The Immigration Reform and Control Act of 1986: Obligations of Employers and Unions

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Overview of the New Statute

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I

Employment Aspects of IRCA

A. New Controls over Hiring Procedures

The Immigration Reform and Control Act of 1986 ("IRCA"),¹ although not the most complicated piece of labor legislation ever passed, is one of the most expansive pieces of labor legislation because it deals with every employer and every employee in the United States.² There are no exceptions. Congress did not except itself, or the executive or

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2. INA § 274A(a), 8 U.S.C. § 1324a(a) (Supp. IV 1986).

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judiciary branches. Small employers are not excepted. Every individual and every employer are affected by this piece of legislation.

The key provision of this statute is a prohibition against hiring unauthorized aliens. Unauthorized aliens are defined by the statute and by the regulations. It is very simple: you have an authorization to work, or you do not.

The statute provides two mechanisms to carry out its objectives. The first is attestation, whereby every employee who is hired after November 11, 1986, completes a simple one-page document. The person asserts, under penalty of perjury, the right and entitlement for that person to work in the United States.

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The employer then certifies, under penalty of perjury, the right and entitlement for that person to work in the United States.

3. INA § 274A(h)(3), 8 U.S.C. § 1324a(h)(3) (Supp. IV 1986), defines an alien as “unauthorized” when “with respect to the employment of an alien at a particular time, that the alien is not at that time either: (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General.”


6. INA § 274A(b)(1)(B), 8 U.S.C. § 1324a(b)(1)(B) (Supp. IV 1986); 52 Fed. Reg. 16,222 (to be codified at 8 C.F.R. § 274a.2(b)(1)(i)(A)). Examples of documents which establish both work authorization and identity are: U.S. passport; Certificate of U.S. Citizenship (Form N-560 or N-561); Certificate of Naturalization (Form N-550 or N-570); unexpired foreign passport which: (A) contains an unexpired stamp which reads, “processed for I-551. Temporary evidence of lawful admission for permanent residence. Valid until __, Employment authorized”; or (B) has attached a Form I-94 in the same name and with identical biographic information as the name in the passport, which must contain an unexpired employment authorization stamp and the proposed employment must not be in conflict with any restrictions or limitations identified on Form I-94; Alien Registration Card (Form I-151 or I-551), provided that it contains a photograph of the bearer; Temporary Resident Card (Form I-688); or Employment Authorization Card (Form I-688A).

7. INA § 274A(b)(1)(C)-(D), 8 U.S.C. § 1324a(b)(1)(C)-(D) (Supp. IV 1986); 52 Fed. Reg. 16,222 (to be codified at 8 C.F.R. § 274a.2(b)(1)(v)). Examples of documents which are acceptable to establish identity of individuals 16 years of age or older are: state-issued driver's license or identification card with a photograph or identifying information; school identification card with a photograph; voter's registration card; U.S. military card or draft record; identification card issued by federal, state or local government agency or entity; military dependent's identification card; Native American tribal documents; U.S. Coast Guard Merchant Mariner card; Canadian driver's license. 52 Fed. Reg. 16,222 (to be codified at 8 C.F.R. § 274a.2(b)(1)(v)(B)(1)). Examples of documents which are acceptable to establish identity for individuals under the age of 16 are: school record or report card; clinic, doctor or hospital record; day care or nursery school record; completion of Form I-9 by minor's parent. 52 Fed. Reg. 16,222 (to be codified at 8 C.F.R. § 274a.2(b)(1)(v)(B)(2)). Examples of documents which are acceptable to establish the right to work are: social security card; unexpired reentry permit (Form I-327); unexpired refugee travel document (Form I-571); birth certificate issued by the Department of State (Form SS-545); certificate of birth abroad issued by the Department of State (Form DS-1350); original or certified copy of a birth certificate issued by a state, county or municipal authority; employment authorization document issued by INS; U.S. citi-
alty of perjury, that he or she has seen the documentation presented. So long as the documentation reasonably appears genuine, the employer has an affirmative defense against charges of having violated the terms of this statute.

The second mechanism is a system of sanctions imposed upon individuals who knowingly hire unauthorized aliens. These people are subject to more severe fines than those imposed for not completing the attestation document, and are also subject to potential civil injunctive relief and/or criminal penalties.

B. New Civil Rights Provisions

The Unfair Immigration Related Employment Practices provision of the Act creates a new civil rights statute. First, it extends many of the provisions of Title VII to employers of four or more. More importantly, it creates a new cause of action, that of citizenship discrimination for those individuals who have filed a declaration of intent to naturalize and are eligible as intending citizens. For those qualified individuals, the statute simply and directly prohibits discrimination because of the alien status. The national-origin aspect of the statute is quite broad, as it deals with the hiring decision and the termination decision in the employment context.

The basic guideline for employers to prevent discrimination is con-
sistency: require every employee to provide proof of authorization to work; and hire only upon the basis of the individual's ability to do the job, not upon racial characteristics or anything else. By utilizing a consistent mechanism, an employer should have both a defense against an Immigration Service charge of hiring unauthorized aliens, and a defense against a charge of an unfair immigration employment-related practice.

This is one instance where the two enforcement provisions accomplish the same result. This statute is very simple for ninety-five percent of American employers. There are some simple do's and don't's that will keep employers out of trouble. First, they must complete the attestation form as to every employee hired after November 6, 1986. Second, they must not knowingly hire or continue to employ persons known to be unauthorized aliens. The sanction does not deal with individuals hired before November 6, 1986. Third, they must maintain the attestation documents for the period required by law. Fourth, they must present the attestation documents to agents of the Immigration Service or the Department of Labor as required and as demanded. Finally, they must not refuse to hire any individual on the basis of race, nationality, apparent citizenship, or for any other reason than the person's ability to do the job.

II
THE NEW REGULATIONS
A. Promulgation of the Regulations

The Immigration and Naturalization Service ("INS") spent a lengthy period of time going through the process of drafting regulations. Not only did it comply with the Administrative Procedures Act, applicable to the federal government in the promulgation of regulations, but it

15. Examination of Documents and completion of Form I-9. INA § 274A(b)(1), 8 U.S.C. § 1324a(b)(1) (Supp. IV 1986); 52 Fed. Reg. 16,221-22 (to be codified at 8 C.F.R. § 274a.2(b), (b)(1)).


17. 52 Fed. Reg. 16,224 (to be codified at 8 C.F.R. § 274a.3); see infra note 46 and accompanying text.

18. Employers must maintain the I-9 forms for three years after the date of hire, or one year after the date of termination of employment, whichever is later; recruiters and referrers for fees must retain the documents for three years after the date of the referral. INA § 274A(b)(3), 8 U.S.C. § 1324a(b)(3) (Supp. IV 1986); 52 Fed. Reg. 16,223 (to be codified at 8 C.F.R. § 274a.2(b)(2)(i)).

19. INA § 274A(b)(3), 8 U.S.C. § 1324a(b)(3) (Supp. IV 1986); 52 Fed. Reg. 16,223 (to be codified at 8 C.F.R. § 274a.2(b)(2)(ii)) provides that the Immigration & Naturalization Service may inspect the Forms I-9 without a subpoena, on three days notice; see infra note 48 and accompanying text.


even printed early copies of its proposed draft regulations so that it could stimulate comment in terms of what should or should not be in the regulations.\textsuperscript{22}

As of April 1987, the INS had already received somewhere around 4,000 comments which were considered before making the current regulations.\textsuperscript{23} Indeed, many of the concerns discussed at public meetings have been translated back into the regulations. This input produced a group of regulations which recognize both the labor market and labor/management problems better than the Agency’s first efforts.

\textbf{B. Definitions}

The regulations begin with a definitional section. It is very helpful in interpreting the rest of the regulations. “Hire,” for example, means the actual commencement of employment.\textsuperscript{24} Thus, while an employer can do an attestation check prior to the time of contracting to “hire,” that is not necessary. The Comments section elaborates a bit on this.\textsuperscript{25} An employer may make an offer to hire someone who is going to start work in three weeks. The employer may ask the employee to complete the attestation form at the time the employer makes the offer of hire. But the time of “hire” is defined in the regulations such that the employee does not have to complete the I-9 form until the time of actual commencement of employment.\textsuperscript{26}

Another important aspect which the definitions control is the reach of the law. The statute applies not just to employers, but also to those individuals who recruit or refer for a fee.\textsuperscript{27} However, if a union hiring hall is maintained by membership union dues, it is not referring or recruiting for a fee. That is made clear in the regulations.\textsuperscript{28}

“Employee” also has special meaning under IRCA. An “employee” is any individual who provides services of labor for wages or other remuneration.\textsuperscript{29} There are exceptions for independent contractors\textsuperscript{30} and for casual domestic services of an intermittent or sporadic nature.\textsuperscript{31} An independent contractor is defined, in conformity with IRS guidelines, as an

\begin{footnotes}
\item[22] 52 Fed. Reg. 8762-95 (proposed March 19, 1987).
\item[23] Id. at 16,217.
\item[24] Id. at 16,221 (to be codified at 8 C.F.R. § 274a.1(c)).
\item[25] Id. at 16,218 (to be codified at 8 C.F.R. § 274a. comment 5).
\item[26] Id. at 16,221-22 (to be codified at 8 C.F.R. §§ 274a.1(c), 274a.2(b)(1)(i)(A)).
\item[27] INA § 274A(a)(1), 8 U.S.C. § 1324a(a)(1) (Supp. IV 1986); see infra notes 82-83 and accompanying text.
\item[28] 52 Fed. Reg. 16,221 (to be codified at 8 C.F.R. § 274a.1(e)); see infra notes 82-83 and accompanying text.
\item[29] 52 Fed. Reg. 16,221 (to be codified at 8 C.F.R. § 274a.1(f)).
\item[30] Id.
\item[31] 52 Fed. Reg. 16,221 (to be codified at 8 C.F.R. § 274a.1(h)) excepts from the definition of “employment” any “casual employment by individuals who provide domestic service in a private home that is sporadic, irregular or intermittent.”
\end{footnotes}
individual or entity which is an independent business contracted to do a piece of work according to its own means and methods, which is not subject to control except as to results. These are the same familiar determining factors as in the IRS statutes.

C. Verification of Status

The INS regulations do a number of things to try to ease the burden on both employers and employees, particularly in the area of attestation. The employer sanctions became applicable only twenty-five days from the commencement of the opening of the period for legalization applications. In areas such as southern California, this creates a severe burden upon the employee, the employer and the INS. Therefore, the INS decided to make some kind of an exception so individuals could obtain employment today if they are legalization eligible. Individuals who are legalization eligible may obtain employment by indicating on the I-9 just two things: one, that they are legalization eligible; and, two, they intend to apply. That is inscribed on the I-9, and that is valid for employment until September 1, 1987. That individual need not present any documentation of work authorization to the employer at all for eligibility to work, although he or she must still provide a document that establishes identity. Then, by September 1, that individual must have an actual work authorization document from the INS that can then be inscribed on the I-9 and thereafter will be the basis for an employer's ability to employ that person.

These regulations follow ordinary agency law in the instances where the employer uses an agent to hire employees. The employer may vest in someone else the authority to cause an employment relationship to commence, so long as that employer is liable as a principal.

The regulations provide an exception for repeater employees. A

32. Id. (to be codified at 8 C.F.R. § 274a.1(j)). "Factors to be considered in [determining whether a person is an independent contractor] include, but are not limited to, whether the individual or entity: Supplies the tools or materials; makes services available to the general public; works for a number of clients at the same time; directs the order or sequence in which the work is to be done and determines the hours during which the work is to be done." Id.

33. The opening date for accepting legalization applications pursuant to INA § 245A, 8 U.S.C. § 1255a (Supp. IV 1986), providing for adjustment of residency status, was May 5, 1987. 52 Fed. Reg. 16,209 (to be codified at 8 C.F.R. § 245a.2(a)); see infra notes 41 & 85. The effective date for citations for unlawful employment of unauthorized aliens was June 1, 1987. INA § 274A(i), 8 U.S.C.A. § 1324a(i) (Supp. IV 1986).

34. 52 Fed. Reg. 16,226 (to be codified at 8 C.F.R. § 274a.11).

35. Id.

36. Id.

37. 52 Fed. Reg. 16,221 (to be codified at 8 C.F.R. § 274a.1(g)) includes in the definition of "employer" "an agent or anyone acting directly or indirectly in the interest thereof."

38. Id. at 16,223 (to be codified at 8 C.F.R. § 274a.2(c)(1)) provides that reverification need not be done in the case of hiring an individual who was previously employed.
number of different industries, including the film industry, utilize employees who are hired for short periods of time, who then go on to employment someplace else, and are later rehired by the first employer. The regulations provide that an employer need not complete another I-9 when each period of employment commences, so long as: 1) the subsequent employment commences within three years from the initial start date; 2) the person is the same individual who completed the I-9 originally; and 3) the person has authorization to work for a period which exceeds the three years. For example, individuals who come here as non-immigrants may have an authorized period to work of a year. Obviously, the employer cannot employ them after that year on the same I-9, because their period of employment authorization did not extend that far. On the other hand, to benefit from the repeater provision, an employer must maintain the documentation from the time the last employment relationship was commenced.

Citizens particularly may have problems when they come into an employment situation. They are going to discover that now they need documentation. Individuals who do not have a Social Security card must satisfy the verification-of-employment requirements by other documentation. They must, within seventy-two hours of being hired, bring back proof of eligibility to work. That proof is satisfied if an individual brings a receipt back to the employer, for example, showing that a request for a replacement Social Security card was filed. That is good for another twenty-one days before an actual document has to be presented.

The INS is not going to require employers to attest for employees who were hired subsequent to November 6, 1986, but who have terminated employment prior to June 1, 1987. The statute basically does say that on November 6 and hereafter, everybody has to be attested. However, the I-9 forms were not yet out, so it was impossible for employers to do what could not be done. The INS has, in effect, partially waived the statute by saying they do not care about people who were employed but no longer are.

As noted previously, an employer is not required to reverify an employee's status if that employment was commenced prior to November 6, 1986, and that employment has been continuous thereafter. The defini-
tion of continuous employment is predicated upon traditional labor concepts dealing with layoff situations, and dealing with promotions and transfers within entities. The regulations are framed in traditional labor law terms, and deal with the reasonable expectation of reemployment. The regulations are fairly clear concerning this.

As for the enforcement process, the regulations provide three days’ notice for employment verification checks. The INS will send to an employer a notice saying that they will check the employer's attestation documentation three days later. Obviously, that does not apply to a situation where there is a subpoena or a search warrant. However, regarding basic documentation checks, both the INS and the Department of Labor have agreed to a three-day notice prior to checking the I-9s.

D. Miscellaneous Provisions

Two other sections are noteworthy. First, any person who knowingly uses a contract, subcontract, or exchange to obtain laborer services is subject to the statute’s sanctions, if that person knows that the services are being provided by an unauthorized alien. Finally, individuals who were hired before November 6, 1986, lose the protection of the grandfather clause if they quit, are terminated by the employer, are excluded or deported from the United States, or required to leave the United States under an order of voluntary departure by the Immigration Services.

III
ENFORCEMENT

The INS plans to enforce the Act primarily by investigating complaints submitted to it by the public. It is likely that most of the complaints that the INS will receive will be initiated by employees who have been laid off or who have observed things that affect their employment, or by labor unions whose members may be affected by an employer’s actions. If the INS commences an investigation and if it appears that a violation has occurred, it will issue a charging document. Thereafter, a

47. Id. at 16,223 (to be codified at 8 C.F.R. § 274a.2(b)(viii)).
48. Id. at 16,222 (to be codified at 8 C.F.R. § 274a.2(b)(2)(ii)).
49. Id. at 16,219 (to be codified at 8 C.F.R. § 274a comment 12).
51. INA § 274A(a)(4), 8 U.S.C. § 1324a(a)(4); 52 Fed. Reg. 16,224 (to be codified at 8 C.F.R. § 274a.7(b)).
52. INA § 274A(e), 8 U.S.C. § 1324a(e) (Supp. IV 1986); 52 Fed. Reg. 16,225 (to be codified at 8 C.F.R. § 274a.9).
53. INA § 274A(e)(3), 8 U.S.C. § 1324a(e)(3) (Supp. IV 1986); 52 Fed. Reg. 16,225 (to be codified at 8 C.F.R. § 274a.9(b)).
hearing is held before an administrative law judge.\textsuperscript{54} If a violation is sustained, the administrative law judge may impose penalties.\textsuperscript{55}

\textsuperscript{54} INA § 274A(e)(3), 8 U.S.C. § 1324a(e)(3); 52 Fed. Reg. 16,225 (to be codified at 8 C.F.R. § 274a.9(c)).

\textsuperscript{55} INA § 274A(e)(3)(C), 8 U.S.C. § 1324a(e)(3)(C) (Supp. IV 1986); 52 Fed. Reg. 16,225 (to be codified at 8 C.F.R. § 274a.10). Section 274A(e)-(f), 8 U.S.C. § 1324a(e)-(f), provides for civil and criminal money penalties, as well as injunctions for pattern or practice violations for knowingly employing or referring or recruiting for a fee an unauthorized alien. Paragraph (e)(5) also provides for civil penalties for paperwork violations, i.e. not preparing the Forms I-9. 52 Fed. Reg. 16,225 (to be codified at 8 C.F.R. § 274a.10) sets forth the penalty scales.
The Union and Employee Perspective

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I
COMMON INTERESTS OF EMPLOYERS AND EMPLOYEES

The implementation of IRCA is an area in which unions and employers can work together under normal circumstances. We have a number of common interests. For example, employers need to have a stable and productive work force, while unions are committed to helping their members, regardless of their immigration status. It does not benefit employers, unions or employees when people are fired unnecessarily. Employees on a company payroll as of November 6, 1986, are grandfathered in for purposes of the sanctions provisions.66 They need not be asked for any additional documents as long as they have been more or less continually employed by the company.67 It is unnecessary for a company to try to obtain any additional documentation from them or fire them for failure to provide it, nor can sanctions be imposed for continuing to employ them.

Similarly, there is no benefit to an employer or a union for discriminating against people because of national origin. This would be in violation of IRCA section 10258 or Title VII.59 The law also does not require

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56. 52 Fed. Reg. 16,224 (1987) (to be codified at 8 C.F.R. § 274a.7(a)) is the "grandfather clause," excepting individuals hired prior to November 7, 1986, from the sanctions provisions. See supra notes 44-45 and accompanying text.


58. INA § 274B(a)(1)(A), 8 U.S.C. § 1324b (Supp. IV 1986); see supra notes 12-14 and accompanying text.

that the employer create unnecessary problems by trying to deal prema-
turely with the issues that will arise with respect to changes of Social
Security numbers and changes of name. There is no need to create addi-
tional problems for employees with respect to hiring because they are not
yet legalized. An employee who believes that he is eligible for legaliza-
tion and intends to apply for it can indicate that on the I-9 form. An
employer hiring such an employee can not be subject to sanctions, at
least until September 1, 1987.60

It is in the unions' and employers' mutual interest that we try to not
overpolice this whole area. The regulations set forth what kinds of docu-
ments an employer may require of an employee.61 Employers should not
express any preference for certain kinds of documents over others as long
as employees obtain the documents that are required. There are a
number of documents that can meet the requirements of the law. All
that is required to meet the requirements under the law is good faith.
There has to be a knowing violation of the law to incur sanctions.62

Employers and unions also have a mutual interest in maintaining
the privacy of the I-9 forms. Under the regulations, INS will give three
days' notice before demanding an employer to produce I-9 forms.63 In
the comments submitted prior to the final adoption of the regulations, a
number of organizations, including unions and civil rights organizations,
urged that a subpoena or a search warrant be required to obtain the I-9
forms.64 That subject may be litigated in the future.

Both employers and unions have an interest in those
"grandfathered" employees who are here without papers, but whom em-
ployers can legally employ as long as they are employees as of November
6, 1986. Many such employees are union members. The employer has
an interest in maintaining the privacy of the factory floor and not losing
the productive labor of those employees. The company has a right to
demand a search warrant of INS agents seeking to enter the company's
premises and a right to demand a warrant or a subpoena before turning
over any payroll records. The unions and employers may find it expedi-
tious to assert those rights.

This selection of interests which unions and employers have in com-

60. 52 Fed. Reg. 16,226 (to be codified at 8 C.F.R. § 274a.11); see supra notes 34-36 and
accompanying text.
61. 52 Fed. Reg. 16,222 (to be codified at 8 C.F.R. § 274a.2(b)(1)(v)); see supra notes 6-9
and accompanying text.
63. 52 Fed. Reg. 16,222 (to be codified at 8 C.F.R. § 274a.2(b)(1)(ii)); see supra notes 19 & 48
and accompanying text.
64. 52 Fed. Reg. 16,219 (to be codified at 8 C.F.R. § 274a comment 12).
mon is by no means exclusive. It is also in the mutual interest of both unions and employers to maximize the legalization of the employees that are affected. This will require cooperation from employers in providing information regarding their employment history. It also will be important for attorneys to make sure that their clients do not rely exclusively on the INS or the Department of Labor with respect to certain information, because some issues are yet to be litigated. Employers will find that unions will be a good source of information, as unions become increasingly sophisticated in immigration law. In short, unions and employers should approach the implementation of IRCA as a field in which they should expect to cooperate.

II
THE UNION PERSPECTIVE

Unions supported IRCA before it was adopted with some trepidation. It is both a threat and an opportunity for everybody. The unions have been involved in educating themselves about the new law, educating their employers, implementing the law, advocating with respect to the regulations and engaging in litigation. The litigation concerns the rights of employees under the National Labor Relations Act, the rights of the undocumented under collective bargaining agreements as enforced by arbitration awards and the IRCA legalization or QDE process for union members. The unions are also involved in monitoring discrimination for purposes of determining whether the sanctions provisions will be terminated as a result of the GAO study mandated by IRCA.

The Los Angeles County Federation of Labor, the San Francisco Labor Council and the California State Federation of Labor have all held conferences for their members on the new immigration law. A project for legalization has been opened up by unions in Los Angeles and will be providing ongoing information as a resource for labor-side attorneys.

The regulations have now finally been adopted. The regulations do not contain everything that labor wants, but there were very substantial improvements following the first draft. The INS appeared to treat the process of adopting the regulations like union/employer negotiations. INS began with a very poor draft and improved it in later versions.

65. Catholic Social Servs., Inc. v. Meese, 813 F.2d 1500, vacated, 820 F.2d 289 (9th Cir.), on remand, 664 F. Supp. 1378 (E.D. Cal. 1987); see infra note 84.
66. A “Qualified Designated Entity” is any entity authorized by the INS to receive Forms I-687, i.e. applications for temporary resident status. 52 Fed. Reg. 16,211 (to be codified at 8 C.F.R. § 245a.2(e)). Typical QDEs include any state, local, church, community, farm labor association, voluntary organization, association of agricultural employers or individual determined by the INS to be qualified to assist aliens in the preparation of applications for legalization status. Id. at 16,209 (to be codified at 8 C.F.R. § 245a.1(1)).
67. Immigrant Assistance Project of the Los Angeles County Federation of Labor.
labor unions submitted comments in conjunction with the American Immigration Lawyers Association, the ACLU, Asian-American Legal Defense and Education Fund, MALDEF, and various church groups. This cooperative effort indicates that all of these groups feel that they have a common interest and are prepared to work together in the future on this issue.

Unfortunately, the issue of discrimination has already surfaced. In the Pasadena Independent School District case,68 the League of United Latin American Citizens ("LULAC") alleged a violation of section 102 of IRCA69 when the employer fired several employees, who were intending to legalize, when they attempted to change their Social Security numbers. The employer demanded that they have new Social Security cards within five days, which was impossible, of course. The judge ruled against the employer, and ordered it to reinstate the employees.

The INS has indicated that an employee will have to fill out a Form I-772, a statement of an intending citizen, in order to be eligible for section 102 rights against discrimination.70 The law does say that one has to be an intending citizen;71 it remains to be seen, however, whether one will actually have to fill out that form before one can bring a suit under section 102.

Recently a Special Counsel has been appointed.72 For a long time that office was vacant, and the office may not be staffed yet. But, hopefully, a special counsel will soon be enforcing section 102, as is contemplated by IRCA, and regulations will be adopted on discrimination which reflect the congressional intent.

One labor assessment of section 102 of IRCA is that Title VII probably will afford more protections, although there is an exemption for smaller employers. Part of what ultimately happens will be a reflection of what the Special Counsel's office does with section 102 and what regulations are adopted. There was a release that was put out on February 26, 1987, by the EEOC, which discusses the EEOC's intent to enforce vigorously nondiscrimination laws against employers overreacting to the

70. 52 Fed. Reg. 16,214 (to be codified at 8 C.F.R. § 245a.2(w)).
71. INA § 274B(a)(1)(B), 8 U.S.C. § 1324a(a)(1)(B) (Supp. IV 1986) provides that it is an unfair immigration-related employment practice to discriminate against a citizen or intending citizen because of that individual's citizenship status. INA § 274B(a)(1)(A), 8 U.S.C. § 1324b(a)(1)(A) (Supp. IV 1986), which provides that it is an unfair immigration-related employment practice to discriminate against any individual because of that individual's national origin, is not limited to citizens or intending citizens.
72. INA § 274B(c), 8 U.S.C. § 1324b(c) (Supp. IV 1986), provides for the appointment of a special counsel by the President, with advice and consent of the Senate, to be responsible for investigation of charges and issuance of complaints under § 274B.
new immigration act.\textsuperscript{73} It is important for the EEOC to follow up carefully on these plans.

### III

**PRACTICAL ISSUES ARISING UNDER IRCA**

#### A. Termination of Undocumented Employees

One of the areas of uncertainty which has resulted from the passage of IRCA is what consequences befall an employer who fires an employee for being undocumented. Prior to IRCA, in the *Bevles* case,\textsuperscript{74} the Ninth Circuit upheld the district court confirmation of an arbitration award in which the arbitrator found that the employer had fired the employees without just cause, in violation of the collective bargaining agreement, when it fired them because they were undocumented. This was a case where it appears that an employer sought to overenforce the law. The employer was apparently responding to what it thought were the requirements of section 2805 of the California Labor Code,\textsuperscript{75} but these had been subject to an injunction under *Delores Canning Co.*\textsuperscript{76} for a long time, and the implementing state regulations had previously been annulled. Thus, the employer clearly overreacted. Both sides now have to be very careful not to follow in those footsteps.

#### B. I-9 Verification Documents

A major topic of concern for both unions and employers is the problem of when employers must require employees to complete or renew their I-9 forms, verifying their immigration status.\textsuperscript{77} In particular, employers and unions frequently ask about the so-called grandfathered employees, those on an employer’s payroll as of November 6, 1986. In general, employers need not require I-9 forms of grandfathered employees, while they must require those forms of all new employees hired after that date.\textsuperscript{78} Nevertheless, there are some situations which need additional explanation.

It is not always necessary to require I-9 forms of employees who are

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\textsuperscript{74} Bevles Co. v. International Bhd. of Teamsters Local 986, 791 F.2d 1391 (9th Cir. 1986), cert. denied, 108 S. Ct. 500 (1987).

\textsuperscript{75} CAL. LAB. CODE § 2805(a) (West 1987) states: “No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers . . . .”

\textsuperscript{76} Dolores Canning Co. v. Howard, 40 Cal. App. 3d 673, 115 Cal. Rptr. 435 (1974) held that CAL. LAB. CODE § 2805 was unconstitutional because it was preempted by federal immigration laws.

\textsuperscript{77} See supra notes 33-49 and accompanying text.

\textsuperscript{78} 52 Fed. Reg. 16,224 (1987) (to be codified at 8 C.F.R. § 247a.7(a)); see supra notes 45-46 and accompanying text.
being rehired after certain interruptions of actual service. As long as there is a continuing employment relationship, grandfathered employees do not have to have I-9 forms on file, and employees hired after the deadline do not have to renew the forms on file. Section 274a.2(b)(viii) of the regulations addresses the question of whether certain types of employment events interrupt continuity of employment for purposes of IRCA.\footnote{79} That section lists the following events as not interruptive of continuity of employment: leaves of absence, promotions, demotions, raises, layoffs, transfers, strikes and other labor disputes, or reinstatement after agency proceedings or under a mechanism established under a collective bargaining agreement, or in settlement of such disputes.\footnote{80}

That section also provides that a related successor or reorganized employer need not require new I-9 forms of grandfathered employees or renewed forms of other employees previously employed by the former employer where the "new" employer maintains the former employer's records. Under section 274a.2(b)(viii)(G), the definition of related, successor, or reorganized employer includes employers who move to new locations, employers who "continue\[\] to employ some or all of a previous employer's workforce in cases involving a corporate reorganization, merger, or sale of stock or assets," and employers who "continue\[\] to employ some or all of another employer's workforce where both employers belong to the same multi-employer association and employees continue to work in the same bargaining unit under the same collective bargaining agreement."\footnote{81} So if a business changes hands and the new employer hires some of the previous employer's employees and obtains the I-9 forms on file from the other employer, the new employer need not secure I-9 forms from any of the newly hired employees. These regulations preserve the congressional intent that a business enterprise be permitted to continue with the same work force employed on the date of enactment of IRCA.

\section{C. Hiring Hall Provisions}

Another provision worth reviewing is the one pertaining to hiring halls.\footnote{82} The preliminary draft regulations that came out in January and February of 1987 provided that union hiring halls would be treated as an agency that referred or recruited for a fee and therefore would have to...
complete the I-9 verification before sending people out. However, the final regulations have deleted that provision. The summary states that the final rule excludes union hiring halls from such definition. INS does not believe inclusion of these entities was within congressional intent. However, such arrangements may be included in contractual or collective bargaining agreements between unions and employers where they are in the interests of both parties. It is important to note, then, that this subject may be coming to the bargaining table before long. The issue is a particularly difficult one when it comes to the hotel and restaurant industry.

IV
LITIGATION ABOUT IRCA

The union's perspective on the law is partially reflected by their involvement in various cases. One such case is Catholic Social Services, Inc. v. Meese, which the AFL-CIO has joined. The union has filed on a number of issues, including the issue of work authorization for those people who are prima facie eligible under the law. There was a real problem, as labor perceived it at the time the regulations were being drafted, for those people who were eligible but did not have work authorization. A final settlement was reached, now reflected in the regulations, which allows a person to self-attest that they intend to apply for legalization and that they believe that they are eligible. That case also established a rule for section 210 SAW (special agricultural workers) aliens, which allows them to return to this country and to have their applications processed here.

The 1987 regulations also back off on the issue of those employees who left the country after November 6, 1986, but were eligible for legalization before they left. The INS had taken the position that they lost their right to legalization unless they had obtained parole, which was written permission allowing them to return. The unions sued on that

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83. Id. at 16,218 (to be codified at 8 C.F.R. § 274a comment 4).
84. 664 F. Supp. 1378 (E.D. Cal. 1987). The district court originally issued its opinion and order in this case on May 4, 1987. The opinion was reviewed by the Ninth Circuit (813 F.2d 1500), and subsequently vacated (820 F.2d 289 (9th Cir. 1987)). The district court therefore withdrew its original opinion and substituted the present one. The parties entered into a settlement with regard to the claims relating to the granting of work authorization. The present case only involved the issue of the exclusion of SAWs (special agricultural workers).
85. INA § 245A(e), 8 U.S.C. § 1255a(e) (Supp. IV 1986), provides that individuals who present a prima facie application for adjustment of status to temporary resident shall be granted employment authorization. The regulations, 52 Fed. Reg. 16,209 (to be codified at 8 C.F.R. § 245a.1(n)), define “prima facie application” as presentation of a completed I-687 and “specific factual information which, in the absence of rebuttal, will establish a claim of eligibility.”
86. See supra notes 34-36 and accompanying text.
ground as well. The new regulations step back from that extreme position and acknowledge that employees may not have been aware of this problem. They now state that persons leaving after the May 1, 1987, publication date of the regulations will waive their right to legalization if they do not obtain permission to leave.\textsuperscript{88} That view, too, may be contested in the future.

V

OTHER ISSUES OF CONCERN

One of the difficult issues for people representing employers and unions is the whole problem of Social Security numbers. At present, although a person can self-attest an intent to apply for legalization, and, by doing so, have the right to work in the country, under the regulations, that person is not able, on that basis, to obtain a Social Security number. Consequently, people are forced to work under somebody else’s Social Security number or under a false Social Security number because of the inability of the system to make the proper adjustment. The INS is presently trying to work this out with the Social Security Administration.

One suggestion for reform is that when the employee applies for legalization and turns in the SS-5 form, he will be issued a temporary Social Security number. A permanent Social Security card would then be issued when and if his application for temporary residence is granted.\textsuperscript{89}

One of the important aspects of the unions’ response to IRCA is the setting up of centers which will process applications for union members. The ILGWU, for example, which has a National Immigration Project with offices in New York, Chicago, and Los Angeles, has been authorized by the INS to file and process applications for its members as a QDE. Likewise, the AFL-CIO has two projects which have applied for and apparently received QDE status from the INS; one is based in Los Angeles and the other in Texas. The Los Angeles group has participation from the following unions: UFCW, Hotel and Restaurant, Glass/Pottery, IUE, ACTWU, Laborers, Carpenters, Steelworkers, Molders, Machinists, Laundry Workers, SEIU, and IBEW. Clients represented on either side involving those unions might find that their members or their employees can obtain services through their union at these centers at a very reasonable charge.

\textsuperscript{88} 8 C.F.R. § 245a.1(g) defines a “brief, casual and innocent departure,” \textit{i.e.}, a departure not disqualifying an individual for adjustment of status, as a departure subsequent to May 1, 1987, authorized by the INS.

\textsuperscript{89} A person who has completed the I-687 will be given six months temporary employment authorization (I-688A) pending a final determination. If temporary resident status is granted, the I-688A is replaced by a Temporary Resident Card (I-688). After 18 months, he or she can apply for permanent residency. 52 Fed. Reg. 16,214 (1987) (to be codified at 8 C.F.R. § 245a.3).
The unions are very concerned about the problem of notaries and others taking advantage of people in need of legal help. Various public entities have established task forces. The unions are participating in these projects and will be monitoring those abuses as well.

One of the other areas of concern with the new law is its impact on collective bargaining. Unions are preparing proposals which will deal with this problem, and employers apparently are also reevaluating their positions. A key area in which employers are reevaluating their positions is the question of forfeiture of seniority. In many situations, employers propose very detailed—in labor's view, overly detailed—forfeiture clauses, which may be interpreted as essentially terminating employees at some point in time. However, if employers want to maintain access to a labor pool, they might find it in their interest to extend the period of time after which employees lose seniority, or to modify the conditions for forfeiture, replacing seniority forfeiture as discipline with other disciplinary methods.

The unions are also proposing language which will require employers to notify them if the INS comes to the premises, to require the INS to use a search warrant before entering the premises, and to require the INS to get a subpoena or search warrant before employers have to provide records. Such requirements are an attempt to deal with the privacy rights of employees. The unions have also dealt with disciplinary issues regarding employees being subject to discharge or discipline because they have to change their name or Social Security number.

Finally, the impact of IRCA on the National Labor Relations Act requires a mention. In Sure-Tan, the Court held that undocumented aliens are covered under the NLRA, and that it is an unfair labor practice to report aliens to the INS in retaliation for their participation in union activities. The Sure-Tan decision was interpreted in Warehouse & Office Workers to allow persons, who were not deported from or voluntarily left the country, to receive backpay and reinstatement regardless of their legal work status. More recently, in Askenazy the charging party filed a motion in the Ninth Circuit to compel the NLRB to comply with Warehouse & Office Workers during compliance proceedings. The NLRB had taken the ridiculous position that an employee who is discriminated against, an employee who happens to be undocumented, may ultimately find his or her case referred to the INS. The end result is

91. Id. at 891-92, 895.
92. Id. at 895-96 (citing Bloom/Art Textiles Inc., 225 N.L.R.B. 776 (1976)).
93. Local 512, Warehouse & Office Workers v. NLRB, 795 F.2d 705 (9th Cir. 1986).
94. NLRB v. Ashkenazy Property Management Corp., 817 F.2d 74 (9th Cir. 1987).
95. NLRB Associate General Counsel Memoranda OM 85-57, OM 85-89 (1985).
that the NLRB is doing what employers are prohibited from doing.\textsuperscript{96} It is clearly labor's hope that the NLRB will not adopt procedures and statutory interpretations which discourage employees from exercising their NLRA rights.

\textsuperscript{96} Id. The NLRB took the position that if an employer raises the issue of the immigration status of a discriminatee, where the employer is required to reinstate a discriminatee, it may condition reinstatement on obtaining proof that the discriminatee is legally entitled to be present and working in the United States. If the discriminatee does not provide proof of his entitlement to work in the United States previously, he would not be entitled to any backpay for those periods. In case the inquiry into the discriminatee's status "does not lead to a clear resolution of the matter, then of course, it will be necessary to refer the issue to INS." \textit{Id.}
INTRODUCTION

For the employer community, life after the Immigration Control and Reform Act of 1986 is filled with confusion, overreaction and fear. The end of the six-month period, the so-called grace period—or as some employers have termed it, the do-nothing period—is here.

Employers have reacted in several ways. Many have been doing nothing because they are still in a state of shock. They cannot believe that this bill has finally passed congressional muster. Most attorneys, in fact, thought that the bill would never pass. But, lo and behold, just like Lazarus, it seemingly arose from the dead.

The most concerned employers are in industries that have a heavy reliance on undocumented workers. They are very fearful because now they realize that INS has a very effective enforcement club: large fines, both civil and criminal in nature. Unless some of these employers are able to legalize large amounts of undocumented aliens in their work force, they may come to think that possibly it was not Lazarus that rose from the dead, but Frankenstein.

I

THE GRANDFATHER CLAUSE

Some employers feel that there is no problem because the bill is prospective in application: it does not punish for past sins. Everyone talks about the grandfather clause and how they are not liable for individuals whom they employed before November 7, 1986. They are not expecting to feel any civil or criminal repercussions.

However, there is a very large exception which the INS carved into

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this grandfather clause, and which is not well publicized to employers. That exception is that if an individual has been subject to removal from the United States by the INS, either as a voluntary departure or as a deportation, that individual cannot return to the employer's work force.\textsuperscript{98} If he does return, he will be viewed as a new hire and the employer will have lost the grandfather protection which had been accorded to him by Congress.\textsuperscript{99}

This could have a devastating impact on a lot of employers who have undocumented employees not eligible for legalization. Should the INS visit their companies and conduct what it euphemistically calls a business survey, but what is better known as a factory raid, and should INS bus all of those employees across the border, those employees cannot return to that employer. For some companies, that will wipe out a large portion of their work force.

In my travels to different companies where I talk to employees about the amnesty bill, I have learned that there are many companies with large numbers of employees ineligible for amnesty. I learned this quickly because, in my presentations in Spanish to the employees, I would focus on what it takes to qualify for amnesty. As I explained all the regulations under the amnesty bill, I would see some of them getting up and walking away. I was not holding their attention because many of them do not qualify for amnesty. So I changed the focus of my discussion to include the plight of those individuals and avenues for them to be able to legalize their status. Frankly, however, there are not very many avenues.

It is important to note here that the regulation which carved out an exception to the grandfather clause appears to be without statutory authority. The grandfather clause was not a loophole. Congress specifically studied the prospective nature of the bill and its application. The need was felt for a grandfather provision in order to allow employers to continue to rely, at least for a period of time, on undocumented workers whom they had hired before November 7.\textsuperscript{100} There will no doubt be some litigation on this issue.

II

Documentation

The next group of employers that I have been working with have definitely overreacted. I get calls all the time from them; they want me to come out to the company and talk to their personnel manager, because

\textsuperscript{98} 52 Fed. Reg. 16,224 (to be codified at 8 C.F.R. § 274a.7(b)(3)).
\textsuperscript{99} Id.
the personnel manager is screening new workers and is asking for excessive documentation. Time and time again, in the presentations I have been giving to employers, the most frequently asked question by personnel managers is: Who goes to jail, just me, or my boss, too? So there are many personnel managers today that, I believe, are overreacting, and demanding excessive documentation. In part, this overreaction stems from some of the problematic aspects of the bill that have not been publicized adequately.

One problem, for example, is that Congress has said that an employer has an affirmative defense against knowingly hiring undocumented aliens only if the documents which he examines reasonably appear to be genuine on their face.\(^{101}\) Frequently employers will ask what a genuine-looking document is. I try to assure them that unless the picture is on upside-down or crooked, or the card is still wet from the printing press, they should not try to be document examiners.

I raised this issue when testifying before Congress because I felt that the rule called for a subjective determination, and that some employers were going to scrutinize the work authorization documents of certain ethnic groups more closely than others.\(^{102}\) In fact, that is what I have been seeing. Some employers feel that they are expert document examiners. Since they have been in the business for a long time, they can tell a good green card from a bad one. They hold the card up to the light; they think if they see one more curlicue than is supposed to be there that it is a fraudulent card. What is clear is that they are going to run into some discrimination charges by doing this.

The other problem that I have seen is insistence on preferred documents. This stems from the fact that Congress has allowed employers to rely on existing documents.\(^{103}\) Congress has said, basically, that it is acceptable to rely on a Social Security card and a driver's license, for example.

Some employers are elated when they hear that. But then there are other employers who do not feel that that is enough. They insist on additional documents. They want Social Security cards and picture I.D.'s plus either U.S. citizenship certificates, U.S. birth certificates, or alien registration cards.

I counsel employers that they cannot insist on further documentation. The bill is quite clear when it states that an employer cannot insist

\(^{101}\) INA § 274A(a)(3), (b)(1), 8 U.S.C. § 1324a(a)(3), (b)(1) (Supp. IV 1986); 52 Fed. Reg. 16,224 (to be codified at 8 C.F.R. § 274a.4); see supra note 9 and accompanying text.


\(^{103}\) INA § 274A(b)(1), 8 U.S.C. § 1324a(b)(1) (Supp. IV 1986); see supra notes 6-7 and accompanying text.
on certain documents, provided that the documents that are being presented reasonably appear to be genuine on their face.\textsuperscript{104}

An interesting question is what happens if employers continue this practice, insisting on certain documents, but insisting on them on a uniform nondiscriminatory basis. Future litigation will no doubt reveal whether there is any remedy for the individual who has been refused employment where an employer has decided to adopt that type of a policy.

Another problem is the provision in the bill which makes it unlawful for an employer to continue to employ an individual if that person no longer has work authorization, that is, has become unauthorized to work in the United States.\textsuperscript{105} Until now, employers have not seen many job applicants present them with documents that have a temporary grant of work authorization. But that situation is going to change because many individuals are filing amnesty applications. They are getting temporary grants of work authorization,\textsuperscript{106} initially for about a month until their interview date. After they are interviewed, they are granted work authorization for six more months. Then, once they are given temporary resident status, they are given work authorization for thirty-one months.\textsuperscript{107}

As a consequence of this process, I have had employers ask me whether they can refuse to hire an individual who has just a temporary grant of work authorization. They say they have jobs into which they need to invest a lot of time, energy, and money training people, and they do not want to hire somebody if in fact her work authorization may expire and the employer has no guarantee that it is going to be renewed. Employers may face discrimination charges if they refuse to hire a worker who has a limited grant of work authorization.\textsuperscript{108}

Another problematic aspect is the three/twenty-one-day rule.\textsuperscript{109} It is a useful rule for the job applicant. Basically, if the job applicant states that she has lost her alien registration card, or if she does not have her birth certificate or her Social Security card, she can present within three

\textsuperscript{104} INA § 274A(b)(1) provides that "[i]f an individual provides a document or a combination of documents that reasonably appears on its face to be genuine and that is sufficient to meet the requirements of such sentence, nothing in this paragraph shall be construed as requiring the person or entity to solicit the production of any other document or as requiring the individual to produce such a document."


\textsuperscript{106} 52 Fed. Reg. 16,213 (to be codified at 8 C.F.R. § 245a.2(m)(2)).

\textsuperscript{107} Id. After temporary resident status has been granted, the individual can apply for permanent resident status after 18 months through the 12 months following. Id. (to be codified at 8 C.F.R. § 245a.3(a)); see supra note 89.


\textsuperscript{109} 52 Fed. Reg. 16,222 (to be codified at 8 C.F.R. § 274a.2(b)(vi)); see supra notes 42-43 and accompanying text.
days a receipt to the employer, and then she has twenty-one days to present the documents. The problem arises with an employer that feels he wants some security in his hiring and wants to make sure that that person will be around after twenty-one days. Thus, there are employers that are going to be tempted to insist on the requisite documentation at the time of hire and not give any grace period whatsoever because they do not want to take a chance that in twenty-one days a birth certificate may not arrive from New York, or the Social Security Administration may not issue a new Social Security card. Some employers will, therefore, want to adopt a policy where, again, maybe on a uniform basis, the new hire needs to present the documents at the time of hire. The question is: Does the job applicant have a right to sue because the bill allows up to twenty-one days to present the document? Again, litigation may have to provide the answer.

III

Amnesty Provisions

Finally, I would like to comment on my experience with the amnesty provisions of the bill. Some employers have been supportive of their workers' efforts to legalize their status. They have been developing amnesty assistance programs, realizing that the cost of legalization is high. They have been giving payroll loans, for example, so that people can afford the high filing fees and the medical exams. On the other hand, there are some employers that are doing nothing at a very critical time in the lives of these individuals. Employees are relying on employers for job confirmation letters, but employers are reluctant to provide them. They do not want to admit that the employee changed names or Social Security numbers during employment. Even though the INS has advised employers that there would be no repercussions—that the information would be kept confidential—some employers refuse to cooperate. I tell the amnesty candidate that we will try to document his residence in the United States some other way, perhaps through affidavits of coworkers, and possibly that the individual will still be able to legalize his status. But the employer is making it tough. And the employee will remember that during future union campaigns, or when demanding higher wages because the employee will have greater mobility and security, as soon as his status is legalized. So it would behoove employers—it really is in their best interests—to assist these individuals by helping them legalize their status, by setting up amnesty assistance programs and by helping to fund the high cost of legalization.

110. 52 Fed. Reg. 16,222 (to be codified at 8 C.F.R. § 274a.2(b)(vi)).