Approved: 3-14-07
Date

MINUTES OF THE SENATE COMMERCE COMMITTEE

The meeting was called to order by Chairperson Karin Brownlee at 8:00 A.M. on February 13, 2007 in Room 123-S of the Capitol.

All members were present except:
Roger Reitz- excused

Committee staff present:
Amy Deckard, Kansas Legislative Research Department
Kathie Sparks, Kansas Legislative Research Department
Norm Furse, Revisor of Statutes
Jackie Lunn, Committee Assistant

Conferees appearing before the committee:
Bob Totten, Public Affairs Director, Kansas Contractors Association
Corey Peterson, AGC
Allie Devine, Kansas Livestock Association
Chris Wilson, Kansas Building Industry Association
Dan Morgan, Builders Association & KC Chapter AGC
Tom Whitaker, Kansas Motor Carriers
Wayne Maichel, Department of Labor

Others attending:
See attached list.

SB 260-Prohibitions on employing or contracting with illegal aliens as part of a public contract for services

SB 292-Employment security law contractor liability for subcontractor payments

SB 235-Employment security law exclusions from definition of employment

Chairperson Brownlee introduced Kathie Sparks, Legislative Services to explain **SB 260**. Ms. Sparks presented written copy. (Attachment 1) Ms. Sparks stated **SB 260** is based on a Colorado law which was passed last session. The bill would prohibit a state agency, a political subdivision, or a quasi-municipal or public corporation from entering into or renewing a public contract for services with a contractor who knowingly employs or contracts with an illegal alien to perform work under the contract or who contracts with a subcontractor who knowingly employs or contracts with an illegal alien to perform work under the contract. Ms. Sparks then explained the contractor's responsibilities and the Kansas Department of Labor's responsibilities.

Questions from the Committee followed.

Chairperson Brownlee recognized Norm Furse, Revisor, to explain a balloon adding Section 3 to the bill regarding the collecting of any dues in the state from an illegal alien. (Attachment 2)

Chairperson Brownlee opened the hearing on **SB 260** and announced there are not proponents for the bill. She introduced Bob Totten, Public Affairs director, Kansas Contractors Association to give his testimony as an opponent of **SB 260.** Mr. Totten presented written copy. (Attachment 3) Mr. Totten stated the Kansas Contractors Association has concerns with the bill and reviewed those concerns for the Committee. In closing he stated that they had a coalition of businesses working on language to be introduced in the House that addresses some of their concerns with the bill.

Chairperson Brownlee introduced Corey Peterson representing AGC to give his testimony as an opponent of **SB 260.** Mr. Peterson presented written copy. (Attachment 4) Mr. Peterson stated that AGC of Kansas finds many of the provisions of the bill to be unclear and based on how the bill may be interpreted, they are opposed. They do not condone the knowingly hiring of illegal immigrants, but **SB 260** unfairly places a burden on employers to verify legal status of employees. In closing, Mr. Peterson stated that AGC is part of

a coalition comprised of business-related associations and organizations that are currently working on alternative immigration language and they respectfully request that any action on the bill be delayed until the proposed language can be presented.

Chairperson Brownlee called the Committee's attention to the written testimony of Marlee Carpenter, KCCI as an opponent of **SB 260** (Attachment 5) and Melinda Lewis, El Centro, Inc., as a neutral party on **SB 260**. (Attachment 6)

Questions and discussion followed. Chairperson Brownlee recognized Allie Devine representing the Kansas Livestock Association to join the discussion. Ms. Devine presented the Committee with written documentation, "Employment Verification Systems–Where Are We and Where Are We Going?" (Attachment 7) Ms. Devine stated she is a member of the coalition drafting new language that would be fair for businesses and help address this problem. The discussion continued regarding I-9 forms and the rules and regulations to be followed by the employer. There was also discussion on the coalition working on this issue and their time frame.

Chairperson Brownlee closed the hearing on **SB 260** and introduced Kathie Sparks to explain **SB 292.** Ms. Sparks stated the bill is an act concerning collections of employer payments under the employment security law; amending K.S.A. 2006 Supp. 44-717 and repealing the existing section.

Chairperson Brownlee opened the hearing on **SB 292** and introduced Chris Wilson, Kansas Building Industry Association, to give her testimony as a proponent of **SB 292.** Ms. Wilson presented written testimony. (Attachment 8) Ms. Wilson stated a company should be liable for their own unemployment contributions, and another company should not be liable for them. It would be impossible for a general contractor to be knowledgeable about what employees a subcontractor had on his job, what hours they had worked, what the liability for unemployment taxes are for that company. In closing, she asked the Committee to pass the bill out favorably.

Chairperson Brownlee introduced Dan Morgan, Builders Association & Kansas City Chapter of AGC to give his testimony as a proponent of **SB 292**. Mr. Morgan presented written copy. (Attachment 9) Mr. Morgan stated that **SB 292** would strike language from current law that holds a general or prime contractor directly liable for any unpaid unemployment contributions, penalties and interest due from subcontractors. They believe that it is unfair to hold one party liable because another party has failed to meet its own responsibilities and that all parties to a construction contract should be expected to meet their own responsibilities and each should be held liable if they fail to meet those responsibilities. In closing, he urged the Committee to support the bill.

Chairperson Brownlee introduced Corey Peterson representing AGC to give his testimony as a proponent of **SB 292.** Mr. Peterson presented written copy. (Attachment 10) Mr. Peterson stated the current law makes one company liable for actions of another company over which it has no control. A payment bond purchased by the subcontractor will relieve the contractor of this liability, but many subcontractors can not obtain such coverage. For those that can, the additional cost of construction will be passed along to the owner. In closing, he stated if this law has indeed proved to be an effective way of collecting unpaid unemployment taxes, AGC of Kansas questions why construction is being singled out and why this law does not apply to every contractor-subcontractor relationship.

Questions and discussion followed. Chairperson Brownlee called the Department of Labor into the discussion regarding the use of the existing law in collecting delinquent taxes.

Chairperson Brownlee called the Committee's attention to the written only testimony of Martha Neu Smith representing the Kansas Manufactured Housing Association as a proponent of **SB 292.** (Attachment 11)

Chairperson Brownlee introduced Wayne Maichel, Director of Employment Security, Kansas Depart of Labor, to give his testimony as an opponent of **SB 292**. Mr. Maichel presented written copy. (Attachment 12) Mr. Maichel stated the bill strikes language in the Employment Security Laws that provided the general contractors may be held responsible for the unpaid unemployment taxes for subcontractors. This statutory

language has been a very effective tool of assuring that subcontractors operating in Kansas pay unemployment taxes owed by them. The agency rarely has to use this provision, but its mere existence provides a good insurance that the taxes are paid. In closing, he stated removing this language will make it easier for unscrupulous subcontractors to avoid paying their fair share of UI taxes.

Questions and discussion followed. The Department of Labor was asked if they had other tools to secure payment from subcontractors, the answer was "yes".

Chairperson Brownlee closed the hearing on **SB 292** and introduced Kathie Sparks, Legislative Services to explain **SB 235.** Ms. Sparks stated the bill clarifies that an owner-operator leased to a licensed motor carrier is not considered an employee under the provisions of the Employment Security Act.

Chairperson Brownlee opened the hearing on **SB 235** and introduced Tom Whitaker representing the Kansas Motor Carriers Association, to give his testimony as a proponent of **SB 235.** Mr. Whitaker presented written copy. (Attachment 13) Mr. Whitaker stated that for more than 60 years, motor carriers have used independent owner-operators of trucks to supplement their fleets and this provides a source of revenue for these independent businesses. An owner-operator is an individual who owns and operates a truck and chooses to lease to a licensed motor carrier in return for a percentage of the revenue generated by the truck. These owner-operators are independent contractors. **SB 235** narrowly defines that a motor carrier/owner-operator relationship is not an employer/employee relationship and continues the decades long practice of the trucking industry. He stated the Kansas Motor Carriers Association strongly supports the bill and would suggest an amendment. On Page 13, line 4, delete the words "any individual who is" and insert "service performed by"

Questions followed.

Chairperson Brownlee closed the hearing on **SB 235**.

Senator Jordan made a motion to add the amendment from the Kansas Motor Carriers Association to SB 235. Senator Schodorf seconded. Motion carried.

Senator Schodorf made a motion to pass SB 235 out favorably as amended. Senator Emler seconded. Motion carried.

Chairperson Brownlee called on Allie Devine, Kansas Livestock Association and requested a copy of the new language the coalition was working on regarding **SB 260** as soon as it was available.

Chairperson Brownlee adjourned the meeting at 9:22 a.m. with the next scheduled meeting February 14th at 8:00 a.m. in room 123 S.

Senate Commerce Committee
Guest List
Date: February 13, 2007

Tom Whitaker	KS Motor Carrier Assn
Chris Howe	Administration / Purchases
Corey Peterson	AGC of KS
Bob Totten	Kansas Contractors
Chad Giles	KTLA

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February 13, 2007

To: Senate Committee on Commerce

From: Kathie Sparks, Principal Analyst

Re: SB 260, An Illegal Alien Prohibited from Performing Work on a Public Contract

SB 260 would prohibit a state agency, a political subdivision, or a quasi-municipal or public corporation (an example would be the Kansas Housing Resource Corporation) from entering into or renewing a public contract for services with a contractor who knowingly employs or contracts with an illegal alien to perform work under the contract or who contracts with a subcontractor who knowingly employs or contracts with an illegal alien to perform work under the contract.

Contractor Responsibilities

A contractor would be required to certify that it does not employ illegal aliens. In addition, the Act would require that subcontractors must certify to contractors that they do not knowingly employ or contract with illegal aliens. Each public contract must include provisions stating that:

- The contractor shall not knowingly employ or contract with an illegal alien to perform work under a public contract;
- The contractor shall not enter into a contract with a subcontractor that employs or contracts with an illegal alien; and
- The contractor shall cooperate with reasonable investigations conducted by the Kansas Department of Labor (KDOL).

A contractor would be required to participate in, or attempt to participate in, the federal Basic Pilot Program administered by the Department of Homeland Security until such time as the Pilot Program is discontinued. The Pilot Program was created to verify that illegal aliens are not employed by participating entities.

A contractor also would be required to notify the contracting state agency or political subdivision within three days of obtaining knowledge that a subcontractor has knowingly employed or contracted with an illegal alien. The provision further requires such contractors to terminate the contract with the subcontractor within three days if the subcontractor does not stop employing or contracting with the illegal alien.

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State Agencies' Responsibilities

The KDOL would be granted authority to investigate public contract compliance related to the employment of illegal aliens. It would be a breach of contract for a contractor to violate these provisions and the contractor would be liable for damages to the agency or political subdivision. The state agency or political subdivision also could terminate the contract. The KDOL could investigate suspected violations. State agencies and political subdivisions would be required to notify the Secretary of State's Office if a contractor violates the provisions of the Act. The Secretary of State's Office would be required to maintain a list of contractors who had public contracts terminated due to failure to comply with the Act. A contractor's name would be removed from the list two years after the contract terminates or if a court determines that there was no violation. The list would be made available to the public and posted on the Internet.

KLS/kal

that the department is undertaking pursuant to the authority established in subsection (e) of this section.

(c) If a contractor violates a provision of the public contract for services required pursuant to subsection (b) of this section, the state agency or political subdivision may terminate the contract for a breach of the contract. If the contract is so terminated, the contractor shall be liable for actual and consequential damages to the state agency or political subdivision.

(d) A state agency or political subdivision shall notify the office of the secretary of state if a contractor violates a provision of a public contract for services required pursuant to subsection (b) of this section and the state agency or political subdivision terminates the contract for such breach. Based on this notification, the secretary of state shall maintain a list that includes the name of the contractor, the state agency or political subdivision that terminated the public contract for services and the date of the termination. A contractor shall be removed from the list if two years have passed since the date the contract was terminated, or if a court of competent jurisdiction determines that there has not been a violation of the provision of the public contract for services required pursuant to subsection (b) of this section. A state agency or political subdivision shall notify the office of the secretary of state if a court has made such a determination. The list shall be available for public inspection at the office of the secretary of state and shall be published on the internet on the website maintained by the office of the secretary of state.

(e) (1) The department may investigate whether a contractor is complying with the provisions of a public contract for services required pursuant to subsection (b) of this section. The department may conduct on-site inspections where a public contract for services is being performed, request and review documentation that proves the citizenship of any person performing work on a public contract for services, or take any other reasonable steps that are necessary to determine whether a contractor is complying with the provisions of a public contract for services required pursuant to subsection (b) of this section. The department shall receive complaints of suspected violations of a provision of a public contract for services required pursuant to subsection (b) of this section and shall have discretion to determine which complaints, if any, are to be investigated. The results of any investigation shall not constitute final agency action. The secretary of labor is authorized to adopt rules and regulations to implement the provisions of this subsection (e).

(2) The secretary of labor shall notify a state agency or political subdivision if the secretary suspects that there has been a breach of a provision in a public contract for services required pursuant to subsection (b) of this section.

Sec. 3. No labor union shall collect any dues in this state from an illegal alien.

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Attachment 2

Senate Commerce
Feb. 13, 2007
Attachment 2

THE KANSAS CONTRACTORS ASSOCIATION, INC.

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Testimony

By the Kansas Contractors Association

before the Senate Commerce Committee

regarding

SB 260

February 13, 2007

Chairpersons and members of the Senate Commerce Committee, I am Bob Totten, Public Affairs Director for the Kansas Contractors Association. Our organization **represents over 350 companies** who are involved in the construction of highways and water treatment facilities in Kansas and the Midwest.

I appear today because The Kansas Contractors Association is concerned about SB 260 which creates more requirements regarding the employment of competent individuals to work in Kansas. As you may be aware, the highway construction industry is constantly striving to find trained personnel to work in construction and at the same time comply with all state and federal laws so as to not discriminate against anyone.

In reviewing SB 260, we believe the measure does not greatly affect the highway

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construction industry as the definition of a contractor in line 19 on page 1 says "a contractor means a person having a public contract for services with a state agency or political subdivision of the state." Later on line 29, it says "services means the furnishing of labor, time or effort by a contractor or subcontractor not involving the delivery of a specific end product." With those two definitions we believe this measure does not pertain to highway construction. Our members sign contracts with state agencies to build an end product such as a bridge or highway.

Even though this measure may not be designed to center its efforts on the highway construction industry, I should tell you we believe it is incorrect for the state to go beyond what the federal government is already requiring under the Immigration Reform and Control Act of 1986. That law, which I have provided a summary already imposes penalties on employers who knowingly hire or continue to employ aliens not authorized to work in the Untied States.

Our membership believes the federal penalties are sufficient and additional state law is unnecessary.

Even with that said, our membership does have concerns on page two and line 8-12 which indicates the prime contractor should be responsible for a sub contractor who fails to hire employees correctly. We oppose such reference as it requires more than it should when it comes to sub contractors. Prime contractors should not be liable for the hiring practices of their subs and subs should not be responsible for the hiring practices of their primes.

I have not addressed the concern over the basic Pilot program which is cited in the first Section of the proposed measure. We have 3 members who have chosen to

participate in the basic pilot program. It appears it is being used as part of an additional effort to comply with the federal law passed in 1986.

Unfortunately, the Basic Pilot Program is not the only answer as in a recent incident in Colorado so proves. In December of 2006, the Swift and Company was raided by the federal government for employing illegal aliens. The Swift and Company had been using the Basic Pilot program since 1997…but even with that program in place, 1,297 undocumented workers in Swift packing plants throughout the Midwest were arrested.

The Federal government took no action against the company however, the meat processor did suffer a loss of over $30 million dollars. What was discovered is that the basic Pilot Program does not snag stolen Social Security numbers that are being used in multiple locations. Such information brings into question how valuable the Basic Pilot Program is.

One other note, our membership believes if any law is passed regarding this measure, it should apply to all companies in Kansas. It should not be centered on one industry or another.

This immigration measure is a complicated issue and after listening to discussion in various Senate committees several weeks ago, I find there are conflicting positions all over the place. To try to come up with some solutions, a group of business interests here in the capitol are working together to come up with a plan to address some of those concerns. We will be glad to provide to the committee a proposal at a later date…in the mean time, I will try to answer some of your questions if you have them.

Order Code RS2218
June 29, 2005

Unauthorized Employment of Aliens: Basics of Employer Sanctions

Alison M. Smith
Legislative Attorney
American Law Division

Summary

The Immigration Reform and Control Act of 1986[1] (IRCA) sought to end unauthorized employment by imposing penalties on employers who knowingly hire or continue to employ aliens not authorized to work in the United States (e.g., illegal aliens and foreign tourists). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996[2] (IIRIRA) amended some of the provisions of IRCA by reducing the number of acceptable documents for completion of the Employment Eligibility Verification form (I-9) purposes, providing employers with the possibility of a good-faith defense against technical paperwork violations and providing some protection for employers who are part of multi-employer associations. This report summarizes the employer sanctions. This report will be updated as events warrant.

Background

Under IRCA, employers in the United States are prohibited from knowingly hiring an alien not authorized to work in the U.S.[3] Three types of conduct are specifically prohibited: (1) hiring, or recruiting or referring for a fee, an alien knowing he or she is unauthorized to work; (2) continuing to employ an alien knowing that he or she has become unauthorized; and (3) hiring any person (citizen or alien) without following the record keeping requirements of the Immigration and Nationality Act of 1952[4] (INA).

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[1] P.L. 99-603, 100 Stat. 3359. IRCA amended the Immigration and Nationality Act (codified as amended at 8 U.S.C. §§ 1101 *et. seq.*).

[2] P.L. 104-208, 110 Stat. 3009 (hereinafter IIRIRA).

[3] 8 U.S.C. § 1324a. For employment purposes, an "unauthorized alien" is one who is not at a particular time either: (a) lawfully admitted for permanent residence or (b) authorized to be so employed by law or by the Attorney General. 8 U.S.C. § 1324a(h)(3). Thus, the term covers, e.g., illegal aliens and certain aliens here temporarily whose status does not permit them to work (i.e., tourists).

[4] P.L. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-*et. seq.*)

IRCA also prohibits discrimination on the basis of citizenship status, sets penalties for document abuse and expands national origin discrimination.[5]

Employment Verification

Section 274(a)(1)(B) of the INA makes it illegal for an employer to hire any person, citizen or alien, without first verifying the person's authorization to work in the United States. Employers (and recruiters and referrers for a fee) must examine documents and attest that they appear to be genuine and relate to the individual. If a document does not reasonably appear on its face to be genuine and to relate to the person presenting it, the employer may not accept it. Under INA § 274B, employers may not specify which document(s) the person must present. The INA and applicable regulations provide for three categories of documents: (1) those that establish both identity and employment eligibility;[6] (2) those that establish identity only;[7] and (3) those that establish work eligibility only.[8] IIRIRA reduced the number of documents acceptable for I-9 purposes from those allowed under IRCA.

An employer can terminate an employee who fails to produce the required document(s), or a receipt for a replacement document(s) (in the case of lost, stolen or destroyed documents), within three business days of the date employment begins. However, these practices must be applied uniformly to all employees. If an employee presents a receipt for a replacement document, he or she must produce the actual document(s) within 90 days of the date employment begins.

An employer is liable under the INA for "knowingly" hiring unauthorized aliens, or for continuing to employ such aliens after learning that they are not authorized to work in the United States. The law defines an "unauthorized alien" as an alien who is not either

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[5] The anti-discrimination provisions of IRCA apply to employers of four or more employees. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* also prohibits national origin citizenship discrimination but applies only to employers of fifteen or more employees. Thus, only employers of three or fewer employees are not subject to anti-discrimination statutes.

[6] Documents establishing both identity and employment eligibility include a U.S. passport; an alien registration receipt card or permanent resident card, Form I-551; a foreign passport with a temporary I-551 stamp; an employment authorization document such as Form I-766, Form I-688, Form I-688A, or Form I-688B; and in the case of a nonimmmigrant alien authorized to work for a specific employer, a foreign passport with the Form I-94 bearing the same name as the passport and indicating an endorsement of the alien's nonimmigrant status, and the name of the approved employer with whom employment is authorized as long as the period of employment has not expired and the proposed employment is not in conflict with any restrictions on the I-94.

[7] Under INA § 274A(b)(1)(D), documents establishing identity include a driver's license or identification document issued by a state, federal or local government containing a photo or other identifying information; or for individuals under age 16 in a state that does not issue an appropriate identification document, documentation of personal identity found by the Attorney General to be reliable.

[8] Under INA § 274A(b)(1)(c), acceptable documents in this category include a social security card or other documentation found acceptable by the Attorney General that evidences employment authorization.

a lawful permanent resident or an alien authorized for employment by the INS.[9] The term "knowledge" is construed broadly and includes not only actual knowledge but also "constructive" knowledge (which may fairly be "inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition.")[10]

Good-Faith Exception

Under INA § 274A(a)(3), a person or entity that establishes that it has complied in good faith with the requirements of the employment verification obligations has an affirmative defense to a charge that it has violated the provisions.[11] IIRIRA also allows an employer a good faith defense when the employer is found to have made technical or procedural errors in preparing or completing Form I-9.[12] IIRIRA requires that if the employer made a good faith attempt to comply, the government must explain the problem to the employer and allow the employer at least 10 business days to correct it.[13] If the employer fails to correct the error, sanctions may be imposed. Section 274A(b)(6) does not provide the employer with a good faith defense if it has engaged in a pattern or practice of violations of this law.[14]

Sanctions

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (ICE) is authorized to conduct investigations to determine whether employers have violated the prohibitions against knowingly employing unauthorized aliens and failing to properly complete, present or retain Employment Eligibility Verification forms (Form I-9) for newly hired individuals. Any person or entity may file a signed complaint alleging a violation of INA § 274(A) with the ICE office having jurisdiction over the business or

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[9] 8 U.S.C. § 274A(h)(3).

[10] For example, in *Mester Manufacturing Co. v. INS*, 879 F.2d 561 (9th Cir. 1989), an employer was orally notified by the then INS that he had accepted fraudulent documentation from several employees in completion of their I-9's. The employer argued that mere oral representations, even when made by the INS, should not impute knowledge to the employer. The Ninth Circuit rejected this argument and held that once the employer was made aware of the problems with the employee's documentation, the knowledge requirement was satisfied, regardless of how this knowledge was obtained. *See*, 8 CFR § 274a.1(l)(1)(listing situations of constructive knowledge).

[11] *See, U.S. v. Tuttle's Design Build, Inc.*, 2 OCA-HO 270 (8/30/91)(stating that a good faith defense may be raised if the employer shows that (1) an examination of the employee's documents was conducted, in order to establish the individual's identity and employment eligibility; and (2) that the pertinent I-9 form concerning that individual was properly completed). The employer may not argue good faith compliance with the verification requirements if the documents presented are clearly counterfeit, forged, or do not relate to the employee.

[12] Examples of technical errors include (1) a missing date or address on the form or (2) the employee did not make an attestation.

[13] INA § 274A(b)(6).

[14] A pattern or practice violation refers to regular, repeated, and intentional activities. 8 CFR § 274a.1(k).

residence of the alleged violator. The complaint must contain specific information as to both the complainant and the potential violator and detailed factual allegations including the date, time and place of the alleged violations or conduct alleged to constitute a violation of the act. ICE may conduct an investigation for violations on its own initiative or as a result of having received a complaint. If ICE determines after an investigation that there has been a violation, ICE may issue and serve a Notice of Intent to Fine[15] or a Warning Notice.[16]

Employers who fail to properly complete, retain,[17] and/or present Forms I-9 for inspection as required by law may be subject to a civil penalty for violations ranging from $110 - $1,100 per employee whose Form I-9 is not properly completed, retained, and/or presented.[18] Factors considered in setting the fine level are the size of the business, the employer's good faith, the severity of the violation, and the employer's history.[19] Also, the Attorney General can bring a district court action seeking equitable relief (i.e., permanent injunction, etc.).

For a violation of INA § 274A(a)(1)(A) or (a)(2), an employer can face: (1) $275 - $2200 fine for each unauthorized individual;[20] (2) $2,200 - $5,500 for each employee if the employer has previously been in violation;[21] (3) $3,300-$11,000 for each individual if the employer was subject to more than one cease and desist order.[22]

Under INA § 274A(f), employers convicted of having engaged in a pattern or practice of knowingly hiring unauthorized aliens or continuing to employ aliens knowing that they are or have become unauthorized to work in the United States, after November

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[15] In cases where a notice is issued, employers may request a hearing within 30 days of service of the NIF. Employers may contest the notice before an Administrative Law Judge of the Office of the Chief Administrative Hearing Officer (OCAHO), Executive Office for Immigration Review, U.S. Department of Justice. Hearing requests must be in writing and filed with the ICE office designated in the notice. If a hearing is not requested within the 30-day period, ICE will issue a Final Order to cease and desist and to pay a civil money penalty. Once a Final Order is issued, the penalty is unappealable. If a hearing is requested, ICE will file a complaint with OCAHO to begin the administrative hearing process which may end in settlement, dismissal, or a Final Order for civil money penalties.

[16] The Notice must contain a statement of the basis for violations and the statutory provisions alleged to have been violated.

[17] For I-9 must be retained by an employer for the later of three years after the date of hire or one year after the individual's employment is terminated. 8 CFR § 274a.2(b)(2).

[18] 8 CFR § 274a.10(b)(2). Pursuant to the Debt Collection Improvement Act of 1996 (P.L. No. 104-134), an adjustment of civil monetary penalties occurs at least once every four years. As such, increases to civil monetary penalties regarding employer sanctions became effective on September 29, 1999.

[19] 8 CFR § 274a.10(b).

[20] 8 CFR § 274a.10(b)(1)(A).

[21] 8 CFR § 274a.10(b)(1)(B).

[22] 8 CFR § 274a.10(b)(1)(C).

6, 1986, (e.g. expiration of work authorization), may be fined up to $3,000 per unauthorized employee and/or face up to six months of imprisonment.

Unfair Employment Practice

It is an unfair immigration-related employment practice for an employer to discriminate against protected individuals with respect to hiring, recruitment (referral) for a fee, or discharging from employment because of that person's national origin or citizenship status.[23] The term "protected individual" is defined as an individual who is a U.S. citizen or national or an alien lawfully admitted for permanent residence, a temporary resident under § 210(a) or § 245A(a)(i), a refugee under § 207, or an asylee under § 208.[24] However, it is not an illegal employment practice, to prefer an American citizen over an alien if both are equally qualified.[25]

Other circumstances allow for legitimate discrimination, such as hiring only U.S. citizens in order to comply with a government contract, or where an agency or department of the federal, state or municipal government so mandates.[26] For example, many public school districts require hiring only U.S. citizens as teachers.

It is also a discriminatory practice to retaliate against an employee who intends to file or has filed a charge or who testified or participated in an investigation or proceeding under this section, or to interfere with an individual's rights under this section.[27]

Document Fraud - INA § 274C

Persons who knowingly use fraudulent identification documents — either identity documents that were issued to persons other than themselves or false attestations for the purpose of satisfying the employment eligibility verification requirements — may be fined and/or imprisoned up to five years.[28] It is unlawful for any person or entity knowingly to engage in any of the following activities:

- Forge, counterfeit, alter, or falsely make any document for the purpose of satisfying a requirement of the INA or to obtain a benefit under the INA;

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[23] INA § 274B(a).

[24] INA § 274B(a)(3). The term does not cover an alien who fails to apply for naturalization within six months of the date the alien is first eligible to apply or within six months after the date of the enactment of this section or an alien who applied timely but has not been naturalized as a citizen within two years after the date of application unless the alien can establish that he or she is actively pursing naturalization.

[25] INA § 274B(a)(4).

[26] INA § 274B(a)(2).

[27] INA § 274B(a)(5).

[28] 8 U.S.C. § 1324c(e).

- Use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered or falsely made document for the purpose of satisfying an INA requirement or to obtain a benefit under the INA;
- Prepare, file, or assist in preparing or filing an application for benefits or any document required under the act with knowledge or reckless disregard of the fact that such applications or document was falsely made.[29]

This provision applies to "any person or entity." As such, it would include attorneys or anyone else who prepares and/or files applications with ICE. Civil penalties for such actions include fines of: (1) $275 - $2,200 for each document used, accepted or created and each instance of use, acceptance or creation[30] and (2) $2,200 - $5,500 for each document that is the subject of a violation where the person or entity was previously subject to a cease and desist order.[31] Where an entity is composed of physically separate subdivisions responsible for hiring, each such subdivision is considered a separate entity.[32]

In addition, criminal penalties may apply. For example, anyone who fails to disclose or who conceals or covers-up the fact that he or she prepared for a fee an application which was falsely made shall be fined, imprisoned for up to five years or both.[33] Moreover, anyone convicted of failure to disclose the preparation of an application for immigration benefits, who knowingly or willfully prepares or assists in preparing an application for benefits under the INA, whether or not for a fee, shall be fined, imprisoned up to fifteen years or both, and prohibited from preparing or assisting in preparing any other such application.[34]

---

[29] INA § 274C(a)(5). "Falsely make" is defined as preparing or providing an application or document "with knowledge or reckless disregard of the fact that the application or document contains a false, fictitious, or fraudulent statement or material representation, or has no basis in law or fact, or otherwise fails to state a fact which is material to the purpose for which it was submitted." INA § 274C(f).

[30] 8 CFR § 270.3(ii)(A).

[31] 8 CFR § 270.3(ii)(B).

[32] 8 CFR § 270.3(ii)(C).

[33] INA § 274C(e)(1).

[34] INA § 274C(e)(2).

AGC of KANSAS

Building a Better Kansas Since 1934

200 SW 33rd St. Topeka, KS 66611 785-266-4015

TESTIMONY OF
ASSOCIATED GENERAL CONTRACTORS OF KANSAS
BEFORE SENATE COMMITTEE ON COMMERCE
SB 260

February 13, 2007

By Corey D Peterson, Associated General Contractors of Kansas, Inc.

Madam Chairman, Mister Chairman and members of the committee, my name is Corey D Peterson. I am the Executive Vice President of the Associated General Contractors of Kansas, Inc. The AGC of Kansas is a trade association representing the commercial building construction industry, including general contractors, subcontractors and suppliers throughout Kansas (with the exception of Johnson and Wyandotte counties).

AGC of Kansas finds many of the provisions of SB 260 to be unclear, but based on how the bill may be interpreted, AGC of Kansas opposes Senate Bill 260 as written.

AGC of Kansas does not condone the knowingly hiring of illegal immigrants. However, it feels this is a federal issue and laws are currently on the books addressing such. The uncertainty as to what will be done on the federal level adds even more complications to an already complicated subject.

SB 260 unfairly places a burden on employers to verify legal status of employees. While the bill calls for application into the basic pilot employment verification program to verify the legal status of employees, many questions remain regarding the accuracy of the program.

This burden and the corresponding substantial penalties to be imposed should the burden not be met may further jeopardize employers, as they will run the risk of discrimination lawsuits while attempting to insure the legal status of their current and future employees.

AGC is part of a coalition comprised of business-related associations and organizations that is currently working on alternative immigration language and we respectfully ask that any action be delayed until this language can be presented.

The AGC of Kansas **respectfully requests that you do not recommend SB 260 for passage**. Thank you for your consideration.

Senate Commerce Committee
February 13, 2007
Attachment 4

5

Legislative Testimony

SB 260

February 13, 2007

Testimony before the Senate Commerce Committee
by Marlee Carpenter, Vice President of Government Affairs

Chairman Brownlee, Chairman Jordan and members of the committee:

I am Marlee Carpenter with the Kansas Chamber. We represent over 10,000 members, small, medium and large businesses from all corners of the state. SB 260 imposes penalties for those who hire illegal aliens. In response to concerns this bill addresses as well as others introduced on both the House and Senate side, the Kansas Chamber has joined with other interested business groups to form a coalition.

The coalition is working together to ensure that Kansas employers who follow the law are not penalized and those who break it intentionally are penalized. We are in the process of bringing a plan to the legislature and we hope that the plan will address many of the concerns raised in bills introduced this session.

We urge this committee to look at the totality of the immigration and illegal alien issue and not and piece together penalties for employers.

THE KANSAS CHAMBER

The Force for Business

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Senate Commerce Committee
February 13, 2007
Attachment 5

The Kansas Chamber, with headquarters in Topeka, is the statewide business advocacy group moving Kansas towards becoming the best state in America to do business. The Kansas Chamber and its affiliate organization, The Kansas Chamber Federation, have more than 10,000 member businesses, including local and regional chambers of commerce and trade organizations. The Chamber represents small, medium and large employers all across Kansas.

El Centro, Inc.

The Center for Continuous Family Improvement

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913-677-0100
www.ElCentroInc.com

The Academy for Children
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Kansas City, KS 66106
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Academy for Children, Choo Choo Child Care
219 S. Mill Street
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913-371-1744
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608 North 18th Street
Kansas City, KS 66102
913-281-1700

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ECI Development, Inc.
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El Centro, Inc. Argentine
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913-362-8520 fax

El Centro, Inc. Family Center, Johnson County
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Overland Park, KS 66212
913-381-2861
913-381-2914 fax

Macías-Flores Family Center
290 S. 10th Street
Kansas City, KS 66102
913-281-1186
913-281-1259 fax

Woodland Hills, Inc.
1012 Forest Court
Kansas City, KS 66103
913-362-8155
913-362-8203 fax

February 13, 2007

Chairs Brownlee and Jordan and Honorable Members of the Senate Commerce Committee,

Thank you for the opportunity to provide testimony on SB260. While it is my analysis that SB260 has identified the narrow window of statutory authority given to states in the area of employer sanctions for the hiring of unauthorized foreign-born workers, I wish to share some information about the Basic Pilot system on which the employer verification component of SB260 rests.

Currently, only 12,000 employers nationwide use Basic Pilot, which is a voluntary system still in development. Several audits have revealed concerns that Basic Pilot cannot handle the significant increase in traffic that would result from its evolution, at the present time, from a voluntary to a mandatory system (Government Accountability Office, 2003). While SB260 would only mandate Basic Pilot for those employers seeking state contracts, the core issues of its unreliability, dependence on outdated Department of Homeland Security and Social Security Administration databases, inability to detect certain types of fraud, and significant costs still may have bearing on the Committee's consideration of this legislation.

Reviews of Basic Pilot have found error rates ranging from 10% to 20% (GAO, U.S. Chamber of Commerce, and Temple University analyses). Almost 50% of work-authorized non-citizens' authorization cannot be automatically verified and requires additional inquiries. One in eight verification submissions are never resolved, leading to concerns about employer liability in the event of an unjust dismissal or the continued employment of an unauthorized immigrant (U.S. Chamber of Commerce study). As demonstrated by the recent raids on the Swift Company (voluntary participants in Basic Pilot who nonetheless had hundreds of unauthorized workers employed), Basic Pilot cannot determine when an individual has presented someone else's valid identity information. Under SB260, then, an employer could be held responsible for employing an undocumented immigrant even if that employer was participating fully in Basic Pilot.

SB260 rightly includes prohibitions on pre-employment screening, but audits of the use of Basic Pilot have found other discriminatory practices, including failure to notify individuals of problems with their authorization, premature dismissals resulting from inaccurate information, and inadequate privacy protection. Finally, there are significant costs to participating employers which may have the result of increasing their bids for state projects. They must purchase dedicated computer lines for secure Internet connections, buy required hardware, and train staff to properly submit information and handle disputed findings.

Thank you again for the opportunity to share this information about Basic Pilot, another example of the inadequacies of the tools provided by the federal government to deal comprehensively, effectively, and humanely with issues of immigration. I hope that the Committee's discussion of SB260 and related concerns will incorporate these considerations. I would be happy to answer any questions.

Most sincerely,

Melinda Lewis
Director of Policy Advocacy & Research, El Centro, Inc.

Mission Statement: The purpose of El Centro and its subsidiaries is to create and sustain edu

Senate Commerce Committee
February 13, 2007
Attachment 6

Alie Devine
Kansas Livestock Ass

EMPLOYMENT VERIFICATION SYSTEMS—WHERE ARE WE AND WHERE ARE WE GOING?

by Eileen M.G. Scofield, Newton J. Chu, Leigh N. Ganchan, and Austin T. Fragomen, Jr.[*]

States all over the country, as well as the federal government, are seeking to create and implement employment verification systems as a means of "correcting" the "illegal immigration" problem that currently exists in the United States. There is a perception by many that a simple magic wand can be waved over some large database, and it will immediately be able to tell employers who is legally in the United States and who is not. Unfortunately, for those of us who deal daily, if not hourly, with employment-related legal issues, particularly with regard to foreign born workers, we know and understand that databases created by the different government agencies not only fail to contain that information, but also fail to talk to each other. As a matter of fact, due to some of our privacy provisions, these systems may never talk to each other, but unfortunately, politicians continue to claim that employer verifications systems will solve the "illegal immigration" problem.

The following is a summary of a variety of issues related to this particular area—so widespread and broad that the authors have included a series of questions and then material seeking to answer these questions. Employment verification systems and the databases upon which they depend and the laws that seek to use them seem to change quite rapidly. Therefore, by the time of publication, some of this information may have already been amended. The authors, thus, recommend that you continue to look to the AILA InfoNet for updated and current information.

EMPLOYMENT VERIFICATION PROGRAM—WHERE ARE WE AND WHERE ARE WE GOING?

By way of background, right now under current federal law, the I-9 system of paperwork verification is the nation's sole mandatory employment eligibility verification program. There are, though, additional programs used to seek to verify work authorization. First is the Social Security Number Verification System (SSNVS); second, the Basic Pilot Program; and third, there is another program called SAVE, but it is not available to employers, only to government agencies.

The SSNVS is a Web-based version of other systems where employers can verify new employees' Social Security numbers against the Social Security Administration (SSA) database for preparing IRS W-2 forms. This system, though, specifically states that information provided by the SSA should not be used to verify an employee's immigration status.

[*] **Eileen Scofield** is a frequent international and national public speaker and published author of numerous articles primarily on business-related immigration. She has held numerous positions over her 21 years of practice with bar associations and AILA. Ms. Scofield also is a member of numerous organizations that advise Congress on business and immigration issues, such as the National I-9 Coalition. She heads a national practice with Alston & Bird, a 700-plus attorney firm, with offices in D.C., New York, Atlanta, Charlotte, and Raleigh.

Newton Chu serves as the resident director in the Hilo, Hawaii office of Torkildson, Katz, Fonseca, Moore & Hetherington. He has practiced immigration law for over 25 years. He currently practices in the area of immigration law and employment law representing management. A graduate of the University of Hawaii, Manoa, and the Antioch School of Law, Mr. Chu is a frequent lecturer on immigration and employment law issues in Hawaii.

Leigh Ganchan is board-certified in immigration and nationality law, by the Texas Board of Legal Specialization and was selected as one of Houston's Top Lawyers for 2005. Her employment-based practice features I-9 compliance planning and litigation, and health care professional immigration. She has authored many articles on employment eligibility verification, serves on the AILA/USCIS Benefits Liaison Committee, and participated on the AILA/Texas Service Center Liaison Committee for many years. Formerly an INS Assistant District Counsel, she is now a senior associate with Epstein Becker Green Wickliff & Hall in Houston.

Austin T. Fragomen, Jr. is chairman of Fragomen, Del Rey, Bernsen & Loewy LLP. Mr. Fragomen has served as staff counsel to the U.S. House of Representatives subcommittee on immigration, citizenship and international law and as an adjunct professor of law at New York University School of Law. He has testified before Congress on a range of immigration issues. He is vice-chair of the board of directors of the Center for Migration Studies, member of the board of CLINIC, and chair of the Practising Law Institute's Annual Immigration Institute. He also is the co-author of the *Immigration Handbook* series. He attended Georgetown University (B.S.) and Case Western Reserve University (J.D.).

Senate Commerce Committee
February 13, 2007
Attachment 7-1

The Basic Pilot Program is a voluntary Web-based verification system. First introduced in 1996, it seeks to verify employment eligibility by using information provided by the employee on the I-9 form and runs a query through the SSA and U.S. Citizenship and Immigration Services (USCIS)/Department of Homeland Security (DHS) databases. The Basic Pilot Program system, when updated and current, works well. Unfortunately, though, if the program database cannot ascertain the legal status of the individual, based on all the documentation inputted or on the information inputted by the government, potential employees have to generally wait eight days or so to get the inconsistency resolved.

The SSA and DHS have sought to improve the Basic Pilot Program by increasing the accuracy of the existing Homeland Security records, expediting data entry for new lawful permanent residence and arriving nonimmigrants, and for valid work authorization. Data errors do continue to exist with Basic Pilot Program, and in cases where the answer cannot be secured immediately via the Internet, there are often delays in hiring and questions related thereto.

Looking forward, however, new legislation seeks to create a new and improved employment verification system. According to the Chairman's Mark, Comprehensive Immigration Reform Act of 2006, introduced February 28, 2006, Senator Arlen Specter (R-PA) has created a compilation of many of the pending immigration bills and consolidated them into a single act. Naturally, there will be a great deal of discussion, and perhaps this bill will be amended and/or passed before the AILA Annual Conference, but as of the writing of this article, the following is a summary of some of the key employer verification provisions of the bill.

Title III of this legislation, Increased Worksite Enforcement and Penalties, as under the Immigration Reform and Control Act of 1986,[1] prohibits the hiring, recruiting, or referring an alien with knowledge or with reason to know the alien's illegal status. In addition, a company that continues to employ an unauthorized alien on its own through contracts or subcontracts is subject to violation of the law.

Also, the proposed law states that in a civil enforcement context, if it has been determined that an employer has hired more than 10 unauthorized aliens within a calendar year, the rebuttal presumption is created that the employer knew or had reason to know that such aliens were unauthorized. The key point with regard to this section, though, is that an employer who voluntarily uses the electronic employment verification system (Basic Pilot Program) under current terms has a good faith defense to any of these charges.

This legislation creates a new certificate of compliance with regard to an employer's formal assurance that the employer is, in fact, in compliance with immigration laws or that it has developed a plan to come in compliance. This provision allows DHS to rely on an employer's self-assessment and self-certification, rather than launching a formal DHS investigation.

There is a new document verification system whereby employers must take reasonable steps to verify that employees are authorized to work and that the employer attests under penalty of perjury that they have verified the identity and work authorization of employees by examining the documents. Finally, there is a standard of compliance with regard to the examination of the documents. This standard is similar to the current standard already in place with regard to I-9 verification process.

Similarly, the employee has an obligation to attest in writing to be legally authorized to work in the United States. The employer must now retain a copy of the attestation made by any such employee.

Senator Specter wants the basic program to be converted into the electronic employment verification system (EEVS). Under section (d), the Commissioner of Social Security, the Secretary of Homeland Security, must implement an EEVS system via the existing Basic Pilot Program. The EEVS will work through both a toll-free number and an electronic media. The Secretary of Homeland Security will keep a record of inquiries and responses to allow for an audit capability. Under this system, EEVS should be a bit tighter and faster than the current basic program because the response must be made within three days and, again, like the basic program, during a tentative nonconfirmation period, the employer may not terminate the employee based on a lack of work authorization. There is language in the statute that requires the system to be operated with maximum reliability, ease of use, and by privacy safeguards. The SSA's portion of this program will continue to compare names with alien identification and authorization numbers to confirm or deny work authorization.

Section (d)(3) outlines the employer requirements with regard to participation in the EEVS.

[1] Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (partially codified in scattered sections of the INA) (IRCA).

Most importantly is to know that this EEVS will be a roll-out system. Within two years after enactment, employers with more than 5,000 employees must participate in the EEVS. All employers must participate within a five-year window. Eventually, under subsection d(6), an employer's failure to comply with the EEVS requirements shall be treated as a violation of the law, and such failure to comply shall be treated as presumed violations of the prohibition against the hiring of unauthorized aliens. So, therefore, within five years, all employers will be required to use the EEVS system, and the failure to do so will be a presumption of unauthorized employment of illegal aliens.

Subsection (d)(8) protects from civil and criminal liability an employer who relies in good faith on the information provided through the EEVS confirmation system. This provision is extremely important when it comes to the ability to avoid class actions such as the one that has currently been brought against Mohawk and that was previously brought against Tyson Foods in Tennessee a few years ago.

Eventually, under subsection (d)(11), the Secretary of Homeland Security may establish and require fees for employers participating in EEVS. The fees will be designed to help recover the cost of the system. In addition, under another subsection, the Secretary of Homeland Security is required to provide a report to Congress within one year of enactment on the capacity, integrity, and accuracy of EEVS.

Under subsection (e) of this section, the law provides that Homeland Security can still seek evidence and documentation with regard to compliance under these provisions. DHS also can issue pre-penalty notices if it believes there has been a violation. Mitigation continues to include good faith compliance and participation in EEVS. The criminal penalties for pattern and practice hiring will be $10,000 for each unauthorized worker and imprisonment for up to six months or both. The Attorney General can bring a civil action to seek such penalties.

Finally, on a few last compliance issues, employers are prohibited from requiring prospective or current employees to post a bond against liability arising from the employer's violation of the section. The legislation bars noncompliant employers from eligibility for federal contracts and directs that all funds paid for civil penalties be placed into an employer compliance fund that shall be used for enhancing and enforcement of employer compliance. There are other miscellaneous provisions not addressed here.

THE I-9 FORM: CHANGING THE FORM BUT NOT THE RULE

In an attempt to assist employers with the I-9 document review mandate, IIRAIRA[2] provided for a reduction in the number of documents acceptable for the employment eligibility verification process. The goal of this provision was to establish a condensed list of easily identifiable documents, as opposed to the current list of some 30 documents. On September 30, 1997, Immigration and Naturalization Service (INS) published an interim rule, amending the documents acceptable under List A, but made no changes to Lists B and C. The interim rule eliminated four documents from List A: (1) certification of U.S. citizenship (Form N-560 or N-561); (2) certificate of naturalization (Form N-550 or N-570); (3) re-entry permit (Form I-327); and (4) refugee travel document. However, in spite of this rulemaking event, INS never changed the I-9 form to reflect the reduced list of acceptable List A documents. Given that most employers would remain unaware of the interim rule and would likely continue to rely on the list as it appears on Form I-9, INS indicated that it would not impose civil penalties on employers who mistakenly continued to accept the documents that had been removed by the interim rule.[3]

In February 1998, INS published a proposed rule that made sweeping changes to the I-9 form and employment verification procedures.[4] These changes provided solutions to many of the problems associated with employment eligibility verification and on the whole, would render the process much easier for employers. Unfortunately, this proposed rule has never been finalized.

USCIS (formerly INS) issued what was expected to contain the long-awaited revisions to Form I-9 in May 2005. However, the only detectable changes were the replacement of outdated references to the Department of Justice (DOJ) and INS with references to DHS, and the addition of a fourth box in section 1 where employees could choose to indicate that they are "nationals" of the United States.[5] On

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[2] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009 (IIRAIRA).

[3] Note that the USCIS website indicates "Interim changes made on September 30, 1997 are currently in effect." *http://uscis.gov/graphics/howdoi/faqeev.htm.*

[4] 62 Fed. Reg. 5287 (Feb. 2, 1998).

[5] This change may have been intended to address a deficiency in the I-9 form that allowed some individuals who

continued

June 21, 2005, DHS announced that it is "rebranding" the I-9 form to reflect the transfer from DOJ to DHS. Without explanation, DHS replaced the "new" I-9 form from May 2005 with a different version of the I-9 form that again combines U.S. "citizen or national" into a single selection, but that reflected none of the changes provided for in the 1997 and 1998, rulemaking events. The government continues to promise to introduce a new Form I-9 that incorporates substantive changes based on the previous rulemakings;[6] however, it is far from clear when this will happen.[7] With regard to the *Handbook for Employers*, intended to provide a step-by-step explanation of what employers must do to meet their employment eligibility verification responsibilities under the law,[8] USCIS has no current plans to update the information contained therein.[9]

CITIZENS VERSUS NATIONALS—NATIONALITY ISSUES FOR FORM I-9 PURPOSES

Form I-9 asks the potential employee to attest, under penalty of perjury, that he or she is a citizen or national of the United States.[10] The answer for most U.S. citizens is easy, but how many people or employers (let alone lawyers) know what a "national" of the United States is? The question rarely comes up unless you have clients who hail from, or employ, people from the Pacific basin.

Nationality Basics

According to the U.S. State Department (DOS), "[v]ery few persons fall within this category since, as defined by the INA, all U.S. citizens are U.S. nationals but only a relatively small number of persons acquire U.S. nationality without becoming U.S. citizens."[11] The answer to this baffling question on Form I-9 can be found if you read §101(a)(21–22) and §308 of the INA[12] together. Section 101(a)(21) defines the term "national" as a "person owing permanent allegiance to a state.[13] State is defined in the INA as any of the 50 states, plus the District of Columbia, Puerto Rico, Guam, and the Virgin Islands.[14] Section 101(a)(22) of the INA sets forth that all U.S. citizens are also nationals of the United States. However, a national is also "a person who, though not a citizen of the United States, owes permanent allegiance to the United States."[15] Further, INA §308 confers U.S. nationality, but not U.S. citizenship, on persons born in or having ties with "an outlying possession of the United States."[16] The

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falsely claimed U.S. citizenship to obtain Green Cards. However, as long as the I-9 form contains only three boxes to choose from, it appears the government will continue to favorably adjudicate otherwise approvable adjustment of status applications where the alien has checked the referenced "citizen or national" block of the I-9 in the absence of other specific evidence of a false claim to US citizenship. *See* "AILA/TSC Liaison Questions & Answers," *published on* AILA InfoNet at Doc. No. 01041902 (*posted* Apr. 19, 2001).

[6] Press Release, "DHS Issues Rebranded Form I-9" (June 21, 2005).

[7] GAO Report to Congress, Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts, GAO-05-813 (Aug. 2005) (recommending that DHS set a target time frame for completing the Department's review of the Form I-9 process and issuing final regulations on the process) (hereinafter GAO Report to Congress). In response to an AILA request to provide more underlying information regarding *Federal Register* Notices associated with changes to USCIS forms and regulations, USCIS has agreed to put a link in the notices that take the reader directly to the proposed or affected regulation or form. This might prove useful in monitoring future changes to the I-9 form. *See* "AILA-USCIS Liaison Meeting Minutes" (Sept. 22, 2005), *published on* AILA InfoNet at Doc. No. 05120941 (*posted* Dec. 9, 2005) (hereinafter AILA-USCIS Minutes, Sept. 22, 2005).

[8] INS *Handbook for Employers*, Instructions for Completing Form I-9 (M-274) (Nov. 21, 1991), available at *www.uscis.gov*.

[9] AILA-USCIS Minutes, Sept. 22, 2005, *supra* note 7. USCIS proposes that employers look to Office of Business Liaison employer bulletins for updated information. *See* USCIS Employer Information Bulletin 102, The Form I-9 Process in a Nutshell (Oct. 7, 2005) (noting that the bulletin's purpose is to supplement the 1991 version of the *Handbook for Employers* and the 1991 version of the Form I-9 and its instructions.).

[10] Form I-9 (rev. Nov. 21, 1991), Section 1.

[11] U.S. State Department website, *http://travel.state.gov/law/citizenship/citizenship_781.html.*

[12] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (*codified as amended at* 8 USC §§1101 *et seq.*) (INA).

[13] The term "naticnal" means a person owing permanent allegiance to a state.

[14] The term "State" includes the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands.

[15] The term "national of the United States" means: (A) a citizen of the United States; or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

[16] INA §308:

> Unless otherwise provided in section 301 of this title, the following shall be nationals, but not citizens of the United States at birth:

continued

statute sets forth the requirements that one needs to meet in order to be determined to be a national of such outlying possessions. According to INA §308, the persons eligible for this status, in addition to those mentioned above, include persons born abroad to two American noncitizen national parents, or persons born abroad to one alien parent and one noncitizen national parent. The statute also includes a residency requirement of the parents of the child prior to birth in order to transmit such nationality.[17]

Additional research reveals that the only "outlying possessions" as defined in INA §101(A)(29) are American Samoa and Swains Island.[18] Since there are no other statutes that define any other territories or any of the states as outlying possessions, we are limited to these two areas. However, the United States has a number of other insular possessions, such as Wake Island, which according to case law, are not foreign territory.[19] Apparently by inadvertence, these islands are not within the designation of "outlying possessions" as defined in the INA even though aliens coming from these areas ostensibly are not coming from a foreign port or place. However, they are excluded from the definition of the United States for immigration purposes, even though they are not regarded as foreign.

Proof of Nationality

If you determine that your client is a "national" but not a U.S. citizen, what do you advise your client to do? If you research this area of law, you will learn that INA §341(b) provides that you can make an application to the Secretary of State for a Certificate of noncitizen National Status. If you present sufficient proof of nationality, but noncitizen status, you would then take an oath of allegiance much like any petition for naturalization.[20]

However, if you inquire with DOS, you will learn that since the it has received so few requests for such certificates, it never created such a noncitizen national certificate. DOS will then direct those who would ordinarily be eligible for the nonexistent certificate to "apply for a U.S. passport that would delineate and certify their status as a national but not a citizen of the United States." DOS would instruct you as follows: "If a person believes he or she is eligible under the law as a non-citizen national of the United States and the person complies with the provisions of 8 USC 1452(b)(1) and (2), he/she may apply for a passport at any Passport Agency in the United States." When applying, applicants must execute a Form DS-11 and show documentary proof of their noncitizen national status as well as their identity.[21]

Quasi-Nationals

There also are other persons eligible to work in the United States who are not citizens or nationals, but subject to certain treaties, are eligible to live, work, and travel within the United States indefinitely. No, these are not citizens of Canada or Mexico, but Pacific Islanders such as the citizens of the

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(1) A person born in an outlying possession of the United States on or after the date of formal acquisition of such possession;

(2) A person born outside the United States and is outlying possessions of parents both of whom are nationals, but not citizens, of the United States, and have had a residence in the United States, or one of its outlying possessions prior to the birth of such person;

(3) A person of unknown parentage found in an outlying possession of the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in such outlying possessions; and

(4) A person born outside the United States and its outlying possessions of parents one of whom is an alien, and the other a national, but not a citizen, of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than seven years in any continuous period of ten years—

(A) during which the national parent was not outside the United States or its outlying possessions for a continuous period of more than one year, and

(B) at least five years of which were after attaining the age of fourteen years.

The proviso of section 301(g) shall apply to the national parent under this paragraph in the same manner as it applies to the citizen parent under that section.

[17] *See U.S. v. Shiroma*, 123 F. Supp. 145 (D. Hawaii 1954).

[18] The term "outlying possessions of the United States" means American Samoa and Swains Island.

[19] Wake Island is not foreign territory. *See U.S. v. Paquet*, 131 F. Supp. 32 (D. Hawaii 1955), *Petition of Willess*, 146 F. Supp. 216 (D. Hawaii 1956) (however, Wake Island was deemed foreign for purposes of naturalization benefits).

continued

[20] INA §341(b)(1): "A person who claims to be a national, but not a citizen, of the United States may apply to the Secretary of State for a certificate of non-citizen national status. Upon—(1) proof to the satisfaction of the Secretary of State that the applicant is a national, but not a citizen, of the United States."

[21] *http://travel.state.gov/law/citizenship/citizenship_781.html.*

Republic of the Marshall Islands, the Federated States of Micronesia, and Palau. These Pacific Islands may enter the United States and its territories and possessions, engage in employment, and establish residence (as nonimmigrants), without a nonimmigrant visa or a labor certification.[22]

Originally, these were Pacific islands controlled by Japan. At the conclusion of World War II, the United States acquired rights of dominion over these islands that were called the Pacific Trust Territory. The United States did not have full sovereignty over the Pacific Trust Territory even though it was clearly an American occupancy much like the Philippines.[23] Additionally, for immigration purposes, the Trust Territory was not a part of the United States and was regarded as a foreign port or place, and many Hawaiian court decisions have followed this analysis.[24]

During the past 20 years, the United States has conducted negotiations to resolve numerous issues and to terminate the Trusteeship Agreement. The ultimate goal of the United States was to provide autonomy for the inhabitants of the Trust Territory and allow them to decide their own future political status. Currently, there are agreements with four separate island groups within the Trust Territory. In 1986, these agreements were approved by Congress, and, thereafter, the United Nations declared that the United States had fully discharged its obligations under the original Trusteeship Agreement.[25]

The 1986, action created three new Associated States known as the Federated States of Micronesia (FSM), the Republic of the Marshall Islands (RMI), and the Republic of Palau (RP). The United States drafted and concluded Compacts of Free Association with each of these three new nations. These Compacts set forth the political, economic, military, and other terms of their relationship with the United States. Only the Republic of Palau has yet to approve its Compact. The most pertinent feature of these Compacts for immigration and employment law purposes is that it allows citizens of the three countries the right to enter, reside, and be employed in the United States indefinitely.[26]

In 1976, the fourth island group in the former Trusteeship, the Northern Mariana Islands, elected to become the Commonwealth of the Northern Mariana Islands. In the signed Covenant of Political Union, it conferred U.S. citizenship on the indigenous inhabitants of the Marianas and prescribes limited applicability of the immigration and nationality laws of the United States. As set forth in §302 of Pub. L. No. 94–241, certain inhabitants of the Commonwealth of the Northern Mariana Islands, who became U.S. citizens by virtue of Article III of the Covenant, are eligible to opt for noncitizen national status.[27]

More recently, on December 7, 2003, President George W. Bush signed legislation approving the amended Compacts of Free Association (CFA) with FSM and RMI. These Compacts went into effect on May 1, 2004 for RMI, and June 30, 2004, for FSM. After those dates, RMI and FSM citizens will no

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[22] 8 CFR §212.1(d), §1212.1(d), *as amended*, 66 Fed. Reg. 37429, 37432 (July 18, 2001). This provision gives effect to provisions of §141(a) of the Compact between the United States of America and Marshall Islands and the Federated States of Micronesia, 48 USC §1901 note, and of §141(a) of the Compact between the United States of America and Palau.

[23] *See U.S. v. Shiroma*, 123 F. Supp. 145 (D. Hawaii 1954).

[24] *See Application of Reyes*, 140 F. Supp. 130 (D. Hawaii 1956); *Aradanas v. Hogan*, 155 F. Supp. 546 (D. Hawaii 1957); *see also Matter of A–*, 7 I&N Dec. 128 (1956).

[25] Presidential Proclamation 5564 (Nov. 3, 1986), *reproduced in* 63 *Interpreter Releases* 1069–70 (Nov. 19, 1986); North, "Sweeping Immigration Changes for U.S. Territories," 64 *Interpreter Releases* (Jan. 12, 1987).

[26] 8 CFR §212.1(d), §1212.1(d):

Citizens of the Freely Associated States, formerly Trust Territory of the Pacific Islands.

> Citizens of the Republic of the Marshall Islands and the Federated States of Micronesia may enter into, lawfully engage in employment, and establish residence in the United States and its territories and possessions without regard to paragraphs (14), (20) and (26) of section 212(a) of the Act pursuant to the terms of Pub. L. 99-239. Pending issuance by the aforementioned governments of travel documents to eligible citizens, travel documents previously issued by the Trust Territory of the Pacific Islands will continue to be accepted for purposes of identification and to establish eligibility for admission into the United States, its territories and possessions.

[27] Section 302 of Pub. L. No. 94-241:

> Any person who becomes a citizen of the United States solely by virtue of the provisions in Section 301 [applying to those born in or residing in the Northern Mariana Islands] may within six months after the effective date of that Section or within six months after reaching the age of 18 years, whichever date is later, become a national but not a citizen of the United States by making a declaration under oath before any court established by the Constitution or laws of the United States or any other court of record in the Commonwealth in the form as follows 'I _____ being duly sworn, hereby declare my intention to be a national but not a citizen of the United States.'

longer be exempt from passport requirements for travel to the United States and therefore require passports for entry. However, the amended Compacts preserved the right for RMI and FSM citizens to nonimmigrant admission without visa and allowance of employment eligibility. While 8 CFR §274a.12(a)(8), §1274a.12(a)(8), requires citizens of RMI and FSM to obtain an employment authorization document (EAD) as evidence of their eligibility to work in the United States, these new Amended Compacts now provide that a person admitted to the United States from the FSM or RMI under the CFA "shall be considered to have the permission of the Government of the United States to accept employment in the United States."

Thus, for Form I-9 purposes, an unexpired RMI or FSM passport with unexpired I-9 evidencing admission under the compact (or the compact as amended) shall be considered to be documentation establishing identity and employment authorization under "List A" documents. Therefore, citizens of FSM and the RMI no longer need an EAD to work in the United States. However, because the Republic of Palau has not yet approved the amended Compact, citizens of RP will continue to need to apply for and receive an EAD to work in the United States.[28]

WHAT CONSTITUTES NOTICE OF UNAUTHORIZED EMPLOYMENT?

An employer is liable under IRCA for knowingly hiring a foreign national who is unauthorized to work, or for continuing to employ a foreign national after learning that he or she is not work-authorized. The employer's liability is not limited to those situations in which it has actual knowledge of an employee's lack of work authorization. The employment authorization regulations define knowledge to include "not only actual knowledge but also knowledge which may be fairly inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition."[29]

The following scenarios are instances in which constructive knowledge may be found under current regulations:

- The employer does not complete Form I-9;
- The employer does not properly complete Form I-9, such as where the employer fails to enter an expiration date for an EAD;
- The employer fails to reverify the foreign national's employment eligibility after an employment eligibility document has expired.[30]

More difficult are the situations in which the employer obtains information that may indicate the employee is not authorized to work in the United States. In such situations, the employer generally has a duty to inquire further about the employee's status, while taking care not to run afoul of IRCA's employment discrimination provisions. Though not every constructive notice scenario can be described in this article, some commonly arising situations are as follows:

- The employee submits conflicting documentation during initial verification;
- The employee submits documents that appear to be forged or tampered;
- The employee states that he or she is work-authorized until a specific date, but presents acceptable documentation that does not include the expiration date of the authorization;
- The employer receives information from government enforcement personnel that an employee's documentation may not be valid;
- The employer receives information through other workplace sources that an employee is not authorized for employment, *e.g.*, through a verification service such as the Basic Pilot program or through information from another employer.

A crucial issue for employers who obtain information that would indicate an employee's lack of work authorization is how to go about following up with the worker. Under prior law, requests for more or different documents during the I-9 verification procedure or refusals to honor acceptable documentation could be considered an unfair immigration-related employment practice, whether or not the employer's action was based on a good faith effort to comply with IRCA's employer sanctions provision. The 1996, revisions to IRCA modified this provision and provide that an employer's request for more documents or refusal to honor tendered documents is not unlawful unless made for the purpose or with the

[28] USCIS Employer Information Bulletin 106 (Mar. 16, 2005).

[29] 8 CFR §274a.1(l)(1).

[30] *Id.*

intent of discriminating against an individual on the basis of national origin or citizenship status.[31]

When following up situations such as those listed above, the employer should adhere to some general guidelines. The employer should never specify which documents it wants to see to establish identity or work eligibility. It should never require presentation of a document issued by USCIS, either during verification or reverification procedures. If the employee specifies an expiration date for his or her employment eligibility, but offers an employment eligibility document that does not contain an expiration date (*e.g.*, a Social Security card), the employer should not request additional information or documents. If an employee has presented acceptable documentation for verification purposes, the information should be reverified only if the employee has listed an expiration date for employment eligibility on Form I-9. During the reverification, the employer should not require the employee to furnish a document issued by USCIS that shows an extended expiration date, and should accept any document offered by the employee, as long as it appears on the list of acceptable I-9 documents. Further reverification procedures should be conducted only if, upon initial reverification, the employee presents an EAD with an expiration date.

Where the employer receives information that raises the possibility of unauthorized employment, further investigation must be handled carefully. In general, the employer should not make further inquiries about employment eligibility, or request or require additional documentation based on mere rumor or hearsay, without more. Information received from the government may require further investigation. For example, if information is received from U.S. Immigration and Customs Enforcement (ICE) that the employee has not properly completed Form I-9 (*e.g.*, where an inaccurate alien registration number has been provided), follow-up is required. Further inquiry is required when the employee offers a document that contains obvious signs of forgery or tampering, or where the name or descriptive information contained in the document does not relate to the employee. Likewise, follow-up is required where the employee presents a receipt showing an application for an acceptable I-9 document.

In general, the employer must develop a consistent approach to dealing with situations in which there is a duty to inquire further. Employers should remember that they are not expected to ferret out all unauthorized workers from the workplace. Therefore, when an employee presents documents evidencing employment eligibility from an acceptable list of documents, those documents are prima facie proof of the employee's eligibility to work in the United States. Absent clear evidence to the contrary, such as notification from enforcement personnel that the documents are invalid or a contradictory statement from the employee or obvious fraud, the employer need not inquire further about the employment eligibility of the employee.

Employers also should be aware of recent cases indicating that using third-party contractors to hire unauthorized workers may not shield them from IRCA liability. In 2005, in a widely publicized case, Wal-Mart Stores agreed to an $11 million settlement arising out of allegations that it had knowingly used the services of undocumented workers hired by independent contractors.[32] More recently, the Supreme Court has agreed to hear *Mohawk Industries, Inc. v. Williams*,[33] in which a class of workers at a carpet and rug manufacturing company has filed a civil lawsuit under the Racketeer Influenced and Corrupt Organizations (RICO) statutes, alleging that its employer, Mohawk, had conspired with a staffing agency to hire undocumented Chinese foreign nationals to take the place of legally authorized workers and had formed a racketeering enterprise to that end. Oral argument before the Court was held on April 26, 2006.

DEALING WITH SOCIAL SECURITY ISSUES

The most common Social Security issue that arises in the context of employment eligibility verification is the Social Security Administration (SSA) "no match" letter. No-match letters are periodically sent to employers to inform them that employee name and Social Security Number (SSN) information does not match the SSA's records. The typical no-match letter, titled "Employer Correction Request," generally explains that discrepancies exist between SSA's database and employee information provided by the employer on the W-2 form, and requests that employers respond to the letter with corrections "within 60 days." A list of mismatched SSNs is typically attached to the letter, along with information on making corrections. Receipt of a no-match letter raises immigration issues that should

[31] INA §274A(b)(6); 28 CFR §44.200(a)(3).

[32] *See* "Wal-Mart to Pay $11 Million in Lawsuit on Illegal Workers," *N.Y. Times*, Mar. 19, 2005.

[33] *Mohawk Industries Inc. v. Williams*, 411 F.3d 1252, *cert. granted*, 126 S. Ct. 830 (2005).

be carefully heeded by employers. In particular, an SSN mismatch may raise IRCA compliance issues, in particular, whether the affected employee is in fact authorized to work in the United States. Receipt of the no-match letter should not by itself prompt an employer to suspect that the affected employee is working without authorization. However, agency guidance suggests that employers who receive no-match letters have an obligation under INA §274A to follow up with affected employees.[34]

The SSA no-match makes clear that it "makes no statement about your employee's immigration status." Employers are further warned that the letter is not, by itself, a basis for taking any adverse action against an employee, such as termination, suspension, or discrimination. Legacy INS shared this view, stating in a 1997 letter that notice of a discrepancy between wage reporting information and SSA records does not by itself put the employer on notice that the employee is not authorized to work, and is not actual notice of an employer's lack of work authorization.[35]

Receipt of an SSA no-match letter should not be ignored, however; employers should take reasonable steps to try to resolve discrepancies. With respect to the possibility of unauthorized employment, the no-match letter should be considered with other circumstances to determine whether there is actual or constructive notice that an employee is not authorized to work. For example, in addition to the no-match letter, the employer may also receive information from another source, such as another employee, that a worker identified in the no-match letter is in fact not authorized to work. In such a case, the totality of circumstances might rise to actual or constructive notice of unauthorized employment.

Follow-up activity should be considered carefully. Receipt of a no-match letter does not authorize the employer to demand that the employee show his or her EAD or other immigration document. In fact, once an employer has received an employee's status documents for initial completion of Form I-9, rechecking immigration documents is prohibited by IRCA. Employees should be given an opportunity to rectify errors in their name or SSN, since mismatches are commonly due to name changes after marriage or divorce, as well as clerical errors. However, follow-up activity may yield information constituting actual or constructive notice of unauthorized employment. In such cases, further review of the employee's work eligibility is warranted, but any such investigation must be conducted in a consistent, nondiscriminatory manner, as discussed above.

THE CHANGING ROLE OF THE DRIVER'S LICENSE

The state driver's license is one of the most frequently selected List B identity documents when it comes to completing Form I-9. However, the REAL ID Act of 2005[36] may change that by making it difficult, if not impossible, for many individuals to obtain a state driver's license. The REAL ID Act provides that as of May 2008, a state driver's license cannot be accepted by federal agencies for any official purpose unless it meets the requirements of the Act. This would likely include the "official federal purpose" of the use of a driver's license to complete Form I-9.

Once the 1998 proposal[37] is in place, there will only be three List B identity documents, one of which is a state-issued driver's license.

Driver's license applicants must present documents that prove their identity, date of birth, citizenship or immigration status, Social Security number, legal name, and physical residence. Then, the Department of Motor Vehicles (DMV) must verify the authenticity of these documents (which include birth certificates, court documents, Social Security cards, U.S. and foreign passports, immigration documents, and other proof of physical residence, such as utility bills and bank statements) with the agency that issued them. Verification whether electronic or manual is likely to be slow. Denials, delays, and repeated trips to the DMV will be the norm. Certain nonimmigrants must receive only temporary licenses that will have to be renewed more often. Accordingly, even U.S. citizens may encounter difficulties trying to obtain their driver's licenses in a timely manner to complete an I-9 for a new job.

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[34] *See* letter from William Ho-Gonzalez, Office of the Special Counsel for Unfair Immigration-Related Employment Practices, U.S. Department of Justice, to Carl G. Borden, (Dec. 16, 1993).

[35] *See* letter from INS General Counsel David A. Martin, to Bruce R. Larson (Dec. 23, 1997), *reproduced in* 76 *Interpreter Releases* 203 (Feb. 9, 1998).

[36] Division B of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005).

[37] 62 Fed. Reg. 5287 (Feb. 2, 1998).

On February 10, 2006, the Texas Department of Public Safety (DPS) changed the list of acceptable documents for issuance of a Texas driver's license. One particularly vexing consequence of this change resulted in the refusal of driver's license to many foreign nationals even though they were in valid nonimmigrant visa status, such as holders of J-1, H-1B, and F-1 visa statuses (except those with work authorization cards). After focused advocacy efforts of various interested groups (NAFSA: Association of International Educators and AILA), state officials provided temporary relief in the form of a DPS memo advising that DPS supervisors may accept a valid foreign passport with a valid visa or valid I-94 card.[38] The memo also provided a general reminder that in Texas, any person who has never had a Social Security card, or who is not eligible to obtain one, can sign a waiver with the Department and be issued a license. Although it may be changed based on future REAL ID implementation, for now the Texas DMV Commission plans to post for public comment its recommended language for a new administrative rule that will allow the combination of documents respective to legal status to be presented for identification. The posting of the rule will also allow for further comment prior to any final acceptance.

CATCH IT IF YOU CAN: THE INTERNAL AUDIT

One of the most rewarding situations an attorney can have is being involved preparing a large corporation for an I-9 audit. Imagine being locked up in a room for days with several human resource managers sorting through thousands of Form I-9s. The relatively simple and straightforward Form I-9 can create the most horrific of nightmares when you review them carefully for legal compliance. As we instruct all corporate clients, it is imperative to conduct an I-9 self-audit on an annual basis at the very minimum. The Form I-9 is deceptively simple, but fraught with potential problems. The Form's potential problems multiply when employers use different managers or employees with varying degrees of training to complete them. If you can save your client potentially thousands of dollars in civil monetary penalties, while teaching management to correctly complete Form I-9, your reward will be having a very satisfied client.

What Is Involved in a Self-Audit

The authors recommend that you follow a procedure that would mirror a government compliance audit. An audit begins with a request to see not only the I-9s, but also the payroll records for the company that lists all current and terminated employees within a certain period of time. The auditor will then determine what I-9s should be made available for inspection.

Therefore, once you obtain the list of the employees, it is important to first make sure that you have an I-9 for all current employees. These I-9s should be kept in a separate file outside of the employees' personnel files—the reason is that I-9s are only kept for inspection by ICE officials or Department of Labor audit teams and should not be available for everyone to see. From an employment law perspective, the I-9 contains information that, if alleged to be used to make an adverse employment decision, could create the foundation of protected category discrimination. Federal and state laws uniformly prohibit discrimination based on age, ethnicity, national origin, citizenship status, and race, and an I-9 form contains information that could be used in a discriminatory manner.

Once you match up all the I-9s with the employee names, you will learn which I-9s are missing. You will also learn which I-9s are for terminated employees. I-9s for terminated employees should be segregated and placed in separate folders or binders. Since I-9s are required to be kept for employees for three years from the date of hire, or one year after termination, whichever is longer, those I-9s that do not fall within these time periods should be destroyed. Additionally, the authors find it useful to write a destruction date on the top of terminated employees' Forms I-9.

Once the binders for current and terminated employees are established, the authors generally recommend following a procedure to systematically inspect each individual I-9 to check for errors and omissions. This includes checking the completion date of the I-9 along with the hire date, and looking for expired or temporary work authorizations that require reverification.

Self-audits are a great training tool, as errors or omissions will indicate specific procedural problems, and can determine areas for additional training of personnel.

Common Mistakes in Preparing Form I-9

Section 1:

- The Employee did not sign or date the form

[38] Memo in possession of the authors.

- The Employee did not complete Section 1 on the date of hire
- The Employee did not check one of the three boxes regarding status
- The Employee checked the wrong box
- The Employee did not list an Alien Number, Admission Number, or expiration date

Section 2:

- The Employer did not sign Section 2
- The Employer did not date Section 2
- The Employer did not fill in the date of hire
- The Employer did not complete Section 2 within three business days of hire
- The Employer photocopied the employee's documents but did not complete the form
- The Employer signing the Form is not the same person who saw the original documents
- The Employer accepted unacceptable documents (*e.g.*, hospital birth certificates, foreign birth certificates)
- The Employer accepted documents that did not "reasonably relate" to the employee (*e.g.*, different names, dates of birth)
- The Employer accepted too many documents (items on list A, B, and C), which can lead to a discrimination charge against the Employer
- The Employer keeps copies of documents for some employees, but not all (there is no requirement to keep copies, but the Employer's policy should be consistently applied for all employees)

Section 3: The Employer Did Not Reverify Form I-9 When Required

- The Employer did not complete the information required in Section 3
- The Employer did not sign Section 3

Self-Audit Corrections

The authors advise employers not to use "white-out" to make corrections on Forms I-9. Such forms are originally completed containing certifications by both the employee and employer. Thus, a later modification must be additionally signed or initialed and dated by the person making the correction, whether it be the employee or employer. An additional notation such as "corrected during self-audit, date" has been accepted by federal auditors.

APPLICATION QUESTIONS—IS IT SAFE TO ASK THAT?

A significant cause for concern for employers is the issue of pre-hire inquiries into a job applicant's work-authorized status and need for future immigration sponsorship. The Department of Justice's Office of Special Counsel (OSC) has issued some guidelines on these issues.[39]

Pre-Hire Inquiries Generally

In general, an employer may institute a policy that limits hiring to those persons with current employment authorization. Under IRCA, the employer need not consider for employment any person who is not already work-authorized. OSC maintains that an employer may permissibly ask a job applicant whether he or she is currently authorized to work in the United States. If the applicant answers in the affirmative, the employer should not inquire into the basis of the employment eligibility, *i.e.*, whether the employee is a U.S. citizen, lawful permanent resident, or a nonimmigrant foreign national with time-limited work authorization. If the applicant answers in the negative, the employer can permissibly inquire further regarding the applicant's current immigration status.[40] Such pre-hiring inquiries should have minimal risk, because an individual who answers "no" to the question, whether he or she is authorized to work in the United States, is not protected against discrimination under IRCA. Nevertheless, the employer should inquire further about immigration status only if its policy contemplates hiring some persons without current employment authorization (*i.e.*, those who will require the employer's sponsorship). Otherwise, the employer can safely eliminate all such persons from employment consideration without any further inquiry.

Pre-Hire Inquiries and Limited Hiring Policies

Some employers wish to institute policies that limit hiring to those persons who have protected status under citizenship discrimination laws, *i.e.*, U.S. citizens, lawful permanent residents, temporary residents, refugees, and asylees.[41] Such policies are

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[39] *See, e.g.*, Office of Special Counsel Opinion Letter of April 20, 1993 (concerning pre-employment inquiries by employers); U.S. Equal Employment Opportunity Commission Opinion Letter of June 17, 1993 (concerning pre-employment inquiries and prehiring completion of Form I-9).

[40] *See, e.g.*, Office of Special Counsel Opinion Letter of August 6, 1998.

[41] 28 CFR §44.101(c).

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generally permitted, but employers may not limit hiring to a subgroup of the protected class, *i.e.*, U.S. citizens and permanent residents only.[42]

The type of pre-hire inquiry discussed above is appropriate when an employer has a policy of recruiting any individual, regardless of current employment eligibility, or if the employer is willing to hire any individual with current employment eligibility. The inquiry is not sufficient, however, if the employer wants to limit hiring to those persons who are protected individuals under IRCA's citizenship discrimination provision. In asking questions to distinguish between those persons protected by IRCA and those who are not, the employer must keep in mind that OSC has not given the same type of explicit approval to such inquiries. In addition, the employer must be sensitive at all times to avoid national origin discrimination. The Equal Employment Opportunity Commission (EEOC) has not given a definitive opinion on the national origin discrimination implications of such inquiries. Because the EEOC reviews employer policies for disparate impact, and is not limited to cases in which it can establish intentional discrimination, the employer must review such inquiries carefully with employment counsel before instituting a limited hiring policy. In all cases, the employer should not ask the question "Are you a U.S. citizen?" The employer may not permissibly distinguish between U.S. citizens and other protected individuals under IRCA. Obtaining this information before the hiring decision is made leaves the employer open to discrimination charges by rejected job applicants.

Pre-Hire Sponsorship Inquiries

Another pre-hire concern of employer is whether the prospective employee will require sponsorship for an employment visa either at the time of hire or in the future. This information is important because it affects cost and timing issues that must be considered in the hiring decision. Merely asking a prospective employee whether he or she is currently work-authorized will not elicit the necessary information to make this determination, since the authorization may be temporary and require future sponsorship for extensions. In such circumstances, OSC has endorsed the following set of questions: (1) "Are you legally authorized to work in the United States?" and (2) Will you now or in the future require sponsorship for employment visa status (*e.g.*, H-1B status)?"[43] OSC does not recommend that applicants be asked to specify their citizenship status in the context of the employment authorization process. Questions such as "Explain the basis of your current employment authorization" should be avoided because a rejected applicant may rely upon such an inquiry to allege later that the employer considered the information in making the hiring decision, and discriminated based on citizenship status.[44]

DEFENDING AGAINST INVESTIGATIONS

ICE's approach to worksite enforcement operations has markedly changed, ostensibly on account of widespread use of counterfeit documents[45] that make it difficult for ICE agents to prove that employers knowingly hired unauthorized workers, and set and collect fine amounts from employers.[46] Most indicative of this change is the dramatic decrease in the number of notices of intent to fine[47] issued to employers for knowingly hiring unauthorized workers or improperly completing Forms I-9.[48] Therefore, as a response to these difficulties, ICE now considers the pursuit of civil settlements with employers preferable to the administrative fines process.

Employers are now more likely to face a full-scale federal investigation including criminal search warrants authorizing seizure of business, financial and personnel records, as well as computers maintained by the

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[42] 28 CFR §44.200(b)(2). *See also* Office of Special Counsel Opinion Letter of September 20, 1988.

[43] *See, e.g.*, Office of Special Counsel Opinion Letter of August 6, 1998.

[44] *Id.*

[45] In its 1997 report to Congress, the U.S. Commission on Immigration Reform noted that the widespread availability of false documents made it easy for unauthorized aliens to obtain jobs in the United States. In 1999, GAO reported that large numbers of unauthorized aliens have either fraudulently used valid documents that belong to others or presented counterfeit documents as evidence of employment eligibility. GAO, "Significant Obstacles to Reducing Unauthorized Alien Employment Exist," GAO/GGD-99-33 (Apr. 1999) (citing GAO, "Immigration Reform: Employer Sanctions and the Question of Discrimination," GAO/GGD-90-62 (Mar. 29, 1990)).

[46] GAO Report to Congress, *supra* note 7.

[47] 8 CFR §274a.9(d) (the proceeding to assess administrative penalties under §274A of the INA is commenced when the Service issues a Notice of Intent to Fine (NIF) on Form I-763.) Upon service of the NIF, an employer has 30 days to contest the NIF and to ask for a hearing before an Administrative Law Judge (ALJ).

[48] *See* GAO Report to Congress, *supra* note 7, noting a decline in the number of notices of intent to fine from 417 in FY 1999 to three in FY 2004.

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employer.[49] ICE agents conducting the worksite enforcement operation also are likely to be accompanied by enforcement agents from other federal agencies, as well as state and local law enforcement officers.[50] At the close of the investigative phase, employer sanctions efforts are more likely to be driven by a U.S. Attorney in Federal District Court than the traditional ICE agent and trial attorney before an administrative law judge.[51]

The nature of sanctions and settlement agreements is also changing. Employers who plead guilty to criminal immigration charges can face significant criminal forfeiture sanctions.[52] Criminal forfeiture occurs when, after the owner is convicted of a crime, it is demonstrated that the property has a sufficient relationship to the criminal activity to justify depriving the owner of his or her property rights.[53] Since criminal forfeiture is justified as a criminal punishment (it is imposed in a criminal proceeding directed against an individual for his or her alleged misconduct), a defendant in a criminal forfeiture prosecution is entitled to all the procedural protections associated with the criminal process.[54] Immigration counsel would be well-advised to work closely with qualified criminal counsel under these circumstances.

Even where the United States concludes that federal criminal proceedings are not appropriate, the terms of the ensuing civil settlement agreement can be comprehensive. Settlement amounts are reaching unprecedented levels.[55] ICE widely publicized its conclusion of a consent decree that directed the employer to pay $11 million through the U.S. Attorney's Office to the Treasury Forfeiture Fund.[56] The government also seeks wide-ranging injunctive relief designed to ensure a partnership aimed at effective enforcement of these immigration laws. Consent decrees can include permanent injunctions from knowingly hiring, recruiting, and continuing to employ aliens who are not legally authorized to work within the United States; and directives to employers to establish a means to verify that independent contractors also are taking reasonable steps to comply with immigration laws in their employment practices and cooperate truthfully with any investigation of these matters, to train employees of their legal obligations to prevent the knowing hiring, recruitment, and continued employment of unauthorized aliens while complying with pertinent antidiscrimination laws, to establish an internal corporate policy and procedures for employment eligibility verification, and to cooperate in any ongoing investigations of other employers involved in the case.[57]

Heartened by the large forfeiture amounts and comprehensive decrees, ICE is likely to continue to pursue this approach to worksite enforcement and sanctions. In fact, ICE emphasizes that it will continue to conduct important enforcement operations at traditional worksites, especially where the agency suspects egregious criminal employer violations or cases in which there is a nexus to other violations such as alien smuggling, alien harboring, money laundering, fraud, or some form of worker exploitation.[58]

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[49] Press Release, "Homeland Security Secretary Michael Chertoff Announces Six-Point Agenda for Department of Homeland Security" (July 13, 2005), *published on* AILA InfoNet at Doc. No. 07071365 (*posted* July 13, 2005).

[50] "120 arrested on immigration violations at Wal-Mart site," S. Armour & D. Leinwand, USA TODAY, Money section (Nov. 17, 2005) (ICE was assisted by the U.S. Department of Labor, the Social Security Administration, Pennsylvania State Police and the Schuylkill County sheriff); ICE News Release, "56 Illegal Aliens Arrested By ICE at Construction Site" (Feb. 22, 2006) (Carthage Police Department and Jasper County Sheriff's Department assisted ICE with executing this criminal search warrant).

[51] Press Conference with Secretary of Homeland Security Michael Chertoff, Assistant Secretary for Immigration and Customs Enforcement Julie Myers, and U.S. Attorney Glenn Suddaby (Apr. 20, 2006); see "News Release: DHS unveils comprehensive immigration enforcement strategy for nation's border," *published on* AILA InfoNet at Doc. No. 06042160 (*posted* Apr. 21, 2006).

[52] Contractors who actually hired the laborers for work inside stores for the world's largest retailer agreed to plead guilty to criminal immigration charges and together pay an additional $4 million in fines.

[53] T. Reed, *American Forfeiture Law: Property Owners Meet The Prosecutor*, Cato Policy Analysis No. 179 (Sept. 29, 1992).

[54] *Id.*

[55] The $11 million civil settlement alone is approximately four times larger than any other single payment received by the government in an illegal alien employment case. C. Bartels, "Wal-Mart Escapes Criminal Charges in Case," ABC News Online, Money section (Mar. 18, 2005).

[56] *Id.* Federal officials said the fine money would go to the Treasury Forfeiture Fund and will be spent on "promoting future law enforcement programs and activities in this field by U.S. Immigration and Customs Enforcement."

[57] ICE News Release about terms of Wal-Mart settlement agreement.

[58] ICE Fact Sheet, Oct. 20, 2005.

KANSAS BUILDING INDUSTRY ASSOCIATION, INC.

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PAST PRESIDENTS
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STATEMENT OF KANSAS BUILDING INDUSTRY ASSOCIATION

TO THE SENATE COMMERCE COMMIITTEE

SENATOR KARIN BROWNLEE, CO-CHAIR
SENATOR NICK JORDAN, CO-CHAIR

REGARDING S.B. 292

FEBRUARY 13, 2007

Chairmen and Members of the Committee, I am Chris Wilson, Executive Director of the Kansas Building Industry Association (KBIA). KBIA is the statewide trade association of the home building industry, with approximately 2500 member companies.

Thank you for the opportunity to support S.B. 292, deleting the liability of general contractors for subcontractors' unemployment contributions. While we have learned that this law has been in the statutes for the better part of a half century, our membership was unaware of it until the Department of Labor issued a notice regarding it a few months ago. We philosophically do not believe this provision should remain in the statutes. A company should be liable for their own unemployment contributions, and another company should not be liable for them.

It would be impossible for a general contractor to be knowledgeable about what employees a subcontractor had on his job, what hours they had worked.

Senate Commerce Committee
February 13, 2007
Attachment 8-1

CHRISTINA M. WILSON, Executive Dire
212 S.W. 8th Avenue, Suite 201 • Topeka, Ks 66603 • (785) 232-2131 • FAX (785) 232-3680

what the liability for unemployment taxes were for that company. The Department of Labor would be buried in paper if each general contractor contacted them to determine if all the subs on all their jobs were current on their unemployment contributions. And they would have to do this on a monthly basis.

In the residential construction industry, the subcontractors are often larger than the general contractor. Also, the subcontractors are often doing a majority of the work. This is different than when the law was originally passed.

The Legislature has passed legislation which states that it is against public policy to require another party to indemnify the first part against his/her own negligence. We believe that this is another case where the customer may be held liable, regardless of his own actions.

We ask that you report S.B. 292 favorable for passage.

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TESTIMONY BEFORE THE
SENATE COMMERCE COMMITTEE
REGARDING SENATE BILL 292
BY DAN MORGAN
BUILDERS' ASSOCIATION AND KANSAS CITY CHAPTER, AGC
FEBRUARY 13, 2007

Thank you, Madam Chairman and members of the committee. I appreciate the opportunity to appear before you this morning and make some very brief comments in support of Senate Bill 292. My name is Dan Morgan and I am the director of governmental affairs for the Builders' Association and the Kansas City Chapter of Associated General Contractors of America. Our membership is made up of more than 1,050 general contractors, subcontractors and suppliers engaged in the commercial and industrial building construction industry throughout central and western Missouri and portions of northeast Kansas. Over half of our members are located in the Kansas City metropolitan area and are either domiciled in Kansas or perform work in the state.

As you know, Senate Bill 292 would strike language from current law that holds a general or prime contractor directly liable for any unpaid unemployment contributions, penalties and interest due from subcontractors. Simply put, we believe that it is unfair to hold one party liable because another party has failed to meet its own responsibilities. We believe that all parties to a construction contract should be expected to meet their own responsibilities and each should be held liable if they fail to meet those responsibilities.

While provisions of current law provide that a contractor can escape liability for the unpaid unemployment contributions, penalties and interests of subcontractors by requiring subcontractors to provide a bond, that option adds cost to construction projects. The contractor may also escape liability by submitting a "Prime Contractor's Release of Liability Application" for each subcontractor and receiving certifications from the Department of Labor that each subcontractor has paid all contributions, penalty and interest due. That option adds administrative costs to both contractors and the department.

If adopted, as we hope it will be, this bill will return the element of fairness and personal responsibility to this area of Kansas law. We urge your support for Senate Bill 292. Thank you very much. I will be happy to try to answer any questions that you might have.

Senate Commerce Committee
February 13, 2007
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AGC of KANSAS
Building a Better Kansas Since 1934
200 SW 33rd St. Topeka, KS 66611 785-266-4015

TESTIMONY OF
ASSOCIATED GENERAL CONTRACTORS OF KANSAS
BEFORE SENATE COMMITTEE ON COMMERCE
SB 292

February 13, 2007

By Corey D Peterson, Associated General Contractors of Kansas, Inc.

Madam Chairman, Mister Chairman and members of the committee, my name is Corey Peterson. I am the Executive Vice President of the Associated General Contractors of Kansas, Inc. The AGC of Kansas is a trade association representing the commercial building construction industry, including general contractors, subcontractors and suppliers throughout Kansas (with the exception of Johnson and Wyandotte counties).

AGC of Kansas supports SB 292 and asks that you recommend this bill favorably for passage.

SB 292 amends K.S.A. Supp. 44-717 to eliminate liability imposed on construction general contractors for subcontractors that fail to pay state unemployment contributions, penalties and interest.

This law was enacted in 1961, when the role of the general contractor was quite different. In the sixties, a general contractor self-performed a large portion of a construction project with its own employees. Only a few subcontractors would be used on a typical job, such as an electrical or mechanical contractor. Today, a general contractor may have up to 40 subcontractors on typical project and will self-perform very little with its own employees. Thus the liability placed on general contractors today is far greater than that in the 1960's.

This law makes one company liable for actions of another company over which it has no control. A payment bond purchased by the subcontractor will relieve the contractor of this liability, but many subcontractors can not obtain such coverage. For those that can, the additional cost of construction will be passed along to the owner. Added enforcement of this law may force general contractors to require a payment bond or self-perform more work, both placing new, small or struggling subcontractors at risk of being removed from the market place.

Also, if this law has indeed proved to be an effective way of collecting unpaid unemployment taxes, AGC of Kansas questions why construction is being singled out and why this law does not apply to every contractor-subcontractor relationship.

The AGC of Kansas **respectfully requests that you recommend SB 292 for passage**. Thank you for your consideration.

Senate Commerce Committee
February 13, 2007
Attachment 10

KANSAS
MANUFACTURED HOUSING
ASSOCIATION

3521 SW 5th Street
Topeka, KS 66606
785-357-5256
785-357-5257 fax
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TESTIMONY
BEFORE THE
SENATE COMMITTEE
ON COMMERCE

TO: Senator Karin Brownlee, Chairwoman
And Members of the Committee

FROM: Martha Neu Smith, Executive Director
Kansas Manufactured Housing Association

DATE: February 13, 2007

RE: SB 292 – Employment Security Law Contractor Liability For Subcontractor Payments

Senator Brownlee and Members of the Committee, my name is Martha Neu Smith and I am the Executive Director of the Kansas Manufactured Housing Association (KMHA). KMHA is a statewide trade association, which represents all facets of the manufactured housing industry (i.e. manufacturers, retailers, community owners and operators, finance and insurance companies, service and suppliers and transport companies) and I appreciate the opportunity to submit written testimony in support of SB 292.

The current law requires contractors to be responsible for their subcontractors' unemployment contributions. It is unrealistic to expect contractors to continually check with the Department of Labor to make sure all of their subcontractors are current on their contributions. SB 292 strikes the language in K.S.A. 44-717 (b)(3) that makes contractors responsible for subcontractors' unemployment contributions. KMHA feels all contractors and subcontractors should be responsible for their own unemployment contributions.

Thank you for your favorable consideration of SB 292.

Senate Commerce Committee
February 13, 2007
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KANSAS
DEPARTMENT OF LABOR

Kathleen Sebelius, Governor
Jim Garner, Secretary

www.dol.ks.gov

Testimony in Opposition Senate Bill 292
Senate Commerce Committee
Wayne Maichel, Director of Employment Security
Kansas Department of Labor
13 February 2007

Chairpersons Brownlee and Jordan and Members of the Committee:

Thank you for this opportunity to appear and share the concerns of the Kansas Department of Labor and our opposition to Senate Bill 292. The bill strikes language in the Employment Security Laws that provides that general contractors may be held responsible for the unpaid unemployment taxes of subcontractors. This statutory language has been the policy in Kansas law since 1961, with the passage of 1961 Senate Bill 232.

This statutory language has been a very effective tool of assuring that subcontractors operating in Kansas pay unemployment taxes owed by them. The agency rarely has to use this provision, but its mere existence provides a good insurance that the taxes are paid. This dual responsibility ensures taxes are paid into the UI Trust Fund as required by law. In doing so, all employers benefit since their tax rates are ultimately affected by the trust fund balance.

Last Thursday, the Employment Security Advisory Council met and considered this legislation. As you know, the Council is comprised of representatives of the business and labor communities and the public and provides advice on policy matters affecting the Employment Security laws. Attached is a list of current members of the Council. The council discussed this proposal and voted to recommend that this change in policy not be pursued. I urge the Committee to consider this advice from the Council.

It is my belief that this proposed change in law is a result of the agency's recent efforts to implement 2006 House Bill 2772 and enhance awareness and enforcement of misclassification of workers. As part of the agency's education campaign on misclassification of workers, the agency sent a reminder flyer to contractors in Kansas about the legal requirement that contractors can be held responsible if their subcontractors do not pay their taxes. Attached is a copy of the flyer distributed by the agency.

Senate Commerce Committee
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Removing this language will make it easier for unscrupulous subcontractors to avoid paying their fair share of UI taxes – especially subcontractors that come from outside Kansas. This results in the burden of funding the UI System to fall on other employers. The language in the current law helps ensure a level playing field and that all subcontractors play by the rules.

It is also important to note that KDOL currently provides a means to free prime contractors from potential liability for subcontractors' taxes. The general contractor can file an application to be released from liability. Attached is a copy of the application form. The contractor completes the form and sends it to KDOL and the agency ensures that the taxes are paid by the subcontractor and then forwards a release to the general contractor. This has worked well for those who have used it in the past.

Thank you for the opportunity to share these concerns and comments in opposition to Senate Bill 292.

Kansas Employment Security Advisory Council
(Revised February 7, 2007)

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Topeka, KS 66611-2553

Wil Leiker (2008)
Executive Vice-President
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Kansas Chamber of Commerce & Industry
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Vice-President of Human Resources
Gill Studios, Inc.
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913-441-6637

Dick Rader (2008)
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Joseph F. Singer (2010)
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Manhattan, KS 66502

Charles Krider, Professor (2008)
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The University of Kansas
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This application, when completed and signed by the prime contractor, is to be returned to the: Delinquent Account Unit
Kansas Department of Labor
401 S.W. Topeka Blvd.
Topeka, Kansas 66603-3182

PRIME CONTRACTOR'S RELEASE OF LIABILITY APPLICATION

If released, the Department will keep the original application and mail a copy to the prime and subcontractor.

PRIME CONTRACTOR:

Kansas Unemployment Account Number (*Required*)

(Name)

(Street)

(City, State, Zip)

(Telephone with Area Code)

SUBCONTRACTOR:

Kansas Unemployment Account Number (*Required*)

(Name)

(Street)

(City, State, Zip)

(Telephone with Area Code)

NAME AND LOCATION OF CONTRACT:

Date subcontract began: _____
(month) (day) (year)

Date subcontract completed: _____
(month) (day) (year)

Date subcontractor paid last wages on this subcontract: _____
(month) (day) (year)

I certify that the subcontract listed above has been completed, and do request a release from liablity under K.S.A. 44-717 (b) (3) of the Kansas Employment Security Law.

(Prime Contractor's Signature)

(Printed Name and Title) (Date)

I certify that the captioned subcontractor

☐ has paid all contributions, payments in lieu of contributions or benefit cost payments, penalty and interest due.

☐ is not liable to the Kansas Department of Labor for taxes on wages paid during the referenced subcontract.

Authorized Signature for the: Kansas Department of Labor
401 S.W. Topeka Blvd.
Topeka, KS 66603-3182
(785) 296-5023

(Date)

K-CNS 222 (Rev. 9-04)

12-4

KANSAS
DEPARTMENT OF LABOR

Notice to Contractors

Kansas employers engaged in the construction trades in Kansas are required to report wages and pay unemployment contributions to the Kansas Department of Labor. Additionally, if any subcontractor in the building trades fails to correctly report wages paid or pay the Kansas unemployment contribution correctly, the prime contractor can be held directly liable for the unemployment contribution, penalty and interest due from the subcontractor.

K.S.A. 44-717(b)(3)

"Any contractor, who is or becomes an employer under the provisions of this act, who contracts with any subcontractor, who also is or becomes an employer under the provisions of this act, shall be directly liable for such contributions, penalties and interest due from the subcontractor and the Secretary of Labor shall have all of the remedies of collection against the contractor under the provisions of this act as though the services in question were performed directly for the contractor, unless the contractor requires the subcontractor to provide a good and sufficient bond guaranteeing payment of all contributions, penalties and interest due or to become due with respect to wages paid for employment on the contract."

Besides the bond requirement in K.S.A. 44-717(b)(3), a prime contractor may also be resolved from liability by submitting a K-CNS 222, **"Prime Contractor's Release of Liability Application"** and receiving a certification from the Kansas Department of Labor that the subcontractor has paid all contributions, penalty and interest due or that the subcontractor is not liable to Kansas for taxes on wages paid during the referenced subcontract. The K-CNS 222 may be obtained online at **www.uitax.dol.ks.gov** (select Forms).

Worker Misclassification

Intentional misclassification of workers is illegal and constitutes tax and insurance evasion. Misclassifying employment in Kansas harms workers, the business community and Kansas taxpayers. Employers that intentionally classify a worker as an independent contractor to avoid paying these taxes are subject to severe penalties in Kansas.

If you are unsure whether people working for your business should be classified as an employee or an independent contractor, you can contact the Kansas Department of Labor for help:

Call 785-368-8313 or go online at www.uitax.dol.ks.gov

13

Kansas Motor Carriers Association

Trucking Solutions Since 1936

70th 1936-2006 ANNIVERSARY KMCA

Legislative Testimony
Presented by the Kansas Motor Carriers Association
Before the Senate Commerce Committee
Senator Karin Brownlee, Co-Chairman
Senator Nick Jordan, Co-Chairman
Tuesday, February 13, 2007

CHAIRMAN BROWNLEE, CHAIRMAN JORDAN AND MEMBERS OF THE SENATE COMMERCE COMMITTEE:

I am Tom Whitaker, executive director of the Kansas Motor Carriers Association. I appear here this morning representing our 1,200 member-firms in support of Senate Bill No. 235. This legislation clarifies that an owner-operator leased to a licensed motor carrier is not considered an employee under the provisions of the Employment Security Act.

For more than 60 years, motor carriers have used independent owner-operators of trucks to supplement their fleets and this provides a source of revenue for these independent businesses. An owner-operator is an individual who owns and operates a truck and chooses to lease to a licensed motor carrier in return for a percentage of the revenue generated by the truck. These owner-operators are independent contractors.

During the 2006 Session of the Kansas Legislature, KMCA successfully sought passage of House Bill No. 2755 which spelled out in the statutes that a motor carrier complying with the safety rules and regulations of the Federal Motor Carriers Safety Administration was not considered as having control over an owner-operator and therefore did not constitute an employer/employee relationship. The 2006 legislation was in response to rulings by the Kansas Department of Labor that threatened the long standing practice of using owner-operators. KMCA thought the adoption of HB 2755 would solve the problem however, cases continue to come before the Department of Labor.

KMCA continues to discuss this issue with the Department of Labor in an effort to solve this situation. We would like to publicly thank Secretary Garner for the openness his office has afforded the trucking industry. On Thursday, February 8, 2007, Secretary Garner brought this issue before the Employment Security Council for discussion. The Council voted to table discussion of SB 235 until their next meeting when more information was available, taking no action either for or against the bill. KMCA continues to discuss this issue with the Department, but feels it is imperative to keep moving this legislation forward in order to provide our carrier with sound business judgment when leasing owner-operators.

SB 235 narrowly defines that a motor carrier/owner-operator relationship is not an employer/employee relationship and continues the decades long practice of the trucking industry. According to the Federal Motor Carrier Safety Administration, there are 8,981

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Senate Commerce Committee
February 13, 2007
Attachment 13-1

motor carriers in Kansas and of these, 86% operate six or fewer trucks, 95% operate 19 or fewer trucks and only .5% operate more than 100 trucks. It is estimated that 80% of these carriers use owner-operators and this is especially true for those that serve the agricultural industry. The state's trucking industry needs stable ground rules to continue to provide the service necessary to keep the Kansas economy growing.

Nebraska, Missouri and Oklahoma currently have an exception for owner-operators in state law. Passage of Senate Bill No.235 would provide Kansas motor carriers a level playing field to compete for owner-operators to move the nation's goods.

We would request one amendment to SB 235. On Page 13, line 4, delete the words "any individual who is" and insert "service performed by." This amendment will make the amendment consistent with other paragraphs in K.S.A. 44-703.

The Kansas Motor Carriers Association respectfully requests the Senate Commerce Committee report Senate Bill No. 235 favorable for passage. We thank you for the opportunity to appear before you today. I would be pleased to stand for questions.