FLSA/WAGE & HOUR CRACKDOWN: STATE AND FEDERAL

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"Ask not for whom the bell tolls; it tolls for thee."
- *John Donne*

A. CLASSIFICATION ISSUES

I. OVERVIEW OF STATE AND FEDERAL ENFORCEMENT SCHEME

The Fair Labor Standards Act of 1938 established national standards in certain areas of employment, including minimum wage, overtime pay, recordkeeping, child labor and special employment, family and medical leave, migrant workers, worker protections in certain temporary worker programs, and prevailing wages for government service and construction contracts.[1] In addition to federal law, states have their own wage and hour standards, which can provide more, but not less, protection than federal law.

Iowa's state minimum wage is $7.25 per hour, as of Januay 1, 2008.[2] The minimum wage applies to every "employee," as that term is defined by the Federal Fair Labor Standards Act.[3] For workers earning "tips," including restaurant, hotel, motel, or inn employees who regularly receive more than thirty dollars in tips, the employer may reduce the employee's base wage by as much as 40% of the minimum wage to as little as $4.35 per hour, so long as the

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[1] 29 U.S.C. § 218 (2010).
[2] Iowa Code § 91D.1(1)(a) (2011).
[3] Id. § 91D.1(1)(b); 29 U.S.C. § 203(3) (defining "employee" for the purposes of the FLSA).

combined amount of base pay and tips in any given week is equal to or greater than the state minimum wage.[4]

Iowa does not have a state overtime law. Iowa's wage payment collection law requires that employers pay all wages due to employees, minus specified lawful deductions (contained in Iowa Code § 91A.5) on a regularly schedule payday no less frequently than a monthly basis.[5] An employee and employer may enter into written agreement that departs from these requirements. Id. Wages may be delivered to the employee, by mail, by direct deposit, at the employee's normal place of employment during normal employment hours or at a place and hour mutually agreed upon by the employer and employee. Iowa Code § 91A.3(3).

In the case of a dispute between an employer and employee concerning the amount of wages or expenses due, Iowa requires that the employer must pay all wages due. Iowa Code § 91A.7. Iowa has no general law mandating paid breaks for adults, except that employees must be allowed bathroom breaks as needed.[6] Separate state and federal regulations may require that certain categories of workers, such as truck drivers and pilots, be permitted or required to take breaks.

State wage and hour enforcement appears to generally supplements federal enforcement in the areas covered by federal law, but can also adds requirements or standards where federal wage and hour laws are absent. The federal standards set out by the FLSA (including minimum wage, overtime, recordkeeping and youth employment standards) apply only to employees who work for businesses that have an annual sales/business volume of at least $500,000; businesses providing medical or nursing care for residents, schools and preschools; and government

[4] Id. § 91D.1(1)(b).
[5] Id. § 91A.3(1).
[6] http://www.iowaworkforce.org/labor/wagefaqs.pdf.

agencies and employees engaged in interstate commerce.[7] It is not hard to see that many employers simply are not covered by the FLSA.

States, including Iowa, generally have wage payment laws that require wages owed to be paid, often within particular time period or within a specified period after the employee has separated. States enforce their wage and hour laws in a variety of ways. Some of these methods include individual complaint procedures administered by state agencies, criminal and civil litigation by state attorneys general or local prosecutors, outreach to and education of employees, employers and NGOs and, for a few states, referral of all complainants to federal authorities. Predictably, these procedures are administered with varying degrees of enthusiasm, resource support and competence. Additionally, because the characteristics (size, dominant industries, education levels, etc.) of labor markets differ across states, what is effective in one state – or area of a state – may not be as effective in another. Minimum wage, overtime and wage payment standards are similar across the states that have these laws. Differences in the results of enforcement are likely explained as much by variation in the form and force of states' application of their enforcement powers as they are by variation in the laws themselves.

What is clear is that recently, things have changed. During the decade leading up to 2007, the number of wage/hour investigators employed by the USDOL decreased by more than 20 percent, and the number of FLSA enforcement actions decreased by almost 40 percent.[8] In 2009, by contrast, the Obama administration and Secretary of Labor announced the hiring of 250 additional wage and hour investigators.[9] While many have followed the activities of the

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[7] United States Department of Labor, Wage and Hour Division, Coverage Under the FLSA, available at http://www.dol.gov/whd/minimumwage.htm (last visited October 1, 2012).

[8] United States Government Accountability Office, Fair Labor Standards Act: Resources and Consistent Reporting Could Improve Compliance (July 2008), available at http://www.gao.gov/new.items/d08962t.pdf (last accessed October 18, 2012).

[9] Press Release, U.S. Dept. of Labor, Wage and Hour Division (Nov. 9, 2009), available at

USDOL, which has stepped up its enforcement efforts, comparatively little research has been done into the states' efforts to enforce their own state wage and hour standards. Iowa is a state with a historically low enforcement activity. However, this appears to be changing as well.

II. EXEMPT VS. NON-EXEMPT

The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek. However, Section 13(a)(1) of the Act provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees.[10] Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for the exemption, employees must generally meet certain tests regarding their job duties and be paid on a salary basis at not less than $455 per week.

The job titles do not determine exempt status – for an exemption to apply, the employee's particular job duties and salary must meet all requirements of the Department's regulations. Some employees are exempt from both the minimum wage and overtime pay provisions, some only from the overtime pay provisions, and some from the child labor provisions of the FLSA. Exemptions are always narrowly construed against the employer asserting them.[11] The burden of supporting the application of an exemption rests on the employer. Exemptions are generally applied on an individual workweek basis. Employees performing exempt and non-exempt duties in the same workweek are normally not exempt in that workweek.

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http://www.dol.gov/opa/media/press/whd/whd20091452.htm (last accessed October 18, 2012).

[10] U.S. Dep't of Labor, "Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)" (July 2008), available at http://www.dol.gov/whd/regs/compliance/fairpay/fs17a_overview.pdf (last accessed October 18, 2012).

[11] Reich v. Delcorp, Inc., 3 F.3d 1181, 1186 (8th Cir. 1993).

The following is a general overview on the exemption from minimum wage and overtime pay provided by Section 13(a)(1) of the Fair Labor Standards Act as defined by Regulations, 29 CFR Part 541.[12]

a. Executive Exemption.

To qualify for the executive employee exemption, the employee must pass the following tests:

• be compensated on a salary basis (defined in the regulations) at a rate no less than $455 per week;

• Have primary duty of managing the business, or managing one of its customarily accepted departments or subdivisions;

• Customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and

• Have hire or fire authority over other employees, or have some particular weight given to the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or change of status of other employees.

b. Administrative Exemptions

To qualify for the administrative employee exemption, the employee must meet the following test:

• Be compensated on a salary or fee basis (defined in the regulations) at a rate no less than $455 per week;

• Have primary duty of office or non-manual work directly related to the management or general business operations of the employer or its customers; and

• Primary duty includes exercising discretion and independent judgment concerning matters of significance.

c. Professional Exemption

To qualify for the learned professional employee exemption, meet the following tests:

• Be compensated on a salary or fee basis (defined in the regulations) at a rate no less than $455 per week;

• Primary duty is work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;

• The advanced knowledge must be in a field of science or learning; and

• The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

d. Creative Professional Exemption

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[12] This general overview is adapted from the fact sheet set forth in note 10, supra ("Fact Sheet # 17A").

To qualify for the creative professional employee exemption, meet the following tests:
• Be compensated on a salary or fee basis (defined in the regulations) at a rate no less than $455 per week;
• Primary duty is performing work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

e. Computer Employee Exemption

To qualify for the computer employee exemption, meet the following tests:
• Be compensated on a salary or fee basis (defined in the regulations) at a rate no less than $455 per week or, if paid on an hourly basis, no less than $27.63 an hour;
• Be employed as a computer systems analyst, computer programmer, software engineer or similar in the computer field performing the duties described below;
• Have primary duty consisting of: (1) application of systems analysis techniques and procedures, including consulting with users to determine hardware, software or system functional specifications; (2) design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; (3) design, documentation, testing, creation or modification of computer programs related to machine operating systems; or (4) combination of the duties, the requiring the same level of skills.

f. Outside Sales Exemption

To qualify for the outside sales employee exemption, the employee must meet the following tests:
• Primary duty must be making sales (as defined in the Act), or obtaining orders or service contracts, or for the use of facilities, for which a consideration will be paid by customers or clients; and
• Be customarily and regularly engaged away from the employer's place or places of business.

g. Highly Compensated Employees

Highly compensated employees performing office or non-manual work, paid total annual compensation of $100,000 or more (must include at least $455 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee.

h. Workers Covered Under the Act

1. Blue Collar Workers

Non-management employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the FLSA, and are not exempt under the Part 541 regulations no matter how highly paid they might be.

2. Police, Fire Fighters, Paramedics & Other First Responders

The exemptions also do not apply to police, sheriffs and deputies, state troopers and highway patrol officers, investigators, inspectors, correctional and parole/probation officers, park rangers, fire fighters and emergency medical personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank and pay level.

3. Other Laws & Collective Bargaining Agreements

The FLSA provides minimum standards that can be exceeded, but are not waivable.

III. INDEPENDENT CONTRACTOR VS. EMPLOYEE

In the investigation of a Misclassification Task Force put together by Governor Culver, Iowa construction workers testified about instances of misclassification by contractors, resulting in missed overtime pay, lack of access to unemployment, high unexpected tax bills (because of no income withholding), and no protection in the event of on-the-job injuries.[13] The findings in December 2008 led to the Iowa Legislature's allocation of funding in 2009 for the special Misclassification Unit within Iowa Workforce Development to enhance enforcement, educate

[13] Iowa Misclassification Task Force, Report to Governor Culver (December 17, 2008), 10.

Iowa workers and businesses about the problem of misclassification, and improve sharing of information between agencies.

Two years later, the Task Force reported that enhanced enforcement had confirmed "the impact of misclassification is broad and deep" and that the problem affected thousands of Iowans. Iowa Misclassification Task Force, 2nd Report, Iowa Workforce Development (December 30, 2010). Within the first 18 months in operation, the unit identified 230 Iowa employers who had misclassified 2,602 workers and failed to report more than $61 million in wages. Of the 230 violators identified, 112 were in construction.[14] While many know about the misclassification problems in the construction industry, the Task Force also received testimony from companies like United Parcel Service, who expressed concerns competitors' practices of misclassifying workers, and how it had distorted competitive bidding within the package delivery industry.[15]

The resulting Misclassification Unit in the Tax Bureau of the Iowa Workforce Development (IWD) Unemployment Insurance Division now investigates businesses that misclassify their workers as independent contractors when those workers should be treated as employees.[16] IWD gathers information, including financial records, questionnaires from workers and employers, observes and talks with workers and employers, and makes a determination of whether or not an employer-employee relationship exists and whether the employer is liable for paying unemployment insurance taxes. IWD bases these determinations on Iowa statutory and administrative law.

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[14] Iowa Misclassification Task Force, 2nd Report (December 30, 2010); David DeWitte, "Task force tally: 2,602 workers misclassified as contractors," The Cedar Rapids Gazette (January 10, 2011).

[15] Iowa Misclassification Task Force, Report to Governor Culver (December 17, 2008), 10.

[16] Of course, misclassification has a range of penalties, once proved: failure to pay unemployment taxes: Iowa Code §§ 96.16, 96.16(2), 96.14(2); failure to pay Iowa income taxes, Id. § 422.16; failure to provide worker's compensation coverage, Id. §§ 87.14A, 86.13, 86.13A; failure to pay wages owed, Id. § 91A.12; and failure to register as a contractor, Id. § 91C.8.

An "employer" for purposes of unemployment insurance is defined as any employing unit which paid at least $1,500 in wages in any calendar quarter during the current or preceding year or which employed at least one person during the current or preceding calendar year.[17] "Employment" is defined as services performed for wages or under any contract of hire, written or oral, express or implied, by any individual who has the status of an employee.[18] The IWD has an administrative process for determining employer liability under the Chapter, including any appeal rights.[19]

The Iowa Code defines wages as all remuneration for personal services, including commission, bonuses and the cash value of all remuneration in any medium other than cash.[20] An employer/employee relationship is presumed unless proven otherwise.[21] In the language of the Iowa Code: "Services performed by an individual for wages shall be deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the department that such individual has been and will continue to be free from control or direction over the performance of such services, both under the individual's contract of service and in fact."

Iowa follows traditional common law principles to determine whether an employer-employee relationship exists. These factors are most clearly set forth in the administrative rules, which require that the Department analyze, in pertinent part:

> (1) The relationship of employer and employee exists when the person for whom services are performed has <u>the right to control and direct</u> the individual who performs the

[17] Iowa Code §96.19(16)(a) (2011).
[18] <u>Id.</u> § 96.19(18)(a).
[19] <u>Id.</u> § 96.7(4).
[20] <u>Id.</u> § 96.19(41).
[21] <u>Id.</u> § 96.19(18)(f)(1); see also Iowa Administrative Code r. 871-23.55 (placing the burden of proof on the employer).

> services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. . . .
>
> The right to discharge or terminate a relationship is also an important factor indicating that the person possessing that right is an employer. Where such discharge or termination will constitute a breach of contract and the discharging person may be liable for damages, the circumstances indicate a relationship of independent contractor. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools, equipment, material and the furnishing of a place to work, to the individual who performs the services.
>
> In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, that individual is an independent contractor. . . .
>
> (2) The nature of the contract undertaken by one for the performance of a certain type, kind, or piece of work at a fixed price is a factor to be considered in determining the status of an independent contractor. In general, employees perform the work continuously and primarily their labor is purchased, whereas the independent contractor undertakes the performance of a specific job. Independent contractors follow a distinct trade, occupation, business, or profession in which they offer their services to the public to be performed without the control of those seeking the benefit of their training or experience.
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> (3) Employees are usually paid a fixed wage computed on a weekly or hourly basis while an independent contractor is usually paid one sum for the entire work, whether it be paid in the form of a lump sum or installments. . . . .
>
> (4) The right to employ assistants with the exclusive right to supervise their activity and completely delegate the work is an indication of an independent contractor relationship.
>
> (5) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.
>
> (6) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. . . . .
>
> (7) All classes or grades of employees are included within the relationship of employer and employee. For example, superintendents, managers and other supervisory personnel are employees.[22]

Why does this matter? The Misclassification Unit is only the first step of the state and federal agencies that will get involved.[23] In the Second Report of the Task Force, they made

[22] Iowa Admin. Code rr. 871-23.19(1) – (7).

clear that: “After the Misclassification Unit finalizes their investigations, they refer cases to the Division of Labor’s Contractor Registration program, the Iowa Workers’ Compensation Division, and the Iowa Department of Revenue to determine what obligations are owed under those laws and programs. Similarly, those entities share information with the Misclassification Unit. IWD also signed an agreement with the Internal Revenue Service that also allows for the transfer of information related to misclassification.”

Of course, if intentional misclassification is proven, it constitutes tax and insurance evasion. Penalties range from civil fines, penalties, and interest to criminal penalties.[24]

IV. VOLUNTARY CLASSIFICATION SETTLEMENT PROGRAM (VCSP)

Agricultural, construction, and food service businesses struggle with the grey areas on whether workers should be classified employees or independent contractors. While this outline has been focused on classification issues involving agencies other than the Internal Revenue Service, the increasingly restrictive classification rules can lead to trouble with the IRS, too.

If the IRS determines during an audit that there has been misclassification, it can order the business to pay employment taxes relating to the workers’ past compensation, penalties, and interest.

In September of last year, the IRS announced a new program that permits employers to prospectively reclassify workers from independent contractors to employees, for federal employment tax purposes without threat of IRS employment tax audits for prior years.[25] The program is titled the Voluntary Classification Settlement Program or VCSP, and it is part of what

[23] Iowa Misclassification Task Force 2nd Report (December 30, 2010).
[24] See Iowa Code §§ 86.13, 86.13A, 87A.14A, 91A.12, 91C.8, 96.16, 96.14(2), and Iowa Code Chapter 422.
[25] Internal Revenue Service Announcement 2011-64 (September 21, 2011).

the agency calls its "Fresh Start" initiative to "help taxpayers and businesses address their tax responsibilities."[26]

The VCSP, as its name implies, voluntary. To participate in the program, an employer must meet certain conditions:

> employer must have treated the workers consistently as non-employees and have filed all Forms 1099 for workers at issue during the previous three years;
> employer must not be currently under audit by the IRS, Department of Labor, or by any other state agency concerning the classification of workers; and
> if the employer was previously audited concerning the classification of workers, the employer must have complied with the results of that audit.

Under the VCSP, the IRS agrees not to audit the employer concerning classification of workers for prior tax years. In exchange, the taxpayer agrees to change the classification of workers from independent contractor to employee and pay 10 percent of the employment tax liability on compensation paid to the workers during the most recent tax year, computed at reduced rates, without interest or penalties.

While these are generous provisions from the IRS, the potential significant disadvantage of the program is that the employer must agree to extend the period of limitations for assessment of employment taxes by three years for the first, second, and third calendar years after the date the taxpayer agreed to begin treating the workers as employees. Also, VCSP applies only to IRS liabilities and does not reduce an employer's potential liability in other areas, such as state unemployment.

To participate in the program, the taxpayer must file Form 8952, Application for Voluntary Classification Settlement Program, with the IRS. The IRS contacts the taxpayer to verify program eligibility. If the application is accepted, the taxpayer enters into a closing

[26] Internal Revenue News Release, 2011-95 (September 21, 2011).

agreement with IRS to finalize the VCSP terms. The taxpayer is obligated to make complete payment at the time of the closing.

B. PITFALLS IN EMPLOYERS' USE OF INDEPENDENT CONTRACTORS, CONTINGENT WORKFORCE, AND STAFFING AGENCY EMPLOYEES TO AVOID PAYROLL TAXES

Employers use contingent workers, including independent contractors, leased employees, consultants, and temporary employees for a variety of reasons: cost savings, administrative efficiencies, flexibility, and the list goes on.

The most significant risk in using contingent workers is in the legal consequences of misclassification, especially concerning independent contractors. Misclassification results in tax, wage and hour, and other employment law liabilities if a court or administrative agency determines your contingent workers were actually employees. Some of the legal risks of misclassifying workers are:

(1) tax liability (misclassifying employees as independent contractors) for failure to withhold employment taxes;

(2) wage/hour violations for failing to pay non-exempt employees wage and overtime under the FLSA;

(3) risk of being considered a "joint employer" with a staffing agency or labor supplier for the purpose of discrimination statutes and the FMLA;

(4) liability for job-related injuries and workers' compensation – remember, employees who suffer a work comp injury are limited to the remedies under the statute; and

(5) issues with your employee benefits plan, including potential disqualification under the plan.

C. ON THE CLOCK OR OFF THE CLOCK / RISE OF COLLECTIVE/CLASS ACTION LAWSUITS

Iowa employers have been no strangers to the rising class action wage/hour litigation sweeping the nation. Taking the last decade alone, class actions targets included not only "bad apple" outliers but major corporations in both the retail and manufacturing sectors.

In 2001, Clinton, Iowa, Walmart employees filed a class-action suit alleging the company regularly required employees to work overtime without pay. Going against its hard-nosed reputation, the embattled Walmart settled the suit in 2008 (along with 62 other wage and hour class-action suits it defended across the nation), agreeing to pay $11 million to 97,259 former employees working over the years between June 1999 and May 2009.[27]

More recently, former employees of washing machine manufacturer Electrolux in Webster City, Iowa, brought a class action for a company policy that required workers to arrive 15 minutes before their shifts to put on armguards and gloves, without pay.[28] While it was initially filed by a few named Plaintiffs, U.S. District Judge Mark Bennett recently ordered the company to produce names and addresses of hourly production workers employed at the plant between December 1008 and December 2011.

Also recently, two companies in the business of providing workers to Agricultural processing giant ADM (Archer Daniels Midland) in Clinton, Iowa, settled a smaller class-action filed on behalf of over 250 employees.[29] In this case, employees the two companies had regularly failed to pay them fully for time worked and failed to pay overtime for work in excess

[27] Steven Martens, Wal-Mart Wage Suit Settled for $11M, Quad-City Times (Oct. 14, 2009), available at http://qctimes.com/news/local/crime-and-courts/article_db6a2602-b925-11de-a7e1-001cc4c002e0.html (last accessed October 12, 2012).

[28] Associated Press, "More than 1,000 Workers to Join Electrolux Lawsuit," (March 12, 2012), available at http://www.cbsnews.com/8301-505245_162-57395607/more-than-1000-workers-to-join-electrolux-lawsuit/

[29] Charlene Bielema, "Men file lawsuit against firms providing workers at ADM," The Clinton Herald (March 15, 2011).

of 40 hours in a week by requiring uncompensated work before and after clock-in times and failing to record all hours on payroll sheets. Similarly, in 2011 Cargill settled a suit concerning allegations of meatpacking workers in Ottumwa, Iowa, who argued they were denied pay for time they were required to be at work to set up, clean up, prepare equipment, or change in and out of protective gear at the start and end of their work days.[30]

These cases, along with scores of others nationwide, illustrate that major employers have challenges complying with existing laws and regulations on issues regarding pay.

D. E-VERIFY, I-9 AUDITS, AND STATE AND FEDERAL LAWS

This Section addresses first the background, statutory, and regulatory authority and basic requirements over which Immigration and Customs Enforcement ("ICE") has stepped up its enforcement activity, specifically concerning the issues of I-9 compliance. Also examined is a model program implemented by ICE that will help employers understand what the agency seeks in terms of compliance efforts. Finally, the third section addresses a practical and sensible I-9 compliance approach, and attached to this presentation are certain Exhibits, including a proposed an internal I-9 audit checklist and a sample immigration compliance policy.

I. BACKGROUND - ICE AND SANCTIONS INVOLVING IMPROPER EMPLOYMENT RECORDS FOR ILLEGAL WORKERS

The Immigration Reform and Control Act of 1986 ("IRCA") requires employers to verify the identity and employment eligibility of their employees and creates criminal and civil sanctions for employment related violations. The most significant portion of the Act[31], requires employers to verify the identity and employment eligibility of all individuals hired in the United States after November 6, 1986.

[30] Briles et al. v. Cargill Meat Solutions Corp., 4:10-cv-00163-JAJ-RAW (S.D. Iowa, 2011).
[31] Section 274A(b), codified at 8 U.S.C. § 1324a (b).

The implementing federal regulations[32] designate the Employment Eligibility Verification Form I-9 (Form I-9) as the means of documenting this verification. Very specific recordkeeping practices must be followed with respect to the I-9 forms for current and former employees.[33] Employers must maintain for inspection original Forms I-9 for all current employees. These include requirements that Employers retain former employees' Form I-9 for at least three years from the date of hire or for one year after the employee is no longer employed, whichever is longer.

The administrative inspection process (where ICE gets involved) is initiated by ICE serving a Notice of Inspection (NOI) upon an employer compelling the production of Forms I-9. Agency practice is to allow three business days to present the Forms I-9. Often, ICE requests that the employer provide supporting documentation, which may include a copy of the payroll, list of current employees, Articles of Incorporation, and business licenses. As a matter of good practice, it is best to keep photocopies of supporting documentation with I-9 materials, as will be further discussed below.

ICE agents/auditors conduct an inspection of I-9 Forms for compliance. When technical or procedural violations are found, the Immigration and Nationality Act ("INA")[34] permits the employer ten business days to make corrections in a "good faith compliance" provision of the statute. An employer may be issued a monetary fine for any and all substantive and uncorrected technical violations that are not corrected within the ten business days.

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[32] 8 C.F.R. § 274a.2.

[33] 8 C.F.R. §§ 274a.1-274a.14.

[34] INA § 274A(b)(6)(B) (8 U.S.C. § 1324a(b)(6)(B)). Section 1324a(b)(6) is a "good faith compliance" section. This section states: "Except as provided in subparagraphs (B) and (C), a person or entity is considered to have complied with a requirement of this subsection notwithstanding a technical or procedural failure to meet such requirement if there was a good faith attempt to comply with the requirement." The exception under Subsection (B) involves employers who have (1) been notified of a deficiency; (2) been given 10 business days to correct the deficiency; and (3) have failed to correct the deficiency. Subjection (C) deals with "pattern and practice" violators.

More severe fines (and potentially criminal prosecution) can be levied against employers determined to have either (a) knowingly hired or (b) continued to employ unauthorized workers.[35] ICE also has authority to subject employers found to have knowingly hired or continued to employ unauthorized workers to debarment, which prevents the employer from participating in federal contracts and from receiving other government benefits.

Monetary penalties for knowingly hire and continuing to employ violations range from $375 to $16,000 per violation, with repeat offenders receiving penalties, at the higher end. Penalties for substantive violations of the Act, which includes failing to produce a Form I-9, range from $110 to $1,100 per violation.[36]

In determining penalty amounts, ICE considers and attempts to apply five factors: (1) the size of the business, (2) good faith effort to comply, (3) seriousness of violation, (4) whether the violation involved unauthorized workers, and (4) history of previous violations.[37]

II. COMPLIANCE: FROM ICE PERSPECTIVE, IMAGE PROGRAM

There is no "safe harbor" or recognized methodology or approach that absolutely insulates the employer from liability. The closest recognized approach put out by the agency is the agency's Mutual Agreement between Government and Employers ("IMAGE")[38], which, in exchange for an employer's explicit commitment to certain practices and a written agreement with ICE, may serve as a mitigating factor in the event a violation of the law is found.

The Department of Homeland Security rolled out the program on July 26, 2006. In return for enrollment ICE promises to do the following for IMAGE program members: (1) waive

[35] INA § 274A(a)(1)(a), (a)(2) (codified in 8 U.S.C. § 1324a(a)(1)(a), (a)(2)).

[36] Fine schedules are appended hereto as Exhibit "A."

[37] Factors are set forth in 8 U.S.C. § 1324a(e)(5). The statute does not require the weight given to each factor, nor does it rule out consideration of additional factors. United States v. Hernandez, 8 OCAHO no. 1043, 660, 664 (2000). The weight to be given each factor in assessing a penalty depends upon the facts and circumstances of the particular case. United States v. Raygoza, 5 OCAHO no. 729, 48, 51 (1995).

[38] See details of program on ICE web site: http://www.ice.gov/image/ (last accessed October 8, 2012).

potential fines if substantive violations are discovered on fewer than 50 percent of the required Forms I-9; (2) in instances where more than 50 percent of the Forms I-9 contain substantive violations, mitigate fines or issue at the statutory minimum of $110 per violation; (3) not conduct another Form I-9 inspection of the company for a two-year period; and (4) provide information and training before, during, and after inspection.

One risk of signing up for the IMAGE program is that an employer may face a sudden disruption in its workforce if it turns out that it is unknowingly employing a large number of illegal workers who presented false documents that could not be detected during the I-9 process.

The requirements for the employer in the program are the following:

(1) Complete the IMAGE Self-Assessment Questionnaire (Application);

(2) Enroll in the E-Verify program within 60 days;

(3) Establish a written hiring and employment eligibility "verification policy" that includes an internal Form I-9 audit at least once a year;

(4) Submit to a Form I-9 Inspection; and

(5) Review and sign an official IMAGE partnership agreement with ICE.[39]

While few employers seem to have subscribed to the program, which is supposed geared at "targeted sectors," the program sets forth a series of "Best Employment Practices" that are helpful not only to the extent they track what the agency currently believes are the best practices, but also because they significantly limit the potential for violations.

The "Best Employment Practices" adopted by the program are the following:

(1) Use E-Verify, to verify the employment eligibility of all new hires;

(2) Use the Social Security Number Verification Service ("SSNVS")[40] for wage reporting purposes, and make a good faith effort to correct and verify the names and

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[39] Id.

[40] A service of the social security administration, available at http://ssa.gov/employer/ssnv.htm

Social Security numbers of the current workforce and work with employees to resolve any discrepancies;

(3) Establish a written hiring and employment eligibility verification policy;

(4) Establish an internal compliance and training program related to the hiring and employment verification process, including completion of Form I-9, how to detect fraudulent use of documents in the verification process, and how to use E-Verify and SSNVS;

(5) Require that Form I-9 and E-Verify process be conducted only by individuals who have received appropriate training, and include a secondary review as part of each employee's verification to minimize the potential for a single individual to subvert the process;

(6) Set up annual Form I-9 audits by an external auditing firm or a trained employee not otherwise involved in the Form I-9 process;

(7) Establish a procedure to report to ICE credible information of suspected criminal misconduct in the employment eligibility verification process;

(8) Ensure that contractors/subcontractors establish procedures to comply with employment eligibility verification requirements. Encourage contractors/subcontractors to incorporate IMAGE Best Practices and when practicable incorporate the use of E-Verify in subcontractor agreement;

(9) Establish a protocol for responding to letters or other information received from federal and state government agencies indicating that there is a discrepancy between the agency's information and the information provided by the employer or employee (for example, "no match" letters received from the Social Security Administration) and make a good faith effort to resolve the discrepancy when it is not due to employer error;

(10) Establish a tip line mechanism (telephone, inbox, email, etc.) for employees to report activity relating to the employment of unauthorized workers, and a protocol for responding to credible employee tips;

(11) Establish and maintain appropriate policies, practices and safeguards to ensure that authorized workers are not treated differently with respect to hiring, firing, or recruitment or referral for a fee or during the Form I-9, E-Verify or SSNVS processes because of citizenship status or national origin; and

(12) Maintain copies of any documents accepted as proof of identity and/or employment authorization for all new hires.[41]

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[41] These are from the office of Immigration and Customs Enforcement. (http://www.ice.gov/image/best-practice.htm, last accessed on October 8, 2012).

III. COMMON SENSE COMPLIANCE: LESSONS FROM THE CONTESTED DECISIONS AND SENSIBLE BEST PRACTICES

Contested cases concerning I-9 compliance efforts by ICE are heard before the Office of the Chief Administrative Hearing Officer ("OCAHO"), and it continues to demonstrate that ICE and OCAHO strongly disagree on the appropriate level of penalties for small employers committing I-9 violations. In a recent OCAHO decision, United States v. Pegasus Restaurant, 10 OCAHO No. 1143 (2012), OCAHO reduced a proposed penalty of $131,554.50 to $49,427, a reduction of about 62%.

In Pegasus, the restaurant failed to fill out any I-9s for 134 hired employees for more than three years. Of the 134 employees, four were not authorized to work in the United States. ICE sought a penalty of $981.75 per violation, which did not include any aggravation or mitigation under the five-factor formula. After some analysis, OCAHO accepted the restaurant's argument that the proposed penalties were disproportionate in light of the size and resources of the business.

Turning to the decision itself, important to note was that OCAHO considered ICE's argument that failure to fill out the I-9s was evidence of "bad faith" and warranted a higher fine. The OCAHO administrative law judge confirmed that, on the issue of good faith, the office has "generally looked to the steps an employer took prior to the inspection to ascertain what the law required and conform its conduct its conduct to it." United States v. Riverboat Delta King, Inc., 5 OCAHO no. 738, 126, 130 (1995). Hence, an employer's efforts in attempting to understand and follow the law will not only stave off ICE arguments that any violation was in "bad faith," but also furnish the basis for a reduction on the basis of "good faith effort to comply".

That said, the following practices appear to be the more moderate and traditionally recognized standard for compliance.

1. <u>Conduct regularly scheduled in-house I-9 audits.</u>
2. <u>Implement reminder system for I-9 reverification of employee's employment eligibility before it expires</u>
3. <u>Perform I-9 training for all company representatives who are part of the recruitment, orientation, and hiring process</u>
4. <u>Make photocopies of supporting documents presented as part of the I-9 process</u>
5. <u>Establish a written hiring and employment eligibility verification policy</u>
6. <u>Apply Policies Uniformly to All Employees and Do Not Discriminate</u>

F. FINAL THOUGHTS: A CAUTIONARY TALE

An example of some (but not all) of these forces coming together can be illustrated by a recent example from what we have probably all seen on the local news. This is a story that broke badly and continued to get worse.

Round 1 – Iowa Workforce Development

For at least 30 years, Hill Country Farms, Inc., d/b/a Henry's Turkey Service placed developmentally disabled men in jobs at West Liberty Foods, a West Liberty, Iowa, turkey processing plant.[42] The documents produced in an Iowa Workforce Development investigation confirmed that Henry's collected the men's wages and collected their Social Security disability payments. In return, Henry's paid the men a $65.00 monthly stipend, with nothing added for extra hours worked or overtime, for full-time work. The balance of whatever wages should have been paid were "deducted" (generally over $1,000 for each worker) for room, board and "kind care" at a bunkhouse the company rented from the city of Atalissa, Iowa. Documents submitted to the agency were fraudulent, the "care" allegedly provided was illusory, and there were no

[42] 1 See <u>In the Matter of Kenneth Henry and Jane Johnson dba Henry's Turkey Service vs. Iowa Department of Workforce Development,</u> IWD CP-003-09, (March 2011); Henry's Turkey workers abused, denied pay, new federal suit claims, The Gazette, Cedar Rapids, (April 6, 2011).

written authorizations for the deductions, many of which charged workers for benefits that were already paid from the men's pools of Social Security benefits.

The Director of Workforce Development found that the company had violated Iowa Code Chapter 91A and 91D for failure to pay minimum wage, illegal deductions for room and board, illegal deductions for kind care, and failure to provide pay stubs – four violations for each worker that, after extrapolated for each pay period, which resulted in 11,644 wage violations and approved a penalty of $1,164,400, or the statutory maximum of $100 per violation.

Round II – United States Department of Labor

In July 2011, the U.S. Department of Labor sought and was awarded from U.S. District Judge Harold Vietor another $1.7 million award for FLSA violations — half in unpaid wages, half in penalties.[43] A DoL inspector general found that Henry's was deducting a total of $67,200 per year from the men's pay for housing, though the company was paying only $7,200 per year to rent the bunkhouse from the city of Atalissa. Henry's also had deducted from the men's pay $100,000 that was spent constructing a Texas retirement home for the company's owner.

Round III - EEOC

Later, the EEOC filed suit against Henry's Turkey Service, alleging violations of the Americans with Disabilities Act (ADA) by paying 32 workers with intellectual disabilities severely substandard wages. On September 18, 2012, [44] a federal judge ruled that Henry's had

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[43] See "Henry's Turkey workers abused," Id.; see also Gannett News Service, "Turkey Plant Workers Awarded $1.7M in Wage Case," The Quad-City Times (July 20, 2011), available at http://qctimes.com/news/local (last accessed October 18, 2012).

[44] See EEOC News Release September 19, 2012, available at http://www.eeoc.gov/eeoc/newsroom/release/9-19-12a.cfm (reference to the Court's docket confirms that Partial Summary Judgment was granted in favor of the EEOC on September 18, 2012, by U.S. District Judge Charles R. Wolle) (last accessed October 22, 2012). Further, the EEOC's complaint not only alleged violations of the Americans with Disabilities Act, but also set forth claims including hostile work environment, harassment, verbal and physical abuse, and the imposition of other adverse terms and conditions of employment because of the employees' disabilities. The issues of liability, damages, and

violated the ADA by its wage discrimination. Damages ordered included over $1.3 million for work they performed under contract at a turkey processing plant in West Liberty, Iowa between February 2007 and February 2009.

<u>The Future</u>

Henry's future is bleak. The business closed down even before Iowa Workforce Development was finished with its investigation. As the ongoing news demonstrates, though, the journey is not yet over for the Turkey Service. Employers must be diligent and proactive and step up their efforts because the state and federal enforcement agencies have certainly stepped up their own.

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injunctive relief for claims not otherwise ruled upon in the Motion for Summary Judgment are reserved for jury trial to take place March 25, 2013.