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Fire First and Ask Questions Later: What Is the Effect of the Social Security Administration's Mismatch Letters.

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FIRE FIRST AND ASK QUESTIONS LATER: WHAT IS THE EFFECT OF THE SOCIAL SECURITY ADMINISTRATION'S "MISMATCH LETTERS?"

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I. INTRODUCTION

A. *Roadmap*

The purpose of this comment is to identify the potential for mistreatment of workers belonging to various ethnic groups in the United States workforce due to the recent proliferation of Social Security Administration "mismatch letters." Part II recognizes the ever-expanding number of foreign laborers toiling in the domestic economy. Part III provides an overview of mismatch letters. Part IV illustrates a cumbersome duality that faces employers: on one hand, employers are forbidden from employing undocumented workers, while, on the other hand, employers must not utilize discriminatory hiring practices. In Part V, the comprehensive federal immigration and employment statute, the Immigration Reform and Control Act of 1986 is examined. Part VI addresses the Freedom of Information Act ("FOIA") as a potential means for employers to determine the work authorization status of potential hirees. Part VII consults professional advice for a course of conduct employers may pursue after receiving a mismatch letter. Lastly, Part VIII advocates legislation that would provide employers with concrete guidance when in receipt of a mismatch letter, thus protecting employees from possible retaliation.

B. *The Problem*

American Hispanic communities are flourishing. According to Census projections, Hispanics will represent approximately 13% of the total United States population in 2003, accounting for some 36 million persons.[1] This increase is largely attributed to the influx of Mexican citizens

1. U.S. CENSUS BUREAU, U.S. DEP'T. OF COMMERCE, PROJECTIONS OF THE TOTAL RESIDENT POPULATION BY 5-YEAR AGE GROUPS, RACE, AND HISPANIC ORIGIN WITH SPECIAL AGE CATEGORIES: MIDDLE SERIES, 2001 TO 2005, *at* http://www.census.gov/population/projections/nation/summary/np-t4-b.txt (last visited Mar. 25, 2003) (providing annual population projections by age and race). Interestingly, for the 2000 Census, nearly half (48%) of Hispanics indicated that they were White. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, POPULATION PROFILE OF THE UNITED STATES: 2000 (Internet Release), at

seeking opportunities in the American workplace.[2] In its 1997 Report to Congress, the U.S. Commission on Immigration Reform listed the "Top Ten Countries of Origin of Legal Immigrants:"

Mexico	159,731
Philippines	55,778
India	44,781
Vietnam	42,006
Mainland China	41,662
Dominican Republic	39,516
Cuba	26,415
Ukraine	21,051
Russia	19,646
Jamaica	19,029.[3]

Although this information is dated, it illustrates the overwhelming abundance of Mexican immigrants assimilating to the United States. According to the data, there were approximately 185 percent more legal Mexican immigrants than legal Philipino immigrants, the second most numerous ethnic group entering the country.[4] This is largely due to wages, hours, and working conditions available from domestic employers which are far superior to those available south of the U.S. border.[5] Moreover, logic dictates that the numbers of undocumented immigrants will be even more heavily weighted toward Mexicans. This, primarily, is attributable to the convenience of the 2,000 mile border between northern Mexico and the southwest United States.[6]

The increasing population, both United States citizen and immigrant, means that American companies will be employing ever-growing numbers of Hispanic workers. As such, there is potential for distrust. An untrusting employer leads to two possible harms. First, potential hirees may be turned away by employers who are weary of violating the Immigration Reform and Control Act's (IRCA) provisions prohibiting the em-

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http://www.census.gov/population/pop-profile/2000/chap02.pdf (last visited Mar. 25, 2003) (explaining the Census report's new category of choosing only one race to represent the person).

2. *See* Karen Fleshman, *Abrazando Mexicanos: The United States Should Recognize Mexican Workers' Contributions to its Economy by Allowing Them to Work Legally*, 18 N.Y.L. SCH. J. HUM. RTS. 237, 239 (2002).

3. U.S. COMMISSION ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY, viii (1997).

4. *Id.*

5. *See* Fleshman, *supra* note 2, at 237.

6. JoAnne D. Spotts, *U.S. Immigration Policy on the Southwest Border From Reagan Through Clinton, 1981-2001*, 16 GEO. IMMIGR. L.J. 601, 601 (2002).

ployment of undocumented workers. This, could have a chilling effect that injures legitimate, law-abiding applicants who might be refused employment based solely on their name or skin color. Second, current employees might face capricious termination simply predicated upon the employer's receipt of a Social Security Administration (SSA) mismatch letter.[7]

In the end, will the American workforce see a reluctance to employ Hispanic laborers? Possibly. Will the net result of SSA mismatch letters cause widespread paranoia in human resource departments? Probably. Is it even remotely possible that the mismatch letters will save the floundering Social Security program by driving down operational costs?[8] Unlikely.

II. General Immigration Information

The United States has long been lauded for its liberal immigration policies.[9] An idea deeply rooted in American history, the United States is a melting pot of diverse cultures and people.[10]

> Immigration to the United States has created one of the world's most successful multiethnic nations. We believe these truths constitute the distinctive characteristics of American nationality:
>
> - American unity depends upon a widely-held belief in the principles and values embodied in the American Constitution and their fulfillment in practice: equal protection and justice under the law; freedom of speech and religion; and representative government;
> - Lawfully admitted newcomers of any ancestral nationality – without regard to race, ethnicity, or religion – truly become Americans when they give allegiance to these principles and values;

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7. Although lacking a formal definition, a mismatch letter is generally sent by the SSA to alert employers that they may be illegally employing unauthorized workers. The letters are discussed in length in Part III, *infra*.

8. An argument can be made that mismatch letters can prevent the need for expensive "suspense accounts" to be created and maintained for individual taxpayers. This idea will be discussed in detail in Part III, *infra*.

9. Enid Trucios-Haynes, *Temporary Workers and Future Immigration Policy Conflicts: Protecting U.S. Workers and Satisfying the Demand for Global Human Capital*, 40 Brandeis L.J. 967, 970 (2002); James F. Smith, *A Nation That Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 U.C. Davis J. Int'l L. & Pol'y 227, 228 (1995).

10. William Booth, *The Myth of the Melting Pot*, Wash. Post, Feb. 22, 1998, at A1, *available at* 1998 WL 2469212.

- Ethnic and religious diversity based on personal freedom is compatible with national unity; and
- The nation is strengthened when those who live in it communicate effectively with each other in English, even as many persons retain or acquire the ability to communicate in other languages.

As long as we live by these principles and help newcomers to learn and practice them, we will continue to be a nation that benefits from substantial but well-regulated immigration. We must pay attention to our core values, as we have tried to do in our recommendations throughout this report. Then, we will continue to realize the lofty goal of *E Pluribus Unum*.[11]

—1997 Report to Congress

According to the Bureau of the Census, the total population of the United States reached over 290 million in January, 2003.[12] The 2000 Census, which reported some 281 million Americans, reflects an increase of 32.7 million people from the prior Census.[13] The previous record increase occurred between the 1950 and 1960 decennial censuses, and is referred to as the "baby boom" increase of 28 million.[14] Under President Clinton's directive, a government task force determined immigration to account for approximately one-third of the U.S. population growth in 1994.[15]

In September 2000, the population of illegal immigrants in the United States was estimated to be as high as twelve million.[16] Furthermore, the average rate of illegal population increase is estimated at 275,000 or more, annually.[17] Thousands of undocumented aliens cross the border between Mexico and the United States on a daily basis.[18]

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11. BECOMING AN AMERICAN, *supra* note 3, at iv-v.

12. U.S. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, *at* http://www.census.gov (last visited Mar. 25, 2003) (providing a real-time population counter for the United States, as estimated by the Census Bureau).

13. Anne H. Ehrlich & James Salzman, *The Importance of Population Growth to Sustainability*, 32 ENVTL. L. REP. 10559, *8 (2002), WL 32 ELR 10559; POPULATION PROFILE OF THE UNITED STATES, *supra* note 1, at 2-1.

14. *See* U.S. BUREAU OF THE CENSUS, LARGEST CENSUS-TO-CENSUS POPULATION INCREASE IN U.S. HISTORY AS EVERY STATE GAINS, *at* http://www.numbersusa.com/overpopulation/census.html (last visited Mar. 3, 2003).

15. PRESIDENT'S COUNCIL ON SUSTAINABLE DEVELOPMENT, POPULATION AND CONSUMPTION TASK FORCE REPORT 15 (1996).

16. Spotts, *supra* note 6, at 601, 602.

17. *Id.*

18. *Id.*

Economic elements create both push and pull factors that draw immigrants, especially Mexican immigrants, into the United States.[19] One estimate predicts Hispanics to be the largest minority in the United States, accounting for some 98.2 million persons, or 24% of the population, by the year 2050.[20] Logically, the push factors are those which contribute to a person's desire to flee the country of their origin. Push factors might include: impoverished living conditions, high unemployment rates, volatile political regimes, overcrowding, and oppression.[21] By contrast, pull factors are perceived characteristics of a country that are appealing to immigrants. Pull factors making the United States workforce seem enticing may consist of the following: higher wages, improved benefits, possibility for education, political stability, and the existence of social service programs.[22] As long as economic inequalities exist between the United States and the immigrants' countries of origin, these push and pull effects will continue to flourish, regardless of domestic immigration policies.[23]

With the ever-increasing number of legal and illegal immigrants entering the United States on a daily basis, immigration questions are sure to remain in the limelight. It follows logically that these immigrants will seek out employment in order to sustain themselves in a capitalistic society. In fact, employment is considered the central reason that illegal aliens are attracted to the United States.[24]

As such, many Americans harbor resentment against migrant workers, adopting the notion that immigrants are usurping "American" jobs.[25] When faced with economic downturns, politicians blame illegal immigrants for "stealing" positions in the American workforce.[26] Many unemployed workers harbor deep-rooted antipathy against immigrants for occupying the jobs of "real" Americans.[27] Immigrant workers have even

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19. Fleshman, *supra* note 2, at 237-38.

20. Elizabeth M. Dunne, Comment, *The Embarrassing Secret of Immigration Policy: Understanding Why Congress Should Enact an Enforcement Statute for Undocumented Workers*, 49 EMORY L.J. 623, 624 (2000).

21. Spotts, *supra* note 6, at 601, 602.

22. *Id.*

23. Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 358 (2001).

24. NANCY HUMEL MONTWIELER, THE IMMIGRATION REFORM LAW OF 1986: ANALYSIS, TEXT, AND LEGISLATIVE HISTORY 31 (1987).

25. Dunne, *supra* note 20, at 631; Note, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926, 1931 (1993); Jennifer A. Nemec, Comment, Yniguez v. Arizonans *for Official English: Free Speech May Have Lost the Battle, But in the End it Will Win the War*, 22 MD. J. INT'L L. & TRADE 117, 118 (1998).

26. Dunne, *supra* note 20, at 631.

27. *Racial Violence Against Asian Americans*, *supra* note 25, at 1931.

been called pariahs, and labeled as a source of pain for American households.[28]

The question then is how will their respective employers handle their arrival? Immigrant workers, especially undocumented workers, are susceptible to discrimination because they are unlikely to report unfair labor practices.[29] Such practices might include paying decreased wages to undocumented workers, forcing them to work greater numbers of hours, or providing them with sub-standard working conditions. Undocumented workers might not report such unfair labor practices in fear of losing their jobs, or fear of deportation.[30] Even more problematic would be a policy whereby an employer terminates employees who are the subjects of mismatch letters, without providing a procedure for re-verification of work authorization.[31]

III. A Brief History of Mismatch Letters

Social Security and welfare programs are common topics in political forums. Discussions often consider the fate of such programs, which naturally includes an inquiry into the financial forecast of Social Security considering the current taxation rates.

> Social Security now takes in more in taxes than it pays out in benefits. The excess funds are credited to Social Security's trust funds, which are expected to grow to over $4 trillion before we need to use them to pay benefits. In 2017, we'll begin paying more in benefits than we collect in taxes. By 2041, the trust funds will be exhausted and the payroll taxes collected will be enough to pay only about 73 percent of benefits owed. We'll need to resolve long-range financial issues to make sure Social Security will provide a foundation of protection for future generations as it has done in the past.[32]
>
> —2002 Social Security Statement

The following sections address policies and protocol for the Social Security Administration. The focus is on the recent decision to decrease the

28. Nemec, *supra* note 25, at 118.

29. Irene Zopoth Hudson & Susan Schenck, Note, *America: Land of Opportunity or Exploitation?*, 19 Hofstra Lab. & Emp. L.J. 351, 356 (2002).

30. *Id.*

31. David H. Nachman & Debi Debiak, *An Imperfect Match*, HRMag., Sept. 1, 2002, *available at* 2002 WL 7664718; *SSA is Sending Out Mismatch Notices*, NewsLine (Associated Landscape Contractors of Mass., S. Natick, Mass.), July/Aug. 2002, at 3, http://www.alcom.org/ALCM%20News%20JA%2002.pdf (last visited Apr. 7, 2003).

32. Social Security Administration, Your Social Security Statement 1 (2002).

threshold requirement prompting the issuance of mismatch letters. As a result, the number of employers receiving mismatch letters is on the rise. The receipt of a mismatch letter could adversely affect immigrant workers or ethnic employees to a greater extent than Anglo workers.

A. *Annual Wage Information*

Every employer must annually submit Copy A of Internal Revenue Service (IRS) Form W-2 (W-2) to report wages earned and taxes withheld for each employee for the previous year.[33] Ideally, when the Social Security Administration receives the W-2 data, it automatically updates the wage credits to the respective employee's social security account.[34] Often, however, SSA is unable to post the W-2 earnings to any individual account because of inconsistencies between the worker's name, birthdate, or social security number (SSN).[35] When SSA is unable to post the W-2 earnings, a suspense account is created, and the reported wage information is held indefinitely pending verification.[36]

Legitimate reasons often exist for inaccurate or discrepant W-2 information.[37] Common reasons for erroneous filings include name changes (marriage), clerical error/transposed digit (either by employee or employer), or use of a non-Roman name.[38] The SSA claims the majority of mistakes are the result of human blunder and typographical errors, including changed or hyphenated last names such as compound, shortened, and women's names.[39]

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33. J. Ira Burkemper, *The "Mismatch Letter" Is in the Mail: The Social Security Administration Ramps Up Its Warnings to Employers*, ¶ 4 (2002), *at* http://www.entertheusa.com/publications/mismatch_letter.html (last visited Mar. 25, 2003).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Social Security "Mismatch" Letter a Trap for the Unwary Employer*, WHAT'S NEW (Fisher & Phillips, L.L.P., Atlanta, Ga.), *available at* http://www.laborlawyers.com/FSL5CS/important%20new%20legal%20developments/important%20new%20legal%20developments518.asp (last visited Mar. 25, 2003); *Handling the Social Security "Mismatch Letter,"* EMPLOYER ADVISOR (Lane, Powell, Spears, Lubersky, L.L.P., Seattle, Wa.), Summer 2002, *at* http://www.lanepowell.com/pressroom/newsletters/detail.asp?NLID=317&XNLTYPEID=3 (last visited Mar. 25, 2003).

38. Robert W. Karr, Jr., *Social Security Number Mismatch Issues*, ROSS & HARDIES IMMIGRATION LEGAL UPDATE (Ross & Hardies, Chicago, Ill.), *at* http://www2.rosshardies.com/publication.cfm?publication_id=224 (last visited Mar. 25, 2003). Although the source does not elaborate on the idea of "non-Roman" names, the author must be referencing names that automatically indicate an ethnic, or non-Anglo, ancestry.

39. *Form I-9 and the Verification Process – Frequently Asked Questions* (Jackson & Hertogs, San Francisco, Cal.), August 2002, *at* http://www.jackson-hertogs.com/jh/faq/8066.htm (last visited Mar. 25, 2003).

B. *Suspense Accounts*

Suspense accounts become problematic for SSA because they are both costly and time consuming.[40] In 1999, approximately 216 million W-2s were submitted to SSA by some 6.5 million employers.[41] Roughly 88% of the total W-2 forms were submitted accurately.[42] SSA, however, is concerned with rectifying the mistakes made by the remaining 12% of employers who submit inaccurate W-2 information.[43]

Considering the bleak financial outlook already forecasted for social security programs, the Administration is seeking ways to lower operating costs.[44] Curtailing the need for suspense accounts is one way SSA claims costs can be reduced.[45] The SSA proposes that properly submitted wage reports cost less than 50 ¢ to post to an individual's earnings record.[46] Suspense accounts, however, cost an average of $300 to maintain while discrepancies are reconciled.[47] The SSA estimates that 212 million items were posted to suspense accounts between 1937 and 1999, with a total value of approximately $262 billion.[48]

C. *The Mismatch Letter*

In 1993, the SSA began notifying employers of discrepant filings.[49] These letters, sometimes called "mismatch letters" or "Code V letters" (because they contain the label Code V at the top), are considered to be educational correspondence to employers.[50] The SSA, then, must contend that by alerting employers of the problem and warning them of penalties the employers would take steps to ensure accuracy, and the SSA would ultimately save money. A very different result, however, is plausible: the employer may elect to terminate the employee without allowing adequate opportunity for the employee to rectify the situation. Such a

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40. *See* Burkemper, *supra* note 33, at ¶ 6-7.

41. *Id.* at ¶ 5.

42. *Id.*

43. *See id.* (indicating that 585,000 employers (9%) "submitted wage items with one to five errors," and 195,000 employers (3%) "reported six or more errors, and of those, only about 3,000 reported 200 or more errors").

44. *See id.* at ¶ 6.

45. *See id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *See id.* at ¶ 9.

50. *See* Letter from Social Security Administration to Employer Having Submitted Incorrect W-2 Form Wage Information, *Retirement, Survivors' and Disability Insurance, Employer Correction Request*, (Mar. 22, 2001) (providing a sample mismatch letter), *available at* http://www.shusterman.com/pdf/ssa-mismatch.pdf (last visited Mar. 25, 2003); Burkemper, *supra* note 33, at ¶ 9.

policy could prove destructive if employees were terminated because their skin color or name created suspicion as to their work authorization. Thus, in terms of social utility, the SSA's mismatch letters could do far more harm than good. If the SSA is able to save a few million dollars at the cost of furthering racially motivated or discriminatory employment practices, then a grave injustice would occur.

The mismatch letters come in a variety of forms, but all generally inform employers that a discrepancy exists and that a suspense account has been created for each employee whose SSN appears on the list provided in the letters.[51] While the notification may be necessary, the mismatch letters fall short by failing to provide lucid instructions for employers. The letters warn of potential fines, including possible criminal punishment, for knowledgeable employment of an unauthorized worker.[52] At the same time, the letters are also quick to mention the possibility of legal actions against employers, including suits for wrongful termination and discrimination, should the employer abruptly terminate the implicated employee because of the receipt of the mismatch letter.[53]

D. *Policy Change*

Since 1993, the SSA sent mismatch letters only to employers whose annual wage reports included mismatches between submitted information and SSA records for more than 10 % of the total employees reported by that particular employer.[54] Recently, the SSA announced a change in its policy for the threshold criteria for issuing mismatch letters.[55] Beginning

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51. *See* Loan T. Huynh & Ingrid N. Nyberg, *Responding to the SSA's "No Match" Letters* (Fredrikson & Byron, P.A., Minneapolis, Minn.), *at* http://www.fredlaw.com/articles/employment/ empl_0208_in.html (last visited Mar. 25, 2003).

52. 26 U.S.C. § 6674 (2002); 26 C.F.R. § 31.6011(b) (2002).

53. Burkemper, *supra* note 33, at ¶ 9.

54. *SSA Announces New Procedure for Issuing Mismatch Letters*, EMPLOYMENT LAW BULLETIN (Bingham McHale, L.L.P., Indianapolis, Ind.), May 2002, *available at* http://www.binghammchale.com/pdf/May%20Employment%20Newsletter.pdf (last visited Mar. 25, 2003); Stephen W. Lyman et al., *Social Security Administration Changes "Mismatch" Letter Policy* (Hall, Render, Killian, Heath & Lyman, P.S.C., Indianapolis, Ind.), July 30, 2002, *at* http://www.hallrender.com/articles/articles_details.asp?article_index=111 (last visited Mar. 25, 2003); *Social Security Administration Institutes New Mismatch Letter Policy,* IMMIGRATION FOCUS (Valentine Brown, L.L.C., Woodbury, N.J.) Apr. 2002, *at* http://www.valentinebrown.com/news/vb_0402.pdf (last visited Mar. 25, 2003); Stanley Mailman & Stephen Yale-Loehr, *Social Security "Mismatch Letters" Jeopardize Jobs* (True, Walsh & Miller, L.L.P., Ithaca, N.Y.), *at* http://www.clubcyrus.com/twmlaw/site/new/ssmismatch.html (last visited Mar. 25, 2003); *see* Jose A. Olivieri, *Social Security Mismatch Letters* (Michael, Best & Friedrich, L.L.P., Milwaukee, Wis.), *at* http://www.mbf-law.com/pubs/articles/629.cfm (last visited Mar. 25, 2003).

55. Darby L. Duncan & Denise Rios, *Avoiding Penalties When In Receipt of a Social Security Mismatch Letter,* EMPLOYMENT, LABOR AND BENEFITS, (Holland & Knight,

with the 2002 wage reports, the SSA will send mismatch letters to every employer who submits even one W-2 with incorrect information.[56] Consequently, while the Social Security Administration mailed roughly 110,000 mismatch letters in 2001, the SSA plans to send over 750,000 letters in 2002.[57] Thus, many employers will be receiving their first mismatch letters in the coming months.[58] As these employers are likely to be confused by the lack of direction found within the letters, the possibility exists that employees will pay the ultimate price due to unwarranted termination.[59]

IV. DECISIONS, DECISIONS

A. *Damned if You Do, Damned if You Don't*

As increasing numbers of employers receive their first Social Security Administration mismatch letters, they will be forced to make a difficult decision: fire or inquire. Either way, severe ramifications can ensue.

On the one hand, under IRCA employers face monetary penalties for the continued employment of undocumented workers.[60] If, after reviewing an employee's work authorization, the employer discovers a mistake has been made, the employer faces charges of actual or constructive no-

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L.L.P.), June 2002, *at* http://www.hklaw.com/newsletters.asp?ID=292&Article=1647 (last visited Mar. 25, 2003); Hernan Rozemberg, *Migrants Forced Out of Jobs*, ARIZ. REPUBLIC, July 6, 2002, *available at* http://www.arizonarepublic.com/special03/articles/0706mismatch06.html (last visited Mar. 25, 2003); *Social Security Administration Increases Issuance of "Mismatch" Letters*, HUMAN RESOURCE & LABOR NEWS (The Associated General Contractors of America, Alexandria, Virginia), June 27, 2002, (on file with author); John F. Koryto & Michael E. Stroster, *Social Security Administration Mismatch Letters to Increase*, EMPLOYER'S IMMIGRATION LAW UPDATE: PART I – IMMIGRATION AFTER SEPTEMBER 11 (Miller, Johnson, Snell & Cummiskey, P.L.C., Grand Rapids, Mich.), Summer 2002, *at* http://www.millerjohnson.com/db30/cgi-bin/pubs/PR%20ELU%20Summer%202002.pdf (last visited Mar. 25, 2003).

56. *Employers Receive More Letters from Social Security Challenging Employees' Numbers*, IMMIGRATION ADVISORY (Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., Boston, Mass.), Summer 2002, *available at* http://www.mintz.com/newspubs/Immigration/ImmAdv0602.pdf (last visited Mar. 25, 2003).

57. Carl Shusterman, *Employers: SA "Mismatch" Letters – How to Respond?*, SHUSTERMAN'S IMMIGRATION UPDATE, (Law Offices of Carl Shusterman, Los Angeles, Cal.), June 2002, *at* http://www.shusterman.com/jun02.html (last visited Mar. 25, 2003).

58. A. Robert Degen, *Employers With Inaccurate W-2s to Receive "Mismatch Letters" from Social Security Administration*, IMMIGRATION AND EMPLOYMENT ALERT (Fox, Rothschild, O'Brien & Frankel, L.L.P., Philadelphia, Pa.), Aug. 2002, http://www.frof.com/PDFs/MismatchLetters_0802.pdf (last visited Mar. 25, 2003).

59. David Nachman & Debi Debiak, *Social Security Mismatch Letters Are in the Mail*, 169 NEW JERSEY L.J. 120, ¶ 1 (2002) *available at* http://www.gghlaw.com/ssletter.pdf (last visited Mar. 28, 2003).

60. 8 U.S.C. § 1324a(e)(4) (2000).

tice. As such, a renewed inquiry could open the employer to IRCA penalties. On the other hand, wrongful discharge of an authorized employee could yield an onslaught of employment law actions under Title VII or the Fair Labor Standards Act.[61] Either way, the employer faces possible repercussions. That being said, which avenue is the employer likely to pursue?

It is all too possible that the employers will elect to terminate the subjects of the mismatch letters instead of opening themselves to penalties. Negative media attention, the added awareness of foreign workers following the September 11 attacks, and the inability of undocumented workers to seek legal recourse are all strong factors which might contribute to a decision to terminate subjects of mismatch letters.

Employers are unlikely to willingly endure the stigma that attaches when the media reports unauthorized employment practices.[62] Although employment of unauthorized workers at home receives less media attention than do labor camps abroad ("sweatshops," for instance), companies are regularly burdened by campaigns alleging unfair labor practices.[63]

Considering the added attention regarding the status of foreign workers following the September 11 attacks, employers are more likely to take whatever action is necessary to avoid negative media publicity.[64] Furthermore, the tragedy of September 11 has created extreme tension

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61. *See generally* 42 U.S.C. § 2000e-2 (1990) (Title VII antidiscrimination provisions); 8 U.S.C. § 1324b(a) (2000) (INA antidiscrimination provisions); 29 U.S.C. § 211 (1998) (Fair Labor Standards Act data collection requirements); 29 U.S.C. § 215 (1998) (Fair Labor Standards Act prohibited acts).

62. U.S. v. Tyson Foods, Inc., 191 F. Supp. 2d 142, 143 (D.D.C. Mar. 5, 2002) (reciting a 36-count indictment for conspiracy to smuggle illegal workers to Tyson Foods processing facilities). *See generally* James Salzman, *Beyond the Smokestack: Environmental Protection in the Service Economy*, 30 ENVTL. L. REP. 10,856 (2000) (detailing boycotts of Wal-Mart, Kathy Lee Gifford, The Gap, Nike, Footlocker, and Woolworth); Eric Brazil, *Official Salvadoran Report Says Its Factories are Brutal*, May 11, 2001, *at* http://www.sweatshopwatch.org/headlines/2001/elsalvador_may01.html (describing substandard labor conditions in El Salvadoran factories producing garments for The Gap, Nike, Liz Claiborne, and Kohl's) (last visited Mar. 28, 2003).

63. *See generally* Salzman, *supra* note 62, at 856 (detailing boycotts of Wal-Mart, Kathy Lee Gifford, The Gap, Nike, Footlocker, and Woolworth); Brazil, *supra* note 62 (describing substandard labor conditions in El Salvadoran factories producing garments for The Gap, Nike, Liz Claiborne, and Kohl's).

64. Burkemper, *supra* note 33, at ¶ 2. Following the September 11, 2001 attacks, Americans have heightened awareness concerning illegal immigration, placing a renewed emphasis on federal immigration statutes designed to deter illegal immigration, such as IRCA. William G. Phelps, *Validity, Construction, and Application of § 274(a)(1)(A)(iv) of Immigration and Nationality Act (8 U.S.C.S. § 1324(a)(1)(A)(iv)), Making it Unlawful to Induce or Encourage Alien to Come to, Enter, or Reside in United States*, 137 A.L.R. FED. 227, 227 (1997) (addressing the effects of statutory regulations that deterred illegal immigration prior to 1997).

within both the Department of Justice and the Immigration and Naturalization Service (INS) concerning the procurement and use of false identification.[65] In response to external pressures, employers might adopt a practice of immediate termination upon receipt of a mismatch letter.[66] This, unfortunately, would be a blind acceptance of the notion that unauthorized workers lack the power to bring wrongful discharge claims, and employees would pay the price.

B. *No Reprieve for the Unauthorized*

In *Egbuna v. Time-Life Libraries, Inc.*,[67] the United States Court of Appeals for the Fourth Circuit, held that an unauthorized employee had no cause of action against his former employer under Title VII of the Civil Rights Act of 1964 because the worker was not "qualified" for the position when he sought reemployment.[68] Similarly, in *Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Board* ("NLRB"),[69] the United States Supreme Court precluded the NLRB from awarding backpay to an undocumented alien who never obtained work authorization in the United States.[70]

In the *Hoffman* opinion, written by Chief Justice William Rehnquist, the Court announces that allowing unauthorized employees to recover would erode federal immigration policy and would both condone past violations and encourage future defiance.[71] Yet such an idea is not necessarily exclusive of a benefit. Herein is the potential for a positive direction in relation to mismatch letters: because IRCA focuses on the responsibilities of the employer to verify an applicant's work authorization, awarding backpay could be viewed as added incentive for the employer to fully comply with its duties under the statutory scheme.

While it is true that such a result might impliedly cause undocumented workers to continue to seek domestic employment, employers would have further motivation to screen applicants more carefully. Following the *Hoffman Plastic* decision, in an inter-agency memorandum addressed to all Regional Directors, Officers-In-Charge and Resident Officers, the

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65. Richard G. Vernon, *Employer Obligations Under U.S. Immigration Law* (Lerch, Early & Brewer, Bethesda, Md.), *at* http://www.lerchearly.com/SummerNewsletter.pdf (last visited Mar. 28, 2003).

66. Nachman & Debiak, *supra* note 59.

67. 153 F.3d 184 (4th Cir. 1998) *cert. denied*, 525 U.S. 1142 (1999).

68. Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184, 186 (4th Cir. 1988) *cert. denied*, 525 U.S. 1142 (1999).

69. 535 U.S. 137 (2002).

70. Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Board, 535 U.S. 137, 150 (2002).

71. *Id.* at 150-51.

NLRB General Counsel stated that a discriminatee is not entitled to reinstatement and backpay unless the INS determines the discriminatee to be lawfully present in the United States.[72]

Thus, following *Egbuna* and *Hoffman Plastic*, employers would not hesitate to terminate unauthorized employees because the employees have no avenue of recourse. This presents potential for abuse. The possibility exists that illegal workers will be recruited abroad by American employers, and then paid substandard wages.[73] For example, in *United States v. Tyson Foods*,[74] the defendant faces charges of causing illegal aliens to be brought into the United States for the purpose of employment.[75] Likewise, legitimate employees possessing authentic work documentation could face termination at the hand of an untrusting employer because of their ethnicity.[76]

V. Summary of the Immigration Reform and Control Act of 1986

A. *The Purpose of IRCA*

In a series of cases, courts have consistently held that Congress, in enacting IRCA, intended to halt the flood of undocumented aliens into the United States.[77] In *Etuk v. Slattery*,[78] the United States Court of Appeals for the Second Circuit stated that Congress sought to stem the tide of undocumented aliens into the United States by enacting the elaborate verification scheme of IRCA.[79] Furthermore, in *United States v. Jackson*,[80] the Unites States Court of Appeals for the Fifth Circuit explained that the passage of IRCA was aimed at reducing the number of illegal aliens from crossing the border.[81] The Fifth Circuit proposed that IRCA

72. Memorandum from Rosemary M. Collyer, NRLB General Counsel, to all Regional Directors, Officers-In-Charge and Resident Officers (Sept. 1, 1988), *available at* 1988 WL 236182.

73. *See generally* U.S. v. Tyson Foods, Inc., 191 F. Supp. 2d 142, 143 (D.D.C. Mar. 5, 2002) (discussing a 36-count indictment for conspiracy to smuggle illegal aliens to work at Tyson Foods processing facilities).

74. 191 F. Supp. 2d 142 (2002).

75. *Tyson Foods*, 191 F. Supp. 2d at 144 (noting that the probation hearing is set for March 2003).

76. Authorized employees wrongly terminated would, however, be able to seek recourse from the employer under employment law theories.

77. Robert F. Koets, *Validity, Construction, and Application of § 274A of Immigration and Nationality Act (8 U.S.C.S. § 1324A), Involving Unlawful Employment of Aliens*, 130 A.L.R. Fed. 381, 400 (1996).

78. *See* 936 F.2d 1433 (2d Cir. 1991).

79. *See id.* at 1437 (reviewing INS procedures for replacing lost or stolen green cards).

80. 825 F.2d 853 (5th Cir. 1987).

81. United States v. Jackson, 825 F.2d 853, 864 n.6.

would reduce alien traffic by removing economic benefits associated with illegally coming to the United States.[82]

B. *Prohibitions*

Signed by President Reagan on November 6, 1986, the Immigration Reform and Control Act of 1986[83] impacts the hiring procedures of all employers.[84] When signing the Act, President Reagan referred to IRCA as "the most comprehensive reform of our immigration laws since 1952."[85]

IRCA specifically prohibits three employer activities:

1. It is unlawful to knowingly hire, or recruit for a fee, an alien who is unauthorized to be employed in the United States;
2. It is unlawful to continue to employ an alien, knowing that the alien is unauthorized to work in the United States; or
3. To hire an individual for employment in the United States without complying with the employment verification system set up by the statute.[86]

C. *The Verification Process*

IRCA sets up an employment verification system under which all employers must execute a verification form (Form I-9) attesting, under penalty of perjury, that the hirer has verified, by examination, the requisite document or documents proving both identity and employment authorization.[87] This verification process must be completed for all new employees hired after November 6, 1986, whether the hiree is a United States citizen or an alien.[88] Employers are required to examine an employee's documentation and complete an I-9 Form within three business days of the hiring of an employee unless the length of employment is intended to be less than three business days, in which case the I-9 Form must be completed at the time of hire.[89]

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82. *Id.*

83. Immigration and Reform Control Act of 1986, Pub. L. No. 99-603, § 100 Stat. 3359 (1986) (codified in scattered sections of 8 U.S.C.).

84. Nancy-Jo Merritt & Joanne T. Stark, *The Immigration Reform and Control Act of 1986: What Employers Need to Know*, 22 ARIZ. B.J. 6, 6 (1987).

85. NICHOLAS LAHAM, RONALD REAGAN AND THE POLITICS OF IMMIGRATION REFORM 1 (2000).

86. 8 U.S.C. § 1324a(a)(1)-(2) (2002).

87. *Id.* § 1324a(b)(1)(A).

88. 8 C.F.R. § 274a.2(a) (2002).

89. *Id.* § 274a.2(b)(B)(iii).

Form I-9 establishes three categories of documents that the employee may present to prove identity and/or work authorization.[90] It is crucial that the decision of which documents to proffer rests strictly with the employee.[91] The employer may not request or require any particular document, risking charges of document abuse should the employer do so.[92] Documents in List A establish both the holder's identity and authorization to work in the United States, and include a certificate of naturalization and U.S. a Passport.[93] Documents in List B only establish identity, and include a driver's license, a voter registration card, or a United States military draft card.[94] Documents in List C establish work authorization alone, and might include a valid social security card or a birth certificate.[95]

D. *The Good Faith Defense: Merely a Rebuttable Presumption*

IRCA provides that an employer who has complied in good faith with the verification requirements has established an affirmative defense to an allegation that the person has knowingly hired an alien or continues to employ an alien that is not authorized to be employed in the United States.[96] This affirmative defense of good faith compliance with IRCA, however, is only a rebuttable presumption.[97] The presumption is rebutted if the Immigration and Naturalization Service can establish, inter alia, that the verification documents did not "reasonably appear on their face to be genuine."[98]

E. *Enforcement Powers*

IRCA authorizes the Attorney General to investigate violations of the statute.[99] The duty to investigate such violations, though, has been as-

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90. Martha J. Schoonover & Marti Nell Hyland, *Employment Authorization Regulations and I-9 Compliance*, SF82 A.L.I.-A.B.A. 243, 249-50 (May 3, 2001), *available at* www.westlaw.com.

91. *Id.* at 249.

92. *Id.* at 254.

93. 8 C.F.R. § 274a.2(b)(1)(v)(A) (2002).

94. *Id.* § 274a.2(b)(1)(v)(B).

95. *Id.* § 274a.2(b)(1)(v)(C).

96. 8 U.S.C. § 1324a(a)(3) (2000).

97. *See* Collins Foods Int'l, Inc. v. United States Immigration and Naturalization Serv., 948 F.2d 549, 553 n.9 (9th Cir. 1991) (citing The House Judiciary Committee Report, H.R. REP. NO. 99-682, pt. 1 at 56-57 (1986)).

98. *See id.* (citing The House Judiciary Committee Report, H.R. REP. NO. 99-682 pt. 1, at 57 (1986)).

99. 8 U.S.C. § 1324a(e) (2000); 8 U.S.C. § 1103(a) (2000).

signed to the INS.[100] Persons charged with IRCA violations are entitled to notice and a hearing conducted by an administrative law judge (ALJ) in accordance with the Administrative Procedure Act.[101]

An ALJ may require violators of IRCA's employment provisions to pay civil money penalties, and may issue a cease and desist order requiring future compliance with the statute.[102] A pattern or practice of employment violations may lead to criminal penalties.[103] However, civil monetary penalties are the avenue generally sought.[104]

A failure to adhere to the employment verification system, referred to as a paperwork violation, will lead to only a civil money penalty, generally of a lesser amount than for an employment violation.[105] Paperwork violations can arise from failure "to complete, correct, update, reverify, retain, or produce Form I-9."[106] When determining the appropriate penalty for paperwork violations, an ALJ may consider: (1) the size of the employer's business; (2) the employer's good faith; (3) the seriousness of the violation; (4) whether the individual involved was an unlawful alien; and (5) whether the employer has a history of violations.[107]

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100. 8 C.F.R. § 2.1 (2002); 8 C.F.R. § 100.2(a) (2002). Signed into law on November 25, 2002 by President George W. Bush, the Homeland Security Act of 2002 authorized the creation of the Department of Homeland Security (DHS), which completely subsumed the Immigration and Naturalization Service. *See generally* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. The INS is abolished as an agency of the Department of Justice, and its duties are to be divided and assigned to new bureaus within the DHS. Leigh McCarthy, *The Immigration Case of Michel Jalbert Teaches Larger Lessons*, 18 ME. B.J. 18, 21, n.18 (2003). As of March 1, 2003 the INS was eliminated and replaced by three DHS bureaus. Austin T. Fragomen, Jr. & Steven C. Bell, *INS Transitions to Department of Homeland Security*, IMMIGR. BUS. NEWS & COMMENT, Mar. 15, 2003, *available at* 2003 WL 1090283. "The Bureau of Citizenship and Immigration Services (BCIS) takes over the INS function of adjudicating applications for immigration benefits, including visa petitions, application to adjust or change status, and naturalization applications." *Id.* "The Bureau of Customs and Border Protection (BCBP) brings together the Border Patrol, INS inspections services, and Customs Service inspectors." *Id.* "The Bureau of Immigration and Customs Enforcement (BICE) brings together the enforcement and investigative arms of the INS, Customs Service, and the Federal Protective Service." *Id.* Because the author is unsure of exactly which DHS bureau will handle mismatch investigations at time of publication, INS will remain in the text of the comment.

101. See 5 U.S.C. § 554 (2000); 8 U.S.C. § 1324a(e)(3) (2000).

102. 8 U.S.C. § 1324a(e)(4) (2000).

103. *Id.* § 1324a(f).

104. Carl Shusterman, *INS v. INC.: Immigration Laws Place Employers on the Defensive: A Delicate Balancing Act is Required*, http://www.shusterman.com/sanction.html (last visited Mar. 28, 2003).

105. *Compare* 8 U.S.C. § 1324a(e)(5) (2000), *with* 8 U.S.C. § 1324a(e)(4).

106. Schoonover & Hyland, *supra* note 90, at 261.

107. 8 C.F.R. § 274a.10(b)(2) (2002); *INS Continues Enhanced Employer Sanctions Effort*, 69 INTER. REL. 253, 255-56 (1992).

F. *Violations*

To violate IRCA an employer must knowingly hire for employment or knowingly continue to employ an unauthorized alien.[108] The general public often mistakenly characterizes IRCA as a strict liability statute, overlooking the fact that knowledge is required for violations.[109] One commentator theorizes that this misconception, above all others, results in violations of IRCA's antidiscrimination provision.[110]

Actual knowledge of the status of the unauthorized worker may be determined during an INS investigation by a statement given by the alien, or an admission by the employer or an informant.[111] Additionally, an agent's actual knowledge may be imputed to the employer's actual knowledge for the purposes of employer sanctions.[112]

More often, the "knowingly" provision has been subject to a constructive knowledge test.[113] In instances where the employer is willfully blind to circumstances that should have put the employer on notice that the employer may have hired or may have continued to employ an unauthorized alien, the knowledge element is satisfied.[114] No actual, specific knowledge is necessary.[115]

Constructive knowledge is defined as "knowledge imputed to a person who, through the exercise of reasonable care or because of position or skill, should have been aware of the fact."[116] The INS has signified that the determination of whether a particular employer has been put on notice of an employment situation in violation of IRCA is an individualized decision that must consider all relevant facts and circumstances.[117]

For example, in *New El Rey Sausage Co. v. U.S. Immigration and Naturalization Service,*[118] constructive knowledge was found where the INS

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108. 8 U.S.C. §§ 1324a(a)(1)-(2) (2000).

109. Andrew M. Strojny, *IRCA's Antidiscrimination Provision: How it Works and Can it Be Used to Combat Anti-Immigrant Fears?*, *at* http://users.erols.com/astrojny/IRCAArt.htm (last visited Apr. 1, 2003).

110. *Id.*

111. Schoonover & Hyland, *supra* note 90, at 262.

112. *Id.*

113. *See* Mester Mfg. Co. v. Immigration and Naturalization Serv., 879 F.2d 561, 567 (9th Cir. 1989); New El Rey Sausage Co. v. U.S. Immigration and Naturalization Serv., 925 F.2d 1153, 1158 (9th Cir. 1991).

114. *See Mester Mfg.*, 879 F.2d at 567; *New El Rey Sausage*, 925 F.2d at 1158.

115. *See Mester Mfg.*, 879 F.2d at 567; *New El Rey Sausage*, 925 F.2d at 1158.

116. BLACK'S LAW DICTIONARY 359 (7th ed. 2000).

117. *Social Security Administration Changes Its Policy Regarding the Issuance of "Mismatch Letters"* (Masuda, Funai, Eifert & Mitchell, Ltd., Chicago, Ill.), August 2002, *at* http://www.masudafunai.com/english/articles/information/08-28-2002.asp (last visited Apr. 1, 2003).

118. 925 F.2d 1153 (9th Cir. 1991).

visited an employer's plant and obtained a list of employees.[119] The INS then notified the employer that certain employees were suspected of being unlawful aliens, and if their green cards matched the number listed in the INS letter to the employer, then they were either using fraudulent cards or cards belonging to someone else.[120] The employer did not take any corrective action other than to ask the named employees whether they were work authorized.[121] Seven of the nine listed employees left, but the remaining two insisted they were authorized to work.[122] The employer accepted their word, and continued to employ the remaining two without further inquiry.[123] In this case, the court found that when the INS had notified the employer of the suspected unlawful aliens, and stated that the employment of the suspected individuals should not be continued unless valid employment authorization could be provided, the employer was put on constructive notice.[124]

In *Mester Mfg. Co. v. Immigration and Naturalization Serv.*,[125] constructive knowledge was also found when the INS, after visiting an employer to inspect paperwork, ran checks on the alien registration numbers of the workers, and unmasked improper or borrowed numbers.[126] The INS then hand-delivered a citation to the employer reciting the results of its investigation and instructed the employer to consider the listed employees to be unauthorized aliens unless valid documents could be presented.[127] The citation also stated that continued employment of undocumented aliens would result in fine proceedings.[128] Nevertheless, the employer in *Mester* continued to employ the unauthorized workers, and constructive knowledge was imputed.[129]

In *Collins Food International, Inc. v. Immigration and Naturalization Service*,[130] the employer's faulty inspection of a social security card at the time of hire was not found to be constructive knowledge of an employee's lack of work authorization.[131] The court stated that the reasonable man

119. *New El Rey Sausage*, 925 F.2d at 1155.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 1159.
125. 879 F.2d 561 (9th Cir. 1989).
126. *See* Mester Mfg. Co. v. Immigration and Naturalization Serv., 879 F.2d 561, 564, 569 (9th Cir. 1989).
127. *See Mester Mfg.*, 879 F.2d at 564.
128. *Id.*
129. *Id.* at 567.
130. 948 F.2d 549 (9th Cir. 1991).
131. Collins Foods Int'l, Inc. v. United States Immigration and Naturalization Serv., 948 F.2d 549, 551 (9th Cir. 1991).

standard should be used to emphasize that employers should accept documents which appear genuine on their face without requiring further investigation.[132] Furthermore, the Judiciary Committee Report in IRCA cautions employers against making "critical judgments" about the authenticity of prospective employees' documents.[133] Instead, employers may hire such individuals and ask that INS audit the documents.[134]

Employers should find little solace in *Collins*, though, as the mistake could still represent a paperwork violation resulting in civil penalties under IRCA.[135] Additionally, *United States v. Haim, Co.*[136] recites that a paperwork violation of IRCA resulting from failure to accurately verify a worker's employment authorization is not, in itself, sufficient to prove the scienter element for an IRCA violation.[137]

In addition to setting forth the limitations of the constructive knowledge test, *Collins* also provides employers with sound advice on compliance with IRCA. The court in *Collins* recommends that employers attempting to comply with IRCA are well advised not to examine an employee's work authorization documents until after an offer of employment is made.[138] The court recognized that an employer conducting pre-employment questioning concerning an applicant's national origin, race or citizenship exposes the employer to charges of discrimination under Title VII of the Civil Rights Act of 1964 if he does not hire that applicant.[139]

G. *"Good Faith"*

The good faith of an employer is frequently contested. Proof of good faith compliance with the statute provides employers with an affirmative defense to IRCA's penalties.[140]

In *United States v. Williams Produce, Inc.*,[141] the INS sent the employer a "Notice of Intent to Fine" resulting from numerous paperwork violations.[142] The INS intended to fine Williams $281,600 for the violations.[143]

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132. *Collins Foods*, 948 F.2d at 554.

133. H.R. REP. NO. 99-682 (Part 1), at 62 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5665.

134. *Id.*

135. 8 U.S.C. § 1324a(e)(5) (2000).

136. OCAHO No. 96A00069, 1998 WL 745994, (Feb. 20, 1998).

137. *Id.* at *6.

138. Collins Foods Int'l, Inc. v. United States Immigration and Naturalization Serv., 948 F.2d 549, 552 (9th Cir. 1991).

139. 42 U.S.C. § 2001e (2003).

140. 8 U.S.C. § 1324a(a)(3) (2003).

141. OCAHO No. 93A00220, 1995 WL 265081 (Feb. 3, 1995).

142. United States v. Williams Produce, Inc., OCAHO No. 93A00220, 1995 WL 265081, at *1 (Feb. 3, 1995).

According to the INS, the employer failed to properly complete I-9s for sixty-five employees, failed to prepare I-9s for 143 individuals, and failed to require that 231 employees properly complete their I-9s.[144] In terms of the employer's good faith, the ALJ noted that submission of I-9s, even though incomplete, indicated that the employer was aware of IRCA's requirements.[145] The employer argued that the hiring manager was a third generation resident of the county and knew most of the employees, thus negating his responsibility to verify their work authorizations.[146] Not surprisingly, the ALJ rejected this argument as evidence of the employer's good faith.[147]

Also, in *United States v. Karnival Fashion, Inc.*,[148] good faith was contested because the employer successfully completed some I-9s but failed to complete or prepare others.[149] In *Karnival*, the ALJ held that the INS must prove an employer's lack of good faith beyond mere failure of compliance and must show some level of culpable behavior.[150] The ALJ admonished the holding in *Williams Produce*, stating that dismal I-9 compliance alone should not affect the civil money penalties imposed.[151]

Lack of good faith can also be found during an INS site survey. In *United States v. Anchor Seafood Distribs., Inc.*,[152] an INS agent discovered thirty-two undocumented workers hiding in an office attic.[153] The employer was not allowed to assert good faith because, in the presence of the agent, the employer looked into the attic and stated that no unauthorized workers were hiding there.[154] The acts of the employer demonstrated a level of culpability that was clearly contradictory to an assertion of good faith on his part.

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143. *Id.*

144. *Id.*

145. *Id.* at *6.

146. *Id.*

147. *Id.*

148. OCAHO No. 95A00014, 1995 WL 626234 (July 20, 1995).

149. United States v. Karnival Fashion, Inc., OCAHO No. 95A00014, 1995 WL 626234, at *2 (July 20, 1995).

150. *Id.*

151. *Id.* at *3.

152. OCAHO No. 94A00095, 1995 WL 474129 (May 5, 1995).

153. United States v. Anchor Seafood Distrib., Inc., OCAHO No. 94A00095, 1995 WL 474129, at *4 (May 5, 1995).

154. *Id.*

VI. The Freedom of Information Act

A. *The Statute*

The Freedom of Information Act (FOIA) was designed "to pierce the veil of administrative secrecy and to open agency actions to the light of public scrutiny."[155] The FOIA exposes government agencies to public examination, thus effectively destroying external barriers that breed distrust.[156]

Generally, each agency is required to publish its administrative procedures, including rules, available forms, and instructions.[157] Agency policies and procedures are first published in the Federal Register, and subsequently included in the Code of Federal Regulations. Policies adopted by an agency but not yet published in the Federal Register must be made available for public inspection and copying.[158] The FOIA, however, does not apply to all information held by a federal agency.

There are nine enumerated situations in which federal agencies are not required to disclose their secrets.[159] For example, an agency is not required to disclose information that is specifically barred from disclosure by another statute.[160] Federal income tax law provides that tax returns and return information are confidential and prohibits the disclosure of such information (including taxpayer identification number or SSN), except in narrowly defined circumstances.[161] Thus, an employer cannot simply obtain a list of all employee social security numbers in an attempt to verify work authorization.

B. *The Decisions*

Courts have regularly held that federal agencies are not required to disclose files containing information which would lead to a clearly unwarranted invasion of personal privacy if made public.[162] At a minimum, social security numbers are protected under this rule.

Two federal courts have found a clearly unwarranted invasion of privacy in the release of social security numbers.[163] In *Sheet Metal Workers*

155. Dept. of Air Force v. Rose, 425 U.S. 352, 360-61 (1976).
156. *Id.*
157. 5 U.S.C. §§ 552(a)(1)(A)-(E) (1995).
158. *Id.* §§ 552(a)(2)(A)-(C).
159. *Id.* §§ 552(b)(1)-(9).
160. *Id.* § 552(b)(3).
161. 26 U.S.C. § 6103(a) (2002).
162. 5 U.S.C. § 552(b)(6) (1995) (listing personnel and medical files as examples).
163. Transp. Info. Serv., Inc. v. Oklahoma, 970 P.2d 166, 174 (Okla. 1998) (holding, in a separate opinion by Okla. Supreme Court Chief Justice Kauger, that two federal courts found an invasion of privacy for the release of SSNs).

Int'l Ass'n, Local Union No. 19 v. U.S. Dept. of Veterans Affairs,[164] the United States Court of Appeals for the Third Circuit held that the release of personal financial information, including social security numbers, constituted a clearly unwarranted invasion of privacy.[165] Also, in *Greidinger v. Davis,*[166] the Fourth Circuit found the required disclosure of voters' social security numbers to be an invasion of privacy.[167]

C. *Why Social Security Numbers are Protected*

Equipped with another person's social security number, an individual with compromised morals could obtain the other person's welfare benefits, social security benefits, or paychecks.[168] Additionally, social security numbers can be used to order new checks sent to a different address on checking and credit card accounts.[169] Current trends involving identity theft over the internet might further bolster the individual's right to protection of sensitive personal information, including social security numbers.

D. *An Alternative for Employers*

Because personal information, including the SSN, is prohibited from distribution to third parties, the SSA created the Employee Verification Service (EVS).[170] The SSA stated that the EVS was intended to be a free and secure internet service to facilitate easy employee verification.[171] The EVS allows employers to request that SSA verify the names, birthdates, and social security numbers of employees prior to submission of the annual W-2 Forms.[172] To protect the privacy of employees, the SSA does not divulge the requested information, but instead reviews data submitted by the employer for accuracy.[173] Thus, the employer gets a

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164. 135 F.3d 891 (3d Cir. 1998).

165. Sheet Metal Workers Int'l Ass'n, Local Union No. 19 v. United States Dept. of Veterans Affairs, 135 F.3d 891, 902-05 (3d Cir. 1998).

166. 988 F.2d 1344 (4th Cir. 1993).

167. Greidinger v. Davis, 988 F.2d 1344, 1354 (4th Cir. 1993).

168. Elizabeth Neuffer, *Victims Urge Crackdown on Identity Theft*, BOSTON GLOBE, July 9, 1991, at 13.

169. Michael Quint, *Bank Robbers' Latest Weapon: Social Security Numbers*, N.Y. TIMES, Sept. 27, 1992, at 7.

170. *See generally* SOCIAL SECURITY ADMIN., EMPLOYEE VERIFICATION SERVICE (2000), *available at* http://www.ssa.gov/employer/evs2000.html (last visited Apr. 1, 2003).

171. *Social Security Administration Proposes New Verification Service for Employers*, IMMIGRATION LAW UPDATE: JULY 29, 2002 – AUGUST 12, 2002 (McCandlish Holton, P.C., Richmond, Va.), August 2002, at http://www.virtualmk.com/publications/Immigration/SSAproposes072902.pdf (last visited Apr. 1, 2003).

172. SOCIAL SECURITY ADMIN., *supra* note 170, at 7.

173. *Id.* at 2, 5.

simple "yes" or "no" as to the correctness of personnel records. Logically then, the EVS is useful for verifying company files, and possibly preventing the issuance of mismatch letters for inaccuracies. It does not, however, impinge on employee privacy rights because protected information is not simply handed out to any inquiring party.

The EVS strikes a balance between the rights of employers and the rights of employees. The privacy interests of employees are protected from outside intrusion into their personal records maintained by the Social Security Administration. Alternatively, employers are given an opportunity to maintain accurate company files, and prevent "mismatch" discrepancies from occurring.

VII. Course of Conduct When in Receipt of a Mismatch Letter

What actions, if any, should an employer take after receiving a mismatch letter? Although courts have not yet addressed the issue, the Immigration and Naturalization Service Office of General Counsel has provided some guidance.

A. *Martin Letter*

In his letter of December 23, 1997, then General Counsel David A. Martin begins by advising recipients that a mismatch letter alone does not put the employer on notice that the employee is unauthorized to work.[174] Constructive knowledge, he says, is an individualized determination that hinges upon all relevant facts.[175] Mr. Martin asserts that no social security numbers have been issued with 000, 800, or 900 areas (the first three digits in a social security number).[176] Thus, an employer should be alerted that a potential problem exists if a worker presents a social security number beginning with a zero, eight, or nine.

More importantly, Martin suggests that upon receipt of notification the employer solicit any useful information regarding the accuracy of company records from the employee.[177] If the employee determines that either the name or social security numbers are incorrect, Mr. Martin

174. Letter from David A. Martin, then Immigration and Naturalization Service General Counsel, to Bruce R. Larson (Dec. 23, 1997), *available at* http://www.shusterman.com/pdf/ssa-martin97.pdf (last visited Apr. 1, 2003).

175. *Id.*

176. *Id.* "A valid SSN must have a total of nine digits. The first three digits are referred to as the area, the next two as the group, and the last four as the serial. No SSNs with a 000 area number, or an area number in the 800 or 900 series, have been issued. Also, no SSNs with a 00 group or 0000 serial number have been issues." *Id.*

177. *Id.*

suggests that the employer ask to see verification of the contradicted information.[178] Interestingly, though, there is no mention of potential for document abuse in this situation.

Mr. Martin also discusses the scenario where a previously unauthorized employee subsequently gains work authorization and notifies the employer of a SSN change.[179] Without any mention of adherence to company fraud policies, Martin reminds the reader that knowingly providing false statements on a Form I-9 or using false documents to obtain employment are felonies unexcused by later work authorization.[180]

Ultimately, Martin's letter gives scant insight into the steps an employer should take to protect itself from IRCA violations. Instead, the letter fosters the underlying notion that document fraud is all-too-possible at the hiring stage. In doing so, Mr. Martin bolsters potential employers' fears, and in the end, may give rise to employment discrimination.

B. *Virtue Letter*

In another letter from the Immigration and Naturalization Service, then General Counsel Paul W. Virtue confronts the issue of employment discrimination.[181] In his letter of April 12, 1999, Mr. Virtue addresses Section 274B of the Immigration and Nationality Act, which, he claims, expresses the goal that citizens and aliens alike not lose employment opportunities unnecessarily.[182]

To counteract any fears of potential discrimination, Mr. Virtue reiterates that the mismatch letter, viewed alone, does not constitute actual notice of a lack of work authorization.[183] Directly adverse to this position, Virtue further emphasizes that an employer may not safely ignore the consequences of Social Security Administration discrepancies.[184]

Virtue explains that employer follow-up is crucial to alleviate potential liability.[185] He does admit, however, that the statute does not specifically require nor prohibit such follow-up investigation.[186] Perhaps detailed instruction on how an employer might lawfully conduct follow-up investiga-

178. *Id.*
179. *Id.*
180. *Id.*
181. Letter from Paul W. Virtue, then Immigration and Naturalization Service General Counsel, to undisclosed recipient (Apr. 12, 1999), *available at* http://www.shusterman.com/pdf/ins-ssa499.pdf (last visited Apr. 1, 2003).
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*

tions upon the receipt of a mismatch letter would help lessen the burdens placed on employers and employees alike.

VIII. Statutory Reform

The underlying problem simply revolves around a lack of information. The breakdown is not complex: (1) a comprehensive federal statute governs the responsibilities of employers concerning immigrant laborers; (2) the Immigration and Naturalization Service has the jurisdiction to investigate possible non-compliance; (3) for its own fiscal reasons, the Social Security Administration decided to drastically increase the recipient pool of its mismatch letters.

Viewed in a vacuum, each subpart is coherent and understandable. Yet, when synergy is added to the equation, the component parts total a bewildering beast. Virtually all inconsistencies can be resolved with Congressional action.

A. *At the Time of Hire*

As stated previously, IRCA presents a contradictory duality that yields incompatible results. On one hand, an employer is prohibited from employing unauthorized aliens. Conversely, if an employer refuses to hire or terminates an employee based on ethnic background, the employer could be liable for discriminatory employment practices. Amendments to the statute could illuminate a desired course of conduct, thus allowing employers to safely follow the proper formalities in compliance with IRCA. Not only would such an approach insulate employers from liability, but employees and applicants would also be protected from possible discriminatory hiring practices.

For example, Congress could require, as a matter of law, that employers photocopy all documents offered by an applicant purporting to prove employment status. This would help the employer prove that the document appeared genuine on its face, and could prevent possible penalty.

IRCA might also be amended to include a checklist of specific questions that a potential employer be allowed to ask of any applicant. These questions, when written by legislators, would be more likely to avoid any possibility of discrimination during the hiring process. Certainly, the questions would not be mandatory, but at least the employer would have a feel for what questions are permitted. If utilized, to avoid discrimination charges, the employer would have to ask all applicants the questions. Alternatively, a similar result might be achieved by publishing a list of questions that would, under no circumstances, be permissible without committing employment discrimination.

Furthermore, with the advancement of the EVS, employers could be statutorily required to participate in the service. Such a requirement

would force employers to verify that all information given by a potential hiree match SSA records prior to hiring. Such a rule seems less burdensome with every passing day given the increasing reliance upon electronic media for daily business operations. This assumes, though, that the SSA's records are accurate and up to date.

B. *Upon Receipt of a Mismatch Letter*

A separate plan of action needs to be formulated to address unlawful employment concerns arising after the date of hire. Though no such statutory structure currently exists, law firms dealing with employment law issues commonly create such plans for their corporate clients.

For example, a comprehensive plan might include:

1. Do Not Automatically Terminate an Employee After Receiving a Mismatch Letter:[187] Receipt of the letter, alone, does not constitute the constructive knowledge required for an IRCA violation.[188]
2. Investigate:[189] Check company records to ensure that no typographical or clerical errors exist.[190] Consult the EVS to verify which company records are inconsistent with SSA information. Notify the employee of the problem.
3. Employees Verifies all Recorded Information as Correct: Possibly suggest that the employee contact the local Social Security office to correct the problem.[191]
4. Employee Admits to Providing False Information: Terminate the employee at once upon learning that the employee was never authorized for employment in the United States.[192]
5. New Information: Should the employee admit to previously providing false information, but has since obtained work authorization, terminate according to company policies, if any, regarding false information provided during the hire process.[193] It is important to note that most companies exercise discretion: they do not always fire when false information has been provided in the application process.
6. Always Remain in Contact with the SSA: Maintain a continuous relationship with the SSA. Ensure that all correspondence is re-

187. Huynh & Nyberg, *supra* note 51.
188. *Id.*
189. Lyman et al., *supra* note 54.
190. Huynh & Nyberg, *supra* note 51.
191. *Social Security "Mismatch" Letter a Trap for the Unwary Employer*, *supra* note 37.
192. Huynh & Nyberg, *supra* note 51.
193. *Id.*

corded in writing to avoid confusion, and to provide evidence that the employer worked diligently to resolve the situation.

Although such suggestions would not answer every question which may arise concerning mismatch letters, employers could at least rely on a concrete frame of reference. If codified, such an outline could vastly diminish confusion within the employment sector, and would protect those employees who are legitimately authorized for work in the United States.

IX. Conclusion

As currently issued, the Social Security Administration's mismatch letters have the potential to do great harm. Facing both monetary and criminal penalties, a misinformed employer could arbitrarily terminate employees on the basis of ethnicity, fearing that the employee lacked work authorization. Such a result could undermine the trust relationship that exists between employer and employee. Furthermore, it could lead to grave injustice through capricious termination, and could have a chilling effect on the willingness to hire ethnic workers. At the heart of the problem is a lack of information. Congress, the SSA, or the INS could easily issue guidelines, or instructions, on how to handle the receipt of a mismatch letter. The plan above is merely a skeleton of the components such experts might choose to include.