

When Homeland Security Comes Calling: A New Agency, Aggressive Prosecutors and Injured Parties Enforce Immigration Law in the Workplace

By Daniel G. Webber Jr. & Matthew C. Kane

INTRODUCTION

There is something unsettling about the image of federal agents displaying "Homeland Security" badges as they enter your client's place of business to question the legal status of employees. This scenario is happening today, and it is the way of the future. On Nov. 25, 2002, President Bush signed the Homeland Security Act into law.¹ This legislation established the Department of Homeland Security (DHS) and set in motion the largest reorganization of the federal government in a generation. Effective March 1, 2003, the act abolished the Immigration and Nationalization Service (INS) and transferred immigration enforcement duties, along with certain Customs Service functions, to a part of the DHS labeled the Bureau of Immigration and Customs Enforcement (ICE). Michael Garcia, a former federal prosecutor, oversees the agency as the DHS assistant secretary for Immigration and Customs Enforcement.



The reorganization and new leadership, against the backdrop of the terrorist attacks of Sept. 11, 2001 and the ongoing conflicts in Iraq and Afghanistan, has brought new focus to the enforcement of existing immigration laws, including the employer sanctions provisions of the Immigration Reform and Control Act of 1986 (IRCA). This law requires employers to make good faith efforts to verify an employee's legal authorization to be present and work in the United States. The IRCA also allows for the imposition of civil and criminal penalties on employers that knowingly hire illegal workers, participate in harboring such aliens or participate in document fraud.

Prior to Sept. 11, 2001, INS enforcement of employer sanctions laws focused on low-wage industries like field agriculture, food processing, food and hospitality services, janitorial services and the garment industry. Current anti-terrorism priorities are likely to focus on specific subsets of these industries. Positions which require access to potential targets, for example employers connected to stadiums, shopping malls or airports, can expect more attention. In the wake of Sept. 11, 2001 attacks, federal law enforcement agencies initiated "Operation Tarmac," an effort to scrutinize workers in and around airports in order to unearth immigration and identity fraud violators that could present potential security risks.

More recently, ICE conducted a similar sweep at a Florida seaport, arresting 13 aliens who used false social security numbers to obtain access badges to restricted areas.²

The Justice Department has also stepped up prosecution of employers for immigration violations, whether or not they are related to terrorism concerns. Although the investigations were underway before the attacks, indictments returned shortly after Sept. 11, 2001 charged several large employers in the transportation and food processing sectors, including Tyson Foods and a number of its executives, with smuggling and harboring illegal workers. These indictments were announced with great fanfare by the Justice Department and signaled a new willingness by federal prosecutors to tackle such cases, seeking significant forfeiture of assets in the process.

In addition, groups of authorized or "legal" workers as well as business competitors have sought damages and injunctive relief from employers that violate immigration laws through civil actions filed under the Racketeering Influenced and Corrupt Organizations (RICO) statute. These civil suits often proceed parallel to or in the wake of criminal prosecution, allowing the plaintiffs to benefit from the government's proof.

As a result, employers of non-citizens, especially those entities engaged in any business linked to a potential venue for a terrorist act, would be wise to brush up on immigration related laws that could subject them to both civil and criminal penalties. This article will discuss these provisions in ascending order of severity.



“The Justice Department has also stepped up prosecution of employers for immigration violations...”

“PAPERWORK VIOLATIONS” ON THE FORM I-9

The IRCA requires employers to take certain steps to verify an employee's identity and authorization to work in the United States. Within three days after hiring, the employer and the employee must together fill out a Form I-9. 8 C.F.R. § 274a.2(b)(11). Section one of the form requires the employee to attest he or she is either a citizen or national of the United States, a lawful permanent resident, or an alien temporarily authorized to work in this country. Section two requires the employer to inspect certain documents to establish identity and work authorization and record details related to the documents examined including expiration dates. An employer cannot insist on a certain document or combination of documents for the verification requirements or refuse to accept those offered as long as they appear facially valid and appear to relate to the person presenting them.

These forms must be retained by the employer for the longer of 1) the term of employment plus one year or 2) three years. Once completed, however, the forms cannot simply be filed away and forgotten if the employee has only temporary work authorization. By definition, such authorization may have an expiration date and the employer must re-verify the individual's eligibility for employment prior to that time.

Penalties for violations of the Form I-9 verification requirements can result in a civil fine ranging from \$110 to \$1,100 per employee involved. 8 C.F.R. § 274a10(b)(2). In setting the proposed fine, the government must weigh five statutory factors: 1) the size of the employ-

er, 2) the good faith of the employer, 3) the seriousness of the violation, 4) any history of previous violations and 5) any actual involvement of unauthorized aliens. *Id.* The severity of the violation takes into account whether the forms simply contained errors, if important sections or attestations were incomplete, or if the requisite form and documents were retained at all. See *United States v. Hudson Delivery Service, Inc.*, 1997 WL 572126 (OCAHO) (analyzing the penalty factors in detail).³

While they can certainly mount quickly in a sizeable business, these penalties reflect only one reason why verification procedures are important. As discussed below, the Form I-9 can become important evidence in a charge of knowingly hiring or continuing to employ an unauthorized worker. If properly completed and maintained, however, it provides an affirmative defense in enforcement actions.

KNOWING HIRES AND KNOWING EMPLOYMENT

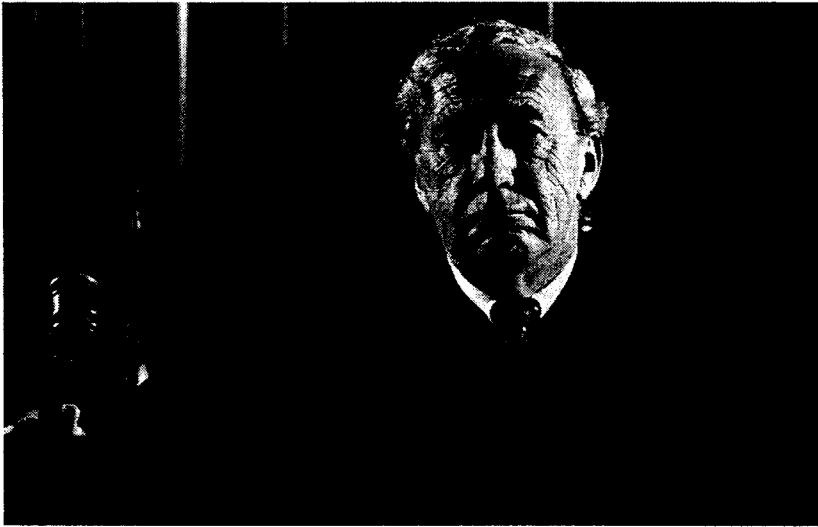
Federal law prohibits any person or entity from knowingly hiring an unauthorized worker or knowingly continuing the employment once knowledge of the unauthorized status is obtained. 8 U.S.C. § 1324a(a). "Knowledge" can be either actual or constructive. Immigration regulations define constructive knowledge as "knowledge which may be fairly inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition." 8 C.F.R. § 274a.1(1). The same regulation provides a non-exclusive list of situations that may amount to constructive knowledge, including those where an employer 1) fails to complete or improperly completes the Form I-9; 2) has information available to it that would indicate the alien is unauthorized; or 3) acts with "reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf." *Id.*



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Early IRCA cases, all arising from the Ninth Circuit, applied the doctrine of constructive knowledge narrowly, usually in instances where the employer was notified of a potential problem with the status of particular employees and then failed to investigate further or take appropriate action in a timely manner. See *Collins Foods International, Inc. v. INS*, 948 F.2d 549 (9th Cir. 1991). The modern trend, however, indicates an expansion of the constructive knowledge concept. In *INS v. China Wok Restaurant, Inc.*, 1994 WL 269371 (OCAHO), the employer was deemed to have constructive knowledge of the worker's status based solely on the fact that the employer was in possession of an I-9, which indicated the employee's work authorization card had expired.

The "reckless and wanton disregard" type of constructive knowledge has also been applied broadly. While it may read as if it is aimed at recklessly accepting employees through a recruiter or referral service, this provision has been applied to employers who recklessly entrust hiring decisions or I-9 verification compliance to incompetent employees. See *United States v. Carter*, 1997 WL 602725 (OCAHO).



“ Courts do not appear to be comfortable with employment alone serving as sufficient grounds of conviction. ”

Concepts of agency are often intertwined with constructive knowledge analysis. Whoever completes section two of the I-9 does so on behalf of the employer. Any knowledge of the agent signing the Form I-9 may be imputed to the employer, even if the agent does not have the authority to hire. *Id.* Imputed knowledge applies not only to corporate settings, but to sole proprietors as well. *Id.*

Although the concept of constructive knowledge has been expanded, the IRCA does not impose a strict liability standard for employment of illegal aliens; proof of knowledge is still required. The statutes also provide an employer with a “narrow but complete defense” to knowing hire violations if it shows it complied with the verification requirements in good faith. *United States v. Walden Station, Inc.*, 2000 WL 773098 (OCAHO) (examining the good faith defense found at 8 U.S.C. § 1324a(a)(3)). Therefore, employers are well advised to assign I-9 compliance to competent employees and establish a system that flags approaching expiration dates.

Civil penalties for knowing hire violations range from \$275 to \$2,200 per unauthorized worker for an employer’s first offense; \$2,200 to \$5,500 for the second offense; and \$3,300 to

\$11,000 for third and subsequent offenses. 8 C.F.R. § 274a.10(b)(1). Employers with multiple places of business can quickly find themselves in a very expensive range of fines if knowing hire offenses from different locations are all counted against the same entity. The statute offers a small glimmer of hope by providing that persons or entities “composed of distinct, physically separate subdivisions each of which provides separately for the hiring, recruiting, or referring for employment, without reference to the practices of, and not under the control of or common control with, another subdivision, each such subdivision shall be considered a separate person or entity.” 8 U.S.C. § 1324a(e)(4). The only appellate court ruling on this provision upheld

the government’s position that relief under this “separate entity rule” requires “complete separation of the subsidiaries from the parent or another subsidiary with regard to employment and oversight of employment decisions.” *Furr’s/Bishop’s Cafeteria’s, L.P. v. INS*, 976 F.2d 1366, 1369 (10th Cir. 1992). The existence of company-wide or even region-wide hiring policies and other employment practices may defeat separate entity treatment.

Multiple knowing hire or knowing employment offenses can lead to criminal penalties as well. Any person or entity that engages in a “pattern or practice” of knowingly hiring or knowingly continuing to employ unauthorized aliens can be fined up to \$3,000 for each such worker and imprisoned for up to six months for the entire pattern or practice. 8 U.S.C. § 1324a(f)(1). Immigration regulations define a “pattern or practice” as “regular, repeated, and intentional activities” as opposed to “isolated, sporadic, or accidental acts.” 8 C.F.R. § 274a.1(k). As a result, multiple instances of knowing hires or employment may be combined to support a pattern and practice charge. If not offered as part of the pattern itself, evidence of prior offenses would likely be offered pursuant to Rule 404(b), Fed.

R. Evid. As a matter of policy, ICE presents such knowing hire cases to the United States Attorney for criminal prosecution.

FELONIES AND FORFEITURE

Pursuant to 8 U.S.C. § 1324(a), it is a felony to knowingly 1) bring an illegal alien into the United States; 2) transport an illegal alien in order to further their unlawful presence; 3) conceal, harbor, or shield an illegal alien from detection; or 4) encourage or induce an alien to illegally enter the country. The IRCA specifically expanded this statute to cover employers. See *United States v. Kim*, 193 F.3d 567 (2nd Cir. 1999) (detailing amendments and legislative history). The term "harboring" encompasses conduct that tends to substantially facilitate an alien's remaining in the United States illegally and/or to prevent authorities from detecting his unlawful presence. *Id.* at 574. This includes acts such as: facilitating a change in identity, assisting in the procurement of false documents, providing housing, warning aliens about impending inspections and, in theory, employment. *Id.*

Courts do not appear to be comfortable with employment alone serving as sufficient grounds for conviction. In two separate convictions, courts found that the employers had substantially facilitated the aliens' illegal presence in the United States by means beyond the scope of employment. See *United States v. Zheng*, 306 F.3d 1080 (11th Cir. 2002) (employment and housing); *Kim*, 193 F.3d 567 (employment and change of identity). Even when more than simple employment is involved, the court may not find that the statute applies. In *United States v. Moreno-Duque*, 718 F.Supp. 254 (D. Vermont 1989), a construction contractor was charged under § 1324 for transportation of illegal aliens. The court found while the act of transportation and the illegality of the aliens was undeniable, substantial doubt remained as to whether the purpose of the transportation was to further the aliens' violation of the law by remaining illegally in the United States. The court was extremely concerned with regard to the potential for widely varying penalties under § 1324 and § 1324a for substantially similar conduct. *Id.*

The statute does contain one provision which specifically addresses employers. 8 U.S.C. § 1324 (a)(3)(A) provides that:

Any person who, during any 12-month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens described in subparagraph (B) shall be fined under Title 18 or imprisoned for not more than five years, or both.

While the "knowingly hire" terminology implies both actual and constructive knowledge, the subsequent inclusion of the "actual knowledge" requirement delineates the violation of this section from a § 1324a violation.

The law also provides more severe penalties for specific types of conduct. The maximum prison term increases from five to 10 years if the harboring conduct was "done for the purpose of commercial advantage or private financial gain." 8 U.S.C. § 1324(a)(1)(B)(i). In *United States v. Zheng*, 306 F.3d 1080, the appellate panel rejected the contention that the higher penalty was meant only for smugglers and not for employers. The *Zheng* panel specifically found the employer achieved commercial advantage and financial gain by paying the aliens low wages and not withholding taxes. *Id.* at 1086.

These concepts of commercial advantage and profit seem to have played a role in a more aggressive approach by prosecutors regarding forfeiture in cases of immigration violations. Federal law allows for the forfeiture of assets used in the commission of certain crimes as well as assets representing the proceeds of the criminal activity. 18 U.S.C. § 982 *et seq.* If an amount of criminal profit can be determined but assets traceable to the crime cannot be found, the law allows for a judgment to be taken by the government and executed against "substitute assets." 18 U.S.C. § 982(b)(1); 21 U.S.C. § 853(p).

In *United States v. Golden State Transportation*,⁴ the government sought to seize and forfeit company assets, including buses, real estate and bank accounts utilized to further the illegal activity. In a more recent suit against Tyson Foods, the government has gone even further, demanding the forfeiture of funds representing proceeds of the crime.⁵ The company and several of its executives and plant managers were charged with conspiring to smuggle illegal workers into the United States. A central theory of the government's case was that Tyson engaged in this conduct in order to meet production goals and cut costs in order to max-

imize profits. Then Assistant Attorney General Michael Chertoff asserted "the bottom line on the corporate balance sheet is no excuse for criminal conduct."⁶ *Id.* In court filings, Tyson accused the government of trying to use the smuggling case, together with Tyson's probation status from an unrelated case, to pressure the company into a \$100 million forfeiture — an amount more than 50 times larger than the record payment for an immigration violation.⁷ Tyson and three of the individual defendants were acquitted in March 2003 after a jury trial. Two other company officials pled guilty prior to trial.

RICO ACTIONS BY LEGAL WORKERS AND COMPETITORS

Tyson not only had to battle the federal government in court, but was also being sued by former employees. A group of former employees from a Tyson processing plant in Tennessee filed a civil RICO action that mirrored the indictment. See *Trollinger v. Tyson Foods, Inc.*, 214 F.Supp.2d 840 (E.D. Tenn. 2002). The complaint alleged that Tyson's illegal recruitment, harboring and use of unauthorized aliens resulted in depressed wages for legal workers — a violation of RICO, which essentially prohibits the conduct of activities affecting commerce "through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c). Racketeering activity can be comprised of a number of predicate crimes, from murder and kidnapping to illegal gambling, including "bringing in and harboring certain aliens" under 8 U.S.C. § 1324. 18 U.S.C. § 1961(F). Anyone injured by conduct which violates RICO can pursue a civil action against the offender for treble damages and injunctive relief under 18 U.S.C. § 1964(c), provided there is "a direct relation between the injury asserted and the injurious conduct alleged." *Holmes v. Securities*

Investor Protection Corp., 503 U.S. 258, 268 (1992).

The district court in *Trollinger* granted Tyson's motion to dismiss, finding the conclusion that the companies hiring of alleged illegal aliens depressed the plaintiff's wages "would require sheer speculation." 214 F. Supp. at 843. In so doing the *Trollinger* court followed the logic of another immigration-related RICO case by finding a "wide range of factors" influence wages in a particular industry. *Id.*, citing *Mendoza v. Zirkle Fruit Co.*, 2000 WL 33225470 (E.D. Wash. Sept. 27, 2000). These employers' victories were short-lived, however, as appellate courts reversed both dismissals, finding the legal workers sufficiently alleged direct injury as a result of the illegal immigration practices. See *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002); *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602 (6th Cir. 2004). The trend to permit such suits is continuing to build momentum. Citing the appellate decision in *Zirkle*, a district court recently refused to dismiss a class action suit brought by current and former employees of a carpet manufacturer under the same RICO theory. See *Williams v. Mohawk Industries*, 314 F. Supp.2d 1333 (N.D. Ga. 2004).



“...claiming it lost a competitive bid contract due to the defendant's use of low-wage illegal workers.”

While individual employees are the plaintiffs in the majority of these RICO cases, *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*, 271 F.3d 374 (2nd Cir. 2001), was brought by a business, claiming it had lost a bid contract due to its rival's use of low-wage illegal workers. The business specifically alleged its competitor gained an advantage by not withholding payroll taxes or workers' compensation insurance fees. *Id.* at 379. It also noted in its complaint that the defendant had been prosecuted by the Justice Department, near

the time the disputed contract was awarded, for hiring and continuing to employ undocumented workers. The appellate panel reversed the district court's dismissal, reasoning that an allegation of injury in head-to-head bidding was a sufficient to survive a motion to dismiss under the *Holmes* "direct relation" test. *Id.* at 382. Thus employers must be prepared for legal challenges from outside competition and the dissatisfied within, as well as Homeland Security and the Department of Justice.

PROCEDURE AND EVIDENCE

Although enforcement of the civil penalties for paperwork violations and knowing hire or knowing employment cases has been transferred to the DHS, the procedures historically used by the INS are still in place. Alleged violations and a proposed fine amount are detailed in a "Notice of Intent to Fine" (NIF) which is served on the employer. Employers can request and are often granted the opportunity to have a "pre-NIF" conference with DHS attorneys and agents. Once the NIF is served, the employer has 30 days to decide whether to request a hearing before an Administrative Law Judge (ALJ). 8 C.F.R. § 274a.9(d). DHS must then file a formal complaint, which triggers the assignment of the case to an ALJ. Although negotiated settlements can occur either before or after the complaint is filed, employers that request a hearing should anticipate additional inspections at their places of business as the government seeks to gain additional evidence or even add new charges to the case.

Procedural rules for these civil enforcement hearings are set forth at 28 C.F.R. § 68 and are similar to the Federal Rules of Civil Procedure. 8 USC § 1324a(e) also outlines the process in an abbreviated format. Importantly, the rules specifically allow for parties to move for "summary decision" where there is no genuine issue of material fact. 28 C.F.R. § 68.38(c). Hearings are adversarial and open to the public, with the Federal Rules of Evidence service as "a general guide." 28 C.F.R. §§ 68.39, 68.40. Appeals from the ALJ's decision can be taken to the Office of the Chief Administrative Hearing Officer (OCAHO) in Washington, D.C., which typically issues a final agency decision. 28 C.F.R. § 68.54. Under rare circumstances, the attorney general may himself issue an opinion, trumping the OCAHO determination. 28 C.F.R. § 68.55. As final agency decisions,

OCAHO opinions are printed in bound volumes (also available on WESTLAW) and may be appealed to the appropriate circuit court. 28 C.F.R. § 68.56.

The criminal violations, including the misdemeanor "pattern and practice" cases, are prosecuted by United States Attorneys Offices pursuant to the Federal Rules of Criminal Procedure. Thus the misdemeanor offense may be charged by information while felony charges must be presented to a grand jury unless the defendant waives this right.

One of the most important differences between the two types of cases centers around the availability of the unauthorized workers as witnesses. In the administrative cases, the hearsay statements of the aliens are often admitted despite the fact that the alien is unavailable to testify at the hearing because he or she has been deported. *See Walden Station*, 2000 WL 773098 (OCAHO); *China Wok* 1994 WL 269371 (OCAHO). These statements are often taken through an interpreter while the alien in custody and are often recorded only in summary fashion on a government form instead of being recorded electronically. *Id.*

In the criminal arena, at least one court has dismissed an indictment where the government deported aliens holding potentially exculpatory evidence resulting in their unavailability at trial. *See United States v. Nebraska Beef, Ltd.*, 194 F.Supp.2d 949 (D.Neb. 2002). The court found the government had acted in bad faith by deviating from its stated policy to ask questions designed to elicit exculpatory information, accurately record such information, and delay the removal of aliens possessing such information. *Id.* at 958. The court specifically noted the government could have sought material witness warrants to better preserve important testimony. *Id.*

While the government may hold aliens indefinitely pursuant to material witness warrants, the more recent practice has been to detain such aliens temporarily while video depositions can be conducted in accordance with 8 U.S.C. § 1324(d) and Fed.R.Crim.P. 15. In *United States v. Aguilar-Tamayo*, 200 F.3d 562, 564-566 (5th Cir. 2002), the court upheld a conviction on multiple counts of transporting and bringing unauthorized aliens into the United States, under 8 U.S.C. § 1324(a)(1) and (2), where a video deposition of a deported alien, taken pursuant to 8 U.S.C. § 1324(d), was intro-

duced into evidence. While it specifically rejected a confrontation clause constitutional argument, the circuit panel rebuked the government for failing to make any attempt to secure the witnesses and proffering the videotape alone. *Id.* Nonetheless, the error of admitting the tape, if indeed there was one, was deemed harmless given the overall strength of the prosecution's case. *Id.*

CONCLUSION

It is a simple fact that unauthorized aliens, occasionally employed with knowledge of their status, more often due to lax internal procedures, constitute a sizeable portion of the workforce in this country. Most employers, however, can conform their hiring practices and thus avoid costly penalties and criminal prosecutions. Key is the establishment of a proper program of compliance. For smaller businesses, this may be as simple as ensuring that a capable and trustworthy individual is responsible for initially obtaining required documentation and then periodically reviewing I-9's to ensure continued validity. Large corporations face a much more daunting and complex task. Nonetheless, appropriate steps can be taken to comply with these hiring provisions. Failure to take these steps invites legal action by the government, competitors and authorized workers.

1. Public Law No. 107-296.
2. ICE Press Release, ICE Agents Arrest Thirteen Illegal Aliens at Port Canaveral (4/6/2004).

3. See "Procedure and Evidence" section of this article for a discussion of the purpose and authority the Office of the Chief Administrative Hearing Officer (OCAHO).

4. *United States v. Golden State Transportation*, Indictment (Case No. 01-CR-01696, D. Ariz. 12/10/01).

5. *United States v. Tyson Foods, Inc.*, Indictment (Case No. 4:01-CR-61, E.D. Tenn. 12/19/01).

6. DOJ Press Release, "INS Investigation of Tyson Foods, Inc.," 10/19/2001.

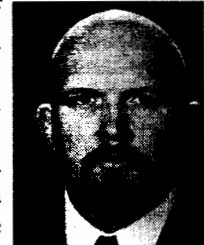
7. *United States v. Tyson Foods, Inc.* (Case No. 1:97-CR-00506, D.D.C. 12/29/97). In early 2002, the court was faced with a flurry of activity, as the government argued that probation should be withdrawn due to the alleged violations in Tennessee while Tyson countered with its "blackmail" claim.

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