Practice Advisory: An Update on Paths to Criminal Charges Under 8 USC §§1324 and 1324a

By Kathleen Campbell Walker and Lisa E. Rios[1]

The Immigration Reform and Control Act (IRCA),[2] made enforcement against employers for the employment of undocumented foreign nationals a central part of the overall immigration policy of the United States (U.S.). Employers who engage in a "pattern or practice" of hiring unauthorized foreign workers can be fined up to $3,000 per unauthorized worker, imprisoned for not more than six months for the entire pattern or practice, or both.[3] This criminal penalty exposure only leads to a criminal misdemeanor offense without the attractive penalty options such as asset forfeiture related to felony harboring.

While I-9 paranoia may make it easy to imagine a scenario in which a stack of poorly completed I-9s might result in a criminal allegation of a "pattern or practice" of hiring unauthorized foreign workers against an employer; criminal penalties are typically sought against employers who engage in practices that go beyond just a pattern or practice of poorly completing or failing to complete I-9s, which results in the hire of an unauthorized worker. Of course, the definition of "constructive knowledge" as to hiring or continuing to hire an unauthorized worker provided in the regulations[4] specifically includes the failure to complete or improperly complete an I-9 form as an example of potential employer culpability. The published federal court cases related to worksite compliance over the past few years use criminal charges against employers, however, for harboring and other egregious actions under 8 USC §1324 versus 8 USC §1324a.

Case Update

After a review of recent federal case law from 2006 to the present, with search terms including "pattern or practice," "I-9," "8 USC §1324a," and "reckless disregard," these searches failed to locate any recent published decisions relating to a criminal conviction under 8 USC §1324a based solely on the routine poor completion or even failure to complete I-9s, which led to the employment or continuation of employment of unauthorized workers. In fact, only a handful of cases made any reference to I-9 practices by the employers. In two cases, I-9 violations did play a minor role in a larger scheme involving the harboring undocumented workers, and, although the I-9s were not the main focus of the investigations in these cases, the cases are worth noting. It is important to remember that a conviction for a harboring offense under 8 USC §1324 can lead to asset forfeiture,[5] unlike the criminal penalty provided under 8 USC §1324a. Asset forfeiture provides the government with greater penalty options than fines for harboring offenses, which is certainly a likely reason for the paucity of 8 USC §1324a(f)(1) federal court case references.

In *United States of America v. Chun Ya Cheung,*[6] Mr. Cheung appealed his conviction for conspiring to harbor illegal aliens, alleging that testimony about conversations with those aliens and the admission of a video deposition violated his Sixth Amendment right to confront the witnesses against him. The published decision described how, in 2006, Cheung opened the Empire Buffet restaurant in Crescent Springs, Kentucky, which he eventually owned in partnership with his cousin, Chun Dong Shi, and his wife, Wang. In 2007, local police and officials from Immigrations and Customs Enforcement (ICE) began an investigation after a neighbor reported a suspiciously large number of people living in a single family home owned by Shi and Wang. At about 10:00am each morning, a white van licensed to the Empire Buffet would appear at the house, and a large number of individuals would enter the van to go to the Empire Buffet. Every night the van would return at about 10:00pm or 10:30pm. On October 16,

2007, local police and ICE stopped the Empire Buffet van en route to the restaurant and searched the house where the workers had been living. Four of the passengers, as well as another person the police found in the house were undocumented Mexican immigrants. When ICE agents asked for the workers' I-9 forms, Cheung had none. Although he later produced some I-9 forms, Cheung never produced any forms for the five individuals in question. The Empire Buffet, it also turned out, had not paid unemployment taxes on the wages of any of these individuals. Cheung stood trial on charges of harboring and for conspiring to harbor illegal aliens for commercial advantage or private financial gain. The jury convicted him of conspiring to harbor illegal aliens.

In a more recent Seventh Circuit decision, *United States of America v. Xiang Hui Ye,*[7] a similar supporting role of I-9 noncompliance was used in another a harboring case. Mr. Ye, a part-owner and manager of Buffet City, a restaurant in Springfield, Illinois, was indicted on one count of concealing, harboring, or shielding from detection illegal aliens, and one count of hiring illegal aliens. Investigators visited Buffet City in April 2005 and observed numerous Chinese and Hispanic workers. Mr. Ye did not have I-9 forms for any of the employees. An agent advised Mr. Ye that I-9 forms and certain other employment documents were required by law. Mr. Ye eventually submitted I-9 forms for some of the Chinese workers, but not for any of the Hispanic employees. The Hispanic workers were paid $1,000 monthly salaries in cash, without taxes withheld. Mr. Ye later met with the Hispanic employees and informed them that they were fired from their jobs, but that they would be rehired if they could produce immigration documents. Mr. Ye advised them that they could purchase fake documents in Chicago, which he would accept. One Hispanic worker was rehired, even though the documents he produced were not in his name. Mr. Ye eventually was indicted under 8 USC §§1324(a)(1)(A)(iii) and (a)(1)(B)(i) for concealing, harboring, or shielding from detection persons he knew were illegal aliens for the purpose of commercial advantage or private financial gain, and under 8 USC §1324a(a)(1)(A) for hiring persons he knew were illegal aliens. A jury convicted Mr. Ye on both counts, and the district court sentenced him to 33 months' imprisonment.

RICO Trends

In addition to this type of scenario in which I-9 noncompliance is just another proverbial nail in the coffin for harboring-related cases in the worksite enforcement context, recent published federal court cases include several civil lawsuits brought under the Racketeer Influenced and Corrupt Organizations Act (RICO).[8] The apparent trend in the RICO cases at the district court level is for a summary judgment to be granted for the defendants for failure on the part of the plaintiffs to state a proper claim.

For example, in *A.L.L. Masonry Construction Co., Inc. v. Boguslaw Omielan and Izabela Omielan*,[9] A.L.L. Masonry Construction Co., Inc. sued Boguslaw Omielan and Izabela Omielan under RICO, claiming that the defendants ran an illegal enterprise that harmed the plaintiff by preventing it from winning a construction contract. The plaintiff argued that it was underbid by defendants, because defendants paid depressed wages to undocumented workers. The evidence indicated violations of §1324a, but not §1324. The Court granted summary judgment on behalf of the defendants, because the plaintiffs failed to show that the defendants actually knew that their employees were in the U.S. unlawfully and held that 8 USC §1324a is not a predicate act for RICO.

The most difficult part of succeeding on a civil RICO claim apparently is still satisfying the causation requirements during all phases of litigation. District courts tend to dismiss civil RICO claims at the pleading stage on this basis. Some circuit courts, however, have been more

willing to allow plaintiffs an opportunity to make their case, making RICO a powerful tool in the arsenal against workplace immigration enforcement.[10]

For example, in *Edwards v. Prime, Inc.*,[11] seven former employees of Ruth's Chris Steak House, a franchise owned by Prime, Inc., ("Prime"), alleged that Prime violated section 8 USC §1324 of the Immigration and Nationality Act, as amended ("INA"), by knowingly providing illegal aliens with the names and social security numbers of former employees who were U.S. citizens and paying illegal aliens in cash.[12] The district court dismissed the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that the plaintiffs had failed to allege a "pattern of racketeering activity."[13] The Eleventh Circuit, however, agreed with the plaintiffs that Prime's provision of the names and social security numbers of U.S. workers facilitated the employment of undocumented workers, thereby encouraging and inducing illegal aliens to unlawfully reside in the U.S. in violation of 8 USC §1324(a)(1)(A)(iv). The Eleventh Circuit reversed the district court's decision, stating that plaintiffs were "entitled to get past the Rule 12(b)(6) stage" based on this "predicate act."[14] Thus, the *Edwards* case offers some insight as to the standard of pleading plausibility at the beginning stages of civil RICO litigation.

The Demise of the SSA No Match Letter?

ICE agents typically ask for the kitchen sink in their Notices of Inspection (NOI) for I-9 forms. One constant component among the NOIs is a request for "any and all photocopies of Social Security Administration (SSA) Employer Correction Requests" or "copies of any correspondence from the Social Security Administration." In the IFCO cases filed in the U.S. District Court for the Southern District of Texas,[15] the government urged inferences from the letters of notice of unauthorized employment, which should trigger employment action. In 2007, the Department of Homeland Security (DHS) proposed regulations that would have elevated the receipt of an SSA no match letter to proof that an employer had "constructive knowledge" of the unauthorized status of a worker.[16] Employers were also provided a path to follow in these regulations to react to no match type letters in order to reduce their exposure (seek a safe harbor) to constructive knowledge exposure.[17]

It appears that the threat of any additional SSA letters being sent to employers is on hold based on the recent minutes from the AILA SSA liaison call held on November 8, 2011.[18] The SSA noted that by letter dated October 26, 2011, it advised AILA that SSA had suspended sending employer decentralized correspondence (DÉCOR) letters due to budgeting constraints as of August 29, 2011. The resurrection of these letters was short-lived.[19] SSA noted that it could not confirm if they would recommence sending the letters. In addition, SSA confirmed that:

- As to DÉCOR letters employers have already received, SSA will take "no follow-up action" and employers should follow the letters' instructions.
- If an issue exists as to an employee's name, the employer should double check its own records, and if that provides no resolution, the employee should attempt to correct the problem with SSA.

Back in September of 2007, SSA advised that it would send 141,000 letters over a three month period starting with a few hundred letters a day and ramping up the mailings to 3,200 daily. SSA refused to respond to AILA's questions in the above-referenced liaison call regarding the release of the TY2010 DÉCOR letters due to the announced suspension. In reference to questions related to what SSA does with information provided by employers in response to the no match letters, it noted that if an employer confirms that the mismatch is not

the result of a "typo," SSA will advise the employer to ask the employee to correct the problem at an SSA office. SSA confirmed that it is "between the SSA and the employer to correct the mismatch, rather than between the SSA and the employee." SSA records mismatches in the Earnings Suspense File until a W-2C correction is made by the employer. SSA can share W-2 mismatch information with the Office of the Inspector General (OIG), which can request mismatch data directly. SSA also sends the Internal Revenue Service (IRS) a copy of all W-2 forms.

Although employers have a temporary reprieve from more SSA DÉCOR letters based on the SSA announcement, ICE has certainly not suspended their requests for such letters. It is interesting to note this continued focus on such letters post the Ninth Circuit's decision in *Aramark in 2008,*[20] which indicated that the SSA no match letter did not place the employer on constructive notice that any particular employee was an undocumented worker. The Office of Special Counsel (OSC) of the Department of Justice (DOJ) also appears to denigrate the importance of the no match letter and its guidance discourages any realistic follow through by the employer. The attached Employer Do's and Don'ts from the OSC [21] (Attachment 1) specifically instruct employers NOT to:

- Require an employee to produce specific I-9 documents to address a no-match.
- Require an employee to provide a written report of SSA verification (as it may not always be obtainable.)

How can an employer possibly determine if the employee even tried to make any correction with the SSA with such OSC guidance? Is this OSC recommended employee visit to SSA a joke?

The OSC no match Frequently Asked Questions (FAQ) memo (Attachment 2) instructs employers to give an employee a "reasonable period of time" to resolve a no-match notice and suggest a totality of the circumstances standard for the time frame. They state that in the E-Verify context, SSA may place a tentative nonconfirmation into continuance for up to 120 days. The OSC then recommends that employers can use the Social Security Number Verification Service to verify the names and social security numbers of employees against SSA records, but the use of SSNVS to verify work authorization is improper and may "violate the antidiscrimination provisions" of the INA. [22] An employer trying to gain any protection for its actions will not gain much comfort from this type of instruction.

Is there anything clear?

Employers must recognize that I-9 completion and responses to no-match letters from SSA or other state and federal agencies are used as building blocks for potential criminal allegations. While the knowing hire or continuing to hire of an undocumented worker can be premised on the failure to complete an I-9 or to do so improperly and can lead to potential pattern or practice violations under 8 USC §1324a(f), the likelihood of this criminal allegation has been as rare to witness as the dodo bird. If there is any rule in the criminal I-9 related rulebook, it is that more egregious conduct by the employer than just crummy I-9 paperwork oversight resulting in the employment of unauthorized workers must be present. As to the SSA no match letter and its state and federal relatives, the SSA DÉCOR letters may be suspended, but ICE is certainly keeping the use of these letters alive in its criminal toolbox. The continuing search for any sort of "safe harbor" from such exposure though remains elusive.

[1] *Kathleen Campbell Walker of El Paso is a shareholder in and head of the immigration practice group of Cox Smith Matthews Incorporated. She is a former national president and general counsel of the American Immigration Lawyers Association (AILA), and she is board certified in immigration and nationality law by the Texas Board of Legal Specialization. She is the current chairperson of the AILA National Verification and Documentation Liaison Committee.*

Lisa E. Rios is a senior associate in the immigration practice group of Cox Smith. She serves on the AILA national liaison committee with the USCIS Texas Service Center and is the AILA Texas Chapter liaison with the Department of Homeland Security in El Paso.

[2] Pub. L. No. 99-603, 100 Stat. 3359 (codified at 8 USC §§1324a-1324b).
[3] 8 USC §1324a(f)(1) and 8 CFR §274a.10(a).
[4] 8 CFR §274a.1((l)(1).
[5] 18 USC §982(a)(6)(A).
[6] *UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CHUN YA CHEUNG*, Defendant-Appellant, No. 08-5962, UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, 09a0694n.06; 350 Fed. Appx. 19; 2009 U.S. App. LEXIS 23454; 2009 FED App. 0694N (6th Cir.) (October 22, 2009, Filed).
[7] *UNITED STATES OF AMERICA, Plaintiff-Appellee, v. XIANG HUI YE, Defendant-Appellant*, No. 08-1333, UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, 588 F.3d 411; 2009 U.S. App. LEXIS 25181 (February 20, 2009, Argued November 17, 2009, Decided)
[8] 18 USC §1961-68.
[9] *A.L.L. Masonry Construction Co., Inc. v. Boguslaw Omielan and Izabela Omielan*, No. 07 C 5761, United States District Court for the Northern District of Illinois, Eastern Division (2009 U.S. Dist. LEXIS 63767)(July 23, 2009).
[10] See, e.g., *Mendoza v. Zirkle Fruit Co*., 301 F.3d 1163, 1171 (9th Cir. 2002) ("It is inappropriate at this stage to substitute speculation for the complaint's allegations of causation . . . the workers must be allowed to make their case through presentation of evidence . . ."); Trollinger, 370 F.3d at 614-615 (6th Cir. 2004) ("A RICO case with a traditional proximate cause problem . . . is more appropriately dismissed on summary judgment than on a motion to dismiss.").
[11] 602 F.3d 1276 (11th Cir. 2010).
[12] *Id*. at 1285.
[13] *Id*. at 1287.
[14] *Id.* At 1297. An act of racketeering is commonly referred to as a '"predicate act." See, *Maiz v. Virani*, 253 F.3d 641, 671 (11th Cir. 2001).
[15] *See , U.S. v. Charles M. Davidson, et al (*2011 U.S – S. Dist. of Texas – Houston Div. – Cr.No. H-10.201) review pacer filings.
[16] *See, 72 Fed. Reg.* 45611-24 (Aug. 15, 2007). This proposed rule was later enjoined by a District Judge in *AFL-CIO v. Chertoff,* No. 07-4472, 552 F.Supp. 999 (N.D. Cal. Oct. 10, 2007). After this injunction, the government ended sending employers SSA no match letters from 2007 until April of 2011. The clarification of the 2007 final rule was posted at 73 *Fed. Reg*. 63843 (Oct. 28, 2008). The rescission was posted at 74 Fed. Reg. 51447 (Nov. 6, 2009).
[17] Id.
[18] *See*, AILA Infonet Doc. No. 11120761.
[19] *See, AILA Liaison Advisory – Resumption of Social Security No Match Letters: Employers Beware AILA Infonet Doc. No. 11041231. Noting that SSA recommenced sending employer DÉCOR letters on April 6, 2011 pursuant to directive from the SSA Commissioner.*
[20] *Aramark Facility Services v. Service Employees International Union, Local 1877, AFL-CIO CLC,* 530 F.3d 817 (9th Cir. 2008). The Court noted that, "[E]mployers do not face any penalty from SSA, which lacks an enforcement arm, for ignoring a no-match letter. The IRS also imposes no sanction stemming from the no-match letters. It requires no additional solicitations of an employee's SSA unless it sends a "penalty notice" to the employer indicated that the SSA is incorrect…" at 826-27.
[21] See, http://www.justice.gov/crt/about/osc/pdf/publications/SSA/Employers.pdf .
[22] See, http://www.justice.gov/crt/about/osc/pdf/publications/SSA/FAQs.pdf .