawyer or the INS demonstrated a lack of good-faith effort).

114. KNEPPER & BAILEY, *supra* note 85, § 17.07[1].

115. A recent ICE investigation was triggered by just such an event.

The ICE investigation began after the North Dakota Highway Patrol stopped a truck for a traffic violation near Fargo . . . Highway patrol officers contacted the U.S. Border Patrol in Grand Forks for assistance in identifying the four men in the truck. Border Patrol agents responded and arrested the men on charges of being in the United States

At bottom, the employer who thinks he might have a problem already has a problem. The costs of rolling the dice may be disastrous.

The good news, however, is that the problem is not insoluble. By implementing an immigration compliance program, the employer may resolve a company's unauthorized employment issues, or at a minimum, at least mitigate penalties in the event an ICE investigation leads to sanctions before a thorough housecleaning can be effected.<sup>116</sup>

The program should begin with a thorough review of existing Form I-9s. The lawyer can check the names and social security numbers of current employees against the Social Security Administration's database. If the data fail to match, the next step is to give the employee a reasonable time to re-verify the information. Sometimes, an innocuous clerical error, or post-nuptial name change will bring about the "no match." In other instances, an unauthorized employee whose Form I-9 data fails to match may be able to adjust his or her status, as in the case of an employee married to a U.S. citizen. An employee, who within a reasonable period of time cannot provide satisfactory evidence of authorization to work in the United States, must be terminated.

The re-verification process must be uniform. All employees should be screened at the same time to avoid any hint of discriminatory practices. Employees should not be singled out by impermissible criteria, such as surnames, countries of origin, accents, or even job descriptions. An across the board policy should give every employee the same amount of time to re-verify status. Termination for failure to re-verify must likewise be implemented without discrimination. A lawyer who designs an uncomplicated, yet comprehensive compliance scheme serves the client well.

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illegally. All four illegal aliens were employees of Stucco Design Inc., and had been working in Dickinson, N.D., at a construction site for a Wal-Mart Super Center. They told ICE agents that, when Stucco Design hired them, they did not complete the required paperwork and did not show any documents to establish they were eligible to work legally in the United States, as required by law. *They also stated that their employers knew they were in the country illegally.*

News Release from U.S. Immigration and Customs Enforcement, Bus. Owner Must Forfeit \$1.5 Million for Conspiring to Harbor Illegal Aliens, Dec. 1, 2006 (emphasis added), available at <http://www.ice.gov/pi/news/newsreleases/articles/061201fargo.htm>.

116. See KNEPPER & BAILEY, *supra* note 85, § 17.07 [1]. "A corporation that demonstrates that it engaged in an effective prevention and detection program can substantially reduce its exposure to criminal penalties." *Id.*

*A. Effective Compliance and Ethics Program Under Federal Guidelines*

In addition to technical directions and adequate remedial measures, a sound program should also embrace the elements of the government's own dictates for effective compliance. In section 8B2.1 of the Federal Sentencing Guidelines,<sup>117</sup> the government lists a number of measures that, if implemented, should evidence prima facie good faith efforts to comply with the Immigration and Nationality Act.<sup>118</sup> "The prior history of an organization may indicate types of criminal conduct that it [should] take actions to prevent and detect."<sup>119</sup>

These guidelines, too lengthy to quote in full, nonetheless set out the kind of measures that an employer should implement, such as having a responsible individual oversee day-to-day compliance, evaluating the program periodically for overall effectiveness, communicating the program's requirements to appropriate employees, etc.<sup>120</sup> This is significant for, as has been observed in an outstanding treatise on the subject of D&O (directors and officers) liability, "[a] company may be held liable for its employee's wrongdoing even if it had expressly forbidden the activity."<sup>121</sup>

The commentary to the Federal Sentencing Guidelines also offers valuable insight as to what effects the employer's own conduct will have on a program's overall effectiveness. "An organization's failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmental regulation weighs against a finding of an effective compliance and ethics program."<sup>122</sup> Moreover,

[h]igh-level personnel and substantial authority personnel of the organization [should] be knowledgeable about the content and operation of the compliance and ethics program, [should] perform their assigned duties consistent with the exercise of due diligence, and [should] promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.<sup>123</sup>

What does a compliance program mean in dollars and cents? Consider a construction company, or a chain of hotels or restaurant

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117. 18 U.S.C.S. appx. § 8B2.1 (Lexis Nexis 2007).

118. *See id.*

119. *Id.* § 8B2.1.

120. *See id.*

121. KNEPPER & BAILEY, *supra* note 85, § 17.07 [1].

122. 18 U.S.C.S. appx. § 8B2.1.

123. *Id.*

franchises, with 500 workers employed at multiple locations. Assume an ICE investigation establishes that 100 of the employees lack authorization to work in the United States. As a first-time offender, the company could be seen as engaged in a “pattern or practice” of employing unauthorized workers.<sup>124</sup> The company now faces \$520,000 in fines alone.<sup>125</sup>

Had the employer hired an attorney to implement a compliance program, these fines could be mitigated substantially, if not avoided altogether. Assume that at the time of government intervention, a pre-emptive Form I-9 audit had taken place and the employees were in the re-verification process. Evidence of good faith compliance would be given due consideration by the government.<sup>126</sup> Depending upon the totality of the circumstances, the employer might be able to demonstrate lack of constructive knowledge. Hiring an attorney to investigate and remedy a problem should be seen as prima facie evidence of “reasonable care”—the absence of which would lead to a finding of constructive knowledge.<sup>127</sup> Even were fines reduced 50%, this would still result in a savings to the client of over a quarter million dollars.

#### IV. CONCLUSION

For employers, the question should not be “Are we being paranoid?” but rather, “Are we being paranoid *enough*?”

For many employers, particularly those in the restaurant, hotel, maintenance, and construction industries, the answer to the latter question is, “*Probably not.*” Everyone knows at some level, employing unauthorized aliens is unlawful. Many lawyers, however, may not appreciate just how serious the risks are. In addition to substantial civil

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124. See 8 C.F.R. § 247a.1(k) (2007).

125. *Id.* § 274a.10(b)(1)(ii)(A). Civil fines for a first offense carry a maximum of \$2200 and criminal fines up to \$3000. *Id.* §§ 274a.10(a), 274a.10(b)(1)(ii)(A). It must be remembered that the fines are *per alien employed*. (\$5200 x 100 = \$520,000). *Id.* § 274a.10(b)(1)(ii)(A). This figure would not include other fines for “paper” Form I-9 violations (up to \$1,100 per document), or those resulting from other charges for document fraud or harboring. *Id.* § 274a.10(b)(2).

126. [T]he particular steps undertaken by the employer . . . along with the time the employer takes to act and follow up with appropriate inquiries, will be relevant considerations in the determination of whether the employer took reasonable steps to avoid a finding of constructive knowledge . . . . The ultimate determination of whether an employer will be found to have knowingly employed an unauthorized alien will be based on the totality of the circumstances.

DHS Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611 (Aug. 15, 2007) (to be codified at 8 C.F.R. Part 274a).

127. 8 CFR § 274a.1(l)(1).

finer, the interlocking statutory scheme of immigration laws and federal criminal statutes imposes serious criminal penalties depending on the egregiousness of the violations. Aside from a potential prison sentence, litigation costs (including attorneys' fees, document production, depositions, etc.) could crush even well-established companies. Moreover, for the franchise operation, franchise agreements (as well as state law in some jurisdictions) often provide for termination of the franchise agreement for guilty pleas or conviction.

The attorney who convinces a suspect client to implement a preemptive compliance program renders a signal service. When the client understands the costs of recalcitrance, the attorney's time is a drop in the ocean.