

# Hiring Unauthorized Aliens

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Anne Sias, Esq.

asias@lewismckenna.com

Undocumented aliens<sup>1</sup> are plentiful and may be willing to work below the prevailing wage rate, but the mere hiring of these workers could subject an employer to serious legal consequences.

## The Legislative Landscape

There are numerous federal and state regulatory provisions that control this sector of the American workforce. They include state immigration compliance laws, Federal and state wage and hour acts, and Federal Homeland Security provisions. Among those that pinpoint the hiring practices is the Immigration Reform and Control Act of 1986 (IRCA). Under that law, an employer who has actual or constructive knowledge<sup>2</sup> of an employee's unauthorized status may face criminal and civil penalties.<sup>3</sup> Administrative fines currently span from \$250 to \$11,000 per undocumented alien, depending on the employer's prior offenses.<sup>4</sup> Additionally, an employer who evidences a pattern or practice<sup>5</sup> of violations may be criminally fined up to \$3,000 per undocumented alien and imprisoned for up to six months.<sup>6</sup>

## Enforcement is Ratcheting Up

IRCA enforcement has dramatically increased since the 2003 creation of Immigration and Customs Enforcement (ICE). From 2002 to 2006, criminal arrests increased from 25 to 716, while administrative arrests jumped from 485 to 3,667.<sup>7</sup> The arrests include corporate officers, managers, and contractors, as well as undocumented aliens. Although ICE focuses on worksites related to critical infrastructure and national security, agents also conduct investigations at traditional worksites. ICE, having found administrative fines ineffective, also pursues more serious charges where possible. Recently, the owner of an Indiana-based provider of stucco-related services faced 40 years in prison for money laundering, harboring and transporting illegal aliens, and making false statements in connection with an illegal employment scheme. As part of his plea agreement, the owner forfeited \$1.5 million, over 95% of the funds in his corporate and personal accounts, that the company allegedly made by undercutting competitors' bids by using cheaper illegal labor.<sup>8</sup> Increased enforcement is not the only recent change.

Legislators seem determined to increase contractor penalties for illegal hiring practices as well. The U.S. Senate unanimously passed an amendment to its minimum wage bill that would impose a 7-10 year government contract ban, not subject to

court appeal, on employers caught hiring illegal workers.<sup>9</sup> Other proposed legislation would increase the caps on IRCA's criminal penalties to \$50,000 per undocumented alien and one year in prison.<sup>10</sup> However, both of these proposed amendments would exempt from penalty those contractors voluntarily participating in a federal work authorization program, whereby employers can electronically verify the work eligibility of employees.<sup>11</sup>

### State and Local Practices

States and municipalities have also been considering and passing legislation restricting the hiring of undocumented aliens. Colorado law prohibits contractors employing illegal immigrants from participating in public contracts, provides for termination for breach if the contractor is found to violate the law, and bars such a contractor from public work for two years.<sup>12</sup> Georgia will require every public contractor, regardless of tier, to participate in a federal work authorization program to electronically verify information regarding all new employees.<sup>13</sup>

Private parties are also seeking redress for illegal hiring practices. In a Washington class action suit, employees won a \$1.3 million settlement after suing their employer for driving down wages by hiring undocumented workers.<sup>14</sup> In California, a temp agency sued a grower and two competitors on theories of state unfair-competition after the grower allegedly canceled an agreement with the Plaintiff so it could hire illegal aliens from competitors.<sup>15</sup>

### Steps to Consider to Avoid Exposure

This area of law will continue to evolve as more legislation is passed and verification systems go into place. Contractors need to be cognizant of changes to the law in jurisdictions in which they do business, especially on more highly regulated public jobs. Although electronic verification of work authorization is not yet required in most jurisdictions, contractors should consider enrolling in this free program, because it is likely to become mandatory at some point in the future and currently evidences a good faith effort to comply with laws concerning the employment of illegal aliens. Regardless of whether or not electronic verification is utilized, every employer should have a system in place for reviewing and retaining I-9 forms. Because IRCA covers constructive as well as actual knowledge, owners and contractors may want to consider including liability-limiting provisions in their contracts. Such provisions could require contractors and subcontractors to certify with every request for payment that I-9 forms have been properly completed and that the entity employs no one unauthorized to work under IRCA. As a further precaution, an indemnification clause could be included to cover any legal costs associated with a lower tier contractor's violation of hiring rules.

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<sup>1</sup> The terms "undocumented alien" and "unauthorized worker" include any foreign national illegally residing in the United States, either by illegally entering or legally entering but deliberately overstaying a visa. A number of documents may be used to evidence a foreign national's eligibility for employment in the United States, including a Permanent Resident (Green) Card, various INS

Employment Authorization Documents, or a foreign passport bearing a temporary work permit stamp. A complete list of acceptable documents may be found at 8 C.F.R. § 274a.2.

<sup>2</sup> Constructive knowledge may include situations where an employer: 1) fails to complete or improperly completes an I-9 form; 2) has information that indicates that the alien is not authorized to work; or 3) acts with reckless or 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. Constructive knowledge is most easily proven when an employer has been supplied information by the INS indicating that one or some of its employees are unauthorized for employment, yet does not take reasonable steps to reverify the employment eligibility of those employees. United States v. Aid Maintenance Company, Inc., OCAHO Case No. 94A00154 (July 18, 1997).

<sup>3</sup> Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a.

<sup>4</sup> Id. at § 1324a(e)(4)&(5).

<sup>5</sup> A “pattern or practice” refers to regular, repeated, and/or intentional activities. An employer who engages in a pattern or practice of violations loses the ability to argue as a defense that it has complied in good faith with employment verification obligations. See Smith, Alison M., CRS Report for Congress, *Unauthorized Employment of Aliens: Basics of Employer Sanctions* (June 29, 2005).

<sup>6</sup> Id. at § 1324a(f)(1).

<sup>7</sup> U.S. Immigration and Customs Enforcement Fact Sheets, *Worksite Enforcement*, Aug. 15, 2007, available at <http://www.ice.gov/pi/news/factsheets/worksite.htm>. Through July 31, 2007, ICE had already recorded 742 criminal arrests and 3,651 administrative arrests.

<sup>8</sup> U.S. Immigration and Customs Enforcement News Releases, *Business owner must forfeit \$1.5 million for conspiring to harbor illegal aliens*, Dec. 1, 2006, available at <http://www.ice.gov/pi/news/newsreleases/articles/061201fargo.htm>.

<sup>9</sup> S.AMDT.148 to H.R.2 and S.AMDT.100 (introduced Jan. 23, 2007 by Sen. Jeff Sessions, Ala.).

<sup>10</sup> S.AMDT.147 to H.R.2 and S.AMDT.100 (introduced Jan. 23, 2007 by Sen. Jeff Sessions, Ala.).

<sup>11</sup> Currently, the federal work authorization program is known as E-Verify, a free internet-based system that allows employers to verify Social Security Numbers and other Form I-9 information in a matter of seconds. A Photo Screening Tool has recently been added to the program, allowing employers to check a new hire’s photo on an Employment Authorization Document or Permanent Resident Card (Green Card) against the images stored in the Department of Homeland Security’s immigration databases. Employers may register at <https://www.vis-dhs.com/EmployerRegistration/StartPage.aspx?JS=YES>.

<sup>12</sup> C.R.S. §§ 8-17.5-101 & 102 (effective Aug. 9, 2006).

<sup>13</sup> Georgia Security and Immigration Compliance Act of 2006, Senate Bill 529 of the 2006 Georgia General Assembly, enacted as Act 457, Ga. Code § 13-10-91. The Employment Eligibility Verification/Basic Pilot Program operated by the U.S. Citizenship and Immigration Services Bureau can be accessed at <https://www.vis-dhs.com/EmployerRegistration>.

<sup>14</sup> Mendoza v. Zirkle Fruit Company, E.D. Wash, No. 00 CY 3024-FVS (Jan. 20, 2006).

<sup>15</sup> Global Horizons Inc. v. Munger Brothers LLC, Cal. Sup. Ct. for Kern County, No. S-1500-cv-258904-SPC (2006). Complaint available at [http://irli.org/CA\\_GlobalHznsVMungerBrost.pdf](http://irli.org/CA_GlobalHznsVMungerBrost.pdf).

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