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NORTH CAROLINA LAW REVIEW

Volume 86 | Number 2

Article 7

1-1-2008

The Homeland Security Safe-Harbor Procedure for Social Security No-Match Letters: A Mismatched Immigration Enforcement Tool

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INTRODUCTION

Under cover of the predawn darkness of December 12, 2006, over one thousand federal immigration agents swept into six Swift & Company (“Swift”) meatpacking plants across the country.¹ It was the largest employment-based immigration raid in history,² resulting in the arrest of almost 1,300 employees and 220 criminal indictments related to identity theft and other miscellaneous charges.³ In addition to its criminal aspects, the raid and its aftermath undoubtedly affected Swift’s long-term financial outlook. Domestic facilities operated at partial capacity for five months following the raid while the company scrambled to hire and train

1. Julia Preston, *U.S. Raids 6 Meat Plants in ID Case*, N.Y. TIMES, Dec. 13, 2006, at A24.

2. Editorial, *Swift Raids*, N.Y. TIMES, Dec. 18, 2006, at A28.

3. Dianne Solís & Sudeep Reddy, *Swift Puts Raid Costs at \$30M*, DALLAS MORNING NEWS, Jan. 6, 2007, at 3A. The number of indictments may further increase as the investigation continues. See *id.* The Swift raids are particularly momentous because the government specifically sought to crack down on identity theft as the source of false worker documentation. See *id.*

replacement employees.⁴ Swift management projected that production efficiency losses and expenses associated with hiring new employees would reach a staggering \$45 million.⁵

Furthermore, the financial impact on Swift echoed throughout the broader meatpacking industry. In the days following the raid, cattle futures prices fell amid speculation that the Swift raid would decrease market demand for cattle.⁶ In addition, retailers providing packaged meat “braced for more fallout” from the raids.⁷ The raid may also be credited with tipping off a global restructuring of the leading beef processing companies.⁸

The prospect of a \$45 million loss is hardly cause for celebration for a company that operates fourteen percent of the domestic beef production capacity and reported a \$130 million loss in the fiscal year prior to the raid.⁹ Nevertheless, Swift executives very well may find themselves breathing a sigh of relief: they and the company escaped civil and criminal immigration charges despite an internal audit’s revelation of “highly suspect trends [within the company that] indicated the employment of illegal aliens.”¹⁰ Eight months earlier, IFCO Systems North America

4. Press Release, Swift & Co., Swift & Company Announces Return of Standard Staffing Levels at All Four Domestic Beef Processing Facilities (May 11, 2007) (on file with the North Carolina Law Review).

5. *Id.*

6. Sudeep Reddy, *Federal Raid Casts a Pall over Cactus*, DALLAS MORNING NEWS, Dec. 13, 2006, at 1A (estimating cattle slaughter rates dropping by ten percent during the week of the raid).

In addition to the raid’s financial effects on the meatpacking industry, the communities surrounding the Swift plants experienced domino effects from the social and financial disruption. For example, after a raid on a Swift plant in Cactus, Texas, children were left without parents, businesses without customers, and landlords without tenants. The surrounding community stepped in to house and feed members of separated families. In addition, the United Way, a local church, and Swift management donated money to help those affected by the raids. Isabel C. Morales, *Ghost Town: Immigration Raid Leaves a Large Void*, DALLAS MORNING NEWS, Feb. 11, 2007, at 1A.

7. Reddy, *supra* note 6.

8. Around the time of the raids, Swift was the subject of numerous “unsolicited inquiries” for a sale or merger. Sudeep Reddy, *Senators Rally on Raids: Actions Show Firms Need Help Screening Immigrants, They Say*, DALLAS MORNING NEWS, Jan. 23, 2007, at 1D. Swift ultimately announced its merger with the largest beef processor in Latin America in July 2007. The resulting JBS Swift Group is now the world’s largest beef processor. Press Release, Swift & Co., JBS S.A. Completes Acquisition of Swift & Company (July 12, 2007) (on file with the North Carolina Law Review).

9. Reddy, *supra* note 6.

10. See Solís & Reddy, *supra* note 3; Press Release, Swift & Co., *supra* note 4. *But see* Dianne Solís, *More Arrested at Swift Plants: Immigration Officials Detain 19, Including HR Employee*, DALLAS MORNING NEWS, July 12, 2007, at 7A (reporting that immigration officials arrested a human resources employee seven months after the raids for “harboring illegal immigrants”).

(“IFCO”) was not nearly as fortunate. In a raid of equally unprecedented scope,¹¹ federal agents detained 1,187 workers from twenty-six states and charged seven managers from four states with various immigration law violations.¹²

Both IFCO and Swift knew that they had employed unauthorized workers,¹³ and both cases implicated the underlying issue of identity theft.¹⁴ Yet, the initial government enforcement action at Swift focused only on low-level employees, whereas both management and non-management employees were implicated in the IFCO raids. The difference in the treatment of the two companies perhaps lies in the disparity of their efforts to comply with immigration laws prior to the raids. Swift management met openly with federal immigration officials to discuss discrepancies discovered during an internal audit of employment verification documents.¹⁵ In contrast, the IFCO investigation began when federal agents received an anonymous tip that management destroyed employment verification forms because they knew their employees were not eligible to work in the United States.¹⁶

11. *DHS Cracks Down on Illegal Immigration Practices*, N.Y. EMP. L. LETTER (Epstein Becker & Green, P.C., New York, N.Y.), June 2006, at 4, 4 (on file with the North Carolina Law Review) (calling the IFCO raid “the largest single-work-site immigration enforcement operation in U.S. history”).

12. See Eric Lipton, *U.S. Crackdown Set over Hiring of Immigrants*, N.Y. TIMES, Apr. 21, 2006, at A1. *The New York Times* also reported that no enforcement actions have been taken against members of the senior management team or the company, but Department of Homeland Security (“DHS”) Secretary Michael Chertoff warned that the investigation had not yet concluded. *Id.* IFCO operations continued to suffer from the financial fallout of the raid for more than a year. Press Release, IFCO Sys., IFCO SYSTEMS Reports Q1 2007 Results (May 10, 2007) (on file with the North Carolina Law Review).

13. Lipton, *supra* note 12 (reporting that the tip to federal agents in the IFCO case stemmed from an assistant manager allegedly destroying documents because the employees were unauthorized); see Julia Preston, *Immigrants’ Families Figuring Out What To Do After Federal Raids*, N.Y. TIMES, Dec. 16, 2006, at A13 (stating that approximately four hundred Swift employees quit after management conducted internal interviews regarding their employment status, many of whom admitted they were unauthorized); Solís & Reddy, *supra* note 3 (explaining that Swift management shared with government officials the unusual “trends” it detected in its own records of unauthorized workers).

14. See Lipton, *supra* note 12 (explaining that IFCO supervisors allegedly paid an undercover DHS official for false identity documents); Solís & Reddy, *supra* note 3 (suggesting the suspected “document rings” at Swift were linked to the subsequent immigration enforcement action). Secretary Chertoff described the intersection of identity theft and immigration violations as “a disturbing front in the war against illegal immigration.” Press Release, ICE, U.S. Uncovers Large-Scale Identity Theft Scheme Used by Illegal Aliens To Gain Employment at Nationwide Meat Processor (Dec. 13, 2006), available at <http://www.ice.gov/pi/news/newsreleases/articles/061213dc.htm>.

15. Solís & Reddy, *supra* note 3. See *infra* notes 47–52 and accompanying text.

16. Lipton, *supra* note 12; Press Release, DHS, ICE Agents Arrest Seven Managers of Nationwide Pallet Company and 1,187 of the Firm’s Illegal Alien Employees in 26 States (Apr. 20, 2006), available at http://www.dhs.gov/xnews/releases/press_release_0891.shtm.

The role the employer plays in self-policing its compliance with immigration law is precisely the focus of a recent Department of Homeland Security (“DHS”) rule that strengthens the link between employment verification documents and immigration compliance. The DHS Bureau of Immigration and Customs Enforcement (“ICE”) issued a final rule on August 15, 2007, “Safe-Harbor Procedures for Employers Who Receive a No-Match Letter.”¹⁷ The rule is designed to clarify the steps an employer should take following the receipt of an Employer Correction Request letter from the Social Security Administration (“SSA”).¹⁸ The SSA letter, commonly known as a “no-match letter,” notifies the employer that the employee’s proffered name and social security number (“SSN”) do not correspond with SSA records.¹⁹ The no-match letter is often the result of routine clerical errors, but it also functions as a red flag—perhaps the employer’s only red flag—that an employee is not legally authorized to work in the United States.²⁰

In principle, the ICE rule links the earnings reports that an employer sends to the SSA, known as W-2 Forms, to the employer’s obligation not to hire unauthorized workers under the Immigration and Nationality Act²¹ (“INA”). Under the INA, an employer may be deemed to have either actual or constructive knowledge that it employed someone who is not authorized to work in the United States.²² The rule amends the regulations

17. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a). The rule was part of a “package of initiatives” DHS undertook after the 110th Congress failed to pass a comprehensive immigration reform bill in the summer of 2007. See Press Release, DHS, Remarks by Homeland Security Secretary Michael Chertoff and Commerce Secretary Gutierrez at a Press Conference on Border Security and Administrative Immigration Reforms (Aug. 10, 2007), available at http://www.dhs.gov/xnews/releases/pr_1186781502047.shtm (“[U]ntil Congress chooses to act, we’re going to be taking some energetic steps of our own.”).

18. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,612.

19. *Id.* The rule also applies to the receipt of a letter from ICE that notifies the employer that the agency could not confirm the validity of an immigration status document. *Id.* This Comment will focus on the SSA no-match letter, though the procedures set forth in the rule are the same for both the DHS and SSA no-match letters.

20. *Id.*

21. 8 U.S.C. §§ 1101–1537 (2000).

22. The INA states that “it is unlawful for a person or other entity . . . to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.” 8 U.S.C. § 1324a(a)(2) (emphasis added). Regulations promulgated under the INA define “knowing” as both actual knowledge and “knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition.” 8 C.F.R. § 274a.1(d)(1) (2007). The Ninth Circuit interpreted the meaning of “knowing” to include constructive knowledge in *Mester Manufacturing Co. v. INS*, 879 F.2d 561, 566–67 (9th Cir. 1989). In *Mester*, the Ninth Circuit held an employer, despite lacking actual knowledge, satisfied the scienter requirement because he received notice directly from the Immigration and

promulgated under the INA by adding receipt of an SSA no-match letter to the list of factors ICE will consider in determining whether an employer had constructive knowledge that it employed unauthorized workers.²³ In addition, the rule establishes a safe-harbor procedure for employers to follow upon receiving a no-match letter so that they can avoid a finding of constructive knowledge.²⁴

The SSA has traditionally discouraged employers from using the no-match letter as the basis for taking an adverse employment action against an employee.²⁵ Under the rule, DHS now requires that if the employer is unable to resolve the no-match discrepancy within ninety-three days, “the employer must choose between: (1) Taking action to terminate the employee, or (2) Facing the risk that DHS may find that the employer had constructive knowledge that the employee was an unauthorized alien.”²⁶ Notably, the rule suggests that employers are protected from a finding of constructive knowledge if they terminate an employee after the safe-harbor procedure fails to clear the no-match discrepancy. However, the rule does not require on its face that the employer terminate the employee, nor does it foreclose the possibility that the employer can take other steps to avoid a finding of constructive knowledge. The rule is simply a safe-harbor procedure by which an employer can definitively avoid a finding of constructive knowledge based on the receipt of a no-match letter.²⁷

The DHS rule received approximately five thousand public comments during the sixty-day public comment period.²⁸ Labor unions, non-profit organizations, trade groups, businesses, attorneys, and other individuals all participated in the comment period.²⁹ The comments addressed a variety of

Naturalization Service (“INS”) that his employees were unauthorized but failed to investigate or “take appropriate corrective action.” *Id.*

23. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,612.

24. *Id.* at 45,612–13.

25. SSA, Retirement, Survivors and Disability Insurance Employer Correction Request 2, <http://www.ssa.gov/employer/SSAsampleLetter.pdf> [hereinafter SSA No-Match Letter] (last visited Dec. 5, 2007).

26. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,613.

27. *See id.* at 45,614 (“There may be other procedures a particular employer could follow in response to a no-match letter, procedures that would be considered reasonable by DHS and inconsistent with a finding that the employer had constructive knowledge that the employee was an unauthorized alien.”). However, the safe-harbor procedure does not protect employers who are later found to have actual knowledge that an employee was unauthorized or constructive knowledge based on sources other than the no-match letter. For example, the employee might admit she is not authorized, or the employer may receive information that would reasonably lead it to believe an employee is not authorized. *See id.*

28. *Id.* at 45,611.

29. *Id.*

topics, including DHS's authority to promulgate the rule,³⁰ the propriety of the rulemaking "in light of the congressional debate over comprehensive immigration reform,"³¹ the rule's interpretation of constructive knowledge under the INA,³² the time frames within the safe-harbor procedure,³³ and the possibility that the rule conflicts with antidiscrimination laws.³⁴

In addition to numerous public comments, a group of unions and businesses petitioned the United States District Court for the Northern District of California for a preliminary injunction.³⁵ On October 10, 2007, Judge Charles Breyer granted the injunction, enjoining the rule from taking effect.³⁶ Judge Breyer noted that the "plaintiffs have raised serious questions going to the merits" of their allegations that the rule "(1) contravenes the governing statute; (2) is arbitrary and capricious under the Administrative Procedure Act; (3) is an exercise of *ultra vires* authority by DHS and the [SSA]; and (4) was promulgated in violation of the Regulatory Flexibility Act."³⁷ In response, DHS plans to issue a revised rule in March 2008.³⁸

This Comment argues that the ICE safe-harbor procedure for employers who receive an SSA no-match letter is ineffective because it exposes employers to additional liability under antidiscrimination laws. This Comment will first identify the perils employers face in DHS's targeted worksite enforcement actions and will summarize the current treatment of SSA no-match letters in both immigration and employment discrimination law. After analyzing the dangers employers face in terminating employees upon receipt of a no-match letter, this Comment will outline the changes that the ICE rule makes to INA regulations that attribute constructive knowledge of an employee's undocumented status to an employer who receives an SSA no-match letter. This Comment will then recommend changes to the rule that seek to alleviate the burden on employers. First, the fact that the employer follows the procedures in the safe-harbor rule should trigger a rebuttable presumption that the employer has not discriminated against its employees. Second, ICE should provide

30. *Id.* at 45,614–15.

31. *Id.* at 45,615.

32. *Id.* at 45,615–16.

33. *Id.* at 45,616–17.

34. *Id.* at 45,620–21. Other comments addressed whether the rule would encourage en masse terminations or have a substantial adverse impact on the economy. *Id.* at 45,621–22.

35. *See infra* note 88.

36. Order Granting Motion for Preliminary Injunction at 1, *AFL-CIO v. Chertoff*, No. C07-04472 CRB (N.D. Cal. Oct. 10, 2007) (on file with the North Carolina Law Review).

37. *Id.*

38. Julia Preston, *Revised Rule for Employers that Hire Immigrants*, N.Y. TIMES, Nov. 25, 2007, § 1, at 34.

employers with another option at the conclusion of the safe-harbor procedure. Instead of forcing employers to choose between (1) electing to terminate the employee and (2) risking a finding that the employer had constructive knowledge that the employee was not authorized to work, the employer should have a third option to request ICE verification that an employee is work-eligible. A self-reporting mechanism would provide the employer with a definitive answer as to whether its employees are work-eligible, and it would support the employer's efforts to comply with the INA by terminating employees who are not lawfully eligible to work.

Before explaining the procedures in the safe-harbor rule, it is helpful to understand both the difficulties that employers face in complying with immigration laws generally and the potential legal liability employers invite by using the no-match letter as the basis for adverse employment decisions.

I. EMPLOYER COMPLIANCE WITH IMMIGRATION LAWS

The IFCO raid in April 2006 kicked off an era of "more aggressive federal crackdown on employers" for immigration violations.³⁹ Previously, employers were relatively unbothered by immigration enforcement actions, in part due to political pressures employers exacted on their congressional

39. Lipton, *supra* note 12. Just five days before the raid, the former immigration commissioner, Doris Meissner, called the lack of enforcement action against employers a "hypocrisy." Steven Greenhouse, *Going After Migrants, but Not Employers*, N.Y. TIMES, Apr. 16, 2006, § 4 (Week in Review), at 3.

An aggressive law enforcement push to arrest undocumented workers at worksites raises ancillary concerns about DHS plans to shelter and care for detained workers. In 2006, ICE awarded a \$385 million contract to Kellogg Brown & Root ("KBR") to provide temporary immigration detention centers in the event there is a large influx of immigrants into the United States. Rachel L. Swarns, *Halliburton Subsidiary Gets Contract To Add Temporary Immigration Detention Centers*, N.Y. TIMES, Feb. 4, 2006, at A7. Although ICE does not intend to use the KBR contract as a vehicle to provide housing for detained immigrants in routine deportation proceedings, DHS confirmed its plans to increase bed space for detained immigrants more generally. *Id.*

The T. Don Hutto Family Detention Center, located near Austin, Texas, is an example of a facility recently constructed to hold immigrants not authorized to enter the United States. Despite the fact that it aims to provide a facility that allows family units to remain intact during deportation proceedings, critics describe it as " 'Draconian,' " Ralph Blumenthal, *U.S. Gives Tour of Family Detention Center that Critics Liken to a Prison*, N.Y. TIMES, Feb. 10, 2007, at A9 (quoting ACLU lawyer Vanita Gupta), and "prisonlike," *id.* DHS, however, must maintain proper oversight of contractors who provide detention services for immigration officials, as evidenced by a recent \$2.5 million settlement between one such contractor and 1,600 immigrants who alleged they were abused while detained at the facility. See John Sullivan, *Settlement for Abused Detainees*, N.Y. TIMES, Sept. 8, 2005, at B8. A recent audit of five of the government's approximately 325 detention centers unveiled a shocking assortment of violations of government standards for healthcare, housing, and the provision of legal services. Rachel Swarns, *Immigrant Centers Inspected*, N.Y. TIMES, Jan. 17, 2007, at A17.

representatives.⁴⁰ Indeed, the number of immigration agents dedicated to workplace enforcement operations fell from 240 in 1999 to just sixty-five in 2004.⁴¹ In contrast to the relatively lax enforcement actions against employers in the early 2000s, fiscal year 2007 saw a record number of worksite enforcement actions that resulted in 863 arrests for suspected criminal violations.⁴² In addition to increasing both the number of agents and worksite enforcements, DHS turned up the heat on employers by replacing administrative fines with criminal charges and asset seizures as the department's preferred enforcement mechanisms.⁴³

Employers must also navigate a policy shift within DHS regarding employers who commit themselves to honest, compliance-minded employment verification policies. DHS Secretary Michael Chertoff has previously indicated the department's position that a company that "[does] the right thing" by maintaining a system of internal controls⁴⁴ and voluntarily "cooperating in 'good faith'" with the government will not be the subject of immigration charges for hiring undocumented workers.⁴⁵ In truth, the current government policy recognizing the honest compliance efforts of employers is far from clear-cut: by Secretary Chertoff's own words, the government is "not in the business of doing amnesty" simply because companies seek to cooperate with the government in enforcing immigration laws.⁴⁶

40. See Greenhouse, *supra* note 39 (explaining that attempts at effective enforcement were undercut by congressional pressures not to "antagonize business"). Texas Representative Lavar Smith attributed lax enforcement to "a lack of political will." *Id.*

41. *Id.* In 2006, ICE applied for funding to support 171 new enforcement agents, which would increase the number of agents dedicated to worksite enforcement by approximately fifty percent. See *DHS Cracks Down on Illegal Immigration Practices*, *supra* note 11, at 4; Lipton, *supra* note 12 (noting the proposed 171 agents would be added to the existing 325 agents).

42. Fact Sheet, ICE, Worksite Enforcement (Oct. 15, 2007) [hereinafter Fact Sheet, ICE], available at <http://www.ice.gov/pi/news/factsheets/worksite.htm>. There were only twenty-five criminal arrests in 2002. *Id.*

43. See *DHS Cracks Down on Illegal Immigration Practices*, *supra* note 11, at 4 (quoting DHS Secretary Michael Chertoff, who called the renewed focus on employers a "'strategic shift' in enforcement").

ICE began relying more heavily on "significant criminal charges" after discovering that the comparatively minor administrative penalties did not effectively deter violations. ICE, Safe-Harbor FAQs, Will ICE Attempt To Criminally Prosecute Employers Engaged in the Practice of Hiring Illegal Workers?, http://faq.ice.gov/cgi-bin/ice_faq.cfg/php/enduser/std_alp.php?p_sid=RRKJOKi (search by Answer ID 94) (last visited Dec. 5, 2007). Despite the shift to criminal penalties, monetary penalties remain an integral part of ICE's worksite enforcement mission. In the first three quarters of fiscal year 2007, ICE collected over \$30 million in "criminal fines, restitutions, and civil judgments" arising from worksite enforcement actions. Fact Sheet, ICE, *supra* note 42.

44. Editorial, *supra* note 2.

45. Solís & Reddy, *supra* note 3 (reporting the assurance DHS Secretary Michael Chertoff gave regarding employers who cooperate in a government-sponsored verification program).

46. Reddy, *supra* note 8.

Swift's experience in striving for compliance with immigration laws is particularly telling of the unavoidable difficulties that employers face in policing their workers' eligibility for employment. For nearly ten years prior to the 2006 raid, the company participated in the Basic Pilot Program, a voluntary government program designed to aid employers in verifying employment documents.⁴⁷ In 2001, however, the Department of Justice stymied the company's compliance efforts by alleging that Swift discriminated against undocumented workers by exploring too deeply into applicants' backgrounds.⁴⁸ The Department of Justice brought suit for \$2.5 million, and Swift agreed to settle the dispute "for less [than] \$200,000 with no admission of wrong doing."⁴⁹

In the months leading up to the raids, Swift management desperately sought to avoid an on-site enforcement action by forming a partnership with government immigration agents, conducting their own internal investigations into employee documentation, and unsuccessfully petitioning a federal court for an injunction against a potential on-site enforcement action.⁵⁰ In the days prior to the raid, the government purportedly ordered Swift to cease interviews it was conducting with employees to verify their work authorization status.⁵¹ Swift management testified before Congress that they found it "particularly galling . . . that an employer who played by all the rules and used the only available government tool to screen employee eligibility[, Basic Pilot,] would be subjected to adversarial treatment by our government."⁵²

47. *Id.* The Basic Pilot Program is only able to verify that stated names match the SSNs provided by the employee; it is simply not able to detect employees who provide matching names and SSNs that have been stolen via identity theft. Secretary Chertoff describes the anomaly using the analogy that "a polio vaccine protects you against polio, [but] it doesn't protect you against tetanus." Press Release, DHS, Remarks by Secretary of Homeland Security Michael Chertoff, Immigration and Customs Enforcement Assistant Secretary Julie Myers, and Federal Trade Commission Chairman Deborah Platt Majoras at a Press Conference on Operation Wagon Train (Dec. 13, 2006), available at http://www.dhs.gov/xnews/releases/pr_1166047951514.shtm; see also *High-Tech Methods, New Rules, Needed for Employment Verification, HR Groups Say*, Daily Lab. Rep. (BNA) No. 45, at A-2 (Mar. 8, 2007) (criticizing Basic Pilot for its inability to uncover identity theft by many of the undocumented workers at Swift).

48. See Preston, *supra* note 1.

49. Press Release, Swift & Co., Testimony by John W. (Jack) Shandley, Senior Vice President, Human Resources, Before the House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the Committee on the Judiciary (Apr. 24, 2007) (on file with the North Carolina Law Review).

50. Preston, *supra* note 13 (describing Swift's efforts to avoid a raid).

51. *Id.*; see Press Release, Swift & Co., *supra* note 49 ("All attempts to generate a collaborative solution were repeatedly rebuffed by ICE under the guise of an 'ongoing criminal investigation.'").

52. Press Release, Swift & Co., *supra* note 49.

The Swift experience demonstrates that employers who utilize rigorous strategies to police their own workers in order to achieve compliance with immigration laws are unlikely to avoid crippling government enforcement actions if they are unsuccessful. It also demonstrates that employers may not have the capability to correct immigration violations, despite reasonable efforts, through internal employment controls. Employers, then, confront a frustrating lose-lose scenario in responding to the presence of unauthorized workers. On one hand, they may disclose suspected violations, fully cooperate with the government, actively seek to correct employment violations, and still face the risk that ICE will conduct a massive workplace raid despite their good faith attempts at compliance. Alternatively, employers may attempt to downplay suspected violations and thereby trigger the full wrath of DHS enforcement, which includes criminal sanctions against both management and non-management employees.⁵³

II. CURRENT TREATMENT OF SOCIAL SECURITY ADMINISTRATION NO-MATCH LETTERS

The SSA and antidiscrimination laws both caution strongly against using the SSA no-match letter as the basis for an adverse employment decision. Employers who terminate on account of a no-match letter risk discharging employees who are, in fact, authorized to work in the United States. Wrongfully terminated employees may then unleash “an onslaught of employment law actions” against the employer, including discrimination suits.⁵⁴ In addition, employers who terminate on the basis of a no-match letter may face extra-legal problems such as backlash from employees, decreased morale, and absenteeism.

The SSA itself warns employers against terminating employees on the basis of the letter. The no-match letter explicitly counsels the employer that it “should not use this letter alone to take any adverse action against an employee.”⁵⁵ The letter warns that taking action could trigger liability under state and federal law, and it cautions the employer to seek corrections from employees in a “uniform[]” manner.⁵⁶ Notably, the SSA

53. See Lipton, *supra* note 12 (noting DHS’s pledge to “‘break the back’” of organizations that contribute to the “hiring of millions of illegal workers” (quoting DHS Secretary Michael Chertoff)).

54. Paul R. Penny, III, *Fire First and Ask Questions Later: What Is the Effect of the Social Security Administration’s “Mismatch Letters?”*, 5 SCHOLAR 355, 366 (2003).

55. SSA No-Match Letter, *supra* note 25, at 2.

56. *Id.*

communicates to the employer that the no-match letter “does [not], by itself, make any statement about an employee’s immigration status.”⁵⁷

One reason the no-match letter counsels employers not to terminate on the sole basis of the letter is that an employer who terminates an authorized employee because of a no-match letter risks suit for discrimination. Under Title VII of the Civil Rights Act of 1964⁵⁸ (“Title VII”), employers are forbidden from discharging employees on the basis of “race, color, religion, sex, or national origin.”⁵⁹ In the no-match letter context, an employee who was terminated at the conclusion of the safe-harbor procedure may allege that the termination constitutes unlawful discrimination based on one of Title VII’s protected classes. In addition, Title VII protects workers who have alleged discrimination or participated in an investigation of alleged discrimination from retaliation.⁶⁰ An employee who is terminated under the safe-harbor rule may allege that the termination constituted unlawful retaliation for activity protected by the statute. Title VII also covers pretextual employment actions in which the employer falsely claims a

57. *Id.* at 1.

58. 42 U.S.C. §§ 2000e to 2000e-17 (2000).

59. § 2000e-2(a)(1). Undocumented workers may take advantage of Title VII’s protections even though the statute does not protect discrimination based on alienage, which is a person’s status as a non-citizen. *See, e.g., Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 188 (4th Cir. 1998) (denying an undocumented worker access to Title VII antidiscrimination remedies because the theory of discrimination was a failure to hire based on alienage); *EEOC v. Tortilleria “La Mejor,”* 758 F. Supp. 585, 590–91 (E.D. Cal. 1991) (holding that Congress intended Title VII to apply to undocumented aliens employed in the United States); EEOC, DIRECTIVES TRANSMITTAL NO. 915.003, § 13: NATIONAL ORIGIN DISCRIMINATION (2002), available at <http://eeoc.gov/policy/docs/national-origin.html> (“While federal law prohibits employers from employing individuals lacking work authorization, employers who nonetheless employ undocumented workers are prohibited from discriminating against those workers.”). Rather than claim discrimination based on alienage, undocumented workers may allege discrimination on one of the other protected classes, such as national origin, race, or sex. *See Tortilleria “La Mejor,”* 758 F. Supp. at 589–90.

However, undocumented workers may be generally deterred from bringing Title VII claims out of fear that the employer will retaliate against them by both terminating them and drawing the attention of immigration officials to their undocumented status. *See* MARION G. CRAIN, PAULINE T. KIM & MICHAEL SELMI, *WORKLAW: CASES AND MATERIALS* 653 (2005) (citing *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064 (9th Cir. 2004)); Christopher Ho & Jennifer Chang, *Drawing the Line After Hoffman Plastic Compounds, Inc. v. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L.J. 473, 492 (2005) (noting that the risk employees face of retaliatory reporting to immigration officials results in a chilling effect on the enforcement of workers’ rights).

Another source of deterrence is the lack of relief that is available to undocumented workers under the statute. Title VII remedies are typically equitable in nature, and they include reinstatement, hiring, backpay, and injunctions against continuing violations. *Egbuna*, 153 F.3d at 186–87. However, under the Fourth Circuit’s reasoning in *Egbuna*, an employee who is not work-eligible may not be awarded remedies when doing so would conflict with immigration laws. *See id.* at 187.

60. § 2000e-3(a).

legitimate nondiscriminatory reason for an adverse employment action.⁶¹ Pretext could be implicated when an employer claims the legitimate reason for firing is the no-match letter, but a court finds the actual motivation is discriminatory.

*Zamora v. Elite Logistics, Inc.*⁶² is an example of a Title VII discrimination case arising from an employer's attempt to verify an employee's work eligibility. In *Zamora*, the employer discovered discrepancies with a group of its employees' SSNs and required the employees to verify their employment eligibility.⁶³ Though many of the employees responded by quitting, the plaintiff sought to correct the discrepancy in order to clarify that he was, in fact, work-eligible.⁶⁴ *Zamora* obtained confirmation from the SSA that he was eligible to work, but he demanded an apology from his employer "before [he] could consider returning to work."⁶⁵ After the employer terminated him, he filed suit under Title VII for discrimination based on race and national origin.⁶⁶

The Court of Appeals for the Tenth Circuit initially reversed the lower court's grant of summary judgment for the employer, allowing the case to proceed.⁶⁷ Later, the en banc court vacated the panel's decision and affirmed summary judgment for the employer.⁶⁸ The en banc opinion began by assuming that the district court was correct in concluding that *Zamora* alleged a prima facie case of discrimination arising from his termination.⁶⁹ The appellate court, however, found that the employer met its "exceedingly light" burden to show a legitimate, nondiscriminatory reason for the discharge—that *Zamora* demanded an apology and the employer would not provide one.⁷⁰ A Title VII cause of action alleging pretext then requires the employee to present evidence that the employer's stated justification was a pretext for discrimination.⁷¹ Because *Zamora*

61. See, e.g., *Alvarado v. Bd. of Trs.*, 928 F.2d 118, 122–23 (4th Cir. 1991) (holding that an employer discriminated against a Hispanic employee, and that its stated reason for discharge, the employee's unsatisfactory job performance, was pretextual).

62. 478 F.3d 1160 (10th Cir. 2007) (en banc).

63. *Id.* at 1163.

64. *Id.* at 1163–64.

65. *Id.* at 1164.

66. *Id.*

67. *Zamora v. Elite Logistics, Inc.*, 449 F.3d 1106, 1115, 1117 (10th Cir. 2006), *vacated en banc*, 478 F.3d 1160 (10th Cir. 2007).

68. *Zamora v. Elite Logistics, Inc.*, 478 F.3d 1160, 1167 (10th Cir. 2007) (en banc).

69. *Id.* at 1165.

70. *Id.* at 1165–66.

71. *Id.* (referencing the burden-shifting scheme established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

failed to meet this burden, the Tenth Circuit affirmed summary judgment for the employer.⁷²

In the Federal Register commentary preceding the safe-harbor rule, ICE dismissed the idea that *Zamora* conflicted with the safe-harbor procedure.⁷³ However, the commentary does not evaluate the risk of Title VII liability that was raised in *Zamora*.⁷⁴ Instead, the commentary simply states that “[t]he rule does not impose upon employers any new responsibilities that do not already exist under current law.”⁷⁵ While it is true that the safe-harbor rule does not change an employer’s obligation under Title VII, the commentary fails to recognize that compliance is made more difficult as employers must navigate their responsibilities under both the rule and existing antidiscrimination laws with little government guidance on how to balance these two potentially conflicting interests.

Critics of the safe-harbor rule read the Tenth Circuit’s panel decision in *Zamora* as evidence that employers who terminate because of SSN discrepancies are likely to risk discrimination allegations. As the critics have realized, similar cases might arise under facts less favorable to the employer. In *Zamora*, the employee’s demand for an apology provided the employer with a legitimate, nondiscriminatory reason to terminate the employee. A second component of *Zamora* is also noteworthy: the employee alleged discrimination based on the fact that he was suspended for failing to present documentation of his work eligibility status.⁷⁶ On rehearing, the en banc Tenth Circuit divided evenly on the question of whether the suspension raised sufficient evidence of discrimination.⁷⁷ As a result, the court affirmed the district court’s grant of summary judgment.⁷⁸ However, a different court may vote differently and permit a similar case to proceed. Thus, employers should not readily dismiss *Zamora* as ICE urges in the Federal Register.⁷⁹ Instead, they should recognize that the Tenth Circuit decided *Zamora* on its own unique facts, and the case does not represent a wholesale approval of any particular course of action in response to a no-match letter.

72. *Id.* at 1167.

73. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,620 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a).

74. *Id.* at 45,620–21 (discussing conflict with the INA antidiscrimination provision, not Title VII).

75. *Id.* at 45,621. The commentary also dismisses judicial discussions of INA liability as simply “dicta.” *Id.* at 45,620–21.

76. *Zamora*, 478 F.3d at 1164–65.

77. *Id.* at 1165.

78. *Id.*

79. See Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,620.

Fears that employers facing liability for employing undocumented workers would be given an incentive to discriminate against documented aliens and U.S. citizens in their compliance efforts prompted Congress to provide an additional antidiscrimination provision.⁸⁰ The INA prohibits an employer from discriminating against an individual with respect to hiring, recruitment, or discharge because of the individual's citizenship status or national origin.⁸¹ The INA antidiscrimination statute applies to citizens and nationals of the United States and to aliens lawfully admitted for residence or granted asylum. Notably, it does not apply to unauthorized aliens, nor to some cases in which the alleged discrimination is covered by Title VII.⁸²

A recent case illuminates an employer's obligations under the INA antidiscrimination provision. In *Incalza v. Fendi North America, Inc.*,⁸³ the Ninth Circuit upheld a \$1 million jury award to a Fendi store manager whose visa had expired at the time the company terminated him.⁸⁴ The employer argued that the INA permitted it to terminate the plaintiff because his work authorization status had lapsed.⁸⁵ The Ninth Circuit disagreed, finding the INA provided a remedy short of termination—suspension or unpaid leave until the employee resolves the eligibility lapse—and that the employer used the employee's eligibility status as a pretext for unlawful termination.⁸⁶

80. H.R. REP. NO. 99-682, pt. 2, at 12–13 (1986), as reprinted in 1986 U.S.C.C.A.N. 5757, 5762; Linda Sue Johnson, Comment, *The Antidiscrimination Provision of the Immigration Reform and Control Act*, 62 TUL. L. REV. 1059, 1071 (1988). Congress thought the INA antidiscrimination provision was necessary to protect lawfully admitted aliens:

The Committee does not believe barriers should be placed in the path of permanent residents and other aliens who are authorized to work and who are seeking employment It makes no sense to admit immigrants and refugees to this country, require them to work and then allow employers to refuse to hire them because of their immigration (non-citizenship) status.

H.R. REP. NO. 99-682, pt. 2, at 12–13, as reprinted in 1986 U.S.C.C.A.N. at 5762.

81. 8 U.S.C. § 1324b(a)(1) (2000). The Immigration Reform and Control Act ("IRCA") of 1986 amended the INA. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended at 8 U.S.C. §§ 1101–1537 (2000)).

82. 8 U.S.C. § 1324b(a)(1)–(2)(B). "Unauthorized alien" includes aliens who are not "lawfully admitted for permanent residence, or . . . authorized [to work]." *Id.* § 1324a(h)(3). The INA prohibits discrimination by employers with more than three employees. *Id.* § 1324b(a)(2)(A). In addition, the INA antidiscrimination provision cannot be used in conjunction with the Title VII remedy; only one charge may be filed on facts that give rise to liability under both statutes. *Id.* § 1324b(b)(2).

83. 479 F.3d 1005 (9th Cir. 2007).

84. *Id.* at 1014.

85. *Id.* at 1009.

86. *Id.* at 1013–14.

Incalza demonstrates the strength of the INA antidiscrimination provision, especially in the case of an employee who was legally authorized to work at the time of hire but whose documentation later expired. The court's ruling in *Incalza* sends a message to employers that although the INA antidiscrimination provision does not explicitly protect aliens who were unauthorized to work at the time of the discriminatory action, it *does* protect aliens who were at one time lawfully authorized to work.⁸⁷ Thus, in the context of a no-match letter, a question of discrimination liability will arise for employers who terminate work-ineligible employees who were at one time lawfully admitted to the United States.⁸⁸

In addition to potential liability for discrimination under Title VII and the INA, employers invite extra-legal problems by terminating employees based on a no-match letter. Employers who terminate employees, regardless of the terminated employees' status as authorized or

87. See 8 U.S.C. § 1324b(a)(3).

88. In addition to the federal antidiscrimination provisions, a terminated employee may allege that the employer violated labor laws by using the no-match letter as pretext for its underlying motive to stifle unionization campaigns or other union activity. Section 8 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158 (2000), prohibits employers from engaging in unfair labor practices and protects employees who exercise their right to support unionization, § 158(a); see also *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17–18 (1962) (recognizing that non-unionized employees have rights under the NLRA).

The NLRA gives little practical protection to undocumented workers. Yungsohn Park, *The Immigrant Workers Union: Challenges Facing Low-Wage Immigrant Workers in Los Angeles*, 12 *ASIAN L.J.* 67, 85 (2005). The landmark case *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), significantly curtailed remedies available to unauthorized workers when it held that undocumented workers were not eligible for reinstatement because reinstatement conflicts with the national immigration policies set forth in the INA. *Id.* at 899. The Supreme Court further undercut the remedies available to undocumented workers in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), which held that undocumented workers are not eligible for backpay under the NLRA. *Id.* at 151. As a result of their lack of remedial measures, undocumented immigrants have almost no practical legal recourse to challenge unfair labor practices, and attorneys are disincentivized from bringing lawsuits on their behalf under the NLRA. Park, *supra*, at 85.

Unions were among the first challengers to the ICE safe-harbor rule. The AFL-CIO filed a suit in the United States District Court for the Northern District of California just two weeks after ICE finalized the rule; the federation successfully petitioned Judge Maxine Chesney for a temporary restraining order to prevent the rule from taking effect. See *Temporary Restraining Order and Order To Show Cause Re: Preliminary Injunction at 1, AFL-CIO v. Chertoff*, C07-4472 (N.D. Cal. Aug. 31, 2007) (on file with the North Carolina Law Review). The AFL-CIO argued that the safe-harbor rule would facilitate the use of no-match letters as a " 'union busting tool.' " Peter Prengaman, *AFL-CIO Sues Government over Planned Crackdown on Illegal Workers*, S.F. *CHRON.*, Aug. 29, 2007, at A12 (quoting an AFL-CIO attorney). Notably, unions have benefited substantially from the influx of immigrant labor in the last decade, finding immigrant workers contributed to an increase in their membership in the face of declining native-born membership. From 1996 to 2006, immigrant participation in unions increased thirty percent. Posting of James Parks to AFL-CIO Weblog, <http://blog.aflcio.org/2007/08/30/immigrant-union-membership-grew-30-percent-in-last-decade/> (Aug. 30, 2007).

unauthorized workers, face the risk that the remaining employees will protest the termination policy.⁸⁹ Their protests may cause economic disruption. One example of such a protest occurred when over five hundred employees at a North Carolina pork processing facility staged a walkout after the company terminated about fifty workers whom management suspected of providing false SSNs during the hiring process.⁹⁰ The protest was both significant and unusual given the fact that the plant was not unionized.⁹¹

Another extra-legal problem arises after employers terminate unauthorized workers or when federal officials raid a worksite: any remaining immigrants who are not in the United States legally may go into hiding and disappear from schools, work, and the community in general.⁹² At minimum, then, employees may respond by communicating their mutual disagreement with the employer's policy by organizing economically disruptive protests. At its worst, backlash may cause a mass exodus of labor sources from local communities.⁹³ Thus, the realistic threat of employment discrimination claims and the extra-legal problems triggered by terminations and raids both reinforce the cautionary language in the SSA no-match letter that an employer "should not use this letter alone to take any adverse action against an employee."⁹⁴

III. IMMIGRATION AND CUSTOMS ENFORCEMENT SAFE-HARBOR RULE

Employers seeking to minimize their risk of discrimination suits and extra-legal problems arising from their response to no-match letters must also balance the risk of government enforcement actions for immigration violations. The ICE rule does not relieve employers of this balancing act; indeed, the ICE rule further jeopardizes Secretary Chertoff's assurances that employers who cooperate with the government will not face sanctions for immigration violations.⁹⁵ The most revolutionary aspect of the rule is that it modifies the INA definition of "knowing" with respect to whether an employer has knowingly employed a person not authorized to work in the

89. Julia Preston, *Immigration Raid Draws Protest from Labor Officials*, N.Y. TIMES, Jan. 26, 2007, at A17.

90. *Id.*

91. *Id.* Although the plant is not unionized, there has been an active union campaign at the plant for several years. *Id.*

92. See Nina Bernstein, *Immigrants Panicked by Rumors of Raids*, N.Y. TIMES, Apr. 29, 2006, at B1 (noting rumors have the effect of potentially "paralyz[ing]" immigrant communities).

93. See Morales, *supra* note 6.

94. SSA No-Match Letter, *supra* note 25, at 2.

95. See *supra* notes 44–46 and accompanying text.

United States.⁹⁶ The regulations promulgated under the INA provide that knowledge may be found in two ways. First, an employer may have actual knowledge that an employee is not eligible to work. Second, constructive knowledge may be attributed to the employer based on a consideration of how a reasonable employer would view the totality of circumstances surrounding the question of whether a person is work-eligible.⁹⁷ The rule adds receipt of an SSA no-match letter to a list of example factors that DHS may consider in a “totality of the relevant circumstances” inquiry into whether an employer has constructive knowledge of immigration violations.⁹⁸

The heart of the rule, as indicated by its title, establishes a safe-harbor procedure under immigration law for employers to follow if they receive a no-match letter from the SSA.⁹⁹ The rule is intended to address widespread employer concern about whether the no-match letter should be viewed as a red flag that a particular employee is unauthorized to work in the United States¹⁰⁰ despite the letter’s assurance that it “does [not], by itself, make any statement about an employee’s immigration status.”¹⁰¹ If the employer follows the safe-harbor procedure, ICE will not consider the no-match letter in its calculus of whether the employer knowingly hired unauthorized workers in violation of the INA.¹⁰² However, the safe-harbor procedure places the ultimate burden on employers to terminate employees who they suspect, based on the outcome of the safe-harbor procedure, are not eligible to work in the United States.¹⁰³

The safe-harbor procedure is a suggested course of action for employers to follow upon receipt of a no-match letter from the SSA. The

96. See Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,620 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a).

97. 8 C.F.R. § 274a.1(l)(1) (2007); see *Mester Mfg. Co. v. INS*, 879 F.2d 561, 566–67 (9th Cir. 1989) (holding that an employer, despite lacking actual knowledge, satisfied the scienter requirement of the INA because he received notice that his employees were unauthorized but failed to investigate or “take appropriate corrective action”).

98. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,612–13.

99. *Id.* at 45,612.

100. See Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 71 Fed. Reg. 34,281, 34,282 (June 14, 2006) (to be codified at 8 C.F.R. pt. 274a) (“[The no-match] letter may be one of the only indicators to an employer that one of its employees may be an unauthorized alien.”).

101. SSA No-Match Letter, *supra* note 25, at 1. The SSA no-match letter is not a tool for immigration enforcement, and the letter itself warns against using the no-match letter as justification for terminating employees. See *infra* Part IV.A.

102. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,613.

103. See *id.* (requiring the employer to “choose between” terminating the employee or risking a finding of constructive knowledge under the INA).

first step of the safe-harbor procedure requires the employer to “promptly” evaluate whether the SSA error resulted from a clerical error in its own records.¹⁰⁴ If the employer finds the source of the error in its own files, it should contact the SSA, correct its own records, and then contact the agency again to verify the error has been cured.¹⁰⁵ The rule considers a “reasonable employer to have acted promptly if the employer [completes these] steps within thirty days” of receiving the SSA letter.¹⁰⁶

If the employer is not able to resolve the mismatch by curing a clerical error in its own records, it proceeds to the second step of the safe-harbor procedure. In the second step, the employer approaches the employee directly to determine if the employer’s records are accurate.¹⁰⁷ If the employer discovers inaccuracies in its own recordkeeping, it must correct the records, inform the SSA, and verify with the agency that the stated name now matches the stated SSN.¹⁰⁸ If, on the other hand, the employee verifies that the employer’s records are correct, then the employer must ask the employee to resolve the matter directly with SSA.¹⁰⁹ The employer must give the employee the date that it received the no-match letter and “advise the employee to resolve the discrepancy with the [SSA] within ninety days of [that] date.”¹¹⁰

Finally, if the first two steps of the safe-harbor procedure do not resolve the discrepancy within ninety days, the employer is provided with an additional three days to embark on a “reasonable verification procedure” of the employee’s work authorization status.¹¹¹ The rule gives one example of such a procedure, which consists of completing a new I-9 form without

104. *Id.*

105. *Id.* The employer would contact either the SSA or DHS, depending on the source of the no-match letter. The rule addresses no-match letters from (1) the SSA resulting from W-2 errors, and (2) ICE indicating that I-9 information is in error. *See supra* note 19. The following summary of the rule and this Comment will address only the SSA no-match letter.

106. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,613. The standard is whether the employer has acted reasonably and with promptness, though it is not clear from the rule whether the examination of constructive knowledge under the totality of the circumstances permits deviation from the thirty-day time period given in the rule. *See id.* (denoting simply that a “reasonable employer [would] check[] its records promptly” and that thirty days is considered prompt).

107. *Id.*

108. *Id.*

109. *Id.* The employee might contact the local SSA office and offer proper documentation of identity and documents that address the error, such as name change documents. *Id.*

110. *Id.* at 45,624. The ninety days for the second step is not in addition to the thirty days for the first step; that is, the employer has ninety days to institute the first two steps. *See id.* at 45,617 (reiterating the timetable under the final rule).

111. *Id.* at 45,613.

the aid of the suspect SSN.¹¹² If the employer continues to provide work for an employee who cannot successfully complete the secondary verification procedure, then DHS may consider the receipt of the no-match letter as a factor indicating that the employer had constructive knowledge that it employed undocumented workers in violation of the INA.¹¹³ The comments to the rule state that the “employer must choose between: (1) Taking action to terminate the employee, or (2) Facing the risk that DHS may find the employer had constructive knowledge that the employee was an unauthorized alien” and thereby violated the INA by continuing to provide employment.¹¹⁴ Thus, the safe-harbor procedure effectively ends with an implicit instruction to terminate the employee if the mismatch is not resolved.¹¹⁵

IV. ANALYSIS

A. *The Social Security Administration Is Separate and Distinct from Immigration Enforcement*

A brief summary of SSA accounting informs the analysis of whether no-match letters are an appropriate tool for immigration enforcement. Employers report wages to the SSA using the Wage and Tax Statement, known as the W-2 Form.¹¹⁶ In addition to reporting wage data to the Internal Revenue Service, the SSA uses the W-2 Form to calculate retirement, survivor, and disability benefits.¹¹⁷ In the absence of correct accounting, employee retirement benefits may be miscalculated or not paid at all.¹¹⁸

The SSA processes 235 million W-2s each year, ten percent of which have mismatched name and SSN combinations.¹¹⁹ The agency then applies

112. *Id.* Identity must be established using a document with a photograph. *Id.* The INA allots three business days for an employer to verify the employment eligibility of a new hire. See 8 C.F.R. § 274a.2(b)(1)(ii) (2007). The completion of an I-9 at this stage of the safe-harbor procedure will be referred to as the secondary I-9 procedure.

113. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,613.

114. *Id.*

115. *But see id.* at 45,621 (“The firing of any employee . . . because of the receipt of a no-match letter is speculative, and is neither required by nor a logical result of the rule being adopted.”).

116. See SSA No-Match Letter, *supra* note 25, at 1; *Is the Federal Government Doing All It Can To Stem the Tide of Illegal Immigration?: Hearing Before the Subcomm. on Regulatory Affairs of the H. Comm. on Government Reform*, 109th Cong. (2006) [hereinafter Testimony] (testimony of Martin H. Gerry, Deputy Comm’r, SSA).

117. Testimony, *supra* note 116.

118. *Id.*

119. *Id.*

specialized computer programming to remove many of the clerical errors, and the remaining mismatches are transferred to an Earnings Suspense File (“ESF”) pending resolution of the mismatch and proper crediting to a taxpayer’s record.¹²⁰ The taxes due on the mismatched wage reports are paid into the Social Security Trust Fund.¹²¹ The SSA then seeks to resolve further discrepancies through notification to employers via the no-match letter.¹²² The administration planned to issue 140,000 no-match letters in 2007.¹²³ The no-match letter informs the employer that its sole function is to correct social security records: the letter clearly explains that it does not “make any statement about an employee’s immigration status.”¹²⁴

In contrast to the W-2, the Employment Eligibility Verification Form, known as Form I-9, is the principal tool used to verify that an employee is authorized to work in the United States.¹²⁵ The Immigration Reform and Control Act of 1986¹²⁶ (“IRCA”) requires that employers verify the employment eligibility of all new hires using the I-9.¹²⁷ Like the W-2, the I-9 collects data on the worker’s name and SSN. Unlike the W-2, however, the I-9 also collects information on documents that employees offer to verify employment eligibility.¹²⁸ Because it calls for an inspection of work authorization documents, the I-9, not the W-2, is best suited to verifying employment eligibility.

Current ICE procedures recognize the I-9 as the principal work eligibility document: during DHS audits, ICE investigators examine the I-

120. *Id.* Since its inception in 1937 through 2003 (the most recent year for which data regarding the ESF is available), 255 million W-2 reports have accumulated in the ESF. *Id.*

121. *Id.* \$7.2 billion was paid into the trust fund for tax year 2003, which amounts to approximately 1.3% of all taxes paid into the Social Security Trust Fund. *Id.* Since taxes on earnings in the ESF are paid into the social security coffers, the need to resolve the mismatches is driven by the need to properly credit taxpayers, not the financial concern for the stability of the social security system. *See id.* Although the SSA currently is authorized to use taxpayer data for the limited purpose of verifying eligibility for social security benefits, the administration does “[support] allowing disclosure of [W-2] data in the interests of national security and for law enforcement purposes.” *Id.*; see 26 U.S.C. § 6103 (2000 & Supp. IV 2004).

122. Testimony, *supra* note 116. The SSA only sends no-match letters to employers who submit more than ten W-2s to the administration and for whom the proportion of mismatches is more than 0.5%. *Id.* The no-match letter may include as many as five hundred SSNs, but the corresponding names are deleted in an effort to protect privacy. *Id.*

123. Order Granting Motion for Preliminary Injunction, *supra* note 36, at 6.

124. SSA No-Match Letter, *supra* note 25, at 1.

125. MARGARET C. JASPER, THE LAW OF IMMIGRATION 35 (2d ed. 2000).

126. 8 U.S.C. §§ 1101–1537 (2000).

127. AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, IMMIGRATION EMPLOYMENT COMPLIANCE HANDBOOK § 2-1 (1997 ed.).

128. *See* Form I-9, Employment Eligibility Verification, DHS, U.S. Citizenship & Immigration Servs. 1 (June 5, 2007), available at <http://www.formi9.com/i-9.pdf>.

9s kept on file by the employer.¹²⁹ If immigration status documents or employment authorization documents recorded on the I-9 do not match ICE records, the bureau will alert the employer in a DHS no-match letter that is similar to the SSA no-match letter.¹³⁰ The United States Department of Justice also recognizes the I-9 as the main work eligibility tool: the department directs employers to the I-9, not documents relating to SSA wage reports, to achieve compliance with immigration laws.¹³¹

Although the W-2 is an accounting tool for social security benefits and the I-9 is an employment authorization tool, the ICE rule applies the same safe-harbor procedure to both the SSA no-match letter and the DHS no-match letter that results from ICE audits.¹³² This rather curious outcome represents a significant departure from the justification that SSA provides for the no-match letter program—to properly record wages for the benefit of the employee.¹³³ In fact, the SSA states clearly in the no-match letter that an employer

should not use [an SSA no-match] letter . . . to take any adverse action against an employee, such as laying off, suspending, firing, or discriminating against that individual, just because his or her Social Security number appears on the list. *Doing so could, in fact, violate State or Federal law and subject [the employer] to legal consequences.*¹³⁴

Under the ICE rule, the no-match letter not only suggests a lawful basis for terminating an employee, but it also implicitly encourages the

129. See Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,612 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a).

130. *Id.* The letter is called a “Notice of Suspect Documents.” *Id.*

131. See U.S. DOJ, Civil Rights Div., Office of Special Counsel for Immigration-Related Unfair Employment Practices, Frequently Asked Questions (FAQs), How Can Employers Verify Their Employees’ Employment Eligibility in a Non-Discriminatory Manner?, <http://www.usdoj.gov/crt/osc/html/facts.htm> (last visited Dec. 5, 2007) (“Employers can demonstrate compliance with the law by following the verification (I-9 Form) requirements and treating all new employees the same.”); see also Comment, Low-Wage Immigrant Worker Coalition 18 (Aug. 14, 2006), available at http://www.nilc.org/immsemploymnt/SSA-NM_Toolkit/SSAnomatch_long_comments_2006-8-14.pdf (projecting that “established federal guidance on no-match letters [will be turned] on its head” when the rule takes effect).

132. See Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,611 (“The amended regulation describes the legal obligations of an employer, under current immigration law, when the employer receives a no-match letter from the Social Security Administration . . .”); *supra* note 19 (explaining that the ICE safe-harbor rule applies the same procedure to both the DHS and SSA no-match letters).

133. SSA No-Match Letter, *supra* note 25, at 1 (calling for the employer to correct mismatched names and SSNs so that an “employee may . . . get benefits he or she is due”).

134. *Id.* at 2 (emphasis added).

termination by threatening a finding of constructive knowledge.¹³⁵ This phenomenon, while laudable as an effort to increase intragovernmental cooperation and efficiency, has the unintended effect of subjecting compliance-minded employers to discrimination liability.

B. The Risk of Terminating a Lawful Employee on the Basis of a No-Match Letter Is Potentially Great

The risk of terminating a lawful employee is surprisingly high given the number of mismatched SSN and name combinations that employers submit to the SSA. Approximately ten percent of W-2s submitted to the SSA contain discrepancies with SSA files.¹³⁶ Given the fact that the SSA processes 235 million W-2s each year,¹³⁷ the annual number of discrepancies exceeds twenty-three million, or roughly 3.6 mismatches per employer.¹³⁸

Undoubtedly, some of the mismatches are evidence of taxes collected from unauthorized workers.¹³⁹ However, many errors are, in fact, harmless because they result from routine name changes undertaken after marriage, clerical errors such as transposed digits, and perhaps even errors resulting from the difficulty employers encounter with correctly spelled, but unfamiliar, ethnic names.¹⁴⁰ Routine computer programming applied to the SSA mismatch data file relieves about half of the initial mismatches.¹⁴¹ Over time, the number of false mismatches in the ESF is steadily decreased through other SSA verification methods, though some errors will inevitably remain.¹⁴² Although the number of mismatches may fall to a very low

135. See Order Granting Motion for Preliminary Injunction, *supra* note 36, at 14 (“It is clear to this Court that DHS has changed course. . . . DHS’s new position is that an employer who receives a no-match letter can, without any other evidence of illegality, be held liable under the continuing employment provision.”).

136. Testimony, *supra* note 116.

137. See *id.* (citing the 2005 figure).

138. Approximately 6.6 million employers submitted 235 million W-2s, which results in approximately 3.56 mismatches per employer. See *id.*

139. The SSA acknowledges that a “major portion of ESF wage items” results from unauthorized workers. OFFICE OF THE INSPECTOR GEN., SSA, EVALUATION REPORT: THE SOCIAL SECURITY ADMINISTRATION’S EARNINGS SUSPENSE FILE TACTICAL PLAN AND EFFORTS TO REDUCE THE FILE’S GROWTH AND SIZE 7 (A-03-97-31003) (2000), available at <http://www.ssa.gov/oig/ADOBEPDF/A-03-97-31003.pdf>.

140. Penny, *supra* note 54, at 362 & n.38. The SSA applies computer programs to the discrepancy file in order to attempt to identify clerical errors such as transposed digits, but it admits that it cannot address common but complex problems using its automated processes. Testimony, *supra* note 116; see also Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,612 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a) (identifying clerical errors and name changes as the cause of many mismatches).

141. Testimony, *supra* note 116.

142. See *id.* (noting 2.3% of wage items from tax year 1995 remained in the ESF as of 2003).

percentage of all W-2s filed with the SSA, millions of mismatches may exist in a given tax year.¹⁴³

Despite explicit warnings in the no-match letter to the contrary, many employers fire employees for whom they receive SSA no-match notification.¹⁴⁴ In fact, a survey of over nine hundred employers and their employees who were the subject of a no-match letter revealed that the majority of employers discharged the employees for whom they received a no-match letter.¹⁴⁵

One reason that employers resort to termination is that they are fearful of employing undocumented aliens. The termination decision is thus an effort to avert any potential risk of violating immigration laws.¹⁴⁶ However, nearly sixty percent of the surveyed employers who terminated the suspect employees failed to conduct further inquiry into the employees' authorization to work, and about one third of the terminated employees were not permitted to avoid termination by attempting to resolve the SSA discrepancy on their own.¹⁴⁷ These findings indicate that many employers do not heed SSA advice against taking employment action based on the no-match letter.¹⁴⁸

If an employer terminates an employee upon receiving a no-match letter, it cannot be certain that the posted mismatch was not the result of a clerical error by either the employer or the SSA. Because a large volume

143. Given the fact that 2.3% of wage items remain in the ESF fund from tax year 1995, and that there were 235 million W-2s submitted for SSA processing in 1995, there are roughly 5.4 million unresolved wage items. *See id.*

144. CHIRAG MEHTA ET AL., CENTER FOR URBAN ECONOMIC DEVELOPMENT, SOCIAL SECURITY ADMINISTRATION'S NO-MATCH LETTER PROGRAM: IMPLICATIONS FOR IMMIGRATION ENFORCEMENT AND WORKERS' RIGHTS 14 (2003) [hereinafter NO-MATCH PROGRAM], available at http://www.niic.org/immsemplymnt/SSA_no-match_survey_final_report_11-20-03.pdf. *But see* Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,621 ("The firing of any employee or 'churning' of the workforce because of the receipt of a no-match letter is speculative, and is neither required by nor a logical result of the rule being adopted.").

145. NO-MATCH PROGRAM, *supra* note 144, at 13. Although a small percentage of employers polled in the survey reinstated the terminated workers at a later date, 2.2% of employers rehired employees without benefits, and 0.6% of employers rehired the employees but refused to grant them their previous seniority rank. *Id.* at 14.

146. Prior to the passage of the IRCA, employers indicated that they would engage in discriminatory practices in order to "play it safe" with immigration laws. Johnson, *supra* note 80, at 1072-73. A similar fear of immigration violations may play into employers' decisions to terminate on the basis of the no-match letter.

147. NO-MATCH PROGRAM, *supra* note 144, at 15.

148. *See* Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,621 (acknowledging that "employers in the past have been confused about their responsibilities . . . [resulting] in unwarranted termination of work-authorized individuals"). An employer's failure to permit an employee to resolve the SSA discrepancy raises the question of whether the termination constitutes pretext for discrimination. *See supra* note 61 and accompanying text.

of mismatches occur each year, an employer's risk of terminating a legitimately authorized employee is potentially great. Employers, therefore, are well-advised to follow the advice in the no-match letter that it "does [not] make any statement about an employee's immigration status," and that the employer "should not use [the] letter alone to take any adverse action against an employee."¹⁴⁹

C. *The Rule Forces an Impossible Choice*

The safe-harbor rule is designed to provide "options for avoiding liability" under the INA for intentional immigration violations.¹⁵⁰ In reality, an employer who cannot resolve the SSA discrepancy "promptly" will be forced to decide whether to continue to employ the individuals who are the subjects of no-match letters.¹⁵¹ Evidence indicates that employers already terminate on the basis of the no-match letter despite warnings against such action.¹⁵² The rule's implicit threat to impute knowledge of INA violations to an employer based on the no-match letter will undoubtedly incentivize additional terminations.

Employers who seek to avoid INA liability by terminating employees, however, risk discrimination suits lodged by the terminated employees who were, in fact, lawfully authorized to work in the United States.¹⁵³ Unfortunately for employers, the safe-harbor procedure does not provide an explicit, parallel safe-harbor under the antidiscrimination provisions of the INA or Title VII.¹⁵⁴ As a result, employers face a nearly impossible choice: they may either elect to take on the risk of potential discrimination suits, or they may risk a DHS finding that they had constructive knowledge of immigration violations under the INA.

The only way for an employer to avoid liability under both immigration and antidiscrimination laws is to maintain absolute certainty

149. SSA No-Match Letter, *supra* note 25, at 2; *see supra* Part II (discussing the potential risks employers face in using the no-match letter as the basis for adverse employment actions).

150. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,612.

151. *Id.* at 45,613. While the rule is correct to point out that it "does not impose upon employers any new responsibilities that do not already exist under current law," *id.* at 45,621, the rule fails to acknowledge that it creates "incentives to take actions that violate" antidiscrimination laws. Letter from Peggy R. Mastroianni, Assoc. Legal Counsel, EEOC, to Richard A. Sloan, Dir., Regulatory Mgmt. Div., U.S. Citizenship & Immigration Servs., DHS (Aug. 14, 2006) [hereinafter Letter from Peggy R. Mastroianni], available at http://www.eeoc.gov/foia/letters/2006/vii_national_immigration.html.

152. *See supra* notes 144–45 and accompanying text.

153. *See supra* Part II.

154. Letter from Am. Immigration Lawyers Ass'n to Dir., Regulatory Mgmt. Div., U.S. Citizenship & Immigration Servs., DHS 11 (Aug. 11, 2006) [hereinafter AILA Letter], available at <http://www.aila.org/content/fileviewer.aspx?docid=20259&linkid=149857>.

that it only hires authorized employees and only terminates undocumented workers. In doing so, it must also maintain a uniform policy in its interaction with both classes of employees. This solution calls for employers to exercise a high level of scrutiny of the eligibility status of their employees.¹⁵⁵ This level of scrutiny is nearly impossible, in part due to the shortcomings of the government's Basic Pilot Program.¹⁵⁶

The employer's burden is particularly onerous considering that the INA, in contrast, merely requires employers to demonstrate "good faith compliance" with the law's mandate to verify employment eligibility documents.¹⁵⁷ The good faith compliance standard requires the employer to accept all documents that "reasonably appear on their face to be genuine."¹⁵⁸ In exchange for good faith compliance, the employer enjoys a rebuttable presumption that it has not knowingly hired an undocumented worker.¹⁵⁹

Congress adopted the good faith compliance standard in the INA because it was concerned by how employers would handle their new employment eligibility verification duties under the act.¹⁶⁰ Congress intended that employers who required assistance in verifying documents would call upon the INS to verify eligibility. Congress did not intend for the employer to elicit additional documentation from the prospective employee.¹⁶¹ In fact, the INA specifically prohibits the employer from asking for "more or different documents . . . or refusing to honor documents tendered that . . . reasonably appear to be genuine."¹⁶² The practice of refusing documents that would appear valid to a reasonable employer is prohibited as discriminatory document abuse.¹⁶³ Thus, the law does not require employers to be as savvy as the government in verifying

155. Employers complain that current technology available to them, including the Basic Pilot Program that Swift utilized, is insufficient to accurately verify worker eligibility status. The Human Resource Initiative for a Legal Workforce called for a complete overhaul of the current eligibility verification system, in part due to the "administrative burden on private employers" the current system imposes. In addition, the initiative is concerned about the balance that employers must strike between accurately verifying documents and avoiding liability for discrimination. *High-Tech Methods, New Rules, Needed for Employment Verification, HR Groups Say, supra* note 47.

156. Press Release, Swift & Co., *supra* note 49; *see also supra* note 47 (discussing the Basic Pilot Program).

157. H.R. REP. NO. 99-682, pt. 1, at 57 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5649, 5661.

158. *Id.*

159. *Id.*

160. AILA Letter, *supra* note 154, at 11.

161. H.R. REP. NO. 99-682, pt. 1, at 61-62, *as reprinted in* 1986 U.S.C.C.A.N. at 5665-66.

162. Immigration and Nationality Act § 274B(a)(6), 8 U.S.C. § 1324b(a)(6) (2000).

163. *See* AILA Letter, *supra* note 154, at 12.

proffered documents.¹⁶⁴ The prohibition on document abuse requires an employer to exercise extreme caution in its diligent efforts to verify the validity of employment authorization documents.¹⁶⁵

The ICE rule addresses the potential for discriminatory document abuse that may arise during the course of the safe-harbor procedure. Under the rule, employees who are the subject of a no-match letter are prohibited from using their suspect SSN in the secondary I-9 verification procedure, which is the final step in the safe-harbor procedure.¹⁶⁶ At first glance, the mandate that the employer require different or additional documents in the secondary verification procedure seems to conflict with the INA prohibition on document abuse.¹⁶⁷ However, the INA verbiage prohibiting document abuse is repeated at the end of the safe-harbor rule in order to indicate that the secondary verification procedure would not be considered document abuse.¹⁶⁸

The comments to the safe-harbor rule purport that “employers who follow the safe-harbor procedures set forth in [the] rule *uniformly and without regard to perceived national origin or citizenship status as required by . . . the INA will not be found to have engaged in unlawful discrimination.*”¹⁶⁹ ICE guidance mailed with the SSA no-match letter will also reiterate the language in the final rule regarding an employer’s lack of liability for INA discrimination under the safe-harbor procedure.¹⁷⁰ The guidance states that employers who follow the safe-harbor procedure in a uniform manner, with the result that employees for whom the employer

164. See *Collins Foods Int’l, Inc. v. INS*, 948 F.2d 549, 554 (9th Cir. 1991) (stating “Congress carefully crafted section 1324a to limit the burden and the risk placed on employers” in the verification process).

165. Swift was unable to meet this burden. See *supra* notes 48–49 and accompanying text (outlining the Department of Justice action against Swift).

166. *Safe-Harbor Procedures for Employers Who Receive a No-Match Letter*, 72 Fed. Reg. 45,611, 45,613 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a). The amended regulations promulgated under the INA will state that “[n]o document containing the SSN . . . that is the subject of the no-match letter . . . may be used to establish employment authorization or identity or both.” *Id.*

167. See AILA Letter, *supra* note 154, at 13.

168. See *Safe-Harbor Procedures for Employers Who Receive a No-Match Letter*, 72 Fed. Reg. at 45,624 (“Nothing in this definition should be interpreted as permitting an employer to request more or different documents than are required under section 274A(b) of the [INA] or to refuse to honor documents tendered that on their face reasonably appear to be genuine and to relate to the individual.”); see also *Immigration and Nationality Act* § 274B(a)(6), 8 U.S.C. § 1324b(a)(6) (2000).

169. *Safe Harbor Procedures for Employers Who Receive a No-Match Letter*, 72 Fed. Reg. at 45,613–14 (emphasis added). The commentary cites the rule’s clarification that an employer must refuse to accept the suspect SSN in the secondary verification procedure that takes place if the mismatch is not resolved after ninety days. See *id.* at 45,614.

170. ICE, *ICE Employer Guidance Insert Letter 2*, <http://www.socialsecurity.gov/employer/ICEinsert.pdf> (last visited Dec. 5, 2007).

cannot verify employment eligibility are terminated, will not face charges brought by the United States under the antidiscrimination provision of the INA.¹⁷¹

There are several problems with ICE's assurance to employers that they will not be liable for discrimination. First, the guidance letter and the rule only address the amendments to the INA regulations pertaining to document abuse. The rule does not protect employers who follow the safe-harbor procedure more generally from charges of discrimination under the INA or Title VII. The guidance letter is also just that—guidance to employers, which may be revoked or changed at any time.¹⁷²

In addition, it is not clear that DHS has the authority to determine whether an employer will be held liable under the INA's antidiscrimination provision. DHS is charged with the authority to investigate whether an employer has knowingly violated the INA's prohibition on hiring unauthorized employees.¹⁷³ In contrast, the Department of Justice enforces the INA antidiscrimination provision.¹⁷⁴ As a result, "[t]here is . . . a serious question whether DHS has impermissibly exceeded its authority . . . by interpreting [the INA's] anti-discrimination provisions to preclude enforcement where employers follow the safe-harbor framework."¹⁷⁵ Therefore, ICE's assurance in the Federal Register commentary that employers will not be held liable for discrimination under the INA is not as reliable as it purports to be.

V. WORKING TOWARDS A UNIFIED IMMIGRATION ENFORCEMENT STRATEGY

A. *The Rule Serves To Increase Cooperative Immigration Enforcement*

The ICE rule is not without merits. Insofar as it generally seeks to meet the INA's mandate that employers only provide work for eligible employees, it should be commended for its attempt to provide guidance to employers. The rule also provides a meaningful deterrent, constructive knowledge, that encourages compliance.

The policy goal of ensuring that all workers in the United States are legally authorized for employment calls for extensive collaboration

171. *Id.*

172. *See supra* notes 44–46 and accompanying text (recognizing conflicting DHS messages regarding immigration enforcement actions).

173. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,614.

174. *See id.* ("The rule does not affect . . . the authority of DOJ to enforce the anti-discrimination provisions of the INA . . .").

175. Order Granting Motion for Preliminary Injunction, *supra* note 36, at 16.

between employers and the government as well as interagency cooperation within the government. The rule will foster these alliances in two regards. First, the safe-harbor rule unifies the SSA and DHS no-match programs as equivalent means of providing notice to an employer that a particular employee may not be authorized for work.¹⁷⁶ As such, the rule seeks to draw the SSA no-match program into the government's toolbox for immigration enforcement. This level of coordination between the SSA and ICE serves to increase the government's ability to uncover and prosecute immigration violations.¹⁷⁷ In addition, the cooperation could be particularly beneficial in curbing the "rampant use of fraudulent documents" by undocumented workers.¹⁷⁸ The importance of this alliance was seen in the Swift case, where government agents and the employer detected unusual trends among employment eligibility documents that indicated an underlying pattern of identity theft.¹⁷⁹

Second, the rule calls upon employers to play a more active role in immigration enforcement.¹⁸⁰ Exacting immigration compliance from employers has the potential to "be a very efficient tool" if used properly.¹⁸¹ Under the good faith compliance provisions of the INA, some employers currently avoid liability by stating they were not capable of determining whether the documents offered by the unauthorized worker were false or forged.¹⁸² In contrast, employers proceeding under the ICE safe-harbor procedure have a greater responsibility to respond to notice from the SSA that there is a discrepancy with an employee's documents.¹⁸³

As seen in Part II, adverse consequences of this cooperation may fall on employers. The safe-harbor procedure calls upon employers to take a more active role in ensuring their workers are eligible to work; in the process, however, employers may find themselves facing various discrimination claims. Under DHS's stated policy of focusing on worksite

176. The rule covers both the SSA no-match letter and the DHS no-match letter. See Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,623-24 (adding the SSA and DHS no-match letters to a list of example situations from which constructive knowledge may be inferred); *supra* note 130 and accompanying text (explaining the DHS no-match letter).

177. See Amanda E. Schreyer, Note, *Human Smuggling Across the U.S.-Mexico Border: U.S. Laws Are Not Stopping It*, 39 SUFFOLK U. L. REV. 795, 807-08 (2006).

178. *Id.* at 807.

179. Solís & Reddy, *supra* note 3.

180. DHS Secretary Chertoff stated the department's goal of discouraging employers from "ignoring clear signs" of potential immigration violations and overcoming industry's "tolerance of hiring illegal workers." *DHS Cracks Down on Illegal Immigration Practices*, *supra* note 11, at 5.

181. Greenhouse, *supra* note 39 (quoting Harvard professor George Borjas).

182. *Id.*

183. See Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,613 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a).

compliance, employers effectively have little choice but to follow the safe-harbor procedure in order to avoid a finding of constructive knowledge.¹⁸⁴ As a result, the expected gains in immigration enforcement for the government must be balanced against the resulting legal exposure to employers who follow the safe-harbor procedure.

B. Proposals for Strengthening the Safe-Harbor Procedure

The safe-harbor rule should provide adequate legal protection to employers who receive SSA no-match letters and respond according to the recommended procedure. The rule intends to eliminate confusion for employers who receive no-match letters and are concerned that the employees who are the subject of the letters are not authorized to work in the United States. However, in the process of providing a safe-harbor procedure under the immigration laws, the rule raises additional questions about an employer's liability for employment discrimination.¹⁸⁵ Thus, ICE should strengthen the rule in two ways. First, the rule should create a rebuttable presumption that the employer has not engaged in discrimination by terminating employees at the conclusion of the safe-harbor procedure. Second, ICE should provide employers with an additional choice upon the unsuccessful completion of the safe-harbor procedure: employers should be permitted to report to ICE that they cannot resolve the no-match discrepancies. ICE will then prioritize worksite enforcement actions in accordance with its own enforcement goals.¹⁸⁶

The first proposal to strengthen the ICE rule recognizes that the safe-harbor procedure should properly live up to its name by providing more protection for conduct undertaken during the safe-harbor procedure that might constitute discrimination. Although DHS's legal authority to

184. The rule does not preclude employers from taking other measures to verify employment documents, but DHS may nevertheless find constructive knowledge. *See* Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,614 (cautioning that "an employer that followed a procedure other than the 'safe-harbor' procedures . . . would face the risk that DHS may not agree" that the employer's actions were reasonable); *cf. id.* at 45,616 ("[R]eceipt of an SSA no-match letter may create [a duty to investigate] depending on the totality of the circumstances."). Given the devastating economic aftermath of a DHS raid, risk-averse employers are well-advised to follow the stated safe-harbor procedure.

185. The U.S. Equal Employment Opportunity Commission submitted a comment during the public comment period, stating that it "strongly believes that the 'safe-harbor' procedure will only work when the Department adopts a thorough step-by-step procedure that allows employers to act affirmatively after receiving a no-match letter without exposing them to unwarranted liability under the [equal employment opportunity] laws." Letter from Peggy R. Mastroianni, *supra* note 151.

186. *See* Fact Sheet, ICE, *supra* note 42 ("In accordance with ICE's homeland security mission, ICE agents prioritize worksite enforcement efforts by focusing on sites related to critical infrastructure and national security.").

influence the enforcement of antidiscrimination laws has not yet been litigated, an effective safe-harbor procedure must be able to address an employer's obligations under both immigration and antidiscrimination laws. The rule already addresses the potential for document abuse in the secondary verification procedure by exempting it from conduct considered abusive under the INA regulations.¹⁸⁷ In order to warn employers about the potential for discrimination liability, the rule should likewise address the termination decision in the text of the safe-harbor procedure.¹⁸⁸ After the secondary verification requirement, an additional provision should follow that confirms the no-match letter's warning that the letter itself is not a "statement about an employee's immigration status" and that employers risk various legal consequences for taking "adverse action against an employee."¹⁸⁹ This statement will serve to reiterate to employers, potential plaintiffs, and the courts that the employer maintains its equal employment opportunity obligations while following the safe-harbor procedure.

The rule should then provide that an employer who follows the safe-harbor procedure and terminates an employee upon unsuccessful verification of employment status will enjoy a rebuttable presumption that it has not violated antidiscrimination statutes by following the safe-harbor procedure. Evidence that the employer did not apply the safe-harbor framework in a uniform manner for all employees would be relevant to rebutting the presumption.¹⁹⁰ This provision relies upon a clear statement in the rule about an employer's responsibility to take action or risk liability if it cannot achieve employment verification as described above, which currently only exists in the Federal Register commentary preceding the rule. It also relies upon a clear showing that the employer terminated the employee because it could not verify employment eligibility, such as is provided by the I-9 procedure, and not because it received an SSA no-

187. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,613-14; *see supra* notes 166-68 and accompanying text.

188. Currently, the safe-harbor procedure that will be inserted as an amendment to the INA does not contain any language indicating an employer must choose between terminating the employee and a finding of constructive knowledge. This language is found in the comments preceding the rule. *See* Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,613.

189. *See* SSA No-Match Letter, *supra* note 25, at 2; *accord* Letter from Peggy R. Mastroianni, *supra* note 151 (encouraging the inclusion of a statement "reminding employers that any employment practice adversely affecting employees on the basis of race/color, physical appearance, accent, religion, or any other foreign characteristic that potentially denotes immigrant status, may violate anti-discrimination laws").

190. *Cf.* Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,613-14 ("[E]mployers who follow the safe harbor procedures set forth in this rule uniformly and without regard to perceived national origin or citizenship status as required by the provisions of . . . the INA will not be found to have engaged in unlawful discrimination.").

match letter. This distinction reflects the tradition that a determination of work authorization status originates solely with the I-9. In keeping with the reality that an SSA no-match letter is one indication that an employee may be undocumented, this proposal also acknowledges that notice of a worker's ineligible status may surface via other documents such as the W-2. If amended as such, the rule will more accurately reflect the employer's effective lack of choice to continue to employ someone whose eligibility status cannot be reasonably verified using the safe-harbor procedure.

Because a rebuttable presumption is potentially overinclusive, employees must be protected against discriminatory practices more generally, such as when employers terminate without permitting certain employees to correct SSA discrepancies in a timely fashion. In other words, the suggested revisions to the ICE safe-harbor rule are narrow, and they would only apply to the employer's decision to terminate upon an unsuccessful attempt to verify employment eligibility under the safe-harbor procedure. An employee could rebut the presumption by presenting evidence that the employer used the SSA no-match letter as pretext for discriminatory employment practices or that the employer discriminated against the employee in some other manner. The rebuttable presumption would therefore follow the burden-shifting scheme sanctioned by existing antidiscrimination law.¹⁹¹

Second, the rule should permit employers to rely on ICE agents to verify employment eligibility if the safe-harbor procedure does not resolve the SSA discrepancy. The INA's good faith compliance standard charges employers with the responsibility for reviewing documents for reasonable authenticity, but ICE should retain the ultimate burden of determining employment eligibility. This result comports with congressional intent to limit the employer's liability exposure when it passed the IRCA.¹⁹² Specifically, Congress intended for the INS, whose enforcement functions are now handled by ICE, to "assist [employers] in a timely manner" if they desire to "check on the authenticity of any alien identification document."¹⁹³

As it stands, the rule serves to deputize employers as the primary enforcers of immigration laws. Employers are ill-suited to this role

191. See *supra* notes 69–72 and accompanying text (discussing Title VII's burden-shifting scheme as applied in *Zamora*).

192. See H.R. REP. NO. 99-682, pt. 1, at 56–57, 61–62 (1986), as reprinted in 1986 U.S.C.A.N. 5649, 5660–61, 5665–66 (describing both the "good faith" defense designed to "protect both employers and prospective employees in the event cautious employers are unduly concerned by documentation presented to them" and the expectation that "INS officials [will] assist [employers] in a timely manner" with verifying the "authenticity of any alien identification document").

193. *Id.*

because they lack the proper training and experience in scrutinizing employment documents,¹⁹⁴ it is misaligned with their economic interests as profit-driven businesses, and it triggers potential liability under antidiscrimination laws. Instead, ICE should shoulder the burden of verifying document authenticity. Once the employer, employee, and SSA are all aware of the SSN discrepancy, the employer should self-report to ICE that it is unable to resolve the no-match so that ICE can elect to pursue an appropriate investigation.

This proposal would benefit ICE agents by initially relieving them of the responsibility for determining if a true mismatch, as opposed to a clerical or other harmless error, exists. ICE would thus be able to utilize its resources more efficiently. The self-reporting option should also come at a price to employers: it should not undercut the valuable progress against identity theft and forged document rings that ICE worksite enforcement missions seek to achieve. An employer who self-reports, rather than taking action to terminate the employee(s) as suggested by the safe-harbor rule, would not be shielded from worksite enforcement actions. However, self-reporting would permit the employer to call for an accurate determination of its employees' work eligibility so that it could be certain it was only terminating work-ineligible employees. Although the practical result may be the same—en masse terminations at the conclusion of the safe-harbor procedure or after ICE verification—employers would be more certain of their compliance with both immigration and employment discrimination laws, and they would be better protected from liabilities that could potentially arise from the terminations.

This Comment has proposed two solutions to protect employers who follow the safe-harbor procedure for SSA no-match letters from additional liability for employment discrimination. Protecting the decision to follow the safe-harbor procedure is necessary to permit employers to ensure their own compliance under the immigration laws. Furthermore, permitting employers to call upon ICE to authenticate employment eligibility at the conclusion of the safe-harbor procedure would ensure that the ultimate responsibility for work authorization remains with the government enforcement agency that controls eligibility.

CONCLUSION

Social security no-match letters are designed to inform employers that an employee's retirement, disability, and survivor benefits are in jeopardy due to a mismatching name and SSN on the employee's W-2. The mismatch is often the result of a routine clerical error or other harmless

194. See AILA Letter, *supra* note 154, at 13.

documentation error. However, the no-match letter could also serve as a red flag to the employer that the employee is not authorized to work in the United States. The ICE safe-harbor rule seeks to capitalize on SSA records by permitting immigration officials to consider receipt of an SSA no-match letter as part of the rule's calculus of whether an employer knowingly violated the INA prohibition on hiring unauthorized workers. In doing so, the rule provides needed guidance to employers who are rightfully concerned about whether employees designated in the letters are eligible to work in the United States.

With the exception of acknowledging the potential for document abuse under the INA, the safe-harbor procedure fails to adequately address the employer's potential liability for employment discrimination. As a result, employers who terminate on the basis of the no-match letter risk suits alleging that the employer discriminated against its employees. The rule should be revised in consideration of the liability that employers face when they terminate employees under the safe-harbor procedure. First, employers should enjoy a rebuttable presumption that they have not committed unlawful discrimination by their decision to follow the safe-harbor procedure in the ICE rule. Terminated employees, however, would be able to rebut the presumption by providing evidence of discrimination. Second, ICE should provide employers with three options at the conclusion of the safe-harbor procedure: (1) terminate the employee who cannot verify employment eligibility and risk liability for unlawful discrimination; (2) continue to employ the individual at the risk that ICE will find constructive knowledge of an immigration violation; or (3) permit employers to self-report to ICE that they could not verify the eligibility of their employees using the safe-harbor procedure. Providing the third option of self-reporting would permit the employer to avoid taking adverse employment actions that could trigger discrimination liability while awaiting determinative verification from ICE. If these modifications are adopted, employers who actively seek to comply with immigration and employment laws will truly enjoy a safe harbor when confronted with a Social Security no-match letter.

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