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# Employers on the Fence: A Guide to the Immigratory Workplace

NATALIE PRESCOTT\*

## I. INTRODUCTION

In 2006, the U.S. population reached the 300-million benchmark, a tremendous fifty-percent increase in just forty years.<sup>1</sup> With our country gaining a new immigrant every thirty-one seconds,<sup>2</sup> foreigners now account for half of new workers.<sup>3</sup> At the same time, as U.S. employers must increasingly rely on immigrant workers there is a growing fear that illegal immigration may harm the U.S. economy.

The rapid population growth, coupled with the fact that a large number of the 300-million population is comprised of illegal immigrants, led Congress to pass a bill in efforts to help the country regain “complete control of its borders.”<sup>4</sup> To prevent illegal immigrants from coming into the United States, the bill calls for the construction of a fence along the entire U.S.-Mexico border.

Despite the recent Congressional efforts to reform immigration laws, the U.S. employment market remains the primary controller of illegal immigration in the United States. Immigrants cannot survive in

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\* Copyright © 2007 by Natalie Prescott. Natalie Prescott is a litigation attorney and the author of numerous publications, including: *Immigration Reform Fuels Employment Discrimination*, 55 DRAKE L. REV. 1 (2006); and *English Only at Work, Por Favor*, 9 U. Pe. J. Lab & Empl. L. 445 (2007). The author acknowledges with gratitude the assistance of her colleague, Heather Stone, in the reviewing of this Article. This Article was presented at the 2007 *Campbell Law Review Symposium on Immigration Law* in Raleigh, North Carolina.

1. Evan Thomas, *Stopping the Census Clock*, NEWSWEEK, Oct. 10, 2006, available at <http://msnbc.msn.com/id/15212808/site/newsweek> (discussing rapid population growth and noting that half of the population growth comes from immigrants); see also Sam Roberts, *Come October, Baby Will Make 300 Million or So*, N.Y. TIMES, Jan. 13, 2006, at A1, available at <http://nytimes.com/2006/01/13/national/13baby.html> (noting that the population in the United States grew from passing a 200-million mark in 1967 to 300 million in October 2006).

2. Roberts, *supra* note 1.

3. D'Vera Cohn, *Immigrants Account for Half of New Workers*, WASH. POST, Dec. 2, 2002, at A1, available at <http://www.washingtonpost.com/ac2/wp-dyn/A61586-2002-Dec1?language=printer>.

4. Press Release, The White House, President Bush Signs Secure Fence Act (Oct. 26, 2006), available at <http://www.whitehouse.gov/news/releases/2006/10/20061026.html>.

this country without jobs; and, unfortunately, the easiest way for Congress to monitor and track down illegal immigrants is by placing the policing burden on U.S. employers.

As a result, U.S. employers suffer the greatest consequences of the public's fear of illegal immigration. Current immigration laws require employers to scrutinize documents of each job applicant, to monitor the legal status of all workers, to report illegal immigrants, and to go through a myriad of legal steps to hire foreign workers. Employers that do not comply with these rules face significant legal penalties and fines. Meanwhile, employers cannot scrutinize the legal status of their workers too closely because doing so may subject them to discrimination lawsuits and penalties.

Furthermore, employment-related immigration laws feature a number of inconsistent and even vague provisions, which leave employers on the fence about how to deal with these conflicting rules. While Congress continues debating immigration reform, nothing is done to relieve the burden on employers. This Article, therefore, offers practical solutions to businesses employing foreign workers. Specifically, it addresses the most common immigration-related problems and explains how employers can avoid some pitfalls, prevent discriminatory practices, and comply with the law.

Part II of this Article discusses tensions in the Immigration Reform and Control Act (the IRCA), which, on the one hand, requires employers to verify employees' work eligibility, and, on the other hand, provides that it is discrimination to ask employees for additional proof of legal status. This part also elaborates on "document abuse," which may result from the IRCA provisions and explains how employers can comply with the document verification requirements without engaging in discrimination.

Part III addresses the employers' obligation to comply with I-9 regulations, which require them to verify work eligibility of each newly hired employee. It also explains how the employers can avoid penalties and lawsuits when filling out these forms.

Part IV discusses the "no-match" letters, which the Social Security Administration sends to the employers whose workers appear to have provided wrong social security numbers. This part also outlines the danger of firing employees whose names appear on the no-match letters and offers practical suggestions for responding to these letters in a proper manner.

Part V of this Article notes yet another common area where discrimination claims on the basis of national origin may arise: English-only rules. This part recounts general background and justifications

for English-only policies and explains how employers can require employees to speak English at work, while avoiding discrimination lawsuits.

Finally, part VI addresses another important problem related to hiring foreign workers. This part explains the labor certification process and provides suggestions to employers on how to comply with the Program Electronic Review Management (PERM). This Article concludes that the U.S. immigration laws must be amended in order to relieve the burden on U.S. employers from complying with laws that are vague, restrictive, and even conflicting.

## II. TENSIONS IN THE IMMIGRATION REFORM AND CONTROL ACT

### A. *From Document Abuse to Fear of Hiring*

The Immigration Reform and Control Act came into existence in 1986.<sup>5</sup> It “was enacted in response to widespread concern that illegal aliens deprived U.S. workers of jobs.”<sup>6</sup> The IRCA’s goal was to end unauthorized employment by shifting the burden of policing illegal immigration to U.S. employers.<sup>7</sup> The IRCA drafters had apparently decided that the easiest way to control illegal immigration was to require all employers to verify work eligibility of prospective job applicants.<sup>8</sup> As a result, employers now have to check documents of each newly hired worker to ensure that he or she is authorized to work in the United States.<sup>9</sup> Moreover, employers who fail to comply with this requirement face harsh penalties for hiring illegal immigrants.<sup>10</sup>

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5. Immigration Reform and Control Act, 8 U.S.C. §§ 1101-1537 (2000) (also known as the Immigration and Nationality Act (INA)).

6. Natalie Prescott, *Immigration Reform Fuels Employment Discrimination*, 55 DRAKE L. REV. 1, 4 (2006); see also Christopher Ho & Jennifer C. 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, 481 (2005). However, Ho and Chang also point out that these concerns are empirically disputed. See *id.* at n.31 (stating that immigrants perform jobs not taken by citizens).

7. Prescott, *supra* note 6, at 4; see also Aristides Díaz-Pedrosa, Note, *A Tale of Competing Policies: The Creation of Havens for Illegal Immigrants and the Black Market Economy in the European Union*, 37 CORNELL INT’L L.J. 431, 453-54 & nn. 182-83 (2004) (stating the purpose of the IRCA was to hinder illegal immigration through the job market).

8. Prescott, *supra* note 6, at 4.

9. 8 U.S.C. § 1324a (2000).

10. See *id.* Additionally, 8 U.S.C. § 1324a(e)(4) (2000) imposes civil fines that range from \$250 to \$10,000 for each violation. 8 U.S.C. § 1324a(f)(1) imposes penalties for “a pattern or practice” of hiring illegal immigrants, ranging from a fine of

In addition to the policing requirements, the IRCA created penalties for discrimination against foreign workers.<sup>11</sup> These penalties apply to employers who commit “document abuse” by asking for different or additional proof of work authorization rather than permitting the employee to present acceptable documents of her choice.<sup>12</sup> Simultaneously, the amended version of the IRCA continues to reinforce sanctions associated with hiring illegal immigrants.<sup>13</sup> Similar to the penalties for discrimination, the fines for hiring illegal aliens are extremely high and can approach a million-dollar benchmark.<sup>14</sup>

As a result, U.S. employers are trapped in a situation where they often have to choose between engaging in document abuse or committing employment discrimination.<sup>15</sup> If they suspect that the newly hired applicant is not authorized to work in the United States, they have several options: (1) terminate the applicant; (2) ask for additional proof of work authorization; or (3) do nothing and continue to employ the worker. Unfortunately, employers are stuck between a rock and a hard place when making this choice.<sup>16</sup> Specifically, the first two options often result in claims of employment discrimination brought by disgruntled workers or by the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC), the agency responsible for enforcing the IRCA.<sup>17</sup> Similarly, the third option can

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not more than \$3,000 or less for each unauthorized alien, to six months imprisonment, to sometimes both.

11. 8 U.S.C. § 1324b (2000).

12. 8 U.S.C. § 1324b(g)(2)(B) (2000) (penalties ranging from \$250 to \$10,000 for each violation).

13. *Compare id.* with 8 U.S.C. § 1324a(e)(4).

14. Janie Schulman, *Avoiding Liability for Your Contractors' Employment of Undocumented Aliens: The Lessons of Wal-Mart*, MONDAQ BUS. BRIEFING, 2005 WLNR 11444065 (July 21, 2005) (“In a recent, highly publicized settlement between Wal-Mart and the Department of Homeland Security . . . arising from the employment of undocumented workers by Wal-Mart contractors, Wal-Mart agreed to pay \$11,000,000 to resolve charges that it violated the Immigration Reform and Control Act . . .”).

15. See Prescott, *supra* note 6, at 12; see also Cynthia Bansak & Steven Raphael, *Immigration Reform and the Earnings of Latino Workers: Do Employer Sanctions Cause Discrimination?*, 54 INDUS. & LAB. REL. REV. 275, 277 (2001) (stating employers may discriminate against ethnic groups that have large numbers of illegal workers in order to avoid paying fines).

16. See Prescott, *supra* note 6, at 12 (stating that “the employers have to choose either to commit document abuse or risk being fined for improper hiring of illegal aliens”).

17. *Id.* at 8. See also Andrew M. Strojny, *IRCA's Antidiscrimination Provision—How It Works and Can It Be Used to Combat Anti-Immigrant Fears?*, in 2 1998-99 IMMIGRATION & NATIONALITY LAW HANDBOOK 379, 379 (R. Patrick Murphy ed. 1998) (The OSC “was created to enforce IRCA’s prohibition against national origin and

lead to penalties for hiring illegal immigrants or for failing to comply with the I-9 requirements.<sup>18</sup>

This apparent conflict between the IRCA's discrimination and document-verification provisions results in confusion and leaves the burden on employers to decide which IRCA provision would lead to costlier penalties.<sup>19</sup> Instead of addressing this problem in the current immigration reform debates, members of Congress are fighting about whether to further increase penalties for hiring illegal workers.<sup>20</sup>

### B. Practical Solutions

Employers face two problems when hiring new workers. On one hand, they must verify the applicant's legal status to ensure that she is authorized to work in the United States.<sup>21</sup> Often, this requires asking difficult questions about the worker's immigration status or demanding additional proof of work authorization.<sup>22</sup> On the other hand, employers cannot be too restrictive or too demanding when hiring foreign nationals.<sup>23</sup> Namely, employers cannot make hiring, promotion, or termination decisions based on their suspicions that the worker is illegal.<sup>24</sup> Adverse employment actions against a foreign national in these circumstances are likely to lead to discrimination lawsuits and penalties.<sup>25</sup>

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citizenship status discrimination. OSC, which until the Spring of 1994 was an independent component within the Department of Justice, is now a part of the Department's Civil Rights Division.”).

18. Compare 8 U.S.C. § 1324a(e)(4) with § 1324a(f)(1) (penalties ranging from \$250 to \$10,000 for each violation).

19. Prescott, *supra* note 6, at 6; Irene Zopoth Hudson & Susan Schenck, Note, *America: Land of Opportunity or Exploitation?*, 19 HOFSTRA LAB. & EMP. L.J. 351, 353 (2002) (noting the full enforcement of the labor policy conflicts with the purposes of the immigration policy); Elizabeth M. Dunne, Comment, *The Embarrassing Secret of Immigration Policy: Understanding Why Congress Should Enact an Enforcement Statute for Undocumented Workers*, 49 EMORY L.J. 623, 645 (2000) (“Not only does current immigration law impose costly and burdensome requirements on employers, there is at least some evidence that it has been ineffective in achieving its stated purpose of eliminating employment as the main attraction for illegal immigrants.”) (footnote omitted).

20. Prescott, *supra* note 6, at 29 (noting that, during the recent congressional debate, one Member of Congress proposed to impose up to \$1.6 million in penalties for hiring illegal immigrants).

21. *Id.* at 17.

22. *Id.*

23. *See id.*

24. *See id.*

25. *See id.*; 8 U.S.C. § 1324b.

The most common problem associated with the IRCA requirements is that the employers do not always understand when and what kind of questions they may ask.<sup>26</sup> For example, employers sometimes ask a job applicant to complete the I-9 form before being hired.<sup>27</sup> Sometimes, they demand that an employee show a social security card or work authorization.<sup>28</sup> Sometimes, they request more proof than necessary.<sup>29</sup> These requests are almost always improper.<sup>30</sup>

When facing these difficult choices, employers should be aware of a few practical recommendations that will help them avoid common IRCA-related pitfalls. First, an employer should never demand specific documents, insist on different documents, or ask for more documents than necessary.<sup>31</sup> The I-9 form lists a number of documents that can be used to verify work eligibility, ranging from a social security card to a U.S. passport.<sup>32</sup> Importantly, employees can choose which of the documents listed on the I-9 form they would like to provide, and employers cannot require different or additional documents.<sup>33</sup>

Second, an employer should never ask for proof of work authorization before making a job offer to the applicant.<sup>34</sup> As discussed in Part III, an employer must comply with the I-9 requirements by checking the legal status of the *newly hired* employee.<sup>35</sup> Even then, the only appropriate question is whether the employee can show she is authorized to work in the United States.<sup>36</sup> Directly questioning the employee

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26. See generally Prescott, *supra* note 6, at 6-12 (discussing the problems and conflicts resulting from the employers' attempts to comply with the I-9 form).

27. See generally *id.* (discussing various instances of document abuse).

28. See *id.* at 8 (explaining that employers violate the IRCA by requiring specific documents, and that penalties for this violation apply regardless of whether an employee was actually hired).

29. See *id.* at 2-3 (describing an instance where an employer demanded additional proof of work authorization because he suspected the workers were illegal and noting that this request resulted in a discrimination lawsuit) (citing *United States v. Strano Farms*, 5 OCAHO no. 748, p. 211 (1995)).

30. See *id.*; see also Department of Homeland Security, U.S. Citizenship and Immigration Services, *About Form I-9, Employment Eligibility Verification*, <http://www.uscis.gov/files/form/i-9.pdf> (enter I-9 into search window then follow I-9 Employment Verification link).

31. See Andrew Strojny, *A Short History of Document Abuse*, FED. LAW., Sept. 1997, at 12.

32. See Employment Eligibility Verification form, available at <http://www.uscis.gov/files/form/i-9.pdf>.

33. See Prescott, *supra* note 6, at 7-8.

34. See *id.*

35. See *id.*

36. See *id.*

about her legal status is never appropriate.<sup>37</sup> Furthermore, absent compelling reasons, employers should avoid asking for proof of work authorization after the employee has been working at the company for some time. Usually, the OSC and the courts view such requests as evidence of national origin discrimination.<sup>38</sup>

Finally, it appears that the penalties for hiring illegal immigrants may be less costly and easier to avoid than discrimination lawsuits.<sup>39</sup> Therefore, when in doubt, employers should continue to employ the worker if there is a reasonable chance that she is legal.<sup>40</sup>

### III. INS REGULATIONS AND FORM I-9 COMPLIANCE

#### A. Common I-9 Pitfalls

The I-9 requirements are set forth in the Immigration Reform and Control Act<sup>41</sup> and on the U.S. Citizenship and Immigration Services website.<sup>42</sup> For the last twenty years, the government treated noncompliance with these rules rather leniently.<sup>43</sup> However, the recent national debate over illegal immigration led to more rigorous enforcement of these rules.<sup>44</sup>

As a result, employers have been paying closer attention to the I-9 forms. To comply with the I-9 requirements, employers must review the documents of each job applicant for authenticity and verify work eligibility of the applicants.<sup>45</sup> They must also retain the completed I-9

37. See generally *id.* (listing specific steps that employers must follow when verifying work eligibility).

38. See generally *id.* at 8 (noting that the OSC “litigates document abuse cases rather aggressively”).

39. Compare *id.* at 7 (noting that fines for hiring illegal immigrants are imposed less frequently) with *id.* at 16 (suggesting there is a recent trend among courts to impose high fines and damages awards against employers who engaged in document abuse).

40. See *id.*

41. See 8 U.S.C. § 1324a(b)(1)(B) (2000).

42. See Department of Homeland Security, *supra* note 30.

43. Rebecca Riddick, *Florida Employers React to Immigration Raids*, NAT’L L. J., Oct. 2, 2006, at S5.

44. *Id.*

45. See 8 U.S.C. § 1324a(a)(1)(A) (making it unlawful to accept a document for verification purposes if there is a reason to know that the document is false or does not belong to an individual); 8 U.S.C. § 1324a(b)(1)(A) (describing two categories of acceptable documents and providing that the employer is deemed to have “complied with the requirement of this paragraph with respect to examination of a document if the document *reasonably* appears on its face to be genuine . . . .”) (emphasis added); see also Prescott, *supra* note 6, at 6, for a more thorough analysis of the I-9 requirements.



forms “for three years from the date of hire or one year from the date of termination, whichever is later.”<sup>46</sup>

According to the U.S. Citizenship and Immigration Services, the I-9 form is in the process of being updated.<sup>47</sup> Because the current form has been widely criticized, the new version will hopefully provide clearer guidelines for employers. Additionally, Congress is currently debating whether to adopt an electronic I-9 form, which would make it easier for employers to comply with the eligibility verification requirements, alleviate their reporting burden, and address the problem of record keeping.<sup>48</sup>

### B. Practical Solutions

Nevertheless, until these problems are addressed, employers must know how to fill out the I-9 forms correctly and thus avoid costly clerical errors and discrimination lawsuits. There are several important guidelines they must follow.

First, an employer should remember that document verification should be completed soon after the employee is hired.<sup>49</sup> Specifically, the new employee must complete the I-9 form after being hired but no later than his first day of work.<sup>50</sup> Furthermore, to comply with the IRCA requirements and the I-9 provisions, an employer only needs to check the documents of the employee once.<sup>51</sup>

Second, an employer is not required to be an expert in document verification.<sup>52</sup> So long as the documents “reasonably appear to be genuine,” an employer need not question their authenticity or ask about the employee’s legal status.<sup>53</sup> Only when there is a good reason to

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46. Zlatko Hadzismajlovic, *Employer Compliance*, NAT’L L. J., Oct. 16, 2006, at 18.

47. See *supra* note 30.

48. See Press Release, Department of Homeland Security, DHS Announces Federal Regulations to Improve Worksite Enforcement and Asks Congress to Approve Social Security “No Match” Data Sharing (June 9, 2006), [http://www.dhs.gov/xnews/releases/press\\_release\\_0925.shtm](http://www.dhs.gov/xnews/releases/press_release_0925.shtm). But see Hadzismajlovic, *supra* note 46 (arguing that the new congressional measures have a “shaky foundation” as they would increase the reporting burden on employers, alleviate the identity theft problems, and heighten the risk of incorrect determinations that the workers are illegal).

49. See Department of Homeland Security, U.S. Citizenship and Immigration Services, Form I-9: Employment Eligibility Verification (2005), <http://www.uscis.gov/files/form/i-9.pdf>.

50. See *supra* note 30.

51. However, in some instances, such as when an employee’s work authorization has expired, it may be appropriate to complete a new I-9 verification form for that employee. See *supra* note 49 (discussing reverification).

52. See Hadzismajlovic, *supra* note 46.

53. See *supra* note 30.

believe that the documents are forged should the employer investigate further.<sup>54</sup> This safe-harbor provision provided by the U.S. Citizenship and Immigration Services is particularly important, since it makes it clear that an employer is not required to investigate beyond the face of the document.<sup>55</sup> Paradoxically, it may be safer for an employer to assume that the suspicious-looking documents are genuine than to investigate further.<sup>56</sup> Such an assumption would likely satisfy the U.S. Citizenship and Immigration Services, while further questioning may result in fines and discrimination lawsuits.<sup>57</sup>

Finally, an employer should be diligent in documenting compliance with the IRCA by photocopying the I-9 documents received from the employee.<sup>58</sup> So long as an employer has the resources necessary to make and maintain these photocopies, they can serve as evidence of compliance with the IRCA in case of an audit. In conclusion, employers who follow these recommendations should be able to avoid the vast majority of IRCA-related problems.

#### IV. SOCIAL SECURITY ADMINISTRATION NO-MATCH LETTERS

##### A. *Confusion About No-Match Letters' Requirements*

When a social security number provided by the employer to the social security office does not match the employee's name, the Social Security Administration sends a "no-match" letter to the company.<sup>59</sup> The goals of this letter is to help maintain an accurate database of social security numbers and to ensure accurate reporting of employees' income.<sup>60</sup> However, many employers treat the letter as a warning sign

54. *See id.*

55. *See id.*

56. Prescott, *supra* note 6, at 16 (noting that "the cost-benefit analysis and added risk of imprisonment may indicate that it is more cost-efficient to violate the IRCA's document abuse provisions than to violate its document verification provisions").

57. *See id.*

58. *See* Form I-9, *supra* note 49 (noting that employers may photocopy the documents).

59. National Employment Law Project, *Social Security No-Match Letters: Questions and Answers for Workers*, July 2002, <http://www.nelp.org/docUploads/pub155.pdf> (last visited Dec. 13, 2006).

60. *Id.*; *see also* Rebecca Riddick, *Florida Employers React to Immigration Raids*, NAT'L L. J., Oct. 2, 2006, at S6 ("Experts caution that there are many causes for no-matches, including typographical errors and name changes. But no-matches also result from illegal immigrants falsely using other people's Social Security numbers . . .").

that the employee does not have a valid social security number and conclude that she is not allowed to work in the United States.<sup>61</sup>

The no-match letters, therefore, often result in discrimination, suspension, or firing of an employee whose name appears on the letter.<sup>62</sup> Afraid of the penalties for hiring illegal immigrants, employers sometimes choose to terminate an employee whose status is being questioned rather than risk paying fines.<sup>63</sup> To make matters worse, workers who appear or sound foreign are the most likely candidates for termination as a result of such letters.<sup>64</sup> As a result, employers unavoidably set themselves up for national origin discrimination claims.

The proper course of action with regard to Social Security Administration no-match letters is to notify the employee, show her a copy of the letter, and ask her to provide the correct social security number or to try to correct the information with the help of the local social security office.<sup>65</sup> However, few employers realize that they cannot fire, suspend, or retaliate against the worker who fails to act on this advice.<sup>66</sup>

Certainly, such a result seems counterintuitive. If an employer is notified by the governmental agency that a certain worker failed to provide a correct social security number, the first thought crossing the mind of the company manager is that the worker is illegal.<sup>67</sup> The second thought undoubtedly relates to penalties for hiring illegal aliens.<sup>68</sup> Thereafter, the most logical thing to do - in the employer's mind - is to

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61. See *supra* note 59.

62. See Ken Ellingwood, *Town's Migrant Workers Living and Leaving in Fear*, L.A. TIMES, Aug. 18, 2003, available at <http://www.equaljusticecenter.org/News%20LA%20times%208-18-03.htm> (describing the improper firing of hundreds of immigrant workers in Mississippi, which resulted from the company's erroneous response to a Social Security no-match letter).

63. See *id.*

64. See Equal Justice Center, *Social Security No-Match Letters*, <http://www.equaljusticecenter.org/SSANo-Matchintro.htm> (last visited Oct. 15, 2006) (noting that the "misguided and improper terminations [resulting from the receipt of the no-match letters] have fallen especially heavily on low-wage immigrant workers").

65. National Employment Law Project, *SSA "No Match" Letters: Top Ten Tips for Employers*, July 2006, [www.nelp.org/docUploads/SSANomatch%20top%20ten%20tips%20july%202006.pdf](http://www.nelp.org/docUploads/SSANomatch%20top%20ten%20tips%20july%202006.pdf).

66. See Equal Justice Center, *supra* note 64.

67. See generally Riddick, *supra* note 43, at 54 (noting that the U.S. Immigration and Customs Enforcement "proposed a plan to take action against employers based on their failure to respond" to no-match letters and to use these letters as evidence that companies hire illegal workers).

68. See generally *id.* (stating that the Secretary of Homeland Security "has asked Congress for greater leeway in accessing and using evidence [of no-match letters] against employers").

question the employee and to terminate the worker if she fails to prove her legal status. Most untrained managers would probably never stop and think that this conduct may be illegal. On the contrary, the manager may act upon a belief that he is doing a service to the company and to the government by terminating the worker.

### B. *Practical Solutions*

Therefore, all managerial-level employees must be trained to recognize the implications of the no-match letters and to respond in a proper manner. First, an employer should not take any adverse employment actions such as firing or demotion of individuals whose names appear on the no-match list.<sup>69</sup> The no-match letter itself states:

This letter does not imply that you or your employee intentionally provided incorrect information about the employee's name or SSN. It is not a basis, in and of itself, for you to take any adverse action against the employee. Any employer that uses the information in this letter as a pretext for taking adverse action against an employee may violate state or federal law . . . .<sup>70</sup>

Second, an employer cannot ask the worker to show her social security card or proof of work authorization.<sup>71</sup> Ordinarily, employees' immigration status is checked during the hiring stage.<sup>72</sup> Therefore, in most cases, subsequent requests to provide these documents are improper.<sup>73</sup>

Finally, an employer should encourage the employee whose name appears on the list to try to correct the problem.<sup>74</sup> Furthermore, if the no-match letter was the result of an error, which has been corrected, an employer must promptly report this error to the Social Security Administration.<sup>75</sup> Beyond that, employers should not take any actions, including harassing, questioning, or terminating the employee whose name appeared on the letter.<sup>76</sup> Such actions may subject employers to discrimination lawsuits or penalties.<sup>77</sup>

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69. National Employment Law Project, *supra* note 65.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. National Employment Law Project, *supra* note 65.

76. *See id.*

77. *See id.*

## V. ENGLISH-ONLY RULES IN THE WORKPLACE

A. *Consequences of the Myth of "Language Protection"*

English-only rules have been around for a long time, and they are becoming more and more popular among U.S. employers because of the growing number of foreign-speaking job applicants in the United States.<sup>78</sup> Many employers are concerned with protecting the safety of their employees, promoting productivity, encouraging harmony in the workplace, and preventing instances of abuse and harassment.<sup>79</sup> As a result, they are imposing English-only rules, which require workers to speak only English at work.<sup>80</sup>

This so-called "language discrimination" is, therefore, another area where employment discrimination claims arise frequently and unexpectedly.<sup>81</sup> The term "language discrimination" was coined by legal scholars and law practitioners who believed employees had a right to speak foreign languages at work.<sup>82</sup> Some scholars argue that there is a fundamental right to language, while others incorrectly assume that language rights are protected by Title VII, which prohibits national origin discrimination.<sup>83</sup>

In fact, careful analysis of the case law, the U.S. Constitution, and Title VII reveals that neither Title VII nor the U.S. Constitution gives

78. See generally Natalie Prescott, *English Only at Work, Por Favor*, 9 U. PA. J. LAB. & EMP. L. 445 (2007) (manuscript at 59, on file with author) (noting that language accommodation is becoming increasingly popular in the United States).

79. See generally *id.* (discussing different reasons why employers seek to impose an English-only rule in the workplace).

80. See *Garcia v. Gloor*, 618 F.2d 264, 266 (5th Cir. 1980) (discussing an English-only rule and the exceptions to this rule).

81. See generally Rosanna McCalips, Comment, *What Recent Court Cases Indicate About English-Only Rules in the Workplace: A Critical Look at the Need for a Supreme Court Ruling on the Issue*, 4 U. PA. J. LAB. & EMP. L. 417, 417 (2002) (discussing language discrimination).

82. See generally *id.*

83. See Juan F. Perea, *Killing Me Softly, with His Song: Anglocentrism and Celebrating Nouveaux Latinas/os*, 55 Fla. L. Rev. 441, 450 (2003); Christopher David Ruiz Cameron, *How the García Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 10 LA RAZA L.J. 261, 277 (1998). See generally James Fife, *The Legal Framework for Indigenous Language Rights in the United States*, 41 WILLAMETTE L. REV. 325, 341 (2005). But see Kiyoko Kamio Knapp, *Language Minorities: Forgotten Victims of Discrimination?*, 11 GEO. IMMIGR. L.J. 747, 765 (1997) (citing *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973)) (suggesting that, consistent with the holding in *Espinoza*, "language discrimination may escape the reach of Title VII").

employees the right to speak a foreign language at work.<sup>84</sup> Title VII prohibits employers from discriminating against an individual “with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>85</sup> As some scholars correctly noted, the goal of Title VII is to protect “immutable characteristics,” which cannot be changed, for example individual’s skin color or place of birth.<sup>86</sup> Meanwhile, individuals always have the ability to learn another language.<sup>87</sup> Furthermore, legislative history and the Supreme Court’s precedents indicate that neither Congress nor the Court intended to protect the right to speak a foreign language under Title VII.<sup>88</sup> Additionally, the U.S. Constitution does not mention a right to language, and the Court has never articulated that this right was implied.<sup>89</sup> Therefore, while there remains a circuit split on the issue, the majority of the federal appellate courts correctly found that employers have a right to impose an English-only rule at work.<sup>90</sup>

Nevertheless, many legal scholars continue to condemn (and many lower courts continue to hold liable) the employers who impose English-only rules.<sup>91</sup> Additionally, the Equal Employment Opportu-

84. Prescott, *supra* note 78, at 9, 20-21.

85. See 42 U.S.C. § 2000e-2 (2000).

86. See, e.g., Prescott, *supra* note 78, at 13-16; Knapp, *supra* note 83, at 780; Adriana Resendez, Comment, *The Spanish Predominant Language Ordinance: Is Spanish on the Way in and English on the Way out?*, 32 ST. MARY L.J. 317, 349 (2001); James Leonard, *Bilingualism and Equality: Title VII Claims for Language Discrimination in the Workplace*, 38 U. MICH. J.L. REFORM 57 (2004).

87. Knapp, *supra* note 83, at 781 (“Unlike African Americans who are incapable of changing their skin color, ethnic minorities . . . possess the ability to give up their mother tongue[.]”).

88. See 110 CONG. REC. 2549, 2550 (1964) (statement of Rep. Roosevelt) (suggesting that the term “national origin” referred to “the country from which you or your forebears came from”); see also *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973) (defining the term “national origin” as referring “to the country where a person was born, or, more broadly, the country from which his or her ancestors came”) (emphasis added).

89. See, e.g., *Maldonado v. City of Altus*, 433 F.3d 1294, 1309, 1312 (10th Cir. 2006), *overruled by Metaler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164 (10th Cir. 2006) (noting that “everyday use of Spanish was not intended, as far as the record shows, to communicate ethnic pride or opposition to discrimination” and declining to find that an English-only rule violated the First Amendment).

90. See, e.g., *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1490 (9th Cir. 1993); *Long v. First Union Corp. of Va.*, No. 95-1986, 86 F.3d 1151 (4th Cir. May 29, 1996) (unpublished opinion); *Garcia v. Gloor*, 618 F.2d 264, 272 (5th Cir. 1980).

91. See, e.g., *Perea*, *supra* note 83, at 450; *Cameron*, *supra* note 83, at 277. See *E.E.O.C. v. Premier Operator Servs., Inc.*, 113 F. Supp. 2d 1066, 1076-77 (N.D. Tex.

nity Commission (EEOC) continues to maintain in its guidelines that English-only policies violate Title VII.<sup>92</sup> As a result, employers who impose these policies are often threatened with litigation by the EEOC and by individual employees.<sup>93</sup> Often, the cost of litigating these lawsuits is so burdensome that employers choose to settle and to withdraw English-only policies because they are unable or unwilling to protect their rights in court.<sup>94</sup>

English-only rules are essential to many businesses. For example, numerous cases and studies indicate that presence of foreign languages at work is a serious safety concern.<sup>95</sup> Specifically, workers unable to understand safety instructions or communicate effectively in emergencies may facilitate or aggravate a hazardous situation and increase risk of injuries to themselves and others.<sup>96</sup> In fact, a recent study conducted by the U.S. Department of Labor determined that Hispanics have the highest fatality rate among all workers the United States.<sup>97</sup> According to Secretary of Labor Elaine L. Chao, “[i]t’s no secret that more than 10 million Americans speak little or no English, and that language has become a major barrier to worker safety.”<sup>98</sup>

Furthermore, there are many examples of situations where foreign languages disrupt an otherwise harmonious and productive work environment.<sup>99</sup> In some cases, instances of sexual harassment or verbal

2000); *E.E.O.C. v. Synchro-Start Prods., Inc.*, 29 F. Supp. 2d 911, 914-15 (N.D. Ill. 1999) (holding that English-only rule amounted to national origin discrimination). *But see Cosme v. Salvation Army*, 284 F. Supp. 2d 229, 236-37 (D. Mass. 2003) (holding that English-only rule did not violate Title VII); *Rosario v. Cacace*, 767 A.2d 1023, 1030 (N.J. Super. 2001); *Kania v. Archdiocese of Philadelphia*, 14 F. Supp. 2d 730, 735 (E.D. Pa. 1998) (holding that Title VII did not prohibit an English-only rule).

92. See 29 C.F.R. § 1606.7(a), (b) (2004).

93. See Prescott, *supra* note 78, at 22.

94. *Id.* (citing Steven Greenhouse, *National Briefing Rockies: Colorado: Casino Settles Bias Suit*, N.Y. TIMES, Jul. 19, 2003, at A10 (\$1.5 million settlement); *Housekeepers Told to Speak Only English Get Settlement*, N.Y. TIMES, Apr. 22, 2001, at A1 (\$2.4 million settlement); *Employer’s English-Only Policy Brings a Settlement of \$192,500*, N.Y. TIMES, Sept. 2, 2000, at A1).

95. See Media Briefing, Elaine L. Chao, U.S. Secretary of Labor, Department-Wide Initiatives to Improve Hispanic Worker Safety and Prosperity (Feb. 21, 2002), available at [http://www.dol.gov/\\_sec/media/speeches/20020221\\_Hispanic\\_Worker\\_Safety.htm](http://www.dol.gov/_sec/media/speeches/20020221_Hispanic_Worker_Safety.htm) (noting that “language has become a major barrier to worker safety” and discussing safety statistics).

96. See Prescott, *supra* note 78, at 25-28 (discussing cases, law review articles, and other sources, which address workplace safety and English-only rules).

97. Media Briefing, Elaine L. Chao, U.S. Secretary of Labor, *supra* note 95.

98. *Id.*

99. See Prescott, *supra* note 78, at 25-28 (discussing workplace harmony justification in greater detail).

abuse are more likely to occur because employees think they can get away with making offensive comments in a foreign language.<sup>100</sup>

Additionally, employers are often faced with a certain business necessity, which requires them to adopt an English-only rule.<sup>101</sup> Notably, courts upheld English-only rules based on the business necessity justification in a variety of cases.<sup>102</sup> For example, an employer could impose the rule because the managers needed to understand the subordinates, and the employees had to address customers in English.<sup>103</sup> Additionally, an employer's desire to improve the working environment and interpersonal relations in the office also justified imposing an English-only rule.<sup>104</sup>

Employers may need to invoke an English-only policy for a variety of reasons.<sup>105</sup> Some courts and the EEOC finally recognized this when they attempted to address this problem by establishing certain exceptions to the prohibition against an English-only rule.<sup>106</sup> Meanwhile, other courts correctly adopted a broader interpretation of U.S. employment laws and gave employers considerable discretion to decide

100. See Michael Janofsky, *Ban on Speaking Navajo Leads Cafe Staff to Sue*, N.Y. TIMES, Dec. 20, 2002, at A1; *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1483 (9th Cir. 1993).

101. Even the EEOC's sweeping prohibition of an English-only rule includes a generous business necessity exception. See 29 C.F.R. § 1606.7(c) (2004) ("An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.").

102. *E.E.O.C. v. Sephora USA, LLC*, 419 F. Supp. 2d (S.D.N.Y. Sept. 13, 2005) (holding that English-only rule was justified by a need to stem hostility between monolingual and bilingual employees and by a need of supervisors to understand what is being said in the workplace); *Roman v. Cornell Univ.*, 53 F. Supp. 2d 223, 237 (N.D.N.Y. 1999) (finding that the rule was justified by necessity to reduce intra-office tensions); *Kania v. Archdiocese of Phil.*, 14 F. Supp. 2d 730, 736 (E.D. Pa. 1998) (finding rule was justified by employer's desire to improve interpersonal relations); *Tran v. Standard Motor Prods., Inc.*, 10 F. Supp. 2d 1199, 1210 (D. Kan. 1998) (holding employer justifiably imposed the rule to address safety concerns and to prevent perception of secretive communication); *Prado v. L. Luria & Son, Inc.*, 975 F.Supp. 1349, 1354 (S.D. Fla. 1997) (holding that the need to understand the subordinates and the need to address customers in English constituted business necessity); *Long v. First Union Corp. of Va.*, 894 F. Supp. 933, 942 (E.D. Va. 1995) (finding rule was justified by employer's desire to improve working environment).

103. See *Prado*, 975 F. Supp. at 1354.

104. See *Long*, 894 F. Supp. at 942; *Kania*, 14 F. Supp. 2d at 736.

105. For example, employers articulate such justifications to an English-only rule as workplace safety, workplace harmony, business necessity, the need to supervise workers effectively, and the need to serve English-speaking customers.

106. See 29 C.F.R. § 1606.7(c) (2004).



whether to impose English-only policies.<sup>107</sup> Nevertheless, the law is still unsettled, and the outcome of each case continues to be a coin toss.<sup>108</sup> Thus, it is difficult to predict how any given court will rule on the issue.<sup>109</sup>

### B. Practical Solutions

Therefore, employers must be careful when imposing English-only rules at work. There are several important steps they must consider and follow when employing bilingual workers.

First, employers must remember they cannot subject workers to national origin discrimination by allowing or tolerating such behaviors as ridicule or harassment.<sup>110</sup> For example, national origin discrimination claims may arise when employees or managers make fun of their foreign co-workers because of their accents or inability to speak perfect English.<sup>111</sup>

Second, employers must understand that the majority of courts uphold English-only rules at least in some circumstances, and both the EEOC and the courts specifically list exceptions for when such rules are permissible.<sup>112</sup> Therefore, if employers need to establish an English-only rule, they should apply the rule narrowly, giving bilingual employees an opportunity to communicate in their language under some conditions.<sup>113</sup> For example, employers traditionally prevailed in cases where they prohibited foreign languages in all circumstances except for breaks and serving bilingual customers.<sup>114</sup>

Finally, employers should take a step back and analyze whether they should impose the rule at all. While there are many important reasons for setting an English-only policy, not every business faces the circumstances that truly require an English-only rule, and some busi-

107. See, e.g., *Garcia v. Gloor*, 618 F.2d 264, 272 (5th Cir. 1980).

108. Prescott, *supra* note 78, at manuscript pp. 7-8.

109. *Id.*

110. See 42 U.S.C. § 2000e-2 (2000).

111. See Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1397 (1991).

112. See 29 C.F.R. § 1606.7(c) (2004) ("An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.").

113. *Garcia*, 998 F.2d at 1487 (citing *Gloor*, 618 F.2d at 270) ("Here, as is its prerogative, the employer has defined the privilege narrowly. When the privilege is defined at its narrowest (as merely the ability to speak on the job), we cannot conclude that those employees fluent in both English and Spanish are adversely impacted by the policy.").

114. See *id.*

nesses impose the rule without any reason at all. The employers should remember that it may be easier to tolerate a bilingual environment than to face discrimination lawsuits.<sup>115</sup>

## VI. LABOR CERTIFICATION FOR SKILLED WORKERS

### A. 'Now Hiring for a Vacancy We No Longer Have'

The U.S. labor market craves not only cheap but also skilled labor. There are plenty of young, ultra-smart, highly skilled foreign nationals looking to work and live in the United States permanently.<sup>116</sup> They are trained, intelligent, well-educated, and, most importantly, willing to do more work for less money.<sup>117</sup> These workers apply for jobs for which they are well-qualified or even overqualified, and U.S. employers happily offer them positions.<sup>118</sup>

This happens, for the most part, long before these employers ever hear about their need to comply with the new Department of Labor (DOL) Regulations. The regulations, titled the Program Electronic Review Management (PERM), provide that employers seeking to hire skilled foreign nationals and sponsor them for permanent residence

115. Prescott, *supra* note 78, at manuscript pp. 7-8.

116. See generally Howard F. Chang, 3 UCLA J. INT'L L. & FOR. AFF. 371, 394 (1998-1999) ("Through the labor-certification requirement, the U.S. government requires U.S. employers to discriminate against foreign workers: the statute requires an employer to prefer any qualified U.S. worker over any foreign worker, no matter how much better qualified the foreign worker may be.").

117. See Mark B. Baker, "The Technology Dog Ate My Job": The Dog-Eat-Dog World of Offshore Labor Outsourcing, 16 FLA. J. INT'L L. 807, 829 (2004) (noting that, in addition to outsourcing, "[t]hrough a variety of legal and extra-legal means, American companies have been systematically replacing American workers with foreign workers who are nearly always paid less than those they replace."); Sabrina Underwood, Note, *Achieving the American Daydream: The Social, Economic, and Political Inequalities Experienced by Temporary Workers Under the H-1B Visa Program*, 15 GEO. IMMIGR. L.J. 727, 736 (2001) ("The industries that have recruited foreign labor in the past have created economic inequality between the foreign workers and American workers. Historically, the wages paid to foreign workers have been significantly less than the amount paid to American workers. While the program for H-1B visas has strict requirements for companies to pay foreign workers roughly the same amount paid to American workers, there is some debate among critics of the program as to whether the regulations are enforced.").

118. See generally William J. Banks, *The Domestic Worker Debacle*, 80 FL. BAR J. 26, 26 (2006) (noting that, "[i]n general, those most qualified for nonimmigrant and immigrant workers' visas are those people with post-secondary degrees, experience, and/or a job offer in a field that is considered professional.").

must first seek qualified U.S. workers and can only hire foreigners if there are no suitable U.S. applicants.<sup>119</sup>

Therefore, one can justifiably call PERM a modern-day bureaucratic nightmare for U.S. employers.<sup>120</sup> PERM certification is expensive and burdensome because of the amount of paperwork and legal uncertainties that surround it.<sup>121</sup> More precisely:

The PERM labor certification process is onerous, time-consuming and expensive, and bears no rational relationship to real-world practice in that it requires employers to advertise a “vacancy” for which it has already selected the worker it deems most qualified, i.e., the alien, and to prove the absence of qualified U.S. workers. If the employer receives a single application from a U.S. worker meeting minimum qualifications that are artificially dictated by the DOL – even one far less qualified than the alien – the process must come to an end, since the goal is not to help the employer hire its selected candidate, but rather to protect the U.S. workforce.<sup>122</sup>

The greatest problem with PERM is that its goal is to protect “US workers by insuring that the employment of a foreign worker will not displace a US worker or depress wages or working conditions.”<sup>123</sup> Unfortunately, this objective completely ignores the fact that the hiring process often resembles a matchmaking – once the employer has his heart set on a certain candidate, he will do whatever it takes to circumvent the labor certification process and hire that particular worker.<sup>124</sup>

As a result, PERM has become somewhat of a mockery of the U.S. immigration system.<sup>125</sup> Most employers try to comply with it by adver-

119. See Deborah J. Notkin, *The New PERM Regulations for Labor Certification*, 1477 PLI 255, 260 (2005) (discussing the PERM requirements, which range from advertising the vacancy to preparing a recruitment report for the DOL); 20 C.F.R. § 656.15 (2004).

120. See Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148, 196 (2006) (citing DEMETRIOS G. PAPADEMETRIOU & STEPHEN YALE-LOEHR, *BALANCING INTERESTS: RETHINKING U.S. SELECTION OF SKILLED IMMIGRANTS* xiii (1996)) (using the term “bureaucratic nightmare” to describe the employment-based immigration system).

121. See Denise C. Hammond, Nathan Waxman, “Give me Your Tired, Your Poor” . . . and Your Best and Your Brightest, 39 MARYLAND B. J. 11, 12 (2006).

122. *Id.*

123. Deborah J. Notkin, *supra* note 119, at 257.

124. *See id.*

125. *See generally* Howard F. Chang, *supra* note 116, at 394. Professor Chang suggests that “it would be in the economic interests of U.S. natives to admit [foreign workers] without protectionist ‘labor certification’ requirements or quantitative restrictions. Indeed, immigration need not increase unemployment among natives at all. Immigrants not only expand the local supply of labor but also expand the local

tising a “vacancy” with very detailed requirements, specifically tailored to the foreign candidate they already found and wish to hire.<sup>126</sup> Then the employers must hold their breath and hope there are no qualified U.S. applicants who meet these criteria.<sup>127</sup> Furthermore, employers risk facing an audit from the DOL, which may result in denial of certification and continuous scrutiny of future applications.<sup>128</sup> Most of the time, however, employers manage to hire the desired candidate, but not before spending a great deal of time and money pretending to have complied with PERM.<sup>129</sup>

## B. Practical Solutions

The simplest advice for employers interested in hiring skilled foreign workers is first to make a genuine effort to hire a U.S. employee instead.<sup>130</sup> Certainly, this advice may not always work. When it comes to picking a perfect candidate, one who speaks multiple languages and has foreign work experience in addition to the usual set of skills may be more desirable than a U.S.-born worker.

Therefore, employers who have their heart set on a specific candidate can do several things to avoid getting into trouble with the DOL. First, the employer should try to conduct a bona-fide recruitment campaign, while preserving its interest in finding a worker with a specific set of skills.<sup>131</sup> To accomplish this, an employer must make genuine efforts to advertise the opening by publishing an ad in specialized magazines, local papers, and any other appropriate media.<sup>132</sup>

Second, employers “undertaking a PERM application must know the intricacies of the new system and prepare each application as though [they] will be subject to a DOL audit.”<sup>133</sup> PERM sets forth

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demand for labor. Immigrant workers will demand goods and services, and many of these goods and services will require locally supplied labor.” See *id.*

126. See Denise C. Hammond, *supra* note 121, at 12 (2006).

127. *Id.*

128. See Francis E. Chin, *U.S. Fast Tracks Employment-Based Immigration: Proceed with Caution*, 49 B. B. J. 14, 15 (2005) for a detailed discussion of DOL sanctions.

129. See Denise C. Hammond, *supra* note 121, at 12 (2006).

130. See STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 185 (2d ed. Foundation Press 1997) (“[T]he employer ordinarily must hire a minimally qualified American over a more qualified alien (or hire no one at all).”). The statute requires the U.S. worker to be “equally qualified” only in the case of an alien who “is a member of the teaching profession” or “has exceptional ability in the sciences or the arts.” 8 U.S.C. § 1182(a)(5)(A) (2004).

131. See Francis E. Chin, *supra* note 128, at 15 (2005).

132. See *id.*

133. See *id.* at 15.

detailed requirements, and employers must familiarize themselves with these requirements if they want to avoid the denial of certification based on the technicalities.<sup>134</sup>

Finally, employers must meticulously document their recruitment campaign by maintaining a file describing their advertising efforts, application process, and selection criteria.<sup>135</sup> In the instance of an audit, meticulous documentation will help them rebut any suspicions of improprieties and increase their chances of obtaining certification for the specific applicant and future foreign job applicants.<sup>136</sup>

## VII. CONCLUSION

Employers face many different legal problems in today's labor market. Unfortunately, many of these problems come from employing foreign workers. Because of the significant inconsistencies in the Immigration Reform and Control Act, employers must often choose between complying with the IRCA document verification and antidiscrimination provisions. On the one hand, employers must verify work eligibility of all job applicants; on the other, they must avoid engaging in document abuse by asking for more proof than necessary.

Similarly, employers face problems when responding to the Social Security Administration's "no-match" letters. Employers who receive such letters are often afraid that they may get into trouble with the government because they are employing illegal aliens. Nevertheless, employers cannot take adverse employment actions against the worker whose status is being questioned.

These and many other issues make it expensive and increasingly difficult to employ foreign workers. However, with immigrants comprising half of the newly hired workforce, employers often must rely on immigrant workers. Rather than staying on the fence about these issues, how can employers figure out whether to hire foreigners, whether to question them about their legal status, and whether to require them to speak English at work?

This Article attempts to answer many of these questions by providing practical guidelines to employers on how to avoid the most common pitfalls when employing foreign nationals. However, a broader, more comprehensive solution is necessary. Specifically, it is up to Congress to take actions to protect U.S. employers from penalties, harassment, and discrimination lawsuits by providing clear guidelines for

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134. See 20 C.F.R. § 656.15 (2004).

135. See *id.*

136. See *id.*

employers and shifting some of the policing burden from businesses onto administrative agencies.