Immigration Issues

The Department of Homeland Security wants to put employers at the forefront of the battle against illegal workers. Violators could face fines and even jail time.

By Angela Palmer

The U.S. Department of Homeland Security (DHS) is getting serious about illegal immigration. Or at least it's trying to.

A newly rewritten federal rule holds businesses responsible for finding, and sometimes firing, those not authorized to work in the United States. Penalties for noncompliance are steep: Employers can face civil and criminal penalties, including fines and jail time. But right now, implementation is on hold pending the outcome of a related court case.

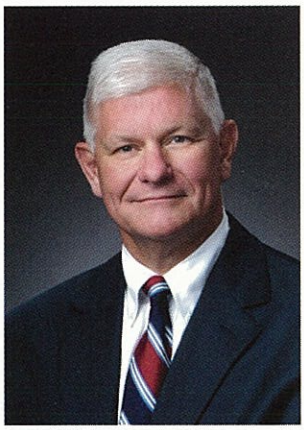
DHS officials say the crackdown is simply a clarification of existing law: the Immigration Reform and Control Act (IRCA) of 1986 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which prohibit employers from knowingly hiring illegal immigrants.

Since the IRCA was enacted, employers have been required to complete an I-9 form, formally called an Employment Eligibility Verification form, for each employee, including U.S. citizens. Human resources departments are required to keep I-9 forms—and copies of the documents that verify an employee's work eligibility—for either three years after the date of hire or one year after an employee is terminated, whichever occurs later.

Immigration law "is something that had been only intermittently enforced," says attorney Bill Todd, of counsel with Benesch, Friedlander, Coplan & Aronoff. "But, beginning with the efforts in the last year or two to do something about what everybody's now calling an immigration problem, there's been more focus coming from the Department of Homeland Security to enforce these statutes and the rules that are out there."

The DHS claims the new rule is the most effective way to discourage illegal immigrants—and employers—from breaking the law. Many employers are crying foul, however, saying the new policy is expensive to enforce and could potentially punish companies and their employees for honest mistakes.

"For employers, this is a very onerous situation because it's now their burden to essentially sort through what are false documents and what are accurate documents and try to figure out if someone's employable in the country, knowing there's a stiff penalty for being wrong," says attorney Brendan Feheley, an associate with Kegler, Brown, Hill & Ritter.



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Nearly 12 million illegal immigrants currently reside in the United States, according to the Office of Immigration Statistics at the DHS. And as long as U.S. businesses are willing to employ them, they'll keep coming. Now, the feds are relying on employers to help them stop the influx.

"The I-9 enforcement actions have been a reaction to the failed immigration reform initiative," says Ian Macdonald, a shareholder with Littler Mendelson's Atlanta office, who handles immigration issues for employers firmwide. "Previously, these enforcement actions were seen more as a PR exercise, in that you would see TV cameras and press accompanying [Immigration and Customs Enforcement] and DHS to raid a particular company. And then there would be a big fanfare about it, and that would be the administration's way of saying, 'See, we are doing something about it.' What's happening right now is a much more calculated and widespread enforcement."

No-Match Letters

In the past, experts say completing an I-9 was sufficient due process for investigating a person's identity. To be penalized, an employer had to have direct knowledge of an employee's illegal work status, such as a verbal statement or falsified documents. Now, the DHS wants to amend the definition of "knowledge" to include constructive knowledge, defined as information that a person should have known, to prove someone's unauthorized status.

To prove constructive knowledge, the DHS has proposed using the Social Security Administration's (SSA) database to cross-check employees' Social Security numbers with SSA records. If the

identification doesn't match, the SSA sends employers a "no-match" letter to notify them of a potential clerical error. Now, the DHS wants to use those letters as proof that an employer knowingly hired an unauthorized employee.

Since 1994, the SSA has sent no-match letters after processing employers' W-2 forms each year. The SSA processes about 245 million W-2s for approximately 153 million people in the United States—both citizens and workers with green cards.

The letters were "not originally an immigration control enforcement tool. It was an informational tool to let people know that there was a problem with their Social Security number, and they should come down to the SSA and get it taken care of," says Jason Lawson, president of the Human Resources Association of Central Ohio board of directors, who also is an HR director for a local construction company.

The problem with using the SSA database as an enforcement tool is twofold. First, what happens if the HR department simply mistypes a number: Are the feds really going to send your secretary to jail? Second, the database isn't always accurate: Social Security numbers may not match because of a name change, clerical error or cultures where a person's first, middle and last names are written in a different order. According to the Office of the Inspector General at the SSA, the database reports an estimated 17.8 million discrepancies each year, and 12.7 million—more than 70 percent—are U.S. citizens.

"The issue of I-9 compliance is a sleeping giant, and now it's going to be at the forefront for every employer," says Sam Shihab, partner at Shihab & Associates.

After the DHS published the new rule in August 2007, the SSA planned to send no-match letters to an estimated 8 million people at 140,000 workplaces. A few weeks later, however, the American Civil Liberties Union Immigrants' Rights Project and national and local labor groups filed a lawsuit in the U.S. District Court for the Northern District of California. The court granted a temporary restraining order and, later, a preliminary injunction against the new policy, which the court said would do more harm than good by potentially firing legal workers.

In December, the DHS filed an appeal to have the injunction dissolved; as of late April, a decision was still pending. The DHS added a new twist in late March when it submitted a revised rule and said it had addressed the court's concerns by explaining the no-match letter policy in depth. Not everyone's buying that explanation.

"This new rule that they came out with is precisely the same; they have not changed it," says attorney Sam Shihab, partner at Shihab & Associates in Co-

lumbus. "In essence, they've provided more of a foundation for the rule."

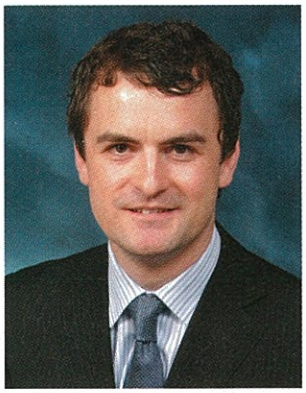
"I think what [the DHS is] trying to do is figure out a way to operate until there's reform with regard to whether it's going to be a guest worker program or some other sort of program, so people know what to do," Feheley says.

"Unfortunately, the DHS doesn't have the authority to solve the problem. They simply can't provide people an employable status who otherwise don't have it," Feheley says. "And they've upped their raids on the employers and sort of said, 'If we can't stop the problem of people coming into the country, then we're going to put the burden on employers to do it by penalizing them if we find out they didn't."

For now, the new rule is on hold pending a court ruling. Because of the injunction, non-match letters for the 2006 tax year were never sent. In April, the SSA began sending out an estimated 8 million to 9 million letters for 2007, noting that they weren't connected to the DHS rule.

Safe Harbor

Assuming the new rules eventually are enacted, there will be ways for employers to avoid prosecution when faced with a no-match letter. An employer will have 30 days to check its records for the source of the error. If none is found, it becomes the employee's responsibility to resolve the issue with the SSA. If the error is not resolved within 90 days, the employer must complete another I-9, but cannot accept any document with the questionable Social Security number. If the employee can't produce another document and his or her situation isn't resolved with the SSA, the employee must be terminated.



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The SSA has acknowledged that in certain cases, it will be impossible to resolve discrepancies within 90 days. But if an employer simply ignores the no-match letter and an employee is later found to be an illegal immigrant, the employer will be held liable. Civil penalties range anywhere from a $275 to $11,000 fine per employee, while criminal penalties range from $3,000 to six months in jail.

Unfortunately for employers, the authenticity of documents needed for the I-9, such as a driver's license, Social Security card or birth certificate, can sometimes be difficult to verify. The SSA and DHS have tried to help by placing electronic copies of original documents on their Web sites. However, the black market for false documents can occasionally trip up employers.

"There are some really, really good fraudulent documents," Lawson says. "There's literally eight to 10 variations of what a [Social Security card] looks like,

going back to 50 years. So how do you know if what someone is handing you is accurate or a forgery when there's significant variations of the card that exist?"

Enter E-Verify, the government-sponsored software program that accesses SSA records and the DHS's immigration databases to verify an employee's identity. Right now, E-Verify is free, but few employers use the service. The low usage rate is partly due to a lack of knowledge about the product, Shihab says, but also because it, too, can generate inaccurate results.

Jen Erb, HR manager for BMI Federal Credit Union, says she doesn't use E-Verify because employers already have to submit information to the SSA for employees who don't show up correctly in the database. "So you'd still have to do both," she says. "If it had all of the information, it would be a timesaver. But, particularly for employers who are hiring a large number of individuals, then adding that additional step in the process could be burdensome."

"E-Verify has shown to be somewhere around 90 percent accurate," says Lawson, who uses it only for his company's Arizona employees because it's a state mandate. The company employs around 2,600 people in more than 30 states. "I've read numerous articles about people—native-born and non-native born U.S. citizens—that E-Verify kicked out, saying that they were illegal and they absolutely were not. … Philosophically, we don't believe in E-Verify."

Complications

In some cases, employers can be penalized for hiring subcontractors, and sometimes the subcontractor's subcontractors, if they're illegal immigrants. In 2005, Wal-Mart agreed to pay an $11 million fine after being prosecuted by the U.S. Department of Justice for hiring outside contractors that hired illegal immigrants.

"People read the articles of people paying millions of dollars in settlement fines and people spending time in jail," says Feheley, "and it's created a fear of what might happen."

Employers have to walk a fine line, though. Since 1986, the IRCA has warned employers to avoid discriminating against potential hires based on their national origin. To protect employees, Congress created a special counsel position for Immigration-Related Unfair Employment Practices at the U.S. Department of Justice's Civil Rights Division.

But industries such as construction, agriculture and retail, which depend upon foreign-born employees to fill low-paying jobs that most U.S. workers don't want, are worried that overly restrictive rules will drive their labor pools abroad. "Their particular concern is that with enforcement actions increasing, they'll have a run on their employee population," Macdonald says. "And they won't have enough workers in place to meet the demands and to produce or manufacture the goods."

Until the issue is ultimately decided in court, Shihab says it's necessary for owners to protect their business by making the I-9 form—and its rules—a priority. "The issue of I-9 compliance is a sleeping giant, and now it's going to be at the forefront for every employer," he says. "The problem with I-9 compliance is that it looks very deceptively simple, and it is not a simple issue."

When in doubt, experts say, consult a lawyer. "We're erring on the side of being overly cautious and saying, 'If there's any problem, I want to know,' " Feheley says. "It's our job to make sure employers aren't overreacting, or under-reacting either." ◊

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