

## **Emergency Relief: Match the Needs of Employers with the Immigrant Resilience Workforce**

April 2, 2020

This is an “all hands on deck” moment in our nation’s history. Each one of us has to evaluate the contribution we can make to help our family, neighbors, and communities survive. For some on the frontlines of the pandemic, that will mean going to work to protect and serve others. Many--likely millions--of workers in these frontline jobs are immigrants. Some have a valid immigration status and the ability to work legally. Others have temporary or limited immigration statuses. And some undocumented immigrants have expired legal status or no legal status at all. Every day, millions of these workers are risking everything they have--their health and safety--to contain the coronavirus and to allow the economy to survive. ***The needs of our economy have converged with the needs of the workers who are supporting us through this public health crisis.*** Quickly, we need to pass a two-part emergency relief bill that will meet a critical need and provide a win-win-win for immigrants, their employers, and their communities.

Once Congress acts, this emergency relief would immediately:

- (1) ***Lighten the burden on employers.*** The emergency relief would temporarily suspend some outdated immigration paperwork requirements and streamline the Form I-9 process that burdens employers.
- (2) ***Stop all immigration-related raids of homes and businesses during this time of national crisis.*** Fear of raids makes workers less likely to report to work when they’re able and less likely to seek treatment if they’re sick. Immigration enforcement is also using up precious personal protective equipment. In this moment, everyone living in America needs to be able to remain safely at home to practice social distancing, to work in essential occupations when they’re able, and to seek treatment when they must without additional fear.

### **Background on the Problem**

Because of the complex nature of existing immigration law, this is the relief we need right now. In addition to the day-to-day challenges posed by coronavirus, many employers are worried about facing steep fines or prosecution for what often amounts to immigration paperwork errors.<sup>1</sup> Under immigration law, U.S. employers--not ICE--bear most of the responsibility to ensure that they are not employing undocumented workers. Employers then face fines and possible criminal charges if undocumented workers are discovered working at their business.

Under the Immigration Reform and Control Act of 1986 ("IRCA") it is illegal for any U.S. employer to: (1) hire, recruit or refer for a fee an alien knowing he or she is unauthorized to work, (2) continue to employ an alien knowing she has become unauthorized, and (3) hire, recruit, or refer for a fee any person without following the record-keeping requirements of IRCA.<sup>2</sup> Collectively, these prohibitions are referred to as IRCA's "employer sanctions" provisions, and only apply to employees hired after 1986.

IRCA's recordkeeping requirements mandate that every employer must verify the work authorization for each employee hired within three days of hire using the Form I-9.<sup>3</sup> The Form I-9 has sections that must be completed by the prospective employee and the employer. The employee must provide personal information (like name and birth date) and must attest to being a citizen, a permanent resident, or to having work authorization through a certain date. The employee also must provide documents that establish her identity and ability to work in the United States. The Form I-9 lists several documents that employees may use to establish identity and ability to work; the employer cannot dictate which document or documents the employee presents.<sup>4</sup>

Typically, ICE discovers and assesses penalties during an I-9 audit. When ICE conducts an I-9 audit, also called a "desktop raid," it requires employers to

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<sup>1</sup>See, e.g., U.S. Immigration and Customs Enforcement, ICE worksite enforcement investigations in FY18 surge, December 11, 2018. Available at <https://www.ice.gov/news/releases/ice-worksite-enforcement-investigations-fy18-surge> (Last accessed April 2, 2020).

<sup>2</sup> 8 U.S. Code § 1324a(a), 8 U.S. Code § 1324a(b).

<sup>3</sup> Some states require some or most employers to use E-Verify, the electronic employment verification system, in addition to the Form I-9. Most federal contractors are also required to use E-Verify.

<sup>4</sup> 8 U.S. Code § 1324b.

submit a variety of paperwork (including the Form I-9s).<sup>5</sup> ICE then assesses penalties per violation. These can be significant. For example, violations relating to the unlawful hiring and employment of undocumented workers range from \$573 to \$20,130 **per violation** (per worker), with repeat offenders receiving penalties at the higher end. Penalties for substantive violations, which can include things like failing to produce a Form I-9 for a worker, range from \$230 to \$2,292 per violation.<sup>6</sup>

By almost any measure, employer sanctions have been a spectacular failure.<sup>7</sup> And the paperwork requirements of the I-9 process remain a significant burden for employers, particularly those who operate small businesses.<sup>8</sup> Some tout E-Verify, an electronic version of the I-9 process, as a solution. But it is not. This higher tech system still forces business owners to learn the online system while costing them precious dollars.<sup>9</sup> And it doesn't do its core job. In last summer's ICE raids in Mississippi, many of the businesses that were employing undocumented workers were actually signed up for E-Verify.<sup>10</sup>

In addition, workers remain deeply frightened by ICE's aggressive and unrelenting enforcement in their homes, workplaces, and communities.<sup>11</sup> Despite ICE's statement that it will "temporarily adjust its enforcement posture,"<sup>12</sup> ICE conducted raids on the first day of the California coronavirus

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<sup>5</sup> For more information on the I-9 audit process, see Immigration and Customs Enforcement, Form I-9 Inspection Overview, Available at <https://www.ice.gov/factsheets/i9-inspection> (Last accessed April 2, 2020).

<sup>6</sup> 8 CFR § 274a.10

<sup>7</sup> See MR Online, [Why Do We Still Have Employer Sanctions?](#), September 13, 2017.

<sup>8</sup> See SHRM [I-9 Paperwork Burdens Too Much for Small Businesses](#), HR Knowledge, [The Burden of the I-9 Form Falls on the Employer, Not the Employee](#)

<sup>9</sup> National Immigration Law Center, [Expanding E-Verify Will Undermine Job Growth and Cripple Small Businesses](#), January 2011. Available at <https://www.nilc.org/wp-content/uploads/2015/12/e-verify-facts-2011-01-26.pdf> (Last accessed April 2, 2020).

<sup>10</sup> Tracy Jan and Hannah Denham, [These poultry plants used E-Verify. They still hired hundreds of undocumented workers](#), Washington Post, August 16, 2019. Available at <https://www.washingtonpost.com/business/2019/08/16/these-poultry-plants-used-e-verify-they-still-hired-hundreds-undocumented-workers/> (Last accessed April 2, 2020).

<sup>11</sup> Jaclyn Kelley-Widmer, [ICE said it won't deport people for seeking medical care. Immigrants won't believe them](#), Washington Post, March 21, 2020. Available at <https://www.washingtonpost.com/politics/2020/03/21/ice-said-it-wont-deport-people-seeking-medical-care-immigrants-wont-believe-them/> (Last accessed April 2, 2020). "Despite official reassurances, however, the administration's [overall anti-immigrant stance](#) will most likely keep immigrants away from health care, increasing the risk of spread more broadly."

<sup>12</sup> U.S. Customs and Immigration Enforcement, [ICE Guidance on COVID-19: Immigration Enforcement and Check-ins](#), March 18, 2017. Available at <http://ice.gov/coronavirus#wcm-survey-target-id> (Last accessed April 2, 2020). (Stating that "To ensure welfare and safety of

lockdown.<sup>13</sup> Additionally, a branch of ICE--Homeland Security Investigations (HSI)--typically conducts immigration enforcement at the worksite. Although ICE has stated that HSI will continue some enforcement efforts,<sup>14</sup> it is unclear how sweeping that will be. Immigration enforcement activity is also using up precious personal protective equipment.<sup>15</sup>

### **The Solution**

An emergency relief bill would temporarily suspend some of the employer sanctions provisions outlined above. Additionally, it would amend the regulations regarding the Form I-9 to increase the numbers and types of documents workers could use to prove “employment authorization.”<sup>16</sup> The emergency relief would also halt most ICE enforcement efforts that target this critical workforce. Although curbing ICE enforcement is certainly within the discretion of the Administration, it is profoundly unlikely to happen.

***Instead, we need a simple, temporary legislative solution to halt enforcement against the very people who are helping us survive.***

This solution would allow employers to focus on the **core aspects** of their business without facing prosecution and fines under IRCA. Like the infusion of cash the government is putting into the economy, we need a major infusion of workers employed on payrolls and living and working without constant fear. This is a moment when we can leave the old politics of immigration in the past. This moment is bigger than that. Our needs are greater than that. And the urgency for this relief is manifest.

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the general public as well as officers and agents in light of the ongoing COVID-19 pandemic response, U.S. Immigration and Customs Enforcement (ICE) will temporarily adjust its enforcement posture beginning today, March 18, 2020.”)

<sup>13</sup> Brittney Mejia. With masks at the ready, ICE agents make arrests on first day of California coronavirus lockdown, March 17, 2020. Available at <https://www.latimes.com/california/story/2020-03-17/for-ice-agents-its-business-as-unusual-day-after-sweeping-coronavirus-order> (Last accessed April 2, 2020).

<sup>14</sup> ICE Guidance, March 18, 2020.

<sup>15</sup> Miriam Magaña Lopez and Seth M. Holmes, Ice agents are still performing raids - and using precious N95 masks to do so, The Guardian, March 31, 2020. Available at <http://theguardian.com/commentisfree/2020/mar/31/ice-raids-coronavirus-n95-masks> (Last accessed April 2, 2020)

<sup>16</sup>These workers would not have an employment authorization document (EAD). Instead, on a temporary basis, the bill increases the documents workers can use to complete for the Form I-9.