Recordkeeping and Disclosure Requirements

The Equal Employment Opportunity Commission has the power to require recordkeeping. Every employer must make and keep payroll and other personnel records for 3 years. The records must contain basic information, such as name, address and date of birth, as well as rate of pay and compensation earned each week. 29 U.S.C. 626(a), 29 C.F.R. 1627.3.

Employers must also keep a record for 1 year of all job applications, resumes, or any other form of employment inquiry whenever submitted in response to an advertisement or anticipated job openings, including records pertaining to the failure or refusal to hire any individual. 29 C.F.R. 1627.3.

Employers must also keep records pertaining to promotion, demotion, transfer, selection for training, layoff, recall or discharge of any employee, job orders submitted by the employer to an employment agency or labor organization for recruitment of personnel for job openings, test papers completed by applicants or candidates for any position that disclose the results of any employer administered aptitude or other employment test considered by the employer in connection with any personnel action, and any advertisements or notices to the public or to employees relating to job openings, promotions, training programs, or opportunities for overtime work. 29 C.F.R. 1627.3(b)(1).

Every employer is required to keep on file copies of any employee benefit plans, such as pension and insurance plans, as well as copies of any seniority systems and merit systems that are in writing, for the full period the plan or system is in effect and for at least 1 year after its termination. If the plan or system is not in writing, a memorandum fully outlining the ten-as of such plan or system and the manner in which it has been communicated to the affected employees, together with notations relating to any changes or revisions thereto, shall be kept on file for a like period. 29 C.F.R. 1627.3(b)(2).

A record related to any enforcement action must be kept until a final disposition is made. 29 C.F.R. 1627.3(b)(3).

Employment agencies and labor organizations must keep similar specific records as well. 29 C.F.R. 1627.4, 1627.5.

Notices must be posted in conspicuous places by every employer, employment agency, and labor organization that has an obligation under the act. 29 C.F.R. 1627.10.

Enforcement and Penalties

The act is enforced consistent with procedures provided in the Fair Labor Standards Act. The Equal Employment Opportunities Commission is responsible for enforcing the act. Amounts owed to a person as a result of a violation of the act are deemed to be unpaid minimum wages or unpaid overtime compensation. Liquidated damages are only available in cases of willful violations of the act. A court

enforcing the act has authority to grant judgements compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under the act. Before instituting any action under this section, the Equal Employment Opportunity Commission must attempt to eliminate the discriminatory practices or practices alleged, and to gain voluntary compliance with the requirements of the act, through informal methods of conciliation, conference, and persuasion. 29 U.S.C. 626(b).

Criminal penalties may be imposed if an individual forcibly resists, opposes, impedes, intimidates, or interferes with a duly authorized representative of the EEOC while engaged in the performance of duties under the act. Violators are subject to a fine of not more than $500 or imprisonment for not more than one year, or both; however, no person may be imprisoned under this section except when there has been a prior conviction of the act. 29 U.S.C. 629.

There is a private right of action under the act. Any person aggrieved may bring a civil action in any court of competent jurisdiction. However, the private right of action by an individual will terminate upon the commencement of an action by the EEOC to enforce the right of such employee under the act. 29 U.S.C. 626(c).

Americans With Disabilities Act (42 U.S.C. 12101 et seq.)

Prohibits employment discrimination (and discrimination in other areas) against individuals with disabilities, and requires employers to make "reasonable accommodations" for disabilities unless doing so could cause undue hardship to the employer.

Coverage

Title I (Employment) does not apply to employers with fewer than 15 employees, private membership clubs, the federal government or corporations wholly owned by the government, or Indian tribes; does not apply to employers with fewer than 25 employees prior to July 7, 1994; after that date, will not apply to employers with fewer than 15 employees. 42 U.S.C. 12111.

Definitions

Employee: An individual employed by an employer. 42 U.S. C. 12111(4).

Employer: A person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for 2 years following the effective date of this title (7/26/92), an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, or an agent of such person. An employer does not include the United States, a corporation wholly owned by the government of the United States, a Native American tribe, or a bona

fide private membership club (other than a labor organization) that is exempt from taxation under the Internal Revenue Code. 42 U.S.C. 12111(5).

Recordkeeping and Disclosure Requirements

Employers are required to preserve personnel records for 1 to 3 years. 29 C.F.R. 1602.14.

Enforcement and Penalties

Same enforcement as Title VII of the Civil Rights Act. 42 U.S.C. 12117.

Penalties are compensatory and equitable relief, attorney fees and costs. 42 U.S.C. 12117(a).

Section 503 of the Rehabilitation Act of 1973 (29 U.S.C. 793)

Prohibits government contractors and subcontractors from discriminating in employment on the basis of disability, and requires them to take affirmative action to employ, and advance in employment, individuals with disabilities.

Coverage

Applies to all government contracts and subcontracts for the furnishing of personal property and supplies or services (including construction) in excess of $10,000. Does not differentiate by firm size. 29 U.S.C. 793(a).

Definitions

None relevant.

Recordkeeping and Disclosure Requirements

Employers are required to maintain for 1 year records regarding complaints and actions taken on the complaints. 41 C.F.R. 60-741.52.

Enforcement and Penalties

The Department of Labor has authority to enforce the act. Complaints may be filed with the Director of the Office of Federal Contract Compliance Programs, Department of Labor. Complaints are then referred to the contractor for resolution. If the complainant is dissatisfied with the contractor's resolution, there is a DOL investigation. The regulations provide for administrative hearings and judicial appeal. 41 C. F. R. 60-741, subpart B.

Anti-Retaliatory Provision of the Surface Transportation Assistance Act (49 U.S.C. App 2305)

Prohibits the discharge or other discriminatory action against an employee for filing a complaint or instituting a proceeding relating

to a violation of a commercial motor vehicle safety rule or regulation or for refusing to operate a vehicle that is in violation of such a rule or regulation, or because of fear of serious injury due to an unsafe condition.

Coverage

Covers private-sector employees of commercial motor carriers who in the course of their employment directly affect commercial motor vehicle safety, and covers employees working with motor vehicles with gross vehicle weight ratings of 10,000 or more pounds, those designed to transport more than 10 passengers including the driver, and those used in the transport of hazardous materials. Does not differentiate by firm size. 49 U.S. C. app. 2301 (1),(2).

Definitions

Employee: (1) A driver of a commercial motor vehicle (including an independent contractor while in the course of personally operating a commercial motor vehicle), (2) a mechanic, (3) a freight handler, or (4) any individual, other than an employer, who is employed by a commercial motor carder and who in the course of his or her employment directly affects commercial motor vehicle safety; but such term does not include employees of federal, state, or local governments who are acting within the course of such employment. 29 C.F.R. 1978.101.

Employer: Any person engaged in a business affecting commerce who owns or leases a commercial motor vehicle in connection with that business, or assigns employees to operate such a vehicle in commerce, but such term does not include federal, state, or local governments. 49 U.S.C. app. 2301.

Recordkeeping and Disclosure Requirements

None.

Enforcement and Penalties

The Department of Labor has authority to enforce the act. An employee or someone on the employee's behalf may file a complaint with the Occupational Safety and Health Commission within 180 days after a violation occurs. 29 C.F.R. 1978.102. The Commission is required to investigate and gather data. 29 C.F.R. 1978.103. After the investigation, and within 60 days of filing of the complaint, the Assistant Secretary must issue written findings as to whether there is reasonable cause to believe that a violation has occurred. If he finds reasonable cause, he shall accompany his findings with a preliminary order. The order will include, where appropriate, a requirement that the named person abate the violation, reinstate the complainant to his or her former position, together with compensation (including back pay), and payment of compensatory damages. At complainant's request, the amount awarded may also include the complainant's costs and expenses (including attorney's fees) reasonably incurred filing the complaint. 29 C.F.R. 1978.104.

Within 30 days of receipt of the findings or preliminary order the complainant or the named person, or both, may file objections to the findings or preliminary order and request a hearing on the record. 29 C.F.R. 1978.105

The administrative law judge (ALJ) is required to issue a decision within 30 days after the close of the record. The decision must contain appropriate findings, conclusions, and, if a violation is found, an order pertaining to the remedy which, may provide for reinstatement of a discharged employee and may issue complainant's costs and expenses if complainant prevailed. Within 120 days after the issuance of the ALJ's decision and order, the Secretary shall issue a final decision and order. 29 C.F.R. 1978.109. Within 60 days of a final order, any person adversely affected or aggrieved may file a position for review with the U.S. Court of Appeals for the circuit in which the violation occurred. Whenever any person fails to comply with a preliminary order of reinstatement, or a final order or the terms of a settlement agreement, the Secretary may file a civil action seeking enforcement of the order in federal district court. 29 C.F.R. 1978.113.

If, in response to a complaint the Secretary determines a violation has occurred he shall order (i) the person who committed such violation to take affirmative action to abate the violation; (ii) such person to reinstate the complainant to complainant's former position together with the compensation (including back pay), terms, conditions, and privileges of the complainant's employment, and (iii) compensatory damages. The Secretary, at the request of the complainant, may assess a sum equal to the aggregate amount of all costs and expenses reasonably incurred by the complainant in bringing the complaint. 49 U.S.C. App. 2305(c)(2)(B).

Occupational Safety and Health Act (29 U.S.C. 651 et seq.)

Requires employers to provide employees with work and a workplace free from recognized hazards that can cause death or serious physical harm; provides for the establishment of safety and health standards that employers and employees must adhere to.

Coverage

Applies to all employment performed in a workplace in the United States and certain enumerated commonwealths, territories and possessions. Self-employed persons are not covered. The act also does not cover safety in industries regulated by other federal agencies, such as mining and much of the nuclear industry, for which safety is regulated by other federal agencies. It applies to employers regardless of size, but appropriations legislation has limited OSHA inspection activity with respect to small, low-hazard businesses. 29 U.S.C. 653.

Definitions

Employee: A person employed by a business that affects commerce. 29 U.S.C. 652.

Employer: A person engaged in a business affecting commerce who has employees, but does not include the United States or any state or political subdivision of a state. 29 U.S.C. 652.

Recordkeeping and Disclosure Requirements

Every employer must keep and make available records relating to occupational illnesses and injuries in the manner specified by regulations in 29 C.F.R. 1904. Among other things, OSHA regulations require employers to keep logs and summaries of occupational illness and injuries; to disclose certain injury, illness, and exposure records to OSHA, employees, and their representatives; and to make an oral report to OSHA of any incident resulting in the death of one or more employees or the inpatient hospitalization of three or more employees. 29 U.S.C. 657(c).

In addition, the Department of Labor has issued regulations requiring recordkeeping in connection with specific health or safety hazards e.g., in connection with employee exposure to particular toxic substances in the workplace.

Enforcement and Penalties

The Secretary of Labor has the authority to inspect and investigate workplaces. If the Secretary finds a violation, he may issue a citation (which provides a period for correction) and propose a penalty and provide a period for the employer to contest. If an employer falls to notify the Secretary that he intends to contest within 15 days and an employee has not informed the Secretary that they consider the time for abatement to be unreasonable, the order becomes final and is unappealable. If the employer or an employee notifies the Secretary of intention to contest, a hearing is set before the Occupational Safety and Health Commission. If after a final order is issued the Secretary has reason to believe an employer has failed to correct a violation for which a citation has been issued within the stated period, the employer is liable for additional penalties. If an employer shows a good faith effort to comply with the abatement requirements of a citation, and the abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing, shall issue an order g or modifying the abatement requirements in such citation. 29 U.S.C. 659.

The potential civil penalty for willful violations is $70,000, with a $5,000 minimum. Maximum available penalty for serious and other-than-serious violations is up to $70,000 for each repeat violation, and up to $7,000 for failure to post required documents. 29 U.S.C. 666.

Any employer who willfully violates any standard, rule, order, or regulation and that violation caused death to any employee, shall, upon conviction, be punished by a fine of up to $250,000 for an individual and $500,000 for an organization or by imprisonment for not more than 6 months, or by both; except that if the conviction is for a

violation committed after a first conviction of such person, punishment shall be imprisonment for up to one year. 29 U. S.C. 666.

Any person who gives advance notice of any inspection to be conducted under the act, without authority from the Secretary or his designees, is subject, upon conviction, to a fine of up to $250,000 for an individual and $500,000 for an organization or imprisonment for up to six months, or both. 29 U.S.C. 666.

Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to the act shall, upon conviction, be subject to a fine of up to $100,000 for an individual and $200,000 for an organization or imprisonment for up to 5 years, or both. 29 U.S.C. 666.

Federal Mine Safety and Health Act (30 U.S. C. 801 et seq.)

Requires mine operators to comply with health and safety standards and requirements established to protect miners.

Coverage

Applies to all coal and other mines, the products of which enter interstate commerce, or the operations or products of which affect interstate commerce, and each operator of a mine, and every miner working in a mine. Does not differentiate by size of business. 30 U.S. C. 801, 803.

Definitions

None relevant.

Recordkeeping and Disclosure Requirements

Each operator is required to maintain at the mine office a supply of Mine Accident, Injury, and Illness Report Form 7000-1, and to report each accident, occupational injury, or occupational illness at the mine. 30 U.S.C. 813(h), 30 C.F.R. 50.20.

Enforcement and Penalties

Authorized representatives of the Secretary of Labor are required to make frequent inspections and investigations of health and safety conditions, including causes of accidents in mines. 30 U.S.C. 813(a).

The Secretary of Labor while conducting an investigation of any accident or other occurrence may hold hearings, and sign and issue subpoenas for attendance and testimony of witnesses and the production of documents. 29 U.S.C. 813(b).

Whenever a representative of the miners or a miner himself has reasonable grounds to believe that a violation of a mandatory health or safety standard exists, the representative or the miner has a right to obtain an immediate inspection by giving notice to the Secretary or

his representative. If, upon investigation, the Secretary finds a violation of a mandatory health or safety standard, he shall issue a citation to the operator, fixing a reasonable time for abatement. If the violation has not been abated in the time prescribed and no extension is appropriate, an authorized representative of the Secretary may issue a withdrawal order (an order withdrawing everyone from the mine and prohibiting all but specified individuals from entering the mine) until the violation is abated. A representative of the Secretary can also issue withdrawal orders when an imminent danger is discovered, or for certain violations by an operator who has been determined to have a pattern of violations. A representative of the Secretary can require that a miner found lacking in safety training be withdrawn from the mine until such training is received. While the miner is receiving training and prohibited from entering the mine, he may not be discharged, or discriminated against and may not lose compensation. 30 U.S.C. 813(g).

The civil penalty for violation of the act or a mandatory health or safety standard is a fine of up to $50,000 for each violation. The civil penalty for failure to correct a violation for which a citation has been issued within the time provided for correction is a fine of up to $5,000 for each day during which the violation continues. 30 U.S.C. 820(a). Miners may be fined $250 for willful violation of smoking standards. 30 U.S.C. 820(g).

Any operator who willfully violates a mandatory health or safety standard or knowingly fails or refuses to comply with any order to correct a violation is, upon conviction, subject to a fine of up to $250,000 for an individual and $500,000 for an organization, or imprisonment for up to one year, or both; except that if the conviction is for a violation committed after the first conviction of such operator under the act, punishment shall be imprisonment for up to 5 years. 30 U.S.C. 820(d).

In addition, civil penalties may be assessed and criminal proceeding pursued against corporate directors, officers, or agents who knowingly or willfully violate mandatory standards or fail to comply with orders. 30 U.S.C. 820(c).

A person who gives advance notice of any inspection conducted under the act is, upon conviction, subject to a fine of up $250,000 for an individual, imprisonment for not more than six months, or both. 30 U.S.C. 820(e).

Whoever knowingly makes any false statement or representation in any application, record, or other document filed or required by the act is, upon conviction, subject to a fine of up to $250,000 for an individual and $500,000 for an organization, imprisonment for not more than 5 years, or both. 30 U.S.C. 820(f).

Drug Free Workplace Act (41 U.S.C. 701 et seq)

Requires federal contractors and federal grantees to take certain steps to maintain a drug free workplace.

Coverage

Applies to all federal grantees and federal contractors with contract amounts of $25,000 or more. 41 U.S.C. 701, 702.

Definitions

Employee: The employee of a grantee or contractor directly engaged in the performance of work pursuant to the provisions of the grant or contract. 41 U.S. C. 706.

Recordkeeping and Disclosure Requirements

Federal grantees and contractors must publish a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the grantee's or contractor's workplace and specifying the actions that will be taken against employees for violations of such prohibition. 41 U.S.C. 701(a)(1)(A),(B), 702(a)(1)(A),(B).

Grantees and contractors must offer drug-free awareness programs to inform employees about (i) the dangers of drug abuse in the workplace, (ii) the grantee's or contractor's policy of maintaining a drug-free workplace, (iii) any available drug counseling, rehabilitation, and employee assistance programs, and (iv) the penalties imposed upon employees for drug abuse violations. 41 U.S.C. 701(a)(1)(A),(B), 702(a)(1)(A),(B).

The grantee or contractor must notify the employee that, as a condition of employment, the employee must abide by the terms of the grant or contract and must notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than 5 days after such conviction. 41 U.S.C. 701(a)(1)(A),(B), 702(a)(1)(A),(B).

The contractor or grantee must notify the contracting or granting agency within 10 days after receiving notice of a conviction from an employee or otherwise receiving actual notice of such conviction. 41 U.S. C. 701(a)(1)(A),(B), 702(a)(1)(A),(B).

The contractor or grantee must impose a sanction on, or require satisfactory participation in a drug abuse assistance or rehabilitation program by, any employee who is so convicted, and such employee must make a good faith effort to continue to maintain a drug-free workplace through implementation of provisions of the act. 41 U.S.C. 701(a)(1)(A),(B), 702(a)(1)(A),(B).

Enforcement and Penalties

Contracting agencies enforce the act. If a contracting officer determines, in writing, that cause for suspension of payments, termination, or suspension or debarment exists, appropriate action shall be initiated by a contracting officer of the agency. Upon issuance of any final decision under this subsection requiring debarment of a contractor or individual, such contractor or individual shall be ineligible for award of any contract by any federal agency,

and for participation in any future procurement by any federal agency for a period specified, not to exceed 5 years. 41 C.F.R. 701(b)(2),(3).

Each grant or contract awarded by a federal agency shall be subject to suspension of payments under the grant or contract, or termination, or both, and the contractor or grantee shall be subject to suspension or debarment if the head of the agency determines that (1) the contractor or grantee has made a false certification; (2) the contractor or grantee has failed to carry out the requirements of the contract relating to notice of a drug free policy and setting up of a drug free awareness program; or (3) such a number of the employees of the contractor or grantee have been convicted of violations of criminal drug statutes for illegal activities occurring in the workplace as to indicate the contractor or grantee has failed to make a good faith effort to provide a drug-free workplace as required by the act. 41 U.S.C. 701(b), 702(b).

National Labor Relations Act (29 U.S. C. 151 et seq.)

Protects certain rights of workers, including the right to organize and bargain collectively through representation of their own choice.

Coverage

Applies to all employers and employees in their relationships with labor organizations whose activities affect commerce. Does not differentiate by f= size. 29 U.S.C. 141(b).

Definitions

Employer: Any person acting as an agent of an employer, directly or indirectly, but does not include the United States or any wholly owned government corporation, or any Federal Reserve bank, or any state or political subdivision thereof, or any person subject to the Railway Labor Act, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization. 29 U.S.C. 152.

Employee: Includes any employee, and is not limited to the employees of a particular employer, unless the act explicitly states otherwise, and includes any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but does not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his or her home, or any individual employed by his or her parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, or by any other person who is not an employer as herein defined.

Recordkeeping and Disclosure Requirements

None.

Enforcement and Penalties

The National Labor Relations Board has authority to enforce the act. Whenever it is charged that any person has engaged or is engaging in any unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, has the power to issue a complaint stating the charges in that respect and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency. No complaint may be issued, however, for any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board, unless the aggrieved person was prevented from filing such charge by reason of service in the armed forces, in which event the 6-month period shall be computed from the day of his discharge. 29 U.S.C. 160(b).

Any person who willfully resists, prevents, impedes, or interferes with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this act is subject to a fine of not more than $5,000 or imprisonment for up to 1 year, or both. 29 U.S.C. 162.

The Board has authority, upon issuance of a complaint charging that any person has engaged or is engaging in an unfair labor practice, to seek appropriate temporary relief or a restraining order in federal district court. 29 U.S.C. 162.

Labor-Management Reporting and Disclosure Act (29 U.S.C. 401 et seq.)

Requires reporting and disclosure of certain financial transactions and administrative practices of labor organizations and employers; establishes basic rights for members of labor organizations; and provides standards for the election of officers of labor organizations.

Coverage

Applies to unions and any employer engaged in an industry affecting commerce that may deal with any labor organization concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. The United States, states, and their political subdivisions are excluded. Does not differentiate by firm size. 29 U.S.C. 402.

Definitions

Employee: Any individual employed by an employer, and includes any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice or because of exclusion from a labor organization in any manner or for any reason inconsistent with the requirements of the act. 29 U.S.C. 402(f).

Employer: Any employer or any group or association of employers engaged in an industry affecting commerce (1) which is, with respect to employees engaged in an industry affecting commerce, an employer within the meaning of any law of the United States relating to the employment of any employees; or (2) which may deal with any labor organization concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, and includes any person acting directly or indirectly as an employer or as an agent of an employer in relation to an employee, but does not include the United States or any corporation wholly owned by the United States, or any state or political subdivision thereof. 29 U.S.C. 402(e).

Recordkeeping and Disclosure Requirements

Every employer who in any fiscal year made (1) any payment or loan, direct or indirect, of money or other thing of value (including reimbursed expenses), or any promise or agreement therefore, to any labor organization or officer, agent, shop steward, or other representative of a labor organization, or employee of any labor organization, except certain payments or loans such as those made by a bank or other credit institution; (2) any payment (including reimbursed expenses) to any of his or her employees, or any group or committee of such employees to persuade other employees to exercise or not to exercise, or as the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing unless such payments were contemporaneously or previously disclosed to such other employees; (3) any expenditure, during the fiscal year, where an object thereof, directly or indirectly, is to interfere with, restrain, or coerce employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing, or is to obtain information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding; (4) any agreement or arrangement with a labor relations consultant or other independent contractor or organization pursuant to which such person undertakes activities where an object thereof, directly or indirectly, is to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing, or undertakes to supply such employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding; or (5) any payment (including reimbursed expenses) pursuant to an agreement or arrangement described in (4) above is required to file with the Secretary of Labor a report showing in detail the date and amount of each such payment, loan, promise, agreement, or arrangement and the name, address, and position, if any, in any firm or labor organization of the person to whom it was made and a full explanation of the circumstances of all such payments, including the terms of any agreement or understanding pursuant to which they were made. 29 U.S.C. 433.

Every person who pursuant to any agreement or arrangement with an employer undertakes activities where an object is, directly or indirectly, (1) to persuade employees to exercise or not to exercise, or persuade employees as to the mariner of exercising, the right to organize and bargain collectively through representatives of their own choosing; or (2) to supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding is required to file within 30 days after entering into such agreement or arrangement a report with the Secretary containing the name under which such person is engaged in doing business and the address of its principal office, and a detailed statement of the terms and conditions of such agreement or arrangement. Every such person shall Me annually, with respect to each fiscal year during which payments were made as a result of such an agreement or arrangement, a report with the Secretary containing a statement (A) of its receipts of any kind from employers on account of labor relations advice or services, designating the sources thereof, and (B) of its disbursements of any kind, in connection with such services and the purposes thereof. In each such case such information shall be set forth in such categories as the Secretary prescribes. 29 U.S.C. 433.

Enforcement and Penalties

The Department of Labor has authority to enforce the act. Whenever it appears that any person has violated or is about to violate any of the provisions of Title II of the act, including the reporting and disclosure requirements, the Secretary of Labor may bring a civil action for such relief (including injunctions) as may be appropriate. 29 U. S.C. 440.

The Secretary has the power when he believes it necessary in order to determine whether any person has violated or is about to violate any provision of the act (except subchapter II (Bill of Rights of members of labor organizations)) to make an investigation and in connection therewith to enter such places and inspect such records and accounts and question such persons as he deems necessary to enable him to determine the facts. The Secretary may report to interested persons or officials concerning the facts required to be shown in any report or any other matter which he deems to be appropriate as a result of such an investigation. The Secretary may issue subpoenas for the testimony of witnesses and production of records. 29 U.S.C. 521.

Willful violations of bonding provisions are punishable by a fine of up to $10,000, or imprisonment for up to 1 year, or both. 29 U.S.C. 439(a). There is a $10,000 penalty and/or 5 years imprisonment for violation of fiduciary provisions. 29 U.S.C. 501(c).

Any person who makes a false statement or representation of a material fact, knowing it to be false, or who knowingly fails to disclose a material fact, in any document, report, or other

information required under the act is subject to a fine of up to $10,000, or imprisonment for up to 1 year, or both. 29 U.S.C. 439(b).

Any person who willfully makes a false entry in or willfully conceals, withholds, or destroys any books, records, reports, or statements required to be kept by any provision of the act is subject to a fine of up to $10,000, or imprisonment for up to 1 year, or both. 29 U.S.C. 439(c).

Each individual required to sign reports under the act is personally responsible for the filing of such reports and for any statement contained therein which he knows to be false. 29 U.S.C. 439(d).

There is a private right of action under the act for individuals to sue labor organizations. 29 U.S.C. 412.

Railway Labor Act (45 U.S.C. 151 et seq.)

Sets out the rights and responsibilities of management and workers regarding labor organizing and labor disputes in the rail and airline industries and establishes the National Railroad Adjustment Board and the National Mediation Board to help resolve labor disputes and prevent work stoppages in these industries.

Coverage

The act applies only to collective-bargaining agreements covering employees of rail and air carriers. Does not differentiate by firm size. Does not cover certain rail operations in coal mines. 45 U.S.C. 151.

Definitions

Employee: Every person in the service of a carrier who does work defined as that of an employee in the orders of the Interstate Commerce Commission. 45 U.S.C. 151(fifth).

Recordkeeping and Disclosure Requirements

The act requires carriers to post notification to employees that all disputes between the carrier and its employees will be handled according to the requirements of the act. Carriers must post, verbatim, the act's provisions relating to representation, organization, and collective bargaining, and the prohibition against agreements to join or not join unions. 45 U.S.C. 152(eighth).

Enforcement and Penalties

The representative of a carrier's employees may apply to the United States Attorney to institute and prosecute all necessary proceedings for the enforcement of the act's provisions and for the punishment for all violations, and for costs and expenses. 45 U.S.C. 152 (tenth).

A willful violation is a misdemeanor. Upon conviction, an offender is subject to a fine of not less than $1,000 nor more than $20,000, or imprisonment, or both. 45 U.S.C. 152(tenth).

Employee Polygraph Protection Act (29 U.S.C. 2001 et seq.)

Prohibits the use of lie detectors for preemployment screening or during the course of employment.

Coverage

Applies to any employer engaged in or affecting commerce or in the production of goods for commerce. 29 U.S.C. 2002. The act applies to all employees of covered employers regardless of their citizenship status and to foreign corporations operating in the United States. 29 C.F.R. 801.3. It does not apply to federal, state, or local government employees. It applies to all other industries with the specific exception of polygraph examinations given by the federal government in the performance of any counterintelligence function, to experts under contract to the Defense Department, or any of their contractors, or any experts or contractors working for the Department of Energy in connection with atomic energy defense. It also does not apply to the examination in the performance of any intelligence or counterintelligence function, of anyone employed by, consulting for, assigned to, or detailed to the National Security Agency, Defense Intelligence Agency, Central Intelligence Agency, or under contract with the Federal Bureau of Investigation. Does not differentiate by firm size. 29 U.S.C. 2006.

Definitions

Employee: Includes any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee. 29 U.S.C. 2001.

Recordkeeping and Disclosure Requirements

Every employer subject to the act shall post and keep posted a notice explaining the act. Records must be kept for 3 years from the date the examination was conducted. The employer must keep, in connection with an ongoing investigation involving economic loss or injury, the statement that sets forth the specific incident or activity under investigation and the basis for testing that particular employee; in connection with an investigation of criminal or other misconduct involving, or potentially involving, loss or injury to the manufacture, distribution, or dispensing of a controlled substance, records specifically identifying the loss or injury in question and the nature of the employee's access to the person or property that is the subject of the investigation; with respect to employees examined under any exemptions for private employers, a copy of the written statement that sets forth the time, place, and lights of the examines; a copy of the notice to the examiner of persons to be examined; and all opinions and reports prepared by the examiner. The examiner himself or herself must keep copies of all written opinions, reports, charts, written questions, lists, and other records relating to

polygraph tests. 29 C.F.R. 801.30.

Enforcement and Penalties

The Department of Labor has authority to enforce the act. An employer who violates any provision of the act may be assessed a penalty of not more than $10,000. 29 U.S. C. 2005(b), (c).

The Secretary of Labor may issue subpoenas to compel attendance at any hearing or investigation. Federal district court may issue temporary or permanent restraining orders and injunctions, and such legal or equitable relief incident thereto as is appropriate, including, but not limited to, employment, reinstatement, promotion and the payment of lost wages and benefits. 29 U.S.C. 2004(b).

The rights and procedures provided by the act may not be waived by contract or otherwise, unless such waiver is part of a written settlement agreed to an signed by the parties to the pending action or complaint under the act. 29 U.S.C. 2005(d).

There is a private right of action under the act. An employer who violates this law is liable to the employee or the prospective employee affected by such violation for such legal or equitable relief as may be appropriate, including, but not limited to employment, reinstatement, promotion, and the payment of lost wages and benefits. No such action may be commenced more than 3 years after the date of the alleged violation. 29 U.S.C. 2005(c).

Veterans Reemployment Rights Law (38 U.S.C. 4301 et. seq.)

Provides reemployment rights for people returning from active duty or reserve training in the armed forces or National Guard.

Coverage

Applies to all employers, whether private or public organizations, including the United States and the states and their subdivisions. Covers all veterans who are discharged honorably in any of the services including reserves, Public Health, and National Guard. Until July 26, 1994, it applies to employers having 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year. On and after July 26, 1994, it applies to employers having 15 or more employees for 20 or more such weeks. 38 U.S.C. 4307 (c)(1)(A),(B).

Definitions

Employer: Includes agent of employer; does not include the United States, a corporation wholly owned by the government of the United States, an Indian tribe, or a bona fide private membership club (other than a labor organization) that is exempt from taxation under the Internal Revenue Code for purposes of complying with the requirement that employers make reasonable accommodation for disabled veterans. 38 U.S.C. 4307(c)(1)(A),(B).

Recordkeeping and Disclosure Requirements

None.

Enforcement and Penalties

The act is enforced through filing suit in court. Upon application to the United States attorney or comparable official for any district in which such private employer maintains a place of business, or in which such state or political subdivision thereof exercises authority or carries out its functions, by any person claiming to be entitled to the benefits provided by the act, such United States attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to require such employer to comply with the act. No fees or court costs may be assessed against any person who applies for such benefits. No state statute of limitations applies to any proceedings under the act. 38 U.S.C. 4302.

If the employer, who is a private employer or a state or political subdivision, fails or refuses to comply with the act, the district court of the United States for any district in which such private employer maintains a place of business, or in which such state or political subdivision thereof exercises authority or carries out its functions, has the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. Any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits provided for in the act. 38 U.S. C. 4302.

Employment Provisions of the Immigration and Nationality Act, as Amended by the Immigration Reform and Control Act (8 U.S.C. 1101 et seq.)

Prohibits the hiring of illegal aliens and imposes certain duties on employers in hiring; prohibits employment discrimination against legal aliens; and authorizes but limits the use of imported temporary agricultural workers.

Coverage

Applies to all employers without regard to industry or size. However, special provisions are made for the hiring of people in certain occupations. For example, any employer may file a petition with the Attorney General to hire aliens who are outstanding professors or teachers, multinational executives or managers, members of the professions with advanced degrees or aliens of exceptional ability, skilled workers or professionals, or certain unskilled laborers. 8 U.S.C. 1154(a)(1)(D); 8 C.F.R. 204.5(c). A group or association of employers of seasonal agricultural workers may request the Secretaries of Labor and Agriculture to raise the number of such

workers allowed into the country to perform such services based on a showing of need. 8 U.S.C. 1161 (a)(7)(A).

Definitions H-2A worker: A non-immigrant coming temporarily to the United States to perform agricultural labor or services. 8 U.S.C. 1101(a)(1)(ii)(a), 1188(i)(2).

Recordkeeping and Disclosure Requirements

Verification of Employment Eligibility: (1) A person or entity that hires or recruits or refers for a fee an individual for employment must ensure that the individual properly fills out section 1 of Form I-9 and presents evidence of identity and employment eligibility. Employers or their agents must physically examine documentation and complete section 2 of Form I-9. (2) If an individual's employment authorization expires, employer, recruiter, or referrer must reverify on Form I-9 that the individual is still authorized to work. 8 C.F.R. 274a.2.

A person or entity who employs special agricultural workers (ending with fiscal year 1992) whose status was changed from temporary to permanent residence shall furnish to the government, and in certain circumstances to the alien, a certificate indicating the number of days the worker was employed by that employer for seasonal agricultural services. 8 U.S.C. 1161(b)(2)

Farm labor contractors, agricultural employers, or agricultural associations that are also fancily or small businesses under 29 U.S.C. 1803 shall not knowingly provide false or misleading information to an alien special agricultural worker concerning the terms, conditions, or existence of agricultural employment. 8 U.S.C. 1161(f)(2).

Employers shall make available, for public examination, the labor condition application filed with the Secretary of Labor. 8 U.S. C. 1182(n)(1).

Farm labor organizations and associations of agricultural employers may receive applications from individuals seeking to enter the United States temporarily to perform special agricultural services. 8 U.S.C. 210(b)(2)(A).

An employer must attest on a designated form that it has verified that an individual it has hired is not an unauthorized alien. The form must be retained and be available for inspection by the Immigration and Naturalization Service or Department of Labor. 8 U.S.C. 274A.

Enforcement and Penalties

The Immigration and Naturalization Service (INS) has authority to enforce the act. It may issue subpoenas to obtain employment records from employer of special agricultural workers to verify employee's eligibility as an alien lawfully admitted for temporary residence. 8 U.S.C. 1225; 8 C.F.R. 210.3(b)(4), 287.4.

Complaints involving violations of the employment of aliens section of the act may be filed with INS. INS may investigate without filing a formal complaint. Alleged violators are entitled to a hearing before an administrative law judge. 8 U.S.C. 1324a(e); 8 C.F.R. 274a.9.

The Secretary of Labor is directed to establish a process for the receipt, investigation and disposition of complaints regarding a facility's failure to meet conditions attested to or a facility's misrepresentation of a material fact regarding conditions that justifying hiring alien nurses. The Secretary shall conduct an investigation if he believes there is reasonable cause that a facility fails to meet conditions attested to. If a basis exists, opportunity for a hearing is available within 60 days. 8 U.S.C. 1182(m)(2)(E)(ii),(iii).

The Secretary of Labor is directed to establish a process for the receipt, investigation, and disposition of complaints regarding a petitioner's failure to meet conditions specified in an application or a misrepresentation of a material fact in an application for employment of non-immigrants in specialty occupations or as fashion models. 8 U.S.C. 1182(n)(2)(A).

The Attorney General is directed to provide a process for reviewing and acting upon petitions by employers to impart aliens to work as executives, managers, or to impart special knowledge in a U.S. subsidiary or affiliate. 8 U.S.C. 1184(c)(2)(C).

Violations of 8 U.S.C. 1161(b)(2) (failing to provide certification or making false statements of a material fact), may result in civil monetary penalties. 8 U.S.C. 1161(f)(4).

If a facility fails to meet a condition attested to or makes a misrepresentation of a material fact, regarding the hiring of alien nurses, the Secretary of Labor may impose administrative remedies, including civil monetary penalties of up to $1,000 per violation, and shall order the payment of any back pay due. Future petitions may not be approved for at least 1 year. 8 U.S.C. 1182(m)(2)(E)(iv), (v).

If an employer willfully fails to meet the wages or working conditions attested to, or fails to meet another condition attested to or makes a misrepresentation of a material fact, regarding the hiring of temporary non-immigrant workers in specialty occupations or as fashion models, the Secretary of Labor shall notify the Attorney General and impose such other administrative remedies as he deems appropriate, including the imposition of civil monetary penalties not to exceed $1,000 per violation. The Attorney General shall not approve petitions filed by the employer for at least 1 year. If back pay is due, the Secretary shall order such payment. 8 U.S.C. 1181(n)(2)(C), (D).

Violations of section 274A of Act (hiring of aliens, verification and documentation requirements): Criminal - up to $3,000 for each violation, imprisoned for not more than 6 months; Civil - cease and desist order enjoining of pattern or practice violations and fines on

a sliding scale from $100 to $10,000.8 U.S.C. 274A(e)(4); 8 C.F.R. 274a.10.

Workers Adjustment and Retraining Notification Act (29 U.S.C. 2101 et seq.)

Requires employers to provide advance written notice of plant closings and mass layoffs.

Coverage

Applies to business enterprises that employ 100 or more employees, excluding part-time employees; or 100 or more employees including part-time employees, who in the aggregate work at least 4,000 hours per week, exclusive of overtime. It covers the permanent shutdown of a single site of employment or an identifiable unit within a single site of employment that results in an employment loss during a 30-day period for 50 or more employees, excluding part-time employees, or a mass layoff or action that is not a closing and results in an employment loss during a 30-day period for between 50 and 500 workers (excluding part-time workers) at a single site of employment if that number is at least 33 percent of the work force at the single site of employment or for more than 500 workers (excluding part-time workers). 29 U.S.C. 2101.

Definitions

Affected employees: Employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer. 29 U.S.C. 2101(5).

Single site of employment: A single facility or plant or a group of related facilities, like a campus or multi-building factory. 20 C.F.R. 639.3(i).

Recordkeeping and Disclosure Requirements

Employers are required to serve written notice of a plant closing or mass layoff at least 60 days, with some exceptions, before the event takes place-they must give notice to affected employees or their representatives, the state dislocated worker unit, and the chief elected official of a unit of local government. 29 U.S.C. 2101; 20 C.F.R. 639.4, 639.7.

Notice to the relevant state dislocated worker unit and to a designated local official must contain specific information: (1) name and address of employment site where layoff is to occur and the name and telephone number of a company official to contact for further information; (2) a statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect; (3) the expected date of the first separation and the anticipated schedule for making separations; (4) the job titles of positions to be affected and the number of affected employees in each job classification; (5) an indication as to whether or not bumping rights exist; and (6) the name of each union

representing affected employees and the name and address of the chief elected officer of each union. Notices containing some of this same information must also be sent to representatives of affected employees or the employees themselves if they are not represented. 20 C.F.R. 639.6, 639.7.

Enforcement and Penalties

Enforcement is in the courts through private actions instituted by employees. Employees, their representatives and units of local government may initiate civil actions against employers believed to be in violation of the act. The Department of Labor has no legal standing in any enforcement action and is not in a position to issue advisory opinions. 29 U.S.C. 2104; 20 C.F.R. 639.1(d).

Any employer who orders a plant closing or mass layoff in violation of the Act is liable to each employee who suffers an employment loss as a result of the closing for back pay for each day of violation and benefits under an employee benefit plan, including the cost of medical expenses incurred during the employment loss which would has been covered under an employee benefit plan, including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred. The liability is calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer. 29 U.S.C. 2104.(a).

Any employer who violates the notice provisions for the act with respect to a unit of local government shall be subject to a civil penalty of up to $500 per day. A person seeking to enforce liability under the Act may sue in any district court of U.S. for any district in which the violation is alleged to have occurred or in which the employer transacts business. 29 U.S.C. 2104(a)(3).

The remedies described above are the exclusive remedies for any violation of the act. A Federal court shall not have the authority to enjoin a plant closing or a mass layoff. 29 U.S.C. 2104(b).

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**DRAFT**
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# OPTIONS FOR ENHANCING WORKSITE ENFORCEMENT

## Background

Employment opportunity is commonly viewed as the principal magnet which draws illegal aliens to the United States. Supporters of the Immigration Reform and Control Act of 1986 (IRCA) hoped that sanctions against employers, combined with a legalization program and enhanced border and interior enforcement, would reduce the incentives for undocumented aliens to enter the U.S. and for employers to hire these unauthorized workers. Curbing illegal movements across the border would, in turn, benefit the wages, working conditions, and employment opportunities of U.S. citizens, permanent residents and other authorized workers. Sanctions would make legal immigration status an employment standard and help to eliminate the "subclass" of employees whose labor is often exploited. In addition, supporters hoped that curbing illegal immigration would allow a liberal policy of legal immigration to continue.

To deter employment of illegal aliens, IRCA made it illegal to knowingly hire an illegal alien or refer such an individual for a fee. The legislation required every employer to verify that employees hired after November 6, 1986 are authorized to work. Employers must ensure that each new employee fills out an I-9 form indicating legal status -- U.S. citizen or national, Lawful Permanent Resident, or alien authorized to work until a date specified by the employee. The employer must then verify that he or she has examined an original document or documents that establish identity and employment authorization. The I-9 lists acceptable documents. IRCA requires employers to fill out the I-9 for citizens and aliens alike. In addition, IRCA established penalties for fraud and misuse of certain immigration-related documents which the Immigration Act of 1990 (IMMACT) enhanced.

Recognizing that employer sanctions could potentially precipitate discriminatory practices if employers feared inadvertently hiring illegal aliens, IRCA also contained provisions banning unfair immigration-related employment practices. For the first time in U.S. law, discrimination based on citizenship was declared illegal. IRCA also extended national origins protection to the employees of small companies, those hiring between 4 and 15 employees. IRCA established a new office of the Special Counsel for Immigration-Related Unfair Employment Practices, whose responsibility it is to investigate these cases. Title VII of the Civil Rights Act of 1964 continues to govern national origins discrimination by employers with more than 15 employees, with the Equal Employment Opportunity Commission (EEOC) having responsibility for these cases. IMMACT sought to tighten the anti-discrimination procedures, for example, by

explicitly prohibiting document abuse by employers (that is, requiring some employees to present more documents than required by law), providing anti-retaliation protection, and making discrimination penalties more closely match employer sanctions penalties.

By many measures, IRCA has proved less effective than anticipated in deterring illegal movements and preventing immigration-related unfair employment practices. Common indices of the flow of illegal aliens, such as border apprehensions controlled for Border Patrol person hours, show an initial decrease in movements followed by an increase since 1990. A number of government and private studies, including the Congressionally-mandated GAO study of discrimination have documented practices that put a greater burden on foreign-sounding and foreign-looking applicants for employment. These include requirements that foreign-looking or sounding employees provide additional or different documentation, selective use of I-9s for presumed aliens but not U.S. citizens and similar practices. Although it remains a matter of controversy whether these practices represent widespread discrimination caused by IRCA, the evidence appears consistent that even well-meaning employers are confused by the requirements under IRCA and, as a result, violate the terms of the law.

A number of factors have been raised to explain why employer sanctions has not worked effectively in curtailing illegal movements:

- Counterfeit and fraudulent documents -- Widespread counterfeiting of documents that can be used for verification of identity and employment authorization has been reported since IRCA's implementation. Moreover, it is relatively easy to obtain genuine documents, such as birth certificates or drivers licenses, by fraudulent means. Since numerous documents may be shown to verify employment authorization, some of which may be unfamiliar to any given employer, employers may have difficulty in determining if these documents meet the law's test -- that is, that they "reasonably appear on their face to be genuine and to relate to the person presenting them." If the employer asks for additional or different documents, he or she may run afoul of provisions regarding to immigration-related unfair employment practices.

- Confusion about employer sanctions provisions -- While substantial education of employers has occurred, it is clear that there are categories of employers who still do not understand their obligations under IRCA. For example, the recent spate of publicity about undocumented aliens serving as childcare workers indicated that many U.S. residents did not realize that the employees working in their homes were covered by

employer sanctions. Each of these employers may be hiring only one or two illegal aliens, but taken cumulatively, the number of illegal aliens so employed is substantial.

- Push and pull factors -- IRCA addresses only the pull factor of jobs in the United States. Even a substantial reduction in employment opportunities in the U.S. may not be sufficient to outweigh the reasons that aliens feel compelled to leave their own countries. In addition, pull factors beyond employment continue to exist, particularly the desire for family reunification.

- Enforcement of employer sanctions -- Shifting priorities and reduced funding have impeded investigation and enforcement of employer sanctions. IRCA authorized a 70 percent increase in INS's budget for the years immediately following its passage, more than $100 million of which was intended to be used for employer sanctions. The actual increased appropriation, however, was much smaller. Moreover, employer sanctions enforcement now competes with other investigation priorities that, at times at least, have had higher priority in INS. These other programs include anti-smuggling efforts and removal of criminal aliens, both of which are legislatively mandated priorities for INS.

- Conflicting mandates -- Employer sanctions added a new challenge to INS' mission. In the enforcement of employer sanctions, it was necessary for INS's investigations unit to change from a police unit, conducting raids and apprehending illegal aliens, to a regulatory unit with responsibility for modifying employer behavior and imposing fines on those violating employers sanctions. This was a role in which INS had little experience, and it involved a shift in thinking about its mandate, particularly regarding the relative attention to be giving to regulation of employer behavior and apprehension and deportation of aliens.

- Costs and benefits of hiring illegal aliens -- Some employers in industries that have traditionally relied extensively on unauthorized workers consider potential penalties under employer sanctions to be a cost of doing business that is still lower than would be the hiring of authorized workers.

- Civil liberties and civil rights concerns -- Employer sanctions provisions attempt to balance the law enforcement and regulatory goals of deterring illegal immigration and penalizing employers who violate its terms with

the civil liberties and civil rights goals that require that verification systems pose as little threat to privacy and civil rights as is possible. While one could envision processes that would go far to ensure the law enforcement goal, many of these options would not meet the civil liberties and civil rights tests.

In fact, a range of observers, as discussed above, believe that the current system already fails on the civil rights test. The range of factors that contribute to immigration-related unfair employment practices are complex:

- Confusion on the part of employers -- Surveys of employers have demonstrated that even those who are aware of their responsibilities may be confused about the actual requirements of IRCA. In some cases, employers express preference for hiring individuals they believe to be citizens (generally meaning those who are not foreign sounding or looking) rather than those whom they believe to be aliens. In doing so, they commit national origins and/or citizenship discrimination.

- Multiplicity of documents -- Compounding employer confusion is the large number of documents that can be used in verifying identity and work authorization. Employer sanctions is predicated on the idea that non-experts will evaluate whether documents are genuine. Employers are confused, however, as to which documents are genuine, not surprising given the range of documents that can be presented. Faced with uncertainty, some employers unfairly request additional documentation of individuals they believe to be aliens or demand standardized documents with which they are familiar (e.g., a drivers license and social security card).

- Constructive knowledge standard -- Although the filling in of an I-9 is a good faith defense against allegations of knowing hire of illegal aliens, in some cases, employers may be determined to have constructive knowledge of the illegal status of their worker if they do not follow up on anomalies uncovered in the I-9 process. If they press for additional documentation because they think they have reason to believe an employee is an illegal alien (for example, the document does not appear to be the same as the one reproduced in the INS Handbook), and their reasoning is faulty, they may violate the anti-discrimination provisions if they ask for additional documentation.

- Non-immigration-related discrimination -- In some cases, the attention paid to discrimination caused by IRCA has picked up national origin and citizenship status discrimination which existed prior to and apart from IRCA. In effect, IRCA has provided new tools to identify and prosecute discrimination.

- Preference for illegal aliens or temporary foreign workers -- A number of cases of discrimination against permanent residents and U.S. citizens have been uncovered because of IRCA's anti-discrimination provisions. The cases fall into several categories: employers who secure labor certification for nonimmigrant workers even though an already resident qualified worker applied for the position; employers who contract for labor with a job shop that uses B visas to provide foreign workers (sometimes pursuant to the lay-off of authorized workers); and employers who refuse to hire authorized workers, preferring to employ illegal aliens.

Many of the companies that rely on unauthorized workers also violate other labor standards. They are part of a growing underground economy of companies that reap an unfair competitive advantage over other companies through their failure to pay minimum wages, pay for overtime work, pay the employer share of various taxes, adhere to safety and health standards, adhere to environmental standards and abide by other regulatory requirements. Recognizing that illegal immigration is but one part of the underground economy, there has been growing interest in a more coordinated approach that would allow for investigation of these various violations. From the immigration enforcement point of view, such cooperation makes sense because employers who are abiding by labor standards would more likely attract a domestic U.S. workforce and have less need for illegal alien labor. Targeting of labor standards investigations on industries with large numbers of illegal aliens often makes sense from the other agencies' point of view since illegal aliens are more vulnerable to the types of violations of concern to them. Yet, structural arrangements and conflicting mandates present obstacles to the coordinated approach to the enforcement of labor standards, including employer sanctions. For example, the Wage and Hour Division of the Labor Department has signed a Memorandum of Understanding with the INS, which is not yet implemented, to share investigative responsibilities. However, some Wage and Hour investigators express concern that their increased involvement in employer sanctions will impede their ability to gain the trust of illegal aliens who may be the victims of labor violations and potential witnesses against employers. Others see employer sanctions as an additional tool in their list of actions that can induce greater employer compliance with labor standards.

This briefing book focuses on the implementation of employer sanctions, the incidence of and policies to address immigration-related unfair employment practices, and systems for verification of work authorization. It also looks at enforcement efforts in the underground economy, including enforcement of labor standards and tax laws. It attempts to present a comprehensive picture of worksite enforcement of immigration policy. This introductory paper provides general background and a summary of options that derive from the analysis. Appendices 1-4 include more detailed information about the specific issues referenced above.

It should be noted that many of the options presented here have been discussed in previous policy discussions of illegal migration and have been recommended in a number of policy research studies. Some of the options were raised and rejected during IRCA and IMMACT deliberations but are worthy of reconsideration now that employer sanctions have been in operation for six years. It should be noted that repeal of employer sanctions is not an option discussed in this report although it continues to be the recommendation of a number of organizations because of findings of unfair employment practices. This briefing book proceeds from the assumption that repeal is not a likely option unless and until other alternatives for improving worksite enforcement are tested and found to be inadequate.

In some cases, alternative approaches for accomplishing the same end are presented. This is particularly the case in describing options to improve verification of employment authorization. In other cases, options are not mutually exclusive; a variety of different approaches could be tried simultaneously to accomplish the same end.

## I. Addressing use of counterfeit and fraudulently-obtained documents

Several approaches are possible to improve the verification of the employees eligibility to work. These approaches each attempt, with their own advantages and disadvantages, to reduce the potential for counterfeiting documents and obtaining them by fraudulent means. They aim as well for a verification process that substantially reduces any incentive for employers to commit unfair employment practices because of fear of knowing hire of undocumented aliens. Options in part A describe approaches for reducing problems with the documents that are widely used to obtain other documents. Options in part B provide alternative approaches for improving verification of work authorization.

A. Reducing Problems with Breeder Documents

Steps would be taken to improve the security of so-called "breeder documents," documents that permit the holder of one document to obtain additional documents.

Option I.A.1. Birth Certificates -- Among the recommendations that have been made to reduce counterfeiting and fraudulent use of birth certificates are: 1) requests for birth certificates be regulated through standardized application forms which include the applicants reason for request, signature, and personal data which are retained on file at issuing office; 2) a system of interstate and intrastate matching of birth and death records whereby the fact of death is noted on the birth certificate of all persons age 55 or less at the time of death; 3) limiting public access to birth and death certificates; 4) making birth certificates issued by states or state-controlled records office the only acceptable form for federal programs; 5) making certified copies of birth certificates unacceptable for application to federal programs; 6) using a standard design and paperstock for all birth certificates to reduce counterfeiting; and encouraging states to computerize birth records repositories. Most of these recommendations have broad support. Many have been implemented by individual states. They would be costly, however, for other states, and they may present difficulties for legitimate requesters of the documents, such as those doing genealogical research, if too tightly drawn.

Option I.A.2. Fraud Resistant Social Security Cards -- Social Security Administration (SSA) has already taken steps to make it more difficult for unauthorized aliens to obtain social security cards. SSA has programs with all but two states to issue social security cards at birth to U.S. citizens. The number of persons using the program is increasing. Records indicate that most citizens obtain a social security number before age 18. Therefore, SSA has been requiring any individual who requests a social security number when they are more than 18 years of age to come into the office for a face-to-face interview. SSA also began issuing cards that specify that they can only be used in conjunction with an INS work authorization document to aliens with temporary status. This effort follows issuance of cards that explicitly state that they cannot be used for employment purposes. Currently issued cards are also more resistant to counterfeiting. However, many easily counterfeited cards remain in circulation. Also, cards do not have any identifier other than the individual's name and so can easily be misused for employment authorization if the individual has an identifying document, such as a drivers license, in the same name. Under this option, social security cards would be reissued to individuals holding the older versions. At a minimum, the current card would be issued; preferably, a social security card with a picture would be issued. The cost of this option would be significant, estimated by

SSA at about $2 billion. It would also necessitate considerable inconvenience for U.S. residents who would need to obtain the newly issued card.

Option I.A.3. Fraud Resistant Drivers Licenses and State Identity Documents -- Another breeder document is the drivers license and identity documents issued by Departments of Motor Vehicles, easily obtained with a birth certificate, Social Security number, or other documents. During the past few years, there has been significant progress in increasing the security of these documents, pointing to further improvements that could be made. In the issuance of driver's licenses, states are typically using secure paperstock, lamination, and other security features with a 4 to 5 year cycle for license replacement. California is the only state currently issuing licenses made of hard plastic with a magnetic stripe. Alteration of the card is difficult and would be very expensive for a counterfeiter to establish an operation for mass production of replicates. The use of a smart-card chip and a biometric identifier on the license is currently being explored through the Department of Transportation. Digital imaging is a new technology currently used for Virginia driver's licenses. Digital imaging technology allows for automated capture and display of signatures and photographs which facilitate comparison between previously recorded and current signatures and photographs. To increase further the security of drivers licenses, possible options include: limiting the number of acceptable identification documents required to issue the license; expanding the drivers license database for cross-referencing purposes, and setting up a system with the Social Security Administration for verification of social security numbers. The latter recommendation would require legislative changes in the Privacy Act.

B. Improving I-9 Process

Even with improvements that inhibit counterfeiting and fraudulent use of such documents as birth certificates, social security cards and drivers licenses, the I-9 process itself is subject to fraud by illegal aliens and abuse by employers. The following approaches could reduce these problems.

Option I.B1. Maintaining the current system but reducing the number of documents citizens and aliens can use to verify authorization to work -- The sheer number of documents presents challenges for effective implementation of employer sanctions. INS is already trying to streamline the number of documents it issues for verifying work authorization for aliens. The agency is also undertaking regulatory steps, after a court challenge of its administrative procedures, for replacing older green cards. In addition, a number of documents used by citizens, such as voter registration cards, could be eliminated from the list since they do not generally contain a photograph needed to verify identity. While this option would reduce some of the

confusion surrounding documentation, it would do little to reduce counterfeiting or fraudulent use of documents. It may also not sufficiently ensure the wary employer who does not trust the documents presented. A variation of this option would require that all aliens present an INS issued document (the green card or employment authorization document). Under current practice, however, the alien informs the employer if he or she is a citizen or alien. This option would not address situations where an illegal alien claims citizenship and presents a counterfeit birth certificate, drivers license or social security card. This approach could then increase discrimination by employers who do not believe an employee who is genuinely a U.S. citizen and require an INS document.

or

Option I.B.2. One identifier for citizens and aliens alike to show to employers-- Under this option, all work authorized individuals would be issued a document that verifies eligibility for employment. Aliens would present an INS document to the government authority with responsibility for administering the program. Citizens would present an identifying document with a picture and a social security number. The government agency would verify status with the appropriate federal agencies (INS and Social Security) with information on the applicant. The issued employment eligibility document would be counterfeit resistant and contain a picture of the individual to whom it is issued. It could be an existing document, such as the drivers license or social security card, or a new document whose use is restricted to the verification of eligibility for employment (and potentially receipt of public benefits). If there is no telephone or computer verification process attached to the document, it would include information about any restrictions on an alien's work authorization (for example, expiration of temporary employment eligibility). The document could be issued in-person by a Social Security office, employment service offices, or other public agency that has offices throughout the country. Alternatively, the model used in issuing passports could be adopted for this purpose -- applicants for the card would fill out an application, have pictures taken, bring them to a post office for verification that the photo and the person match, and then mail the packet to the administering agency. The agency would do a secondary verification of the information presented in the application and issue the card.*

The employer would only be required to verify that the single document presented reasonably appears to be genuine and relates to the person presenting it.

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*Approximately three million passports are issued each year. About 40 million U.S. citizens are estimated to hold passports

The advantage of this option is that it reduces significantly the counterfeiting and fraudulent use of documents. It also sufficiently simplifies the process for the employer so he or she should have no cause to require additional proof from foreign-looking or sounding individuals. The employer would not be required to ask if the applicant is a citizen or alien so the option should also reduce the potential for citizenship or national origins abuse. It may not help in situations where the employee has temporary work authorization because the document would have an expiration date in those cases. Disadvantages include the cost of establishing a new system of this type, particularly if an agency that does not currently produce identifying documents has responsibility; the potential intrusion of privacy in the establishment of a new database on all U.S. residents, citizens and aliens alike; the potential for harassment of foreign-looking and sounding individuals who do not have the identifier on their persons, particularly if an existing documents such as the drivers license is used; and the cost and inconvenience of reissuing documents when temporary authorization for employment has been extended. Such a system would require sharing of information among government agencies combined with procedures to ensure the security of the data so personal information is not accessible by unauthorized users.

and/or

Option I.B.3: Telephone/computer verification system -- Telephone and computer verification could be coupled with Options B1 and B2 or stand alone. Either in conjunction with a document or through use of a pre-assigned number, the employer could check eligibility to work. In the case of Option A1, the employer would telephone for verification, using the social security number for citizens and the A-number for aliens. Under Option A2, the single employment authorization documents could be produced with a magnetic strip or other mechanism to permit computerized access to verification data. This system would further reduce counterfeiting and fraudulent use of documents. It would increase costs to maintain the system. Some of the costs may be offset by savings if the telephone/computer system allows for extensions of work eligibility to be done through updating of the database rather than issuance of a new card. When initially verifying employment authorization of those with temporary statuses, the employer could be told the individual had work authorization but to reverify as of a particular date when the eligibility expired. When the employer reverifies, the information would have been updated to include the individual's current employment eligibility status.

A telephone/computer verification system would likely require manual secondary verification and an appeal when there is no match because experience with existing databases, such as SAVE, indicate a sufficiently high error rate to merit further review.

If the error rate is too high, the result may be discrimination against employees who come up as a false negative. To deter such discrimination, employers would be required to hire the individuals until the verification is confirmed. The current pilot project on telephone verification has this provision.

The computerized database compounds the problems discussed above regarding privacy. Security options would need to be built into the system so that employers could not obtain information apart from work authorization from tapping into the database.

Option I.C. Application of RICO provisions for those conspiring to produce and sell fraudulent documents

The Immigration Act of 1990 significantly expanded provisions regarding document fraud and established civil penalties to facilitate enforcement. Criminal penalties of up to five years imprisonment continued for fraud and misuse of visas, permits and other documents. Document fraud and counterfeiting has become a lucrative and well-organized operation that may involve international networks that conspire to produce and sell the resulting fraudulent products. The documents are used in smuggling operations as well as for work authorization. Legislation has been introduced to increase criminal penalties for smuggling and to amend the RICO statute to include alien smuggling as a primary offense. Along the same lines, conspiracy to produce and sell fraudulent documents could be covered under RICO. Pending legislation also proposes an increase in criminal penalties for smuggling. A similar increase in penalties for large-scale, multimillion dollar counterfeiting activities could also be considered.

## II. Improving Investigations

A. Increasing and Better Targeting Resources/Staff for Worksite Investigations

More effective investigation of employer sanctions and other labor standards would benefit from increased resources and staff and increased targeting of investigations in industries with significant employment of unauthorized workers. The following options are not mutually exclusive; any combination could be implemented

Option II.A.1. INS resources -- IRCA authorized funds to buttress investigation of employer sanctions, but actual appropriations have not tended to keep pace with authorized levels. In addition, since IRCA, INS has had to focus new or increased attention on a number of other enforcement priorities, including anti-smuggling activities and criminal alien removal -- both required by Congressional mandate. As a

result, resources and staff for employer sanctions are well below the level that was believed necessary to implement this program effectively. In today's budget climate, a redirection of funds to employer sanctions (rather than new money) would be the likeliest way to assure added resources for these investigations. Such a decision would need to balance the benefits of more effective and rigorous employer sanctions investigations with these other priorities. Redirection of funds to employer sanctions would be supported by evidence that most illegal aliens come to the United States for employment.

Option II.A.2. Paperwork and Knowing Employment Investigations -- Each year, INS undertakes about 2500 random investigations of employer compliance with the I-9 provisions. Eliminating or reducing significantly these random investigations would enable INS to target its resources on investigation of tips and in industries with a record of hiring illegal aliens. The agency currently devotes about 25 percent of investigative time to GAP investigations, most of which are random ones. While it would increase resources available for more targeted, lead-driven investigations, this option would make it more difficult to arrive at a compliance rate since all investigations would be generated by a suspicion of violation. In this sense, these investigations would more closely mirror Wage and Hour Division investigations which do not include random reviews. Given that employer sanctions have been in operation for several years, and random investigations show a high compliance rate (89% in 1992), the need for continuing to develop a national compliance rate may be diminished.

Several different approaches could be taken in accomplishing this option. Under one scenario, INS would discontinue random investigations but would investigate I-9 violations in companies and/or industries with known employment of unauthorized aliens and where the agency has specific leads.

Under the second scenario, Wage-Hour would have responsibility for all I-9 paperwork investigations, allowing INS to devote all of its resources to investigations of cases of knowing hire. A variation of this approach is implementation of the existing Memorandum of Understanding (MOU) between INS and Labor Department. INS and the Employment Standards Administration in the Labor Department signed a MOU in June 1992 which would expand DOL's role in enforcing employer sanctions. DOL staff have been inspecting I-9s but under the MOU, they will be able to issue warning notices for certain violations. They will also refer serious violations and suspected substantive violations to INS. In turn, INS investigators who identify wage and hour violations will report these to DOL. The MOU has not yet been implemented although joint training of staff from INS and DOL began in February 1993. The MOU

will increase the number of investigators who are trained and knowledgeable about both employer sanctions and labor standards.

Under a third scenario, all employer sanctions investigations would be the responsibility of Wage-Hour, allowing INS to focus all of its interior enforcement on apprehensions, removal of criminal aliens, anti-smuggling operations, etc. This option would more firmly establish employer sanctions as a labor standard by giving principal responsibility to the Labor Department. It would also address the tensions in INS' mandate since all of its resources would be focused on the illegal aliens not the employers. On the other hand, it would remove INS from an important element of the strategy to deter illegal migration.

Option II.A.3. Augmentation of resources for labor standard investigations in industries relying on unauthorized workers -- Wage-Hour received a slight increase in authorized investigators because of IRCA, but it received no increases to administer more recent immigration-related requirements (such as investigation of H-2A work contract enforcement, and labor standards requirements of H-1A nurses, H-1B specialty workers, D-1 longshore limitations, and F-1 students). The agency has been losing personnel since FY 1989, when staffing was at 970. In FY 1993, Wage-Hour was required to decrease the number of investigators from 835 at the end of FY 1992 to 820 (currently at 812 -- a 16 percent cut). For FY 1994, 797 investigators have been requested. Wage-Hour will have increased responsibilities under the MOU.

B. Changes to Support More Effective Investigation

Option II.B.1. Three-day notice to employers-- Under current policy, INS generally provides a three-day notice to employers before examining I-9s. (Where there is probable cause of violation, a warrant may be obtained for entry without notice onto the premises of suspected violators.) The three-day notice was put into place before implementation of employer sanctions when it was not clear what the administrative burden on employers would be. Eliminating the 3 day notice would facilitate investigation of employer sanctions violations during the investigation of other labor standard violations. For example, Wage-Hour is under no requirement to give such notice in routine investigations. Now, Wage-Hour can only examine I-9s if the employer waives his or her right to notice or if the investigators return three days later.

Option II.B.2. Requiring employers to keep copies of documents used to verify identity and authorization to work -- Under current law, employers are not required to keep copies of the documents that they examine to verify authorization to work. many employers nevertheless make and keep copies with the I-9. These copies have been useful in establishing the good faith defense for employers who inadvertently hired

illegal aliens even though they properly filled out the I-9. Requiring that all employers keep copies, while representing additional administrative burden on employers, would be helpful in determining whether employers are in fact culpable. Some of the cases that have been made on both knowing hire and unfair employment practices have hinged on the copies that an employer voluntarily made. Without access to copies of what the employer actually saw when filling out the I-9, proving or disproving either violation is made more difficult.

Option II.B.3. Enforcing employer sanctions for contractors -- Contractors present a number of dilemmas in enforcement of employer sanctions and other labor standards. A company can be held liable for contracting for the labor of an alien if he or she knows that the alien is not authorized to work. The company is not required to take steps to verify status of independent contractors, however, making it difficult to establish that the company knew the contractor was unauthorized. Nor are there effective provisions for penalizing a firm whose contractors utilize illegal aliens or enlisting the cooperation of companies to monitor the hiring practices of their contractors. IRCA, in common with the Fair Labor Standards Act, Title VII and NLRB, has a "joint employer" concept for both employer sanctions and discrimination. The test to determine joint employment is whether the entities jointly exercise control over the employee's employment. In many cases, however, the company using contractors does not have control over the contractor employees. The company may have indications, if not knowledge, that a contractor uses illegal labor, particularly if a contractor is able to undercut the costs of competitors. A Wage-Hour initiative under FLSA may serve as a model for obtaining cooperation of companies in influencing the hiring practices of the contractors. Legislation would be needed to apply it to these cases because of the use of the so-called "hot goods" provision. It is a violation of the FLSA for any person to move goods in interstate commerce which were manufactured in violation of the minimum wage, overtime, or child labor provisions of the Act -- thus, "hot goods." Under the Wage-Hour initiative, goods are seized and returned only if manufacturers agreed to sign compliance agreements with Wage-Hour to monitor their contractors and makes other remedies, such as paying back wages. While this strategy has limited applicability (primarily to manufacturing operations where there is a good to be seized), it may be useful in some industries that are heavily reliant on illegal labor.

Option II.B.4. Increased criminal penalties -- Penalties for violation of employer sanctions could be increased to make the cost of violations a greater burden to the employer. In particular, if the criminal penalties for engaging in pattern and practice of knowing hire were increased from 6 months imprisonment to 12 months, U.S. attorneys may be more willing to bring cases to trial. The misdemeanor level of penalty is an inhibitor, given the heavy caseloads of many U.S. attorneys.

Option II.B.5. Seizure of goods and assets of employers in violation of employer sanctions -- A further increase in cost for the violating employer could come with a provision to seize goods produced through the knowing hire of unauthorized aliens. As noted above, such a provision could help leverage support from manufacturers in monitoring the hiring practices of their contractors. For pattern and practice violations of employer sanctions, the seizure of goods could be a meaningful penalty that would encourage future compliance. Seizure of assets would serve the same purpose.

Option II.B.6. Coordination of penalties where a combination of labor standards are violated -- Employers who violate one labor standard are more likely to violate others, including the hiring of unauthorized workers. At present, investigations tend to be done separately and penalties are levied separately. More coordinated enforcement efforts could result in multiple penalties that would have greater impact on the violating employer. A further change along this line, which would require legislation, would increase penalties geometrically if an employer was found guilty of multiple labor standards violations. Thus, rather than pay the sum total of employer sanctions and wage and hour penalties, the offending employer would pay a higher amount for the multiple violation. This option would require an even greater level of coordination among the agencies involved, and it would require new administrative provisions for hearing these cases.

## III. Addressing Immigration-Related Unfair Employment Practices

Aside from the options offered above for improvements in verification of employment eligibility, the following proposals outline steps that could be taken to lessen unfair employment practices. Although this paper does not address national origins discrimination unrelated to IRCA, a review of the baseline EEOC data on these cases (about 12,000 in 1986, with modest increases since IRCA) would indicate the need for attention to this issue as well.

Option III.A. Clarification of employer's responsibilities -- Many employers are between the proverbial "rock and a hard place." If they do not sufficiently scrutinize the documents presented to them, and these documents are determined on their face to be counterfeit, they may be subject to employer sanctions penalties. If they ask for further documentation and it is determined that they did not have due cause, they may be subject to penalties for unfair employment practices. The most difficult cases arise where the employer may have constructive knowledge of the illegal status of the employee. Case law is confusing on this issue. Another confusing area involves aliens with temporary work authorization. These individuals are not in protected categories for citizenship discrimination, but they are protected for document abuse.

Their documents may be the most confusing for employers. A particularly problematic situation arose regarding Salvadorans whose work authorization was extended before it was possible to reissue the employment authorization document. Although INS issued press releases explaining the situation, many employers were confused by the process.

Option III.B. Continued information and training for employers on unfair employment practices -- Employers are often confused about their responsibilities in filling out the I-9 and do not understand that this process constitutes a good faith defense against allegations of knowing hire. The handbook alone does not provide sufficient education for employers, as indicated in a recent study that found that unfair employment practices did not necessarily decrease simply because an employer had seen the handbook. Cooperation between INS and the Office of the Special Counsel for Immigration-Related Unfair Employment Practices should help improve education efforts. It appears that the joint activities they have already undertaken have been useful. The separate but coordinated media campaigns mounted by INS on employer sanctions themselves and OSC on discrimination issues should be carefully monitored to test their effectiveness, with changes made to improve them if needed.

Option III.C. Revise handbook where cases have indicated employers are confused -- The small but growing body of case law on the unfair employment practices in which employers are currently engaged could be useful information for revising the handbook to give more explicit direction to employers.

Option III.D. Continue grants to Community Based Organizations (CBO) -- Many resident aliens and other authorized workers have trust in CBOs, particularly those providing various types of assistance, counseling and services. Currently, OSC provides grants to CBOs to assist in education about the anti-discrimination provisions of IRCA. These agencies play a useful role in informing foreign-looking and sounding individuals of their rights. They are also able to clarify employer sanctions provisions for employers, thereby preventing discriminatory practices.

## IV. Coordination of Enforcement Efforts

A number of options are available for increasing coordination and cooperation among the array of agencies that enforce workplace standards. These agencies include INS, Wage-Hour, Occupational Safety and Health Administration, the Internal Revenue Service, and state and local governments.

Option IV.A. Establish taskforce in Washington to promote cooperation and coordination -- Directions from headquarters that promote cooperative efforts would

help establish the practice more firmly in locations where joint operations are not currently underway. A Washington taskforce could identify enforcement strategies that would target industries where there are multiple violations of labor law, including the hiring of illegal aliens. It could also assess the various mandates and legal constraints of each agency to determine how cooperation could best be achieved. It could identify legislative changes needed to increase cooperative efforts. For example, IRS is currently unable to participate in some joint activities because legislation precludes them from disclosing investigations. The taskforce would also be an encouragement for increased intra-agency coordination in preparing for the discussions with other departments.

Option IV.B. Establish local taskforces of worksite investigators to share information and coordinate efforts -- In a number of localities, joint operations are already underway with considerable effectiveness. The models established in these communities could be useful ones for other sites.

Option IV.C. Joint training for worksite investigators from all applicable agencies -- INS and Wage-Hour have already signed an MOU which provides for joint training so that each agency's investigators will be aware of what constitutes violations of the other's law. Similar joint training could be arranged with other workplace standards enforcement agencies.

**DRAFT**
September 16, 1993

## III. VERIFICATION OF EMPLOYMENT AUTHORIZATION

### Introduction

Employer sanctions provisions of IRCA have given rise to the use of fraudulent documentation to fulfill the Employment Eligibility Verification Form, or I-9 requirements. Under IRCA, all employers are required to verify all employees' identity and authorization to work. With the passage of IRCA, every employer and employee must sign an I-9 form. Under these verification provisions, employees can use a combination of more than 29 different documents to prove identity and work eligibility. Employers are responsible, under IRCA, for examining documentation establishing identity and employment eligibility and must ensure that the documents presented reasonably "appear" to be genuine and relate to the individual. The ease of counterfeiting employment eligibility documents has resulted in rampant use of fraudulent documents.

Document fraud may occur in two ways: either the document itself is fabricated, or the document is legitimate, but is used in a fraudulent manner (either obtained through fraudulent means, or used by someone other than the person to whom it was issued). There is no way to accurately measure the degree to which document fraud exists since it takes on so many forms. There may be primary documents used to obtain legitimate secondary identification or the secondary documentation itself may be fraudulent. There are layers of documentation, one building upon the next, so fraud could take place in any number of ways.[1]

### Background

Employer Sanctions require verification of identity and verification of work authorization for all employees. Document fraud can be committed by the alien, by presenting fraudulent documents to fulfill I-9 requirements, or the employer by failing to verify all employees' identity and work authorization documents. The Select Commission on Immigration and Refugee Policy (SCIRP), which recommended

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[1] GAO's examination of INS records of employed aliens in five cities found that 39% either "provided, or were suspected of providing, counterfeit or fraudulent documents to employers."

employer sanctions as one part of the system to better control illegal immigration, addressed the issue of document fraud in its report to Congress in 1981. To discourage discrimination by employers and document fraud by workers, SCIRP Commissioners agreed that an employer sanctions system must depend on a reliable means of verifying employment eligibility for all members of the U.S. workforce. SCIRP members agreed that a documentation system needed to be established to deal with employment verification. However, they could not reach a consensus as to the specific type of identification that should be required for verification. They did agree on the following set of principles which would guide such a system: "reliability, protection of civil rights and civil liberties and cost effectiveness."

**IRCA**

Congress recognized that the creation and use of counterfeit and fraudulent documents would have a profound negative impact on the effectiveness of employer sanctions. Therefore, section 103 of IRCA amended 18 U.S.C. 1546 (Fraud and Misuse of Certain Immigration-Related Documents) to increase the penalties thereunder and to add paragraph (b) relating to fraud associated with the employment verification system.

IRCA amended section 1546 of Title 18 as follows:

> *"§ 1546. Fraud and misuse or visas, permits, and other documents"*
> *... by inserting in lieu thereof "border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or evidence of authorized stay or employment in the United States"*

Criminal penalties of up to five year's imprisonment could be imposed for this type of document fraud.

When Congress enacted IRCA, it explicitly declined to authorize the establishment of a national identification card as a means of sanctions enforcement [8 U.S.C. 1324(c) (1989)]:

> *Nothing in this section shall be construed to authorize directly or indirectly, the issuance or use of a national identification card or the establishment of a national identification card.*

However, IRCA did specifically provide the President with a mechanism to institute the new system [274A(d)(1)(A) of the INA]:

> *The President shall provide for the monitoring and evaluation of the degree to which the employment verification system established under subsection (b) is found not to be a secure system to determine employment eligibility in the United States, the President shall, subject to paragraph (3) and taking into account the results of any demonstration projects conducted under paragraph (4), implement such changes in (including additions to) the requirements of subsection (b) as may be necessary to establish a secure system to determine employment eligibility in the United States. Such changes in the system may be implemented only if the changes conform to the requirements of paragraph (2).*

The law goes on to say that any change the President proposes to the system must satisfy the following requirements: the system must establish a reliable determination of identity, and if a new form of employment verification is established, that system must be issued in a form which is resistant to counterfeiting and tampering. The system must be used only for employment verification, must protect the privacy and security of personal information, and must not be used for law enforcement purposes. According to Sec.274A(d)(G):

> *If the system requires individuals to present a new card or other document (designed specifically for use for this purpose) at the time of hiring, recruitment, or referral, then such document may not be required to be presented for any other purpose other than under this Act (or enforcement of sections 1001, 1028, 1546, and 1621 of title 18, United States Code) nor to be carried on one's person.*

**Immigration Nursing Relief Act of 1989 (INRA)**

By 1989, concerns about documentation failings prompted further Congressional action. Not prepared to propose a wholesale change in the verification process, the INRA called for investigations of options to reduce document fraud. More specifically, section 5 of the INRA tasks the Attorney General with reviewing and supporting initiatives which affect fraudulent production, issuance, and use of state-issued documents pertinent to the employment eligibility process. The INRA also authorized 10 million dollars for FY 92 to support initiatives to improve the security of state-issued documents in California and two other States. The authorized funds were

never appropriated, however.

**IMMACT**

Other provisions to deter document fraud were added through the Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649. Section 544 of IMMACT added a new section 274C to the Immigration and Nationality Act (INA), creating a civil proceeding for document fraud similar to an employer sanctions proceeding under section 274A of the INA. The 274C provisions are an enforcement tool used by INS in conjunction with other operations to impose both cease and desist orders and civil monetary penalties against those who commit civil violations relating to document fraud. 274C cases can be generated by several INS programs and several divisions within a particular program (for example, within the Investigations program, Anti-Smuggling, Criminal Alien Apprehension Program, and Fraud)

Section 274C creates a civil cause of action for document fraud. Under section 274C there are four types of civil document fraud punishable by fine: 1) creation of a counterfeit document, 2) use of a counterfeit document, 3) use of a document issued to another individual, and 4) acceptance of a document issued to another person for employment verification purposes. This cause of action, which brings civil prosecutions against manufacturers and users of fraudulent documents, makes it easier for INS to set and collect fines, as the agency can proceed administratively instead of criminally.

Under section 274C(d)(3)(A) of the INA, the amount of fine must be at least $250, but not more than $2,000 for each document used, accepted, or created and each instance of use, acceptance, or creation. In the case of a person or entity previously subject to an order of fine for the purpose of fraud, the minimum fine is $2,000, maximum $5,000 for each document used, accepted, or created and each instance of use, acceptance, or creation.

The process for issuance of fines for civil document fraud involve many divisions of INS: Inspections, Investigations, Examinations, National Fines Office, and the Office of General Counsel. In September 1992, INS began implementing the provisions of Section 274C. Cases include aliens who knowingly present a counterfeit document, aliens who obtain and possess counterfeit/falsely made documents, aliens who complete and present INS applications containing false statements, U.S. citizens who provide falsely made documents to aliens for entry into the United States, impostors, and smugglers and those smuggled.

In deliberations on IMMACT, Congress discussed a further change in the documentation provisions of IRCA including a pilot program on the use of driver's licenses/identity cards for establishing employment authorization and identity. The pilot program, established by the Attorney General, would include up to 3 states which would provide for the issuance of driver's licenses/identification with a photograph and a biometric identification system. The proposal as described in the Conference Report, also provided for a report to be issued to Congress within three years of the pilot on the functioning of the pilot and a recommendation about whether or not the pilot should be extended. The proposal was deleted from the final bill, however, because of the many concerns about initiating the ID Card Pilot Program without full consideration and debate. This provision was strongly opposed by the Hispanic Caucus, the American Civil Liberties Union and other civil rights advocates as providing impetus towards the creation of a national ID and potentially exacerbating employment-related discrimination.

## Critiques of Documentation Provisions

Several federally-mandated studies have reported findings and made recommendations related to document fraud.

The 1990 GAO Report "Employer Sanctions and the Question of Discrimination" suggests that in terms of discrimination and document fraud:

> *To be optimally effective in reducing discrimination, the solution must greatly reduce the number of work eligibility documents, make the documents more difficult to counterfeit and reduce document fraud, and apply to all members of the workforce.*

The report goes on to recommend three principles for improving the current verification system while reducing discrimination:

> *1) reducing the number of work eligibility documents, 2) making the documents more counterfeit-resistant and less vulnerable to being used fraudulently, and 3) applying any reduced work eligibility documents to all members of the workforce.*

The Task Force on IRCA-Related Discrimination recommends in its 1990 report that the I-9 be simplified and the number of work eligibility documents be reduced.

The President's First and Second Reports on the "Implementation and impact of Employer Sanctions" both concluded in 1991:

> *The use of fraudulent documents poses the greatest threat to the employment verification system; therefore, security of documents must be increased...and coordinated with continual fine tuning and enforcement of the law.*

The Commission on Agricultural Workers recommended the following in its 1992 report to Congress:

> *Illegal immigration must be curtailed. This should be accomplished with more effective border controls, better internal apprehension mechanisms, and enhanced enforcement of employer sanctions. The U.S. Government should also develop a better employment eligibility and identification system, including a fraud-proof work authorization document for all persons legally authorized to work in the United States, so that employer sanctions can more effectively deter the employment of unauthorized workers.*
>
> *If these immigration control mechanisms ultimately prove ineffective, after being given ample time for implementation, alternatives to employer sanctions should be explored.*

## Constraints on Verification

A number of factors constrain the effectiveness of the procedures for verifying eligibility and make them prone to document fraud and unfair employment practices: the insecurity of documents used to obtain other documents; counterfeiting of INS documents; absence of a reliable back-up verification database; employer verification procedures; and civil liberties and civil rights concerns.

### "Breeder" Documents - Birth Certificates, Social Security Cards, and Driver's Licenses

Since document fraud can lead to great monetary cost to the federal government[2] or even crimes of grave consequence, the issue has long been of

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[2] A 1988 report by the Office of Inspector General estimates the cost to society of fraudulent ID to be approximately $30 billion (based on estimates made in the 1982 U.S. Senate Subcommittee on Investigations

serious concern to Congress and the federal agencies. In 1974, the Federal Advisory Committee on False Identification (FACFI) was established by the Attorney General to put together the first comprehensive report on document fraud. The Committee's report, containing a series of recommendations, was issued in 1976. Many of its recommendations, as seen below, have not yet been implemented on a national basis but have been adopted by individual states.

In many cases false identification use begins with the abuse of a birth certificate, then a state driver's license, which are then used as breeder documents to obtain other identification. It has been found that Social Security cards, birth certificates, and alien registration cards are the most commonly used employment eligibility documents. At the same time, these cards have also proven to be the most subject to fraud.

The two primary ways in which breeder document fraud occurs is 1) obtaining breeder document under false pretenses, or 2) counterfeiting of breeder documents. This section breaks down the category of breeder documents into its component parts with a separate section on birth certificates, Social Security cards, and driver's licenses, and makes recommendations for improving the current system for issuance of each.

Birth Certificates

The issue of birth certificate fraud is twofold: either the birth certificate itself is altered (lack of standardization makes it easy to counterfeit birth records), or the document is obtained through fraudulent means (obtaining birth records of someone other than the person making the request) .

There are currently 7,000 local registrars in addition to state registrars issuing certified copies of birth certificates.[3] The majority of requests for birth certificates are by mail and most are made for administrative or legal purposes (to verify age, citizenship, or parental relationship for Social Security cards, passports, driver's licenses, etc.). Another common reason for requesting birth records stems from the tracing of family lineages. The volume of requests is quite high. Certain state offices are already months behind on issuing certified copies.

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Study and adjusted for inflation).

[3] In the Montgomery, Alabama state office alone, on average, there are 1000 certified copies of birth certificates issued daily.

Currently the majority of states have restricted access to birth records, meaning that requests can only be made by certain individuals. Requests for certified copies are handled either in-person or by mail. In-person requests are handled differently by each state. Twelve state registrars require both a picture ID and that the applicant be either named on the birth certificate or be a designated representative of the person named. Many states require certain identification information be sent in along with mail-in requests. Nevertheless, it is relatively easy for someone seeking a legal identity to scan the obituary section of any newspaper for a name and birth date of someone of similar age, request a certified copy of the deceased's birth certificate, and automatically acquire a new identity.

There are thousands of different types of birth certificates, many of which are easily obtained and can be easily altered. Currently most states utilize specialized paper and markings, seals and other features. Controls have not been put into place in most local registrars, however. There is no standard form for certified copies of birth certificates and there is no national standard for issuance of birth certificates. Lack of secure paperstocks and inks in local registrars' offices increases the ability to altar or counterfeit birth certificates.

Experts point to the need for a system which could control access to birth certificates, while not impinging a registrars' ability to be responsive to the public. The 1976 FACFI report contains a series of recommendations related to birth certificate security which include: 1) requests for birth certificates be regulated through standardized application forms which include the applicants reason for request, signature, and personal data which are retained on file at issuing office; 2) a system of interstate and intrastate matching of birth and death records whereby the fact of death is noted on the birth certificate of all persons age 55 or less at the time of death; 3) limit public access to birth and death certificates; and 4) make state-issued or state-controlled records office issued birth certificates the only acceptable form and make certified copies unacceptable for application to federal programs.

While some states have adopted some or all of these recommendations, observance of these standards are not universal. Also, states have taken half-measures, particularly in the matching of birth and death certificates. The majority of states are already implementing programs whereby death certificates are sent to the state Vital Statistics office where the corresponding birth certificate is on file. The problem is many times there is no further action taken by the birth certificate office, or copies of death certificates are not sent to the local office so that deceased individuals identity can still be used to gain certified copies. Experts recommend that states computerize their birth records repositories in order to keep track of requests for

certified copies and facilitate the birth/death records matching system.
A constraint on further improvements is cost. Federal funding for birth certificates has been minimal, and state resources do not appear sufficient to cover the recommended innovations.

To reduce counterfeiting, experts recommend creating a national standard for all U.S. birth certificates as well as a standard form for certified copies of U.S. birth certificates. Another way to decrease counterfeiting would be to use a standard paperstock for all birth certificates. If the paper were standardized and regulated throughout the United States, the design of the certificate itself could be distinctive in every state. However, since the recording of births and issuance of birth certificates is a State function, there is no Federal control of this State process. More secure birth certificate security could be imposed on the States if a Federal agency or program would only accept birth certificates with national standards for federal applications and benefit programs.

Social Security Cards

The Social Security number (SSN), although designed for a narrow purpose, has grown to be an all-purpose primary identifier. The first official statutory authority to issue Social Security Numbers did not occur until 1972, when all aliens authorized to work in the United States and anyone receiving federally-funded benefits in the United States became required by law to have a Social Security number.

Beginning in 1972 all Social Security card applicants became required to provide documentary evidence of age, identity and U.S. citizenship or alien status. Of the 210 million SSNs in use today, over 60% were issued before evidence of age, identity and legal status were required.

Older versions of the card are valid and are easy to counterfeit. There are 44 versions (26 original and 18 replacement) of the Social Security card in circulation today. The new Social Security card, with security features (marbleized paper blue tint, white writing, intaglio printing) is much more difficult to counterfeit. As of June, 1993, sixty-three percent of the total number of active card holders had been issued the new counterfeit-resistant card. However, there is no way of knowing how many counterfeit cards are currently in use and how many cards were obtained through the use of fraudulent birth certificates.

A GAO report issued in March 1988 discusses the role of the Social Security card as an employment eligibility document to fulfill I-9 requirements. The report points

out that the Social Security number (SSN) application process as well as the card itself are vulnerable to fraud. Thousands of different documents can be used in support of an application, making it difficult for the Social Security Administration (SSA) employees to be familiar with all of them. The report noted that older models of Social Security cards can be easily counterfeited, particularly with the high quality color copiers that are available today.[4]

The SSA currently issues three types of Social Security cards: 1) an unrestricted card issued to U.S. citizens and permanent resident aliens; 2) a card which specifies "VALID FOR WORK ONLY WITH INS AUTHORIZATION", first issued in September 1992, to aliens who are in the United States on a temporary basis and who have INS work authorization; 3) and, since May 1982, the Social Security Administration has issued Social Security numbers to aliens for non-work purposes by specifying on the card NOT VALID FOR EMPLOYMENT." [5]

Aliens submit their applications to Social Security with their INS eligibility documentation and receive the appropriate Social Security card. Social Security employees have had training in the detection of fraudulent documents and if there is reason to believe that the INS document is fraudulent, the aliens name is entered in the SSA database as suspected fraud and a secondary verification with INS is commenced. The secondary verification is done either through the SAVE system (160 high-volume SSA Offices out of a total 1300 Offices have the terminals) or by submitting to INS a Document Verification Request Form with the applicant's documentation for INS verification within 120 days.

Social Security numbers use to be assigned to individuals upon request, usually around the time of the applicant's first bank account or first job application. For tax purposes in claiming dependents, the IRS requires that dependents from age one have a SSN. Studies by the SSA have shown that persons over 18 who have never been issued a Social Security card are the most likely group to fraudulently attempt issuance of a card. The SSA is now conducting personal interviews of all SSN

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[4] Since 1988 SSA has issued cards resistant to copying by high quality color copiers.

[5]Social Security numbers can disclose significant information about a person's personal history. For example, the first three digits of the Social Security number reveal the state or territory in which the holder resided at the time the card was issued. The next two numbers provide information on where the number was issued.

applicants age 18 and older who apply for new numbers. The interviews include: verification of the reasons the applicant never previously needed a Social Security number; verification of a birth certificate at the state Bureau of Vital Statistics for all U.S. born applicants; search for a death certificate if there is reason to believe the applicant is using the name of a deceased individual for application purposes, and review and approval by a management official prior to issuance. According to the SSA statistics, prior to the interview program, there were approximately 30,000 annual applications from U.S. born adults, the annual workload for this group of applicants is currently approximately 15,000.

There is a new program within the SSA called the Enumeration at Birth (EAB) process which is an alternative to the filing of an application for a Social Security card. This process, which began in 1989, is offered through the states whereby SSA assigns a Social Security number and issues a card to a child as part of the birth registration process. Forty-nine states and the District of columbia currently participate in the EAB program. Currently, approximately 50 percent of all original SSNs assigned are through the EAB process, and this is expected to increase. This form of issuance will lower the instances of original requests, thereby allowing for more scrutiny of potentially fraudulent original applications submitted by adults.

To encourage increased security for SSNs, experts recommend, at minimum the current card with security features should be reissued to those legitimate card holders of the older versions; even more secure, a Social Security card with a picture could be issued. In pointing out the practical constraints to this recommendation, the SSA notes the substantial cost involved in re-issuing the card. The cost of replacing all Social Security cards with a more fraud-resistant version was estimated by the SSA to cost approximately $2 billion.

Driver's Licenses and Non-Driver ID cards

Another breeder document is the driver's license, easily obtained with a birth certificate, Social Security number, or other identification document. According to the 1992 "Immigration Nursing Relief Act Report on the Security of Fraudulent Documents," more progress in increasing the security of state issued documents is occurring in driver's license issuance rather than in birth certificate issuance.

The report also states that:

*State attention and efforts could be increased if they would designate driver's licenses and non-driver identification cards as the*

*officially recognized State identification document(s), as California has done under State law.*

The Department of Transportation supports and funds efforts to improve driver licensing which includes improving security features. Driver licensing authorities have a national association, The American Association of Motor Vehicle Administrators (AAMVA) which is funded with a paid headquarters staff and is actively involved with the states and the federal government in promoting initiatives affecting licensing.

Improvements have focussed on making the licenses more counterfeit resistant. In the issuance of driver's licenses, states are typically using secure paperstock, lamination, and other security features with a 4 to 5 year cycle for license replacement.

Nevertheless, counterfeiting still occurs. It was reported by the Commission on Agricultural Workers in 1992 that researchers visited flea markets in California where private entrepreneurs were selling fraudulent state identification cards, with photographs, for $10 and "Social Security" cards for $15.

California is the only state currently issuing licenses made of hard plastic with a magnetic stripe. Magnetic stripes are used in conjunction with point-of-sale devices to call up existing information and initiate linkage with other systems. Alteration of the card is difficult and would be very expensive for a counterfeiter to establish an operation for mass production of replicates. The use of a smart-card chip and a biometric identifier on the license is currently being explored through the Department of Transportation. Digital imaging is a new technology currently used for Virginia driver's licenses. Digital imaging technology allows for automated capture and display of signatures and photographs which facilitate comparison between previously recorded and current signatures and photographs.

In 1986 Congress passed the Commercial Motor Vehicle Safety Act (CMVSA) which mandated certain document integrity requirements and a new license issuing process for commercial drivers. CMVSA established a national data base (CDLIS) that must be checked by each State to verify driver identity and records prior to issuing or reissuing a commercial license and required States to establish tamper-proof commercial license documents. The CMVSA also imposed new criminal and civil penalties to deter fraudulent documentation.

To increase driver's license security the Senate staff report on "Options for an Improved Employment Verification System" recommends that states limit the number

of acceptable identification documents for a driver's license, expansion of the current database to include noncommercial driver's licenses in the CDLIS for an interstate cross referencing purposes, and set up a system with SSA whereby the CDLIS system could verify SSNs.

At present, the use of Social Security numbers on drivers licenses varies from one state to another. Currently, the state DMVs are barred by the Privacy Act from linking with the SSA database to provide a system of SSN verification. This procedure could only occur if the statutory authority were given to the SSA to validate SSNs.

## Counterfeiting of INS Documents

Since the enactment of IRCA legalization provisions and employer sanctions, the underground industry for the production and sale of high-quality fraudulent INS documents has become a lucrative business responsive to the increased demand. Two types of documents are in demand: evidence of permanent residence (which automatically gives work authorization) and employment authorization documents (which authorize temporary employment) Fraudulent resident alien cards are widely available on the streets. There are currently 17 versions of the INS "green card" which are acceptable for employment purposes. Except for the newest cards issued between July 1992 - May 1993, the majority do not have an expiration date. The older versions are easily counterfeited, as they do not contain the security features (not printed on fraud-resistant paper, no expiration date, etc.) of the newest card.

Employment Authorization Documents (EAD) also present anti-counterfeiting challenges. Until recently there has been no system in place to standardize and keep record of all work authorization documents issued. The INS is currently working on an EAD project which began in August 1990, whereby one single work authorization card will be issued for all aliens eligible for temporary periods of employment in the open labor market. The current card (I-688B) is a laminated card which includes aliens' photograph, fingerprint, and signature. The application process can be initiated by mail or in-person, but positive identification is required before any EAD card is issued (issuance in-person). The long range goal includes replacing the current EAD card (I-688B) with the Alien Documentation, Identification, and Telecommunications (ADIT) system's improved version (I-766). The new EAD cards will include added security features which incorporate imaging data with biographical data.

## Absence of Back-up Verification Database

At the present time there is no centralized database which explicitly lists all citizens and aliens and their employment eligibility status. The current INS system for aliens is fragmented. There exists the ASVI system, the INS Central Index, and the database which keeps track of issuance of employment authorization documents, but no comprehensive system which universally provides access to an alien's employment eligibility status. The ASVI database, the system currently used for other INS tracking purposes, is used in the pilot telephone verification system, as discussed below. The system has many inconsistencies which could lead to false negative results in employment authorizations. These concerns must be addressed along with a well defined system for secondary verifications.

Beyond this problem, lies an even greater problem with our current system -- the "citizenship loophole." Under the current I-9 verification system/ telephone verification pilot program, if a person identifies him/herself as a U.S. citizen, he/she is not subject to further scrutiny. Currently there exists no database which verifies information on citizenship status.

## Employers' Verification Procedures

The documentation requirements of employer sanctions make it necessary for employers with no training in identifying counterfeit documents to determine, when presented with a document, whether or not that document is valid and whether or not that document can be used for employment purposes. Employers are not document experts, but they are required to assess whether a document reasonably appears on its face to be genuine. The INS employers' handbook demonstrates most of the acceptable documents with black and white photographs, but employment authorization documents included in the handbook are not exhaustive of all possibilities. Moreover, new documents are issued or old documents have modified uses. It would be impossible to provide fraudulent document detection training to all employers. Further complicating the situation, employers must be careful not to ask too many questions which could potentially lead to discrimination, while making too few inquiries into worker documentation could lead to the unlawful employment of illegal aliens.

## Civil Liberties and Civil Rights Concerns

The system for verifying eligibility must conform to U.S. standards regarding privacy and equal access of all authorized workers to employment. A system that impinged on privacy or created discrimination (as is alleged in the current one) will fail the civil liberties and civil rights test. For this reason, employers cannot require additional documentation if they have suspicions but no cause to believe that an employee is an illegal alien. For the same reason, the employer cannot intrude too much into the employee's privacy to convince himself or herself of the validity of the employee's claim to legal status.

## Initiatives to Improve Verification of Work Authorization

Current initiatives to improve verification of work authorization focus on reduction in the number of documents that can be used, telephone verification of eligibility, and anti-counterfeiting/anti-fraud efforts.

### Reduce Number of Documents

The problem of narrowing the possible eligibility documents is staggering considering that in the United States alone there are thousands of authorities who issue a wide variety of vital records, on a variety of forms, using a hodgepodge of formats and issuance procedures.

The first step already taken to simplify the verification process has been to decrease the number of acceptable documents produced by INS. Also, INS has proposed a reduction in the number of acceptable work eligibility documents which would remove 16 of the 29 currently acceptable documents.

In July 1992, the INS initiated a "green card" replacement program with the ultimate goal of drastically reducing the number of work eligibility documents. The new card issued is more counterfeit-resistant; printed on a different color paper with an expiration date. All new cards are subject to the Alien Documentation, Identification, and Telecommunications (ADIT) system which incorporates added security features, including fingerprints, an inscription code, and a photograph. INS began with a three-year program to replace the least secure "green" cards, or Alien Registration Receipt Cards (I-151s). The cost of replacing the cards is covered by the immigrants themselves in the form of a $70 per card user fee. The second phase of the program, is scheduled to begin in 1995, to replace the I-551 Alien Registration

Receipt Cards (issued between 1977 and 1989) over a 10-year period .

The first phase of the program was initiated by administrative order, and was functioning through the local INS offices from July 1992 - May 1993. The process of re-issuance was slow, and efforts to require permanent resident aliens to turn in their cards met with resistance. A campaign was launched by INS through television, radio, and community voluntary agencies to publicize the recall program. Applicants were required to file form I-90 along with the filing fee to replace their existing card at their local INS office. The applicant was required to show up in-person for card replacement. Waivers were available for the filing fee for the indigent, as well as waivers of in-person requirement for those medically unable to appear in person for issuance.

INS was criticized for initiating the program without a public comment period established by regulations published in the Federal Register. In May 1993, the proposed rule was filed in the Federal Register. At the same time, the program was suspended by a court order which resulted from a law suit filed in California. Among other charges, the lawsuit claimed that the INS initiated a program which would benefit the federal government, not the individual card holders, therefore the $70 service fee should not be paid for by the individuals. To date (as of September, 1993), the program continues to be suspended until further notice.

As discussed above, INS is also in the final stages of an initiative to reduce the number of Employment Authorization Documents that it will distribute to aliens.

**Telephone Verification**

Section 274A(d) of IRCA allows the establishment of a telephone verification system (TVS) to determine an employee's work eligibility. In 1991, the President signed Executive Order No. 12781 authorizing INS to implement the TVS program. The system in place currently involves nine corporations within five states (California, Florida, Illinois, New York, and Texas) to verify documents presented to fulfill the I-9 requirement. The TVS process can only be initiated as part of the I-9 process, and therefore, cannot be used by an employer to screen potentially illegal applicants. The pilot began April 1, 1992 and as of June, 1993, the corporations had submitted 2,000 verification requests for employees which resulted in identifying approximately 200 being ineligible for U.S. employment. TVS has been viewed by INS and participating employers as a generally successful program, however since the pilot is on such a small scale questions are raised at to the effectiveness of TVS utilization on a larger scale.

TVS built on the Systematic Alien Verification for Entitlement program (SAVE), established by IRCA. The experience with SAVE is informative to assess the potential of TVS for handling all employer sanctions verification. SAVE is currently used by state agencies administering federal benefit programs to verify legal status of non-citizen applicants. The program's primary objective is to ensure that illegal aliens do not receive federal benefits. All applicants for any of six federal benefit programs are divided into two categories, U.S. citizen or a non-citizen in a legal immigration status. There is no verification process for people who claim citizenship status. The non-citizen applicant must present documentation proving legal status, which is then verified through the SAVE system. The federally-funded programs which participate in SAVE include Aid to Families with Dependent Children (AFDC), Medicaid, Food Stamps, Unemployment Compensation, Federal Housing programs, and Title IV Educational Assistance programs.

SAVE involves the use of a terminal, either in the INS district office or in a state agency, to access the alien file. By entering the individual's "A" number, the Alien Status Verification Index (ASVI) can be accessed. ASVI contains the following information: "A"-number, name, SSN (though not used because many are not entered in database), date of birth, port of entry, file control office, class of admission, alien status and the date the file was opened. If the response shows that the INS has no record of an "A" number, or that the alien is not listed as a lawful permanent resident, it indicates that a second verification should be initiated. The agency then fills out INS' form G-845 (Document Verification Request) and mails it, with copies of the applicants immigration documents, to the nearest INS district office. After INS staff review the documents, make a computer check against the more comprehensive Central Index, and/or institute a manual check against paper files, the results are mailed back to the state agency.

The legislation requiring verification explicitly requires a manual verification so as to help ensure that aliens are not wrongly denied benefits because of problems in the automated database. The burden is on the government agency, not the individual, to demonstrate that the applicant is ineligible for benefits. The program gives "presumptive eligibility" for the benefits to the applicant until the manual verification is completed. Applicants denied on the basis of immigration status may request a hearing. States that deny benefits based on SAVE are not liable if they have complied with the SAVE procedures. Like employer sanctions, which provides a disincentive to illegal alien employment, SAVE is also a disincentive program for illegal immigration (intended to discourage aliens from collecting federal benefits in the United States). INS personnel view the SAVE program as one element of a comprehensive effort to deter illegal immigration.

According to a 1988 Inspector General's Report on "Alien Verification for Entitlements," 16 states had used the SAVE program. States have been generally slow to use SAVE and once states try SAVE, about half continue to participate in the program beyond the pilot phase. The initial cost of installing SAVE is about $2,500 with an annual maintenance costs near $25,000. INS projects that annual data processing costs, if all 50 states were using SAVE, would come to about $1.35 million, but savings from SAVE are estimated to be $2.8 billion in potential illegal immigrant benefit costs (cost avoidances).

The ASVI database has had many insufficiencies including lack of accuracy and completeness of data. INS officials indicate that recent entrants, as well as persons who entered the United States prior to 1956, will not be in the SAVE system. Another problem reported is that the SAVE file is incomplete for other aliens later determined to be legal residents. The status of certain categories of aliens are recorded or updated very slowly.

Like the SAVE program, TVS utilizes the ASVI database, which in and of itself, has many flaws as discussed above. Another similarity to SAVE is the citizenship loophole inherent in the TVS system since telephone verification is only carried out for aliens who self-identify. The TVS pilot has been noted for its quick response. However, if more secondary verifications were necessary, it is not likely that the quick response would continue.

## Anti-Counterfeiting/Anti-Fraud Operations

Every document, whether valid or fraudulent, can be reduced to four basic elements: paperstock, pre-printed format, recorded data, and issuance procedures. Any or all of these elements could be altered to create a counterfeit or fraudulent document. The key to creating a document which is tamper-proof is to implement a variety of features which cannot be easily duplicated, yet are able to be detected quickly and easily outside of a laboratory (a document which can be held up to the light to read coding, for example). The booming business of document fraud, like any other business, boils down to a simple matter of economics. When the cost of producing a document becomes too high for the producer to create a marketable product, then that product is no longer a practical business. The technology is currently available to create an affordable tamper-proof form of identification.[6]

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[6] Security Imaging Corporation, based in California, claims it can produce an identification card with security features for $2 per card, for a total cost of $520,000,000 for the current U.S. population of 260 million

Undercover operations are initiated by INS Special Agents to gather evidence and criminally prosecute document vendors and manufacturers. Recently, most likely as a result of IRCA legalization eligibility provisions and sanctions requirements, INS has uncovered large-scale criminal organizations involved in document fraud. INS is encouraging increased sentencing for these large-scale violations for an overall deterrent effect. Currently, the punishment does not match the seriousness of the crime and persons committing large-scale document fraud have been known to gain release from prison facilities after less than two years time.

The INS has growing capability to detect counterfeit and fraudulent documents through its Forensic Document Laboratory. The laboratory, which opened in 1980, is staffed with 25 employees, and utilizes a variety of high tech fraud detection devices. As counterfeiting becomes more technologically advanced, so must the devices to detect fraud. The INS forensic document laboratory personnel are prepared to testify in any judicial proceeding or hearing as expert witnesses on the examinations they conduct. Among many other things, the laboratory staff assist investigative officers around the world through the use of a computerized document verification system, and issue "Document Alerts" to INS and State Department officials in more than 300 field locations. Document Alerts are sent to field locations when a recurring counterfeit/fraudulent document is detected in the lab and there is reason to believe that there may be many more of such documents to follow. The alerts include a description of the document fraud along with a color copy photograph with arrows indicating the area of the document in which fraud can be spotted. Given the size of the forensic document laboratory and the potential case load, although it is quite an impressive operation, the resources are not available to tackle the current proliferation of fraudulent documents which are now in circulation.

## Recent Legislative Interest

Documentation related to employer sanctions, and increased media focus on illegal immigration in general, have given rise to serious Congressional consideration to the issue of fraudulent documentation in recent years. During employer sanctions hearings held during the past two years, a theme repeated throughout has been the urgent need to improve, simplify, and strengthen the current documentation system for establishing employment eligibility. According to many who testified, until the documentation requirements are improved, employer sanctions will continue to be less than fully effective and unintended job discrimination will be caused by document confusion.

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people.

A roundtable discussion held by the Senate Subcommittee on Immigration and Refugee Affairs in August 1992 to debated the options posed in a report outlining options for an improved verification system. Three options were detailed in the report:

1. Social Security Validation System: This program would designate the existing Social Security card as the sole document for proof of an employee's identity and work eligibility. There would be a telephone verification system that would allow employers to check Social Security numbers of job applicants through the Social Security Administration (SSA). Designating the Social Security card as the single document for employment verification would require close cooperation between SSA and INS.

2. Telephone Verification System: This program would enable employers to verify the employment eligibility status of employees by using the applicant's A-number and a touch-tone telephone to access the automated Alien Status Verification Index (ASVI) database. For every valid A-number entry, ASVI would respond with the alien's first and last name, identification number, and a statement on the individual's employment eligibility status. If any inconsistencies were discovered through the ASVI system, a manual check of internal records would be completed by INS personnel.

3. Drivers' License/ State I.D. with a prevalidated Social Security Number - This program would require that the SSA prevalidate an applicant's Social Security number before the issuance of a driver's license or a state identification card. It would be up to each state to decide whether or not the Social Security number is the same as the driver's license number. Twenty-nine states are currently using the Social Security number as the driver's license number or have the option of showing the number on the license. Currently, the SSA can validate employees' SSNs at the request of employers for the purpose of ensuring proper wage reports, but very few employers actually use this service. There is no system in place, to date, between SSA and state DMVs for this validation process, although it would be feasible through legislative action and increased funding to the SSA.

The roundtable weighed the pros and cons of the three options above, and recommended the third option, Drivers' License/ State I.D. with a prevalidated Social

Security Number, as the most feasible of the three options discussed.

Since the roundtable, several legislative proposals have been introduced in Congress to alter the verification process, for example:

On February 23, 1993, H.R. 1031 was introduced. It calls for the development of a new Social Security card which contains biometric information, bar-code validation, a photograph, or some other identifiable feature. The proposed Social Security number would be used as the single acceptable work authorization document.

On February 24, 1993 the "Immigration Document Fraud Prevention Act of 1993" (H.R. 1079) was introduced, under which work-eligible aliens would be issued new registration and identification cards. The cards would be counterfeit-resistant, and would contain a photograph and other identifying information, and a 10-year expiration date. The new card would not be considered a national identity card as it would not be issued to citizens or nationals of the United States, it does not need to be carried on one's person, and it would be almost exclusively used for employment purposes. The bill also includes a nationwide employer education program, stronger penalties for immigration fraud, and an employment eligibility verification demonstration project.

Senator Alan K. Simpson stated on August 6, 1993 that he will introduce a bill to address the "widespread manufacture and use of fraudulent documents by illegal aliens to obtain employment and other benefits." The bill will require the Administration to develop and implement a secure system to verify work authorization which will not be considered a national ID card, but rather used at the time of seeking employment or welfare benefits.

## Conclusion

Any system of verification of employment authorization must take the issues of fraudulent documentation into account. The issue becomes more complex the further one goes in attempting to seek solutions to problems rooted in document fraud. To be balanced are the effectiveness of the system in verifying eligibility and the potential civil liberties and civil rights infringement that may accrue.

Date: 02/13/97 Time: 17:56
bLabor Dept. to Fund Elimination of Child Labor in Soccer Ball

To: National and Business Desks, Labor Writer
Contact: Bob Zachariasiewicz of the U.S. Department of Labor, 202-219-6373, ext. 164 or 301-774-2432 (home)

WASHINGTON, Feb. 13 /U.S. Newswire/ -- The Department of Labor (DOL) announced today it will fund a coordinated international project to eliminate child labor in the soccer ball manufacturing industry.

The joint effort will include U.S. manufacturers, the International Labor Organization (ILO), UNICEF and the Sialkot Chamber of Commerce and Industry of Pakistan.

The Sialkot district in Pakistan accounts for almost 75 percent of the hand-stitched soccer balls in the world and, according to an ILO study, thousands of children work in the industry.

In making the announcement, acting Deputy Under Secretary for International Affairs Andrew Samet said, ''This effort is the result of the priority the Labor Department placed on the soccer ball industry child labor problem last June. We are encouraged by the progress. Moreover, we are hopeful the effort will be fully and effectively implemented.''

At a news conference last June, former Secretary Robert B. Reich resolved that before the decade was over there would be no children stitching soccer balls rather than getting an education. Sen. Tom Harkin (D-Iowa), Rep. George Miller (D-Cal.), Rep. Christopher Smith (R-N.J.), Rep. Joseph Kennedy II (D-Mass.) and Rep. Barney Frank (D-Mass.) joined Reich in the June effort. Today acting Secretary Cynthia A. Metzler observed, ''We have taken an important step in making that resolution a reality.''

Also in June last year, DOL offered to provide funding through the ILO's International Program for the Elimination of Child Labor (IPEC), if the industry was ready to respond.

The project will remove children from the soccer ball industry in Sialkot and provide them with educational opportunities. The goal is to have all the children out of the business in 18 months. The Labor Department will commit $500,000 to the effort over the next two years. The funds, appropriated by Congress, are part of the department's ongoing support for IPEC. In addition, local manufacturers in Pakistan will provide approximately $360,000 to cover independent monitors, the Soccer Industry Council of America will contribute $100,000 and UNICEF will add $200,000.

The project will phase children out of the soccer ball industry in Pakistan, give them opportunities at education and establish both internal and independent monitoring to keep children out of the industry.

Samet heads up the Bureau of International Labor Affairs, which directs the department's international child labor activities. He said that many organizations, businesses and individual consumers made their positions on the issue known to the department last year at a public hearing on international child labor or in written statements submitted to the department. It is particularly important to note that American companies helped lead this effort. Samet pointed out, ''Reebok and Nike responded early to the challenge and have provided significant leadership in addressing the issue.''

The Sialkot project is the sixth program the Labor Department is helping to fund through IPEC. Other projects have been initiated in Bangladesh, Thailand, Africa, Brazil and the Philippines.

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

JAN 18 1994

JAN 18 1995

MEMORANDUM TO JUDGE MIKVA
Counsel to the President

FROM: Christopher Edley, Jr.
Associate Director for General Government & Finance

**SUBJECT: Incarceration of Aliens Abroad -- Action Needed**

In the Rasco Immigration Working Group meeting this morning you raised the question of moving illegal Mexican immigrants incarcerated in the United States to Mexican prisons, and I made the point that if this is to be pressed seriously, it should be readied as part of the rollout of the President's immigration strategy in early February for maximum domestic political benefit. The discussion hazily identified the two components of fashioning an initiative: (1) a decision to negotiate a treaty amendment with the Mexicans, and (2) a complementary set of domestic actions affecting sentencing statutes, funding, and procedures.

The domestic actions, it seems to me, require OLC work on: (a) the Due Process issues related to sovereignty and to elimination of the voluntariness required under current law -- presumably this can be handled by statutory changes in sentencing -- and (b) Eighth Amendment concerns related to the conditions in Mexican prisons. I've asked Seth Waxman and Merrick Garland to explore immediately the feasibility of getting to closure with Dellinger on these questions in order to meet the Stephanopolous rollout schedule.

None of the domestic elements make sense absent a decision to engage the Mexicans on a treaty amendment. According to Seth Waxman, DOJ sent a letter to the State Department over the weekend recommending that prisoner policy be linked to the peso stabilization initiative. Seth will get the letter to you. I assume the State Department is generally unreceptive to linkage ideas, preferring a "clean" bill and little informal baggage.

I think you have an assignment: *This idea of announcing in February a major shift of criminal aliens back to Mexico is going nowhere until and unless you win a decision to pursue renegotiation of the treaty* -- whether or not tied to the peso plan. If you pursue this with the NSC and State Department, please bear in mind that we also have the related bilateral problem of the border crossing fee, which I raised this morning. If you want to drop the matter, let me and/or Seth Waxman know. Otherwise, let us know who on your staff DPC and OMB should work with in making sure the pieces come together for the rollout. Thanks.

cc: Gordon Adams
Carol Rasco

1ST STORY of Level 1 printed in FULL format.


PR Newswire

January 23, 1997, Thursday - 07:31 Eastern Time

SECTION: Financial News

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HEADLINE: Clean Up Poultry Industry Religious Leaders Demand Ethical Conduct From Poultry Processors

BODY:

Broadening its campaign to improve working conditions in one of America's fastest growing industries, the National Interfaith Committee for Worker Justice (NICWJ) released a "Code of Ethics for Poultry Companies" today, providing the U.S. poultry industry with guidelines for the ethical treatment of workers and poultry growers have raised concerns about increasing injuries to workers, declining income for growers and the treatment of immigrant workers. The "Code of Ethics" addresses these concerns and provides the rapidly growing poultry industry with a set of recommendations for responsible corporate behavior.

"I came to this country to work and improve the life of my family," said Juan Ignacio Montes, who is employed by Case Farms, a North Carolina poultry processor where workers are without a union contract despite voting to be represented by the Laborers International Union of North America (LIUNA) more than a year ago. "The hazardous conditions and disrespect I face at work every day have forced me to fight for my livelihood and my dignity." ATLANTA, Jan. 23

A coalition of consumer, farm and labor groups led by NICWJ has called for and received a commitment from the U.S. Department of Labor to form a task force to investigate work conditions in the poultry industry. The ethical code is intended to complement that investigation by providing poultry processors with standards for ethical conduct.

"Poultry workers suffer from some of the highest workplace injury rates in the U.S.," said Kim Bobo, executive director of NICWJ. "As a nation, we must provide all workers with safe work conditions, fair compensation and the right to bargain collectively. It is a disgrace that workers in such a prosperous industry face daily hazards that ought to be eliminated."

The "Code of Ethics for Poultry Companies" was developed by NICWJ with an advisory board of prominent ethicists and poultry industry experts. The ethics code calls on the poultry industry to:

-- Establish processing line speeds that are safe for workers.
-- Pay workers living wages and fair benefits.
-- Prevent dangerous plant conditions such as slippery floors, respiratory hazards and the accidental start-up of machinery.
-- Assist immigrant workers with their transition into a new community and

country; and

-- Negotiate contracts with poultry grower cooperatives that allow a fair return on their investments.

"These guidelines address some of the most horrendous conditions faced by poultry workers and growers," said Rev. Jim Lewis, Episcopal missioner with the Sussex County Mission and member of the ethics advisory board. "As a nation, we can not credibly condemn foreign sweatshop conditions when workers in this country face such hazards."

Due to increasing consumer demand for poultry products, the U.S. broiler industry alone earned more than $1 billion in operating profits in 1996 and employs more than 200,000 workers. Poultry workers complain of hazardous work conditions, including excessive line processing speeds that increase the chance of carpal tunnel syndrome, chopped-off fingers and respiratory hazards from ammonia leaks and poultry fecal matter.

During the past 40 years, poultry farming has shifted from independent growers to farmers under contract to poultry processors. Under these contract agreements, poultry growers provide more than fifty percent of the investment capital in the industry, but have little control over the return on their investment.

NICWJ is one of the largest and most diverse collections of religious leaders assembled to support worker justice and organized labor. The NICWJ is fighting for the rights of low-wage workers and forging a new relationship between the religious community and labor organizations.

SOURCE National Interfaith Committee for Worker Justice

/EDITORS' ADVISORY: For information or to receive a copy of the "Code of Ethics for Poultry Companies," please CONTACT: David Kindler of L.R. Glenn Communications, 312-642-6813, for the NICWJ/CO: National Interfaith Committee for Worker Justice

LANGUAGE: ENGLISH

LOAD-DATE: January 23, 1997

THE WHITE HOUSE
WASHINGTON

Nightline
Wednesday
June 19

Sweatshops

HHS

data linkages

potential backlash

go slow - issues need to be thought out carefully

Soc Sec

Don't want Soc Sec card to be I.D card

can do electronic

INS

In 2 yrs down to 2 cards

Database improvement over 2 yrs

Coord database in 1 year

Tel Ver. - Will be expanded to 200 employers

Go slow - look at it carefully

We should do some smaller, controlled pilots

Commission is recommending a new database (by combining 2 existing databases)