IMMIGRATION REFORM: WHAT EMPLOYERS NEED TO KNOW
—SELECTED EXCERPTS FROM THE GRINGO’S GUIDE TO
IMMIGRATION REFORM FOR EMPLOYERS

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I. INTRODUCTION

Immigration reform is coming. Forewarning and forearming you, *The Gringo’s Guide to Immigration Reform for Employers*\(^1\) was written to do just that: Prepare employers for new requirements in compliance, documentation and employer-employee relations. The guide is designed to help you, the employer, counteract undue union pressure and manage healthcare benefits under ObamaCare. This guide will also equip Gringo\(^2\) readers with essential information that they can share with “friends” that are seeking help, hope, and ways to make their dreams a reality.

II. *La Neta (The Truth): Knowledge is Power for You and Your Employees*

Employers need to be acutely aware about the developing details of immigration reform. Employers must be diligent about staying informed because employees will likely go to their employers for answers to their questions. Your information or lack thereof, is pivotal in nurturing a stable workforce.

Keep in mind that Hispanic\(^3\) workers often identify emotionally with the company they work for and look to company leaders for trusted information on a range of issues.


Hispanic immigrants often come from countries where the identity of a company’s founder is celebrated and cherished in the workplace. They tend to value knowing who the

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\(^1\) JACOB M. MONTY & SARAH D. MONTY, *THE GRINGO’S GUIDE TO IMMIGRATION REFORM FOR EMPLOYERS* (Emporion Press 2013).

\(^2\) In this article, we use the term “Gringo” to mean all non-immigrant U.S. citizens. Gringos are not just “Anglos,” but non-immigrant U.S. citizens of all races and ethnicities.

\(^3\) “Hispanic” and “Latino” will be used interchangeably throughout this article.
founder and key managers are so they can identify personally with them and talk about their accomplishments with family and friends. After all, Mexican and Central American cultures tend to place a great deal of importance on hierarchy and class.4

Similarly, your employees often look to you for solid information on immigration issues.

_A. Immigration reform presents a huge opportunity for employers_

By keeping abreast of immigration developments, you demonstrate to your Hispanic workforce that you are concerned with matters affecting them. You will also find that a common factor such as immigration reform that links company well-being to worker well-being, compels a diverse workforce to work together for the collective benefit of the company. When an employer establishes that it has its employees’ best interests in mind, the employer creates a more loyal and unified work environment and builds respect for the organization.

Conversely, an employer’s failure to stay informed and communicate with its workforce provides an opening for unions and others to influence employees—to the detriment of the employer. Although it may take a great deal of effort to sift through the political rhetoric to determine what’s really going on in immigration reform, your efforts will be well worth it in the long run.

The major news outlets report daily on various debates, proposals, and progress of immigration reform. While some reports seem slanted to support particular positions, if

you collect your information from a variety of sources, you will acquire a good understanding of the central issues. How to even begin educating yourself about immigration reform may be difficult. A simple Internet search on immigration reform produces hundreds of informative articles, some with up-to-the minute coverage. In our offices, we have a Google Alert set for certain immigration reform topics. The alert notifies us of updates via an email with links to news articles and blog commentary on each topic of which we wish to keep abreast. We also advise you to add the Department of Homeland Security (“DHS”) website (www.dhs.gov) and the U.S. Citizenship & Immigration Services (“USCIS”) website (www.uscis.gov) to your favorites and to peruse them frequently, especially the news and updates pages. If you are not already familiar with these websites, it is crucial that you take time to familiarize yourself with them right now.

Between now and the day when immigration extra space reform becomes law and meaningful implementation occurs, there are a myriad of issues impacting employees and employers and their relationship with each other—for better or worse. Your employees will seek answers, and you cannot afford to be in the dark. You must be informed.

**B. Lifting the shadow of deportation from young, hardworking people**

In 2001, Senators Dick Durbin and Orrin Hatch proposed legislation centered around the argument that it makes no sense to remove hardworking young people who were brought to this country through no fault of their own and who have grown up in the United States, often with no memory of the countries they came from. The “DREAM

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Act” (Development, Relief, and Education for Alien Minors) would qualify undocumented youth to be eligible for a 6-year long conditional path to citizenship and require the completion of a college degree or two years of military service. The legislation never became law.

In June 2012, however, DHS and President Obama, under pressure from Hispanic voters and others who said the President hadn’t fulfilled a 2008 campaign promise to overhaul the tangled U.S. immigration laws, announced a new executive “exercise in discretion” to allow certain young people who were brought to the U.S. as young children to obtain deferment from deportation (for two years) and receive temporary work-authorization. The hurdles for obtaining this deferment for deportation are high, and only those who meet several key criteria are eligible to apply. This exercise of discretion did not create a formal law, but is called a “Deferred Action for Childhood Arrivals,” known by the acronym DACA. DACA is a good preview of how comprehensive immigration reform will change lives on a larger scale.

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C. DACA Essentials

USCIS formally launched DACA on August 15, 2012.\textsuperscript{10} DACA is neither a path to citizenship nor a permanent fix to immigration issues, as only Congress can provide a permanent fix through comprehensive immigration reform.\textsuperscript{11} And, while we know immigration reform will be passed eventually, we do not know when it will be passed, and it may be months or even years before practical implementation can be felt and impact on employers realized. The immediate importance of DACA cannot be underestimated, and employers must be familiar with its provisions.

DACA provides that individuals under the age of 31 as of June 15, 2012, may be eligible for relief from deportation and may be granted temporary work authorization if they meet the following criteria:

(1) The individual must have arrived in the United States before reaching their 16th birthday.
(2) The individual must prove continuous residency in the United States from June 15, 2007, to the present time.
(3) The individual must have been physically present in the United States on June 15, 2012, and at the time of making the request for a deferred action.
(4) The individual must prove that they entered without inspection before June 15, 2012, or that their lawful immigration status expired before June 15, 2012.
(5) The individual must be enrolled in school (primary, secondary, college, or trade school) or have a diploma from a high school or college or a Certificate of Completion from high school such as a General Education Development (GED) Certificate. Alternately, proof that they are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States is accepted.
(6) DACA applicants must not have a felony, a significant misdemeanor, or three or more other misdemeanors.

\textsuperscript{10} Id.
\textsuperscript{11} U.S. CONST. art. I, § 8, cl. 4.
(7) The individual must pass through a database inspection and be proven to not otherwise “pose[s] a threat to national security or public safety.” (See also Chapter 9.)  

If the DHS exercises its discretion and grants deferred action to an individual, the individual is then eligible to obtain a work permit and, under limited circumstances, may also obtain permission to travel in and out of the U.S.  

D. What DACA means to employers  

DHS spokespersons have assured the public that the agency is not interested in investigating DACA applications for the purpose of prosecuting employers unless there appears to be a “widespread pattern and practice of unlawful hiring” by a particular employer.  

Be advised that this statement is not necessarily bulletproof. In fact, business owners and CEOs have been quoted in the press, including The New York Times, as saying that these government statements do not reassure them. 

As an employer, you may have your share of younger workers, and if so, it is especially important that you pay attention to DACA and are well versed in its provisions. Within a young workforce, the likelihood of one successful DACA applicant turning into many successful DACA applicants is entirely possible. If this happens, there are some questions that you must be prepared to answer.

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12 Napolitano, supra note 4, at 1-2.  
E. Proving continuous residency

As noted in criteria number two above, DACA applicants must prove continuous residency in the United States. While there are several ways an individual can demonstrate continuous residency, one option is to provide a letter from their employer documenting their work dates. ¹⁶ Employers need to be acutely aware that how they respond to requests for employment documentation in any regard can cause problems—such as actual or constructive knowledge of illegal work status, if not handled correctly. ¹⁷

As there are a number of circumstances where an employee will ask for employment verification, having a neutral company policy regarding all requests for letters stating dates of employment will save you some really big headaches. DACA applicants can prove continuous residency through several types of documents. Our clients have used school records, phone bills and receipts from remittance services. Employer letters are not required but may be used. ¹⁸

III. CAUTION: THE FEDS ARE COMING TO ENFORCE WAGE LAWS

Typically, your immigrant employees come from civil law countries where the courts do not play a strong role in protecting the rights of the citizens as they do in our common law system, and class action law suits are virtually unheard of. On top of that, undocumented workers are often unaware of their rights in our judicial system or just

¹⁷ 8 U.S.C.A. § 1324a (West).
¹⁸ For a complete discussion of how and why employers should create an employee policy for employment verification letters, see Chapter 8.
plain scared to use them. Nevertheless, two of the strongest motivating factors for immigrants to leave their countries of origin are the prospects of making more money and safety.\textsuperscript{19} It would be naïve for an employer with bad pay practices to think that a newly documented workforce will not take advantage of all of the rights and protections that come with their new status.

\textit{A. Wage and hour enforcement crackdown}

Statistically, the “Department of Labor (‘DOL’) wage and hour enforcement under the Obama administration has become markedly more hostile toward employers.”\textsuperscript{20} They are conducting more unannounced investigations into businesses without any prior record of violations.\textsuperscript{21} Further, “investigators are being instructed to seek civil penalties.”\textsuperscript{22} Finally, they are “giving employers less time to respond, threatening subpoena actions in federal court against employers who fail to respond in” a timely manner.\textsuperscript{23} Do not think that you will not get caught, or that you will get a pass on your first-time offense. The odds of that these days are slim.

\begin{footnotes}
\item[22] DOL Ramps Up Wage and Hour Enforcement, supra note 20, at 1.
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B. Low hanging fruit for ICE and DHS

The Department of Homeland Security (“DHS”) and Immigration & Customs Enforcement (“ICE”) will conduct an investigation if they find cause—regardless of business size, type or location. But, if your company falls into one the traditionally “low wage industries” you are considered one of the agencies’ three top priorities.

Keep in mind that these days the DOL does not always work alone! A compliance issue that is discovered in the investigation of one agency can turn into an investigation by the other agency, as well. Recently, the DOL has a memorandum of understanding with ICE to work together, which has led to increased investigations. In addition to working with ICE, the DOL has teamed up with the IRS to audit companies that are using independent contractors. These two agencies are working together to shore up the loophole and collect otherwise lost tax-revenue for the government.

C. Wage and hour claims grow

“Plaintiffs (employees) today bring more than three and a half times as many Fair Labor Standards Act (“FLSA”) cases as they did 10 years ago, when the annual court filings for the year ending March 31, 2001, totaled only 1,961 cases.”

25 Id.
27 See id.
29 DOL Ramps Up Wage and Hour Enforcement, supra note 20, at 3.
2010 through March 31, 2011, plaintiffs filed 7,008 FLSA cases in federal courts. This represents “an increase of more than 15 percent over the prior year.”

The lawsuits filed by your employees or former employees for violating the FLSA can be far more costly than the fines imposed by the DOL. A New York court approved a settlement of $42 million against J.P. Morgan who mistakenly classified underwriters as managers, thereby failing to pay the required overtime wages. Class members in this suit may receive as much as $94,000 each. In California and Maryland, plaintiffs have filed FLSA and state-wage law violations simultaneously, thereby increasing their settlement amounts anywhere from $2.7 million to $14.1 million, such as in the case of Starbucks, who mistakenly allowed their shift supervisors to share in the tip jars.

In addition, courts are now frequently giving plaintiff lawyers extra time to find class action plaintiffs in cases where the class includes Spanish speakers and employees who may have moved to other states or countries, increasing the cost of these suits by increasing the size of the class. Unfortunately, these figures do not include the fees paid in defending these lawsuits. On top of that, judgments are printed in newspapers, both

30 Id.
31 Id.
32 See Davis v. J.P. Morgan Chase & Co., 587 F.3d 529, 537 (2d Cir. 2009).
offline and online, affecting the public opinion of the companies being sued by their employees for pay violations.\(^{36}\)

**D. Undocumented workers can file FLSA claims**

The courts have been clear that undocumented workers are “employees” under the FLSA and they can file suits receiving back wages, liquidated damages (doubling of back pay), and attorneys’ fees.\(^{37}\) Although undocumented workers currently have the right to file FLSA lawsuits, many of them are simply afraid to use the courts. However, going forward, you should expect that newly documented workers in the wake of immigration reform will likely not hesitate to exercise their rights once they have the protection of work authorization.

**E. What you need to do now**

Now more than ever, companies need to make wage and hour compliance a priority. It is imperative that you make sure that your wage and hour compliance program meets the DOL’s standards. Once you are sure that pay policies and practices comply with both federal and state law, you must train your employees, especially managers.

Ignoring these two steps, compliance audits and training, is where companies are most likely to fail in compliance programs—either the program is flawed from the beginning or they fail to communicate it to mid-level managers who supervise employees and implement the program. But companies that complete those two steps and implement a program to test their compliance periodically find that FLSA compliance is cheaper

\(^{36}\) *Davis v. J.P. Morgan: $42 Million Settlement of Unpaid Overtime Claims Approved, supra* note 33.

than the back pay and fines imposed by the government or a costly lawsuit. A program that includes training and testing shows good faith.

**F. Best Practices: Conduct a FLSA Audit**

We cannot implore employers enough regarding the importance of conducting an internal audit for FLSA compliance. Considering the risks and costs that you potentially face if you do not conduct an audit, conducting an audit should be a no-brainer. Moreover, the process is very simple.

The first step is to identify the employees in exempt positions and verify that those employees are indeed exempt from overtime. Generally, the most common are the executive exemption and the administrative exemption. We encourage you to familiarize yourself with all of the exemptions, and a good place to start is the DOL Factsheet regarding exemptions.

The second step is to identify your hourly employees who are eligible for overtime. Regarding these hourly employees, you must audit your records, policies, and practices to ensure that your hourly employees are being paid properly. Again, the DOL website is an excellent place to start looking for guidance to be compliant with the FLSA.

**Employee Records.** Every human resource professional in your organization, no matter what their role or specialty, should be familiar with the exact information that the

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39 See id.
40 See *http://www.dol.gov/whd/regs/compliance/fairpay/fs17a_overview.pdf*.
company is required to keep for every employee under the FLSA. If you haven’t audited your personnel files in the past year, it is time to do so.

**Wage and Hour Policies.** In addition to posting official wage and hour materials in your break room or near your time clock, a comprehensive wage and hour policy and a description of remedies should be included in your employee handbook.

**Policy and Training Maintenance for Managers.** In the daily grind of keeping up with the laws that apply to non-exempt employees, especially where there is high turnover, it’s often easy to overlook the needs of exempt employees. All managers—exempt employees—need to be trained on wage and hour issues. It is especially important to offer training immediately upon an employee’s promotion to manager, and also on a regular basis thereafter.

In our experience, it is not enough to hand a new manager a stack of information and expect them to fully comprehend the material, let alone have the free time to do so. In areas like FLSA, where the stakes are high, it is important to schedule a mandatory training and review session annually. Further, you might consider establishing a mentor/mentee program that pairs a senior manager or human resource professional with a new or junior manager and require a weekly or monthly meeting where they can openly discuss any questions or issues.

Managers need to be fluent in all company policies, but in particular, those that have technical requirements such as FLSA. Managers are the company representatives, interacting day-to-day with employees. They have to understand the liability created by
changing time slips, allowing employees to work “off the clock”\textsuperscript{42} for only tips, not paying overtime, not allowing employees to take protected leave, or any wage and hour issue that is unique to your industry and your newly empowered, documented workforce.

FLSA lawsuits and DOL investigations can be avoided with fair pay practices and good record keeping. A great compliance program will start with a solid policy, continue with great training, and end with periodic testing to ensure that it is working properly. Now—before immigration reform happens is the time to redouble your FLSA compliance efforts so that when reform comes you can enjoy its benefits and not face an extensive DOL audit or class action lawsuit.

\textbf{IV. Unions, Immigration Reform, and You}

Immigrants without work authorization often accept being underpaid. They are vulnerable because they fear deportation. For them, the promise of higher wages and more benefits through union membership—coupled with a sense of organizational legitimization and representation—holds incredible appeal and may be difficult to refuse. Unions are keenly aware of this appeal and work to exploit it.\textsuperscript{43}

The Service Employees International Union (“SEIU”) attracts and organizes immigrants in cities with large Hispanic workforces such as Houston and Los Angeles with promises of wage increases, paid personal days, and vacation. “About one-fourth of SEIU’s 2.1 million members are Hispanic, including many Latin American immigrants


who work as janitors, security guards, or healthcare aides”. While unions are an issue for employers now, when immigration reform passes and more immigrants hold work authorization, employers can expect that more workers—emboldened by their new legal status and secured with documentation—will soften to the calls of unions.

The upcoming changes in immigration reform are creating a confusing environment for immigrants. They are inundated with questions and are scared to ask for the answers. Employers are in a unique position to assist immigrants, and the ways in which employers inform and assist them during this time is pivotal in keeping businesses union-free and flexible in the marketplace.

A. Unions offer education

More and more, unions are offering workshops for Hispanic member prospects. These include DACA workshops offered by the SEIU Local 99, which include “a free attorney assessment and application review” for all attendees. Note that these workshops are not entirely “free,” as they require immigrant workers to present proof that they have attended a union information session in order to receive the immigration information. On the SEIU Local 99 website, they advise potential workshop attendees that “[a]nyone wishing to participate in the workshop must have attended an information session and come prepared with the necessary supporting documents.”

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46 Id.
47 Id.
Unions operate under the guise of protection for all laborers, but their real objective is increased membership. Often, employees can’t decipher unions’ objectives. Employees in need of immigration assistance may be especially blinded by their own need for the unions’ offers of immigration help. Keep in mind that an employee with enough cash on hand—perhaps thanks to a company loan—can be immune to unions’ tactic of increasing membership by providing free legal assistance in immigration matters.

In light of the unions’ interests and the resources being deployed to push immigration reform, employers have an obvious and vested interest in keeping their immigrant workforce from attending union fairs and seminars. Unions advertise complete immigration assistance for members—and do not doubt that it is a huge calling card. To counteract this tactic, we strongly recommend that employers match union offers, if possible, and help employees attain legal services through them.

CAUTION: Take special heed to note that if employees have already begun organizing into a union, employers must follow federal laws on elections.\(^{48}\) Once union organization commences, the law strictly regulates what employers can and cannot say and do.\(^ {49}\) You cannot spy, threaten, question, or promise any kind of benefit to employees for voting down the union.\(^ {50}\) If you do, you can be sanctioned with unfair labor practices.\(^ {51}\)

The acronym **TIPS** can help you to remember what you must refrain from doing: Do not **Threaten, Interrogate, Promise, or Spy.** The minute you believe that your employees

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\(^{48}\text{See 29 U.S.C.A. § 158 (West).}\)
\(^{49}\text{29 U.S.C.A. § 158 (West).}\)
\(^{50}\text{29 U.S.C.A. § 158 (West).}\)
\(^{51}\text{29 U.S.C.A. § 158 (West).}\)
are becoming softened by union tactics or are considering organization, immediately consult your attorney.

V. DON’T GET ICED: I-9 WORKPLACE INSPECTIONS ARE TARGETING EMPLOYERS

Do not let the hype of immigration reform lull you into believing that compliance should be ignored or forgotten. In fact, the immigration reform proposals currently on the table all call for more compliance and that includes the release of a new Employee Eligibility Verification Form, or the Form I-9. Further, two bills were introduced by Congress in early 2013 “to make the E-Verify Program mandatory and expand the use of E-Verify.”

Today’s Hispanic workplace and workforce face increased pressures regarding employment authorizations and verifications, calling for heightened awareness by employers and managers. It is imperative that employers continue to be diligent in complying with current employment laws. Among the more common missteps employers with large immigrant workforces make are improper preparation, verification and handling of the I-9.

Employer audits are a growing part of the Obama administration’s immigration enforcement strategy. Under George W. Bush, U.S. Immigration & Customs

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Enforcement ("ICE") employed frequent workplace raids and arrested undocumented immigrants on the job; but the Obama administration, on the other hand, believes targeting employers is a more effective and humane approach.\textsuperscript{56} Company investigations are "one of the pillars of President Obama’s immigration policy," focusing agency resources on the investigation and audit of employers suspected of cultivating illegal workplaces by hiring workers who are not authorized to work.\textsuperscript{57}

"In fiscal year 2012, ICE made 520 criminal arrests tied to worksite enforcement investigations."\textsuperscript{58} Of the individuals criminally arrested, 240 "were owners, managers, supervisors, or human resources employees."\textsuperscript{59} Charges included harboring or knowingly hiring illegal aliens.\textsuperscript{60} "The remaining workers who were criminally arrested face charges such as aggravated identity theft and Social Security fraud."\textsuperscript{61} In 2012, ICE also debarred 376 businesses and individuals for administrative and criminal violations and served a record-breaking 3,004 Notices of Inspection ("NOI") on companies.\textsuperscript{62} ICE monetary fines have grown from $1 million in 2009 to $13 million in 2012.\textsuperscript{63}

Now more than ever is the time for employers to revise their compliance procedures to include new policies concerning the proper completion, retention and


\textsuperscript{57} Valdes, \textit{supra} note 54.


\textsuperscript{59} Id.


\textsuperscript{61} Id.

\textsuperscript{62} Id.

\textsuperscript{63} Id.
auditing of I-9s. Take preventive measures now and contact a law firm that specializes in Form I-9 compliance to conduct an external audit of your business today. Your company will only have a 72-hour window to produce current and terminated employee I-9s from the time an NOI is issued.\textsuperscript{64} In the event that your company is investigated, you should immediately retain an attorney in order to mitigate civil and criminal penalties.

During an ICE investigation, investigators routinely subpoena records of all current employees, as well as any employees terminated within the last three years.\textsuperscript{65} The three-year period relates to the record-keeping requirement for former employees, which is three years from the date of hire or one year from the date of termination, whichever date is later in time. In addition, investigators will require that the employer produce a roster of and supporting documentation for all independent contractors, temporary staff from an agency and “on-call” individuals, which are then dutifully scrutinized.\textsuperscript{66}

Beyond I-9s, during an ICE investigation the employer will be required to produce payroll reports, quarterly tax statements with the IRS, state unemployment insurance tax reports, and other corporate information such as articles of incorporation, employer identification number, owner’s social security number, business license, and annual reports.\textsuperscript{67} Investigators will also consider whether the company is a current or

\textsuperscript{64} Immigration Officer’s Field Manual for Employer Sanctions § IV-B-2-d.
\textsuperscript{66} Id.
\textsuperscript{67} Id.
previous E-Verify member.\textsuperscript{68} ICE will use this information to assess the company’s compliance.\textsuperscript{69}

**I-9 NEWS**

One need only glance at the headlines to know that work-site enforcement by the federal government is increasing in the government’s stated attempt to reduce the demand for illegal employment and to protect employment opportunities for the nation’s lawful workforce. In the past year, ICE and Homeland Security Investigations (HSI) have emphasized increased utilization of all available civil and administrative tools, including Form I-9 inspections, civil fines and debarment from government contracts in efforts to strengthen the integrity of the U.S. workforce and to curtail the employment of unauthorized workers.\textsuperscript{70} No company large or small is immune.

**A. Penalties for prohibited practices**

If your business fails to properly complete, retain, and/or make available for inspection Forms I-9, your company may face monetary penalties of $110 to $1,100 per I-9 for “paper” violations.\textsuperscript{71} If you are convicted of having engaged in the practice of knowingly hiring unauthorized aliens, fines may accrue up to $3,000 per employee and/or six months imprisonment.\textsuperscript{72}


\textsuperscript{69} Id.


B. Best practices to protect your company now

Designate One Qualified Individual to Manage and keep form I-9s. No matter how large or small your management staff or how far and widespread your operations; a wise strategy is to designate one individual to handle all I-9s. You will find that this one step makes the task more manageable, helps to avoid missteps and makes furnishing records easier should the government come calling.

For example, an employee’s Form I-9 must be kept separate from their personnel files. Assigning a designated individual to handle I-9s, one who does not also handle routine employee personnel files, benefits plans or other workplace issues, will make compliance easy. Further, because the Form I-9 must be available at the workplace for inspection by authorized U.S. government officials from the DHS, Department of Labor, or Department of Justice who may drop in with only three days’ notice, the designated individual can avoid unnecessary delay in producing the documents and possibly eliminate further inspection or questioning.

A Designated I-9 Expert Ensures Compliance. As mentioned above, the fines for failing to properly complete the Form I-9 can be quite hefty. The individual designated for I-9 compliance across the enterprise will serve as the gatekeeper for form completeness and accuracy. For example, this individual will be tasked with ensuring that an “authorized individual” is signing the attestation in Section 2 to verify authenticity of

73 Immigration Officer’s Field Manual for Employer Sanctions § IV-B-2-d.
documents produced to prove work authorization. They will crosscheck documentation numbers and keep track of employee work-authorization expiration dates. They will manage record storage and be responsible for monitoring and destroying the forms of retired or terminated employees a task that can easily fall by the wayside if not charged to a specific, conscientious individual.

And finally, he or she will be charged with keeping up-to-date on United States Citizenship and Immigration Services (USCIS), DHS, Form I-9, and E-Verify changes. They will be your point guard responsible to communicate changes to hiring managers, personnel staff, and others that need to know.

Establish an Internal I-9 Training Program. As we now recognize, ICE agents scrutinize I-9s. If they notice non-compliance or a pattern of identity fraud, they will expand their search to other facilities or more frequently today, go companywide. Therefore, employers should make sure that all their human resource staff and hiring managers are very familiar with the I-9 process. At the very least the company should mandate reading and digesting the M-274 Handbook for Employers. However, reading materials are rarely enough. Employers should consider providing onsite seminars, training workshops, access to online classes, and a direct line to legal counsel who is intimately familiar with I-9 compliance and related issues and can answer any unusual questions should they arise in the course of business.

The I-9 Audit Saves Time, Money and Headaches. When it comes to I-9s, E-Verify and worksite compliance, employers need to be proactive and preemptive. Now,

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75 Available for download from www.uscis.gov.
with the new I-9 form in place, is a great time to conduct an internal I-9 audit of all employee records.

Whether you use in-house legal counsel or a knowledgeable employment or immigration law attorney to conduct the audit, a careful review of existing I-9s is going to be your best defense. An I-9 audit can help your company avoid significant fines, negative publicity, and even criminal charges. Establish a Written I-9 Compliance Policy. A clearly written in plain English compliance policy for all managers and resource personnel will not only increase quality assurance, but it is a solid preemptive risk-management strategy. As noted above in the section on ICE investigations, having a policy and procedure in place is a sign to investigators that you are making a good-faith attempt to comply with the rules. Another sign of good faith is the government’s E-verify program, which we expect to be a mandatory requirement of immigration reform.

C. What’s new about the new form I-9?

On March 8, 2013, the USCIS released an improved Form I-9.76 The revised form has several new features, including a new two-page format, a clearer description of the information employees and employers must provide in each section, and new data fields for an email address, phone number, “other” name, and foreign passport number.77 The instruction sheet is now six pages.78

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77 Id.
78 Id.
When to Use It. Employers should begin using the new Form I-9 with the revision date of March 8, 2013 immediately for all new hires, as well as for rehires or re-verifications. 79 Beginning May 7, 2013, employers must only use the new Form I-9.80

REMEMBER:
1. Hiring employees without complying with the employment eligibility verification requirements of the Form I-9 is against the law, and could result in civil and criminal penalties.
2. Employees hired after November 6, 1986, must present documentation that establishes identity and employment authorization. Employers must record this information on Form I-9.
3. Employers may not discriminate against employees on the basis of national origin or citizenship status. 81

VI. OH! OH! OH! OH- Bamacare! – BE AWARE OF ITS IMPACT ON IMMIGRANT WORKFORCES!

The Patient Protection and Affordable Care Act (“PPACA”) became law on March 23, 2010. 82 Also known as the Affordable Care Act or “ObamaCare,”83 the requirements of this new law are significant for employers generally, but they are particularly significant for employers with a Latino workforce. As ObamaCare rolls out over the coming months and years, there will be numerous issues employers will need to tackle. Meanwhile, we’ll give you the briefest of overview as to how the PPACA works and a few thoughts on what it means to the Hispanic workforce and their employers.

80 Id.
81 Id.
A. PPACA overview

ObamaCare is a very long law. It is over 2000 pages. When you add the regulations, it gets even longer. The number one issue employers are worried about is the “employer mandate” penalties. Everyone has heard by now that certain kinds of employers have to offer healthcare insurance coverage to all employees or pay a penalty. Specifically, if an employer has 50 or more full-time employees or their equivalent, the company has to offer affordable insurance coverage to all its full-time employees or pay a penalty. However, where an employee finds the insurance offered by the employer “unaffordable,” they could obtain government help, a subsidy, for paying insurance premiums. Although the details get quite complex as you delve into the law, for the purpose of this overview, it’s safe to say that many employers will face penalties for not offering qualified coverage.

B. Incentive for unemployment

While not its intention, the employer-mandate under ObamaCare, has created an incentive for employers to minimize the number of full-time employees they have on their payrolls. This simple fact is why you are seeing more borderline employers—those at or near 50 full-time employees—cutting back on the number of full-time workers they hire to sustain their operations and avoid exposure to employer-mandate penalties. The fewer full-time employees a company has, the smaller the employer mandate

86 26 C.F.R. § 54.4980H-1; 26 C.F.R. § 54.4980H-4
87 26 C.F.R. § 54.4980H-5(e)
penalties become. This is the logic behind why employers are starting to cut back on full-time employees.

C. The challenge for Hispanic workforces

The challenge ObamaCare presents to employers of primarily Hispanic workforces is two-fold:

(1) Replacing one full-time worker with two part-time workers in order to escape liability for the employer mandate, and

(2) Verifying workers under an almost certain expectation that immigration reform will require employers to begin using the E-verify online system.

To put this into perspective, let’s suppose you have an employee that presently works 40 hours a week and you decide to let that employee go because you want to replace him with two part-time employees at 20 hours to meet the employer mandate. Although your goal is to limit your employer liability under ObamaCare, you soon learn that replacing one 40-hour employee who has verified his work authorization with two part-time employees, who each must pass verification, is not as easy as you thought it would be. In fact, it is particularly difficult because your company participates in E-Verify. Thus, you need to weigh the pros and cons to determine whether the effort is worth anything to your organization. Undocumented workers do not qualify for insurance coverage under ObamaCare.

D. ObamaCare: much ado about nothing for Hispanic labor

Even if an employer is prepared to offer employees insurance under the employer mandate, this does not help their undocumented employees that are not entitled to accept

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89 26 C.F.R. § 54.4980H-5
such an offer—essentially making ObamaCare a total non-issue for undocumented workers. You should be aware that the proposed immigration reform released in mid-April 2013, will place its main benefactors (those individuals who will phase out of unlawful status into some new provisionally lawful status) in the same category as undocumented workers. 91 This should help employers with large Hispanic workforces because they will receive the benefit of a new, lawful labor force without ObamaCare’s requirement to offer full-time employees within that labor force health insurance.

Under ObamaCare, the biggest incentive for any an individual to obtain employer insurance (aside from having coverage) is to avoid paying an IRS penalty at the end of the year for not having insurance coverage. 92 But most, if not all, undocumented workers do not currently file income tax returns!

Without filing an income tax return, there is no way the IRS can penalize an individual for not carrying insurance coverage throughout the year. Thus, Obamacare is a non-starter for much of the current, undocumented Hispanic labor pool and their employers.

On the other hand, for documented Hispanic workers, Obamacare does little to actually help them, either. The law does not reduce nor control the price of insurance. 93 And while the employer is obligated to provide “affordable” care, if the employee finds it unaffordable—based on the law’s proscribed income calculation—they face two

92 Castillo, supra note 87, at 331.
unattractive options: they (1) must apply for government assistance or (2) personally pay a penalty tax for being uninsured.  

Keep in mind that health insurance coverage has been typically prohibitively expensive for employees in low-wage industries that are traditionally staffed by Hispanic employees making minimum wage or close to it. Therefore, paying for healthcare is generally considered a low priority for those employees who do not see the value of giving up good portions of their paychecks to pay for insurance something most perceive as a luxury.

Perhaps one of the most misunderstood things about Obamacare is that not offering insurance is not the greatest cost. Paying the penalties for full-time employees who obtain government help in paying for his or her coverage is and can add up to significant expense.

For example, if an employee cannot technically afford the employer’s plan—as defined in the law by a percentage of total household income—but wants to avoid a personal penalty tax for not being insured, they can apply for a government subsidy and get coverage. When the employee applies for federal assistance in paying for the healthcare offered through the employer, the employer pays a penalty. We believe that

94 The fee you pay if you don’t have health, HEALTHCARE.GOV, https://www.healthcare.gov/fees-exemptions/fee-for-not-being-covered/(last visited May 23, 2015).
this can escalate quite quickly if the workforce is primarily minimum wage because the employer pays the penalty for each worker that chooses the government subsidy.

Notwithstanding, we predict that most Hispanic employees will not take advantage of the available subsidies and will simply opt out of the employer plan—seeing the personal tax penalty as the worse of two evils. There are two things to consider and that lead us to this conclusion: (1) Hispanic workforces are very distrusting of the federal government, generally, and (2) the application for federal subsidy is pages long! The second fact alone will probably intimidate many Hispanic employees, and they will not apply for a subsidy.

Finally, where an employer offers affordable insurance coverage but an employee rejects it and does not apply for a federal subsidy—because the personal tax penalty is less than the employee’s contribution would be—the employer is off the hook for any employer mandate penalty.97

VII. CONCLUSION

Economists, demographers and other experts who have studied the potential impact of immigration reform are uncertain of its effects on economic recovery, but most remain optimistic and project that it will have positive effects on both employees and employers.98 Forewarned is forearmed—“To be prepared is half the victory.”99 We trust

97 Options if you have job-based insurance, HEALTHCARE.GOV, https://www.healthcare.gov/have-job-based-coverage/ (last visited May 23, 2015).
that the foregoing content has prepared, enlightened and enriched all employers, and possibly their “friends,” as we ring in a new era of immigration reform.\textsuperscript{100}

\textsuperscript{100} If you have questions or comments about the Hispanic workforce, or other Hispanic issues you may encounter, please email us at jmonty@montyramirezlaw.com.