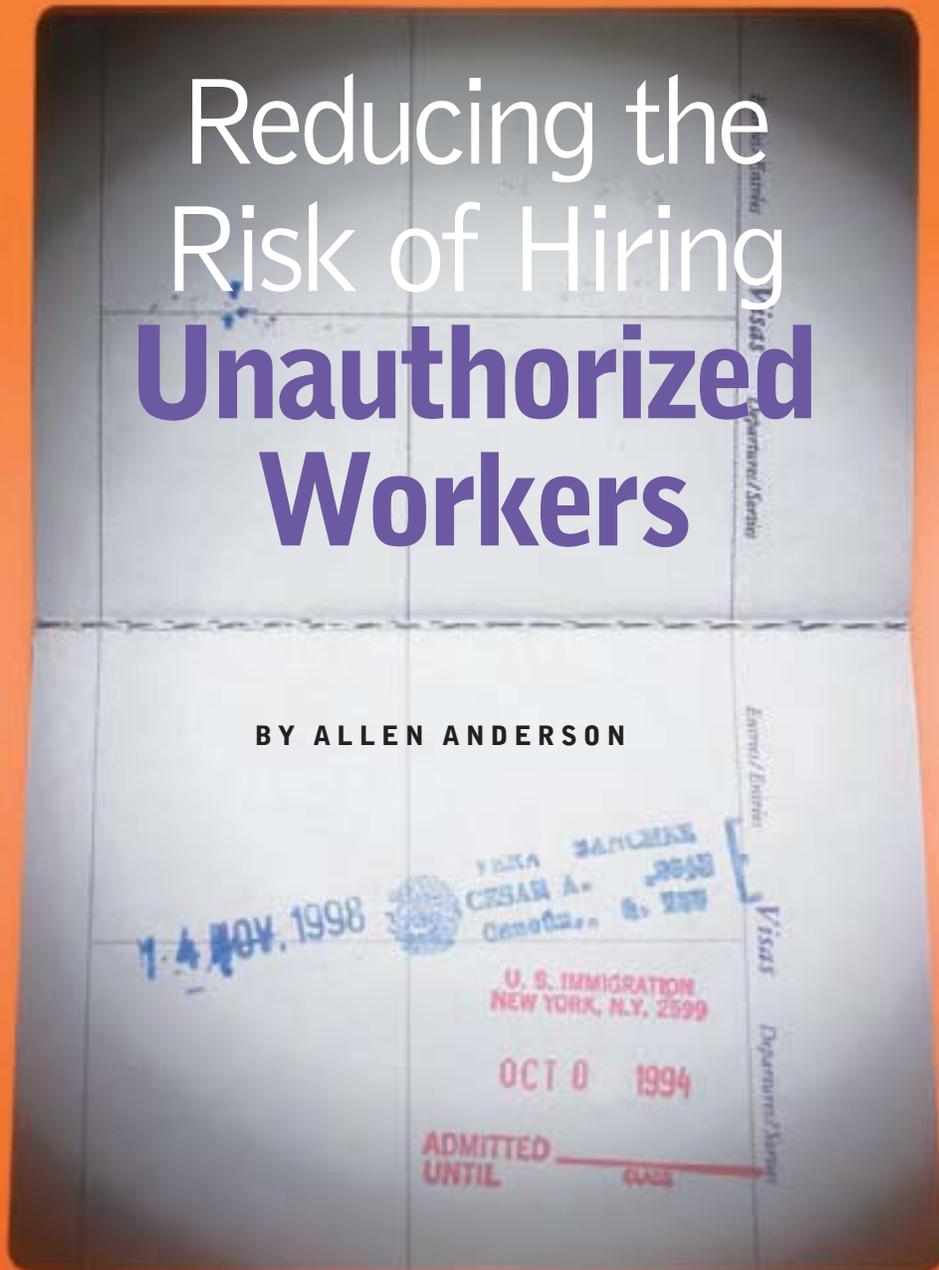


# Reducing the Risk of Hiring Unauthorized Workers

BY ALLEN ANDERSON



Construction industry executives expect to battle any number of problems that threaten the financial bottom line, including inclement weather, natural disasters and material or labor shortages. Today, the issue of illegal immigration threatens the bottom line to much the same degree.

Many attribute the availability of jobs and the hiring of illegal immigrants by domestic employers as the primary reason for the rise in the number of illegal immigrants in the United States. While numbers vary, the Pew Hispanic Center estimates as many as 7 million undocumented immigrants were employed domestically in 2004, representing as much as 5 percent of the U.S. workforce. According to the U.S. Government Accountability Office, many of those are working, or are thought to be

working, within labor-intensive industries such as construction.

Politicians and special interest groups are now reacting on local, state and federal levels with increased efforts to combat illegal immigration and prevent employment of illegal immigrants. In many instances, the result is newly proposed legislation or increased legal and financial responsibilities placed on employers in the construction industry.

#### **THE EXISTING LANDSCAPE**

The Immigration Reform and Control Act of 1986 (IRCA) mandates that employers, regardless of size, hire and maintain employment of only U.S. citizens, or non-citizens holding U.S. Citizenship and Immigration Services employment authorizations. IRCA regulations require employers to complete Form I-9 for every new employee hired to verify employment eligibility. IRCA penalties for knowingly hiring and continuing to employ illegal immigrants not authorized to work range from hundreds of dollars for paperwork violations to \$10,000 and six months in prison for employers engaging in a pattern or practice of hiring unauthorized workers.

Historically, employers feared little in the way of serious worksite enforcement under IRCA. For example, between fiscal years 1999 and 2004, the number of notices of intent to fine issued to employers for improper completion of Form I-9 or hiring of unauthorized workers declined from 417 to three. Similarly, the number of worksite arrests for IRCA violations declined from 2,849 in 1999 to 445 in 2003. Immigration and Customs Enforcement (ICE), the primary investigative arm of the U.S. Department of Homeland Security (DHS), attributes the minimal worksite enforcement to various factors, including lack of allocated resources.

Yet, political winds of change are blowing. President Bush has repeatedly outlined his demand for immigration reform, including a comprehensive reform bill that would hold employers more accountable. During the last Congress, various immigration bills with increased employer requirements of employment verification and severe penalties for hiring illegal immigrants—such as \$50,000 for each unauthorized employee and imprisonment for up to three years—were passed without reconciliation by the U.S. House

of Representatives and Senate. Similar provisions are back on the table in the current Congress.

While Congress debates, state and local governments also are acting, introducing and passing legislation that, in some instances, attempts to place liability on employers even when the violation is unknowing. Although the constitutionality of any number of these local and state laws remains in doubt, the proposals and passage of the legislation nonetheless present a growing concern among employers fearful of increased civil and criminal penalties. For contractors, debarment from public work for infractions is contained in several state laws.

Meanwhile, ICE says it is now targeting businesses built on hiring illegal workers and focusing on particular industries, including construction. Undeniably, ICE has stepped up its enforcement in the workplace, bringing 445 criminal charges against employers in the first 10 months of fiscal year 2006, compared to only 25 in fiscal year 2002.

How might a construction industry employer respond? A change in “image” may be one answer.

**IMAGE: A PROACTIVE RESPONSE**

On July 26, 2006, DHS launched a new initiative called ICE Mutual Agreement between Government and Employers (IMAGE). DHS designed IMAGE to promote a partnership between the government and employers to strengthen hiring practices, reduce unlawful employment of illegal aliens and facilitate greater industry compliance and corporate due diligence through enhanced training and education of employers. DHS claims that IMAGE resulted from employer requests for information on how to avoid hiring illegal aliens in the face of increasing criminal prosecutions.

IMAGE consists of three main components:

1. participation in the DHS Basic Pilot Employment Verification Program (Basic Pilot Program), as administered by the U.S. Citizenship and Immigration Services' Systematic Alien Verification for Entitlements (SAVE) Program in connection with the Social Security Administration (SSA);
2. government-sponsored employer training; and
3. adoption and implementation of an all-

encompassing series of best practices.

Employers that enroll in IMAGE, and complete the outlined requirements, will be classified "IMAGE-Certified," a distinction DHS and ICE believe will become industry standard. However, these employers will not be exempt from investigations or other waivers.

The Basic Pilot Program is a voluntary program to streamline an employer's ability to verify an employee's eligibility to work. The Internet-based system provides a direct link to the SSA database and DHS immigration records, allowing employers to compare documentation provided by job applicants with government records. The Basic Pilot Program—which has been available on a limited basis since 1997 and available to all employers since 2004—is said to immediately detect illegal job applicants, enabling employers to refuse ineligible applicants.

However, testimony by researchers and employer groups before Congress has challenged this claim of reliability. Notably, immigration measures being considered by Congress would, if enacted, require employers to use the Basic Pilot Program.

Under the second component of

IMAGE, ICE offers employers direct training and education in the following areas: hiring procedures, fraudulent documentation detection, use of the Basic Pilot Program and anti-discrimination procedures. ICE training in connection with IMAGE offers possible advantages to employers, including affordable training by the government agency directly responsible for enforcing the nation's immigration laws.

Finally, under IMAGE, DHS requires adherence to a series of best practices that require, among other things, compliance with the following:

1. agreement to submit to an I-9 audit;
2. use of the Basic Pilot Program for hiring;
3. establishment of an internal training program, with annual updates, on how to complete the Form I-9, how to detect fraudulent use of documents in the I-9 process, and how to use the Basic Pilot Program;
4. permitting the I-9 and Employment Verification Program process to be conducted only by individuals who have received IMAGE training, and inclusion of a secondary review as part of each employee's verification to minimize the potential for a single individual to subvert the process;
5. establishment of annual I-9 audits by an external auditing firm or a trained employee not otherwise involved in the I-9 or electronic verification process;
6. establishment of a self-reporting procedure to ICE regarding any violations or discovered deficiencies;
7. establishment of a protocol for responding to no-match letters received from the SSA;
8. establishment of a tip line for employees to report activity relating to the employment of unauthorized aliens and a protocol for responding to tips;
9. designation of a compliance officer (for employers with more than 50 employees) to ensure that employment practices are in accordance with IMAGE guidelines;
10. establishment and maintenance of safeguards to protect against use of the verification process for unlawful discrimination;
11. establishment of a protocol for assessing adherence to the best practices guidelines by contractors/subcontractors; and

12. submission of an annual report to ICE to track results and assess the effect of participation in the IMAGE program.

**CAUTION: AN IMAGE MAKEOVER IS NOT WITHOUT RISK**

Enrollment in IMAGE provides employers with easier entrance into the Basic Pilot Program, which may become law under the current competing congressional bills or a combination of those bills. However, according to the SSA, approximately 10 percent of the 240 million wage reports it receives annually from the Internal Revenue Service differ from SSA records. In such instances, a cautious employer might be compelled to refuse to hire or otherwise discharge some applicants or employees as a practical matter. Yet, the majority of these discrepancies involve mere typographical errors or name changes, rather than ineligibility for employment.

By terminating or refusing to hire such applicants or employees, an employer may run the risk of committing unlawful discrimination under various federal and state equal employment opportunity laws. Accordingly, although the Basic Pilot Program offers nearly instant access to government records, its benefits might be outweighed by an increase in discrimination claims from legal workers whose documentation fails to match government records.

Similarly, IMAGE's best practices would undoubtedly improve an employer's ability to detect and prevent the hiring of illegal workers. However, these practices—including the requirement to submit to an I-9 audit—place a heavy burden on the employer. Under IRCA, penalties may be imposed on employers who either knowingly hire illegal aliens or fail to properly comply with documentation requirements. Despite an employer's best efforts, a violation may occur.

Presumably, the greatest benefit of IMAGE would be the opportunity for employers to confirm compliance with the government. However, it is unclear how ICE will deal with violations discovered

through the program. No assurances have been made to participants as to protection from civil or criminal penalties.

Other apparent drawbacks with IMAGE are the cumbersome administrative and financial burdens. Among other things, IMAGE requires an I-9 audit from both the government and an external source, self-reporting procedures and protocols, a tip line, a compliance officer and an annual report.

IMAGE, if properly implemented, can achieve its intended goal. However, an employer must determine whether

the benefits of education and good citizenship outweigh the costs of volunteering for a program that could bring civil or criminal liability and potentially burdensome administrative and financial requirements. Knowing these facts, employers must decide whether they can achieve compliance independent of programs like IMAGE.

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**Resource**

The U.S. Citizenship and Immigration Service's required Form I-9, more details on the Basic Pilot Program and IMAGE enrollment, and information on state immigration laws affecting contractors can be found at [www.abc.org/immigration](http://www.abc.org/immigration).