

Informational Abundance and Scarcity in Immigration Worksite Enforcement

by Angelo A. Paparelli and Ted J. Chiappari*

A recent article published by the Nieman Journalism Lab (a group at Harvard billing itself as “an attempt to help journalism figure out its future in an Internet age”) bemoaned today’s challenge of “informational abundance.”¹ To employers and attorneys who try mightily to understand and comply with rapidly evolving state and federal immigration-compliance obligations, the proliferation of immigration data is likewise an all too familiar problem.

The writer of the Nieman piece, Maria Popova, maintains that the solution lies in content “curation,” a buzzword borrowed from the art world, that she considers a new form of authorship. “Curation,” she suggests, is the best “semantic placeholder” to describe the social media application, Twitter, and its *raison d’être*. What Twitter and other forms of social media accomplish, Ms. Popova asserts, is to serve as a “conduit of discovery and direction for what is meaningful, interesting and relevant in the world.” Content curation, then, is an attempt to filter and make sense of the digital world—an even more daunting challenge than trying to sip water from a gushing fireplug.

Unfazed by the plethora of immigration news, this column’s authors will attempt to “curate” a few of the most important developments in immigration-related worksite enforcement recently spewing forth as unfiltered “content” from smartphones, tablets, desktops and other mobile and stationary media. Be forewarned, however, that snippets of significance may exceed 140 characters. Yet rest assured that no anatomical parts will be exposed or salacious text offered.

Supreme Court

The U.S. Supreme Court opened the immigration hydrant with its recent decision in *Chamber of Commerce of the United States v. Whiting*, 563 U.S.— (May 26, 2011), giving the states freedom to piggyback federal immigration laws by catching a ride on E-Verify, the online employment-eligibility screening tool maintained by the Department of Homeland Security (DHS). A five-justice majority in *Whiting* declaimed (over heated dissents) that the exemption from federal sovereignty in the 1986 Immigration Reform and Control Act (IRCA) for “licensing and similar laws” allowed enactment of a 2007 state immigration law, the Legal Arizona Workers Act (LAWA).² That legislation required employers to use E-Verify in Arizona or suffer the suspension or loss of a business license to operate there. A number of states have passed LAWA copycats, most recently, Georgia and Alabama, all of which face court challenges by business groups and civil rights organizations.³

¹ Maria Popova, “In a New World of Informational Abundance, Content Curation Is a New Kind of Authorship,” June 10, 2011, accessible [here](#) (all hyperlinks last accessed on June 12, 2011).

² For actions employers may wish to consider in light of *Whiting*, see, Seyfarth Shaw LLP, “Strategy & Insights—How Will the Supreme Court’s Approval of Arizona’s E-Verify Law Affect Your Organization?—7 Action Items to Consider,” June 1, 2011, accessible [here](#). For a forecast by one of the authors concerning the likely aftermath of the Supreme Court’s *Whiting* decision, see, Angelo A. Paparelli, “10 Immigration Predictions: The Foreseeable Consequences of the Supreme Court’s Arizona E-Verify Decision,” NationOfImmigrants.com, accessible [here](#).

³ The Court also remanded a Hazelton, Pa., ordinance for reconsideration in light of *Whiting*. The city ordinance, inter alia, would suspend the property rental license of landlords found to be engaged in the “harboring” of an “illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law.”

Still uncertain, however, is the fate of SB1070, a more controversial Arizona immigration statute en route for inevitable Supreme Court review. Although SB1070 has been temporarily enjoined, the law as written would (a) allow police officers with reasonable suspicion of criminal conduct to stop and ask suspects about their immigration status, and (b) introduce state immigration scrutiny into worksites such as hospitals and schools. Critics charge that the Arizona legislation will invade the exclusively federal law-enforcement domain of immigration and lead to racial and ethnic profiling.⁴

Enforcement

Before and after the high Court's ruling, however, the nation's employers have continued to face unprecedented enforcement scrutiny by the Obama administration, as previously reported in this column.⁵ Recent high-profile actions have been targeted against Abercrombie & Fitch (settlement of civil violations concerning the digital storage of Forms I-9), American Apparel (a civil order to terminate several unauthorized workers), two restaurant chains, Chipotle and Chuy's Mesquite Broiler (separate actions involving allegations that the employer knew employees lacked work permission), an electronic I-9 software vendor, Lookout Services (an FTC enforcement action for alleged data breaches), and a multinational IT consulting firm, Infosys Technologies (claims that business visas were misused to gain entry and work in the United States). For publicly traded companies, these types of actions can create securities law risks and potential litigation exposure.⁶ For privately held firms, the risks may include extinction of the entity and incarceration of the principals.

Also likely to stir the immigration enforcement pot, the Social Security Administration recently announced that it would resume its practice of sending employers "no-match" letters reporting discrepancies between SSA records and employer-reported payroll data on individual workers or groups of employees.⁷ These notices report discrepancies in three data fields, viz., a worker's SSN and first and last name, but do not necessarily involve immigration violations, e.g., they may be data-entry errors or legitimate name changes.

Nonetheless, as DHS asserted in its since-withdrawn federal rule creating a safe harbor for no-match checks, an employer must investigate whether the worker is indeed lawfully authorized for employment. Failure to investigate can lead to a finding based on all relevant circumstances that the employer had constructive knowledge that one or more subject workers had no right to work in the United States. Ironically, employers that proactively verify SSNs for payroll-auditing purposes through the Social Security Number Verification Service (SSNVS), an online tool, end up checking additional data fields (gender and date of birth), thereby heightening the prospect that discrepancies will trigger a duty to investigate potential immigration worksite violations.⁸

DHS and SSA initiatives have also created tension between employers, labor unions and unionized workers. In particular, the Service Employees International Union (SEIU) has been perhaps the most outspoken and vigilant against employer compliance initiatives and federal and state worksite incursions under the immigration laws.⁹

As employers have proactively conducted internal immigration compliance audits, or responded to Social Security

⁴ Other states have taken different tacks. Illinois, Massachusetts and New York, with California perhaps not far behind, have announced their withdrawal from the federal Secure Communities program because "S-Comm" has not lived up to its promise to deport dangerous foreign felons, but instead has mostly removed nonviolent immigration law violators who have entered the United States without proper papers or overstayed their visas. Another state, Utah, has adopted its own guest worker program which, to be effective, would require a federal waiver.

⁵ See, Angelo A. Paparelli and Ted J. Chiappari, "*Goldilocks' Lessons for Dealing With Bearish Immigration Police*," New York Law Journal, Feb. 23, 2011.

⁶ See webinar, "*I-9 Compliance, Corporate Disclosure, and Shareholder Lawsuits: What's Next?*" Rock Center for Corporate Governance, Stanford University, accessible [here](#), June 1, 2011 (no charge, but registration required).

⁷ See, "RM 01105.027 Handling Inquiries Relating to SSA Letters on No-Match Names and Social Security Numbers (SSNs)," April 11, 2011, accessible [here](#); see also, Ted J. Chiappari and Angelo A. Paparelli, "*Social Security Is Again Sending No-Match Letters to Employers*," New York Law Journal, April 26, 2011.

⁸ See SSNVS's online Handbook chapter "SSNVS Results," accessible [here](#).

⁹ For the SEIU's statements on immigration policy, see the union's "Immigration" tab on its website, [here](#).

Administration no-match notices or I-9 inspection notices issued by U.S. Customs & Immigration Enforcement (ICE)—the immigration enforcement agency within DHS—the SEIU and other unions have resisted what they see as employers’ overzealous demands to unionized workers for acceptable documentary proof of identity and lawful immigration status.

Interestingly, many collective bargaining agreements (CBAs) drafted during the first heyday of immigration enforcement (from 1986 to 2000) prescribe explicit procedures and timelines for immigration compliance and the verification of employment eligibility. Pre-dating the growth of E-Verify and the Obama administration’s resumption of enforcement after a lull during the George W. Bush presidency, these CBAs have often led to the filing by unions of grievances under the National Labor Relations Act and the submission of disputes to arbitration. Labor arbitrators have thus become de facto interpreters of the immigration laws, issuing hotly contested rulings that may at times deviate from DHS regulations.¹⁰

Yet another federal subdivision, the U.S. Department of Justice, has issued two significant rulings that shed light on immigration worksite enforcement.

The first, by the Office of Special Counsel for Immigration-related Unfair Employment Practices (OSC), clarified that an employer, without risking a charge of citizenship status or national origin discrimination, may pose questions about the need for work-related immigration sponsorship to nonimmigrant applicants for employment. The advisory opinion issued by the OSC¹¹ reached this result by reasoning that nonimmigrants are not members of the protected class under IRCA, which only covers these forms of discrimination against U.S. citizens, green card holders, asylees, refugees and temporary residents under IRCA’s (now expired) legalization program. As a result of the OSC’s guidance, employers may either avoid or knowingly accept the cost of sponsorship for immigration benefits before the candidate is hired.

The second Justice Department action arose as a decision from the Office of the Chief Administrative Hearing Officer in *United States v. Snack Attack Deli Inc., D/B/A Subway Restaurant #3718*, (OCAHO Case No. 09A00025, Dec. 22, 2010).¹² In *Snack Attack*, ICE charged a franchisee of a national restaurant chain with 108 separate paperwork violations for failing to maintain Forms I-9 on the franchisee’s employees. The Administrative Law Judge sustained the charge, but the parties differed over the amount of fines to be imposed under the relevant statutory factors. IRCA, at 8 U.S.C. §1324a(e)(5), requires consideration of the following factors: 1) the size of the employer’s business, 2) the good faith of the employer, 3) the seriousness of the violation(s), 4) whether or not the individuals involved were unauthorized aliens, and 5) any history of previous violations of the employer.

The ALJ rejected ICE’s proposed fines of \$111,078, and instead imposed fines totaling \$27,150. Although the court found that the employer had made virtually no effort to comply with the I-9 obligation, the workers in question were not unauthorized, ICE failed to establish that the franchisee was other than a small business, and the fines that ICE would have proposed far exceeded the ability of the employer to pay. *Snack Attack* thus offers a road map on how an employer may negotiate a reduction of ICE-proposed fines or seek fine mitigation before an Administrative Law Judge.

Proposal Expected

Not to be outrun in the zealous-immigration-enforcement sweepstakes, a GOP proposal soon to be introduced by Representative Lamar Smith will make E-Verify mandatory, increase employer compliance burdens and enhance penalties for

¹⁰ See, e.g., *Service Performance Corporation (Employer) and Service Employees International Union, Local 1877 (Union)*, McKay Case No. 04-292, Jan. 12, 2005 (union prevailed on claim that employer that assumed prior employer’s workers did not newly hire the workers; hence, a new Form I-9 (Employment Eligibility Verification) compliance process was unwarranted). Cf., *Wheatland Tube Company (Employer) and Sheet Metal Workers’ Local 37 (Union)*, Nov. 12, 2009 (employer acted properly in terminating workers who did not resolve SSN discrepancy over a two-year period). (Copies of both arbitration decisions on file with the authors.)

¹¹ The OSC’s opinion letter is an embedded link within a blog post by Angelo A. Paparelli, “The Right Immigration Question is at Last Approved by the OSC,” *NationOfImmigrants.com*, July 9, 2010, accessible [here](#).

¹² The case can be accessed [here](#).

immigration law violations.¹³ As described in a blog post by one of the authors,¹⁴ a June 8 “Discussion Draft” of the bill (titled the Lawful Workers Act, or LWA), if enacted, would dramatically alter the immigration landscape:

- **Mandatory Use Phased in.** Employers would be required to enroll and use E-Verify by a set deadline based on the number of current workers. From the date LWA is enacted (if ever), E-Verify would be required within: 30 days for covered federal contractors; six months (for employers of 10,000 or more personnel); 12 months (for firms with 500 to 9,999 employees); 18 months (20 to 499 workers); two years (one to 19 workers); and three years (for employers of farm workers).
- **E-Verify Use Only for New Hires.** Except for federal vendors who must verify current employees assigned to a covered federal contract, the LWA will only apply to new hires. Also, it will not apply to farm workers returning to a former employer.
- **No Preemption of Arizona-Style E-Verify Laws.** LWA would permit the proliferation of state laws and local rules mandating E-Verify use as recently blessed by the Supreme Court in *U.S. Chamber of Commerce v. Whiting*: “A State, locality, municipality, or political subdivision may exercise its authority over business licensing and similar laws as a penalty for failure to use the verification system.”
- **Weakened Good Faith Compliance Defense.** The LWA enfeebles the Sonny Bono amendment, enacted in 1996, which gives employers 10 days to correct technical or procedural Form I-9 compliance failures after ICE points them out. Although the Smith proposal would extend the curative period to 30 days, it would apply the defense only to compliance errors that are “de minimis.” Good faith compliance would be available, however, for E-Verify queries that failed because the online system was unavailable at the time.
- **Criminal Penalties for False I-9 Attestations and Improper Use of E-Verify.** Individuals would face more serious criminal penalties, heftier fines and sentences of up to two years with sentences to run consecutively, unless the court exercises discretion to allow concurrent sentences for knowingly furnishing a Social Security number or DHS-approved ID or authorization number that does not belong to the person or submitting such a number in an E-Verify screening. Helpfully, however, the LWA waives a good faith first violation of the unlawful hiring rules.
- **Change in Retention Period.** Employers would now be required to hold on to electronic or paper verification records for the later of five years from date of hire (currently it’s three years) or one year from date of termination.

Not surprisingly, however, Mr. Smith’s proposal says nothing about how Congress would fund mandatory E-Verify nationwide, the expensive prisons needed to house immigration violators convicted under his bill, and the Federal Tort Claims Act discrimination suits the bill would authorize. Perhaps this would become the subject of another Republican proposal, introduced by Senators John Cornyn and Jon Kyl, which would require an analysis of national security risks arising from increased deficits and federal debts.¹⁵

Conclusion

So there we have it. An attempt at content curation with focus on immigration worksite enforcement, preserved and displayed for employers and their lawyers to inspect and consider. Does it meet author Popova’s prescript as a social media “conduit of discovery and direction for what is meaningful, interesting and relevant in the [immigration] world?” The ending of her article provides a possible answer:

13 The bill is available [here](#).

14 See Angelo A. Paparelli, “Immigration Voyeurism: An Early Peek at Rep. Lamar Smith’s Mandatory E-Verify Bill,” *NationOfImmigrants.com*, June 11, 2011, accessible [here](#).

15 See June 12, 2011, Tweet on Twitter from “@JohnCornyn”: “*Cornyn, Kyl bill requiring assessment of national security risk of mounting.*”

Ultimately, I see Twitter [and presumably other Web 2.0 innovations] neither as a medium of broadcast, the way text is, nor as one of conversation, the way speech is, but rather as a medium of conversational direction and a discovery platform for the text and conversations that matter. Until we find new ways to classify, codify, and talk about this medium—new language, new laws, new normative models—our understanding and use of it will remain a museum of empty frames. (Emphasis in original.)

“A museum of empty frames,” indeed. Without “new language, new laws [and] new normative models,” emptiness and scarcity—quite regrettably—also describe the state of immigration-related worksite enforcement in America today.

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