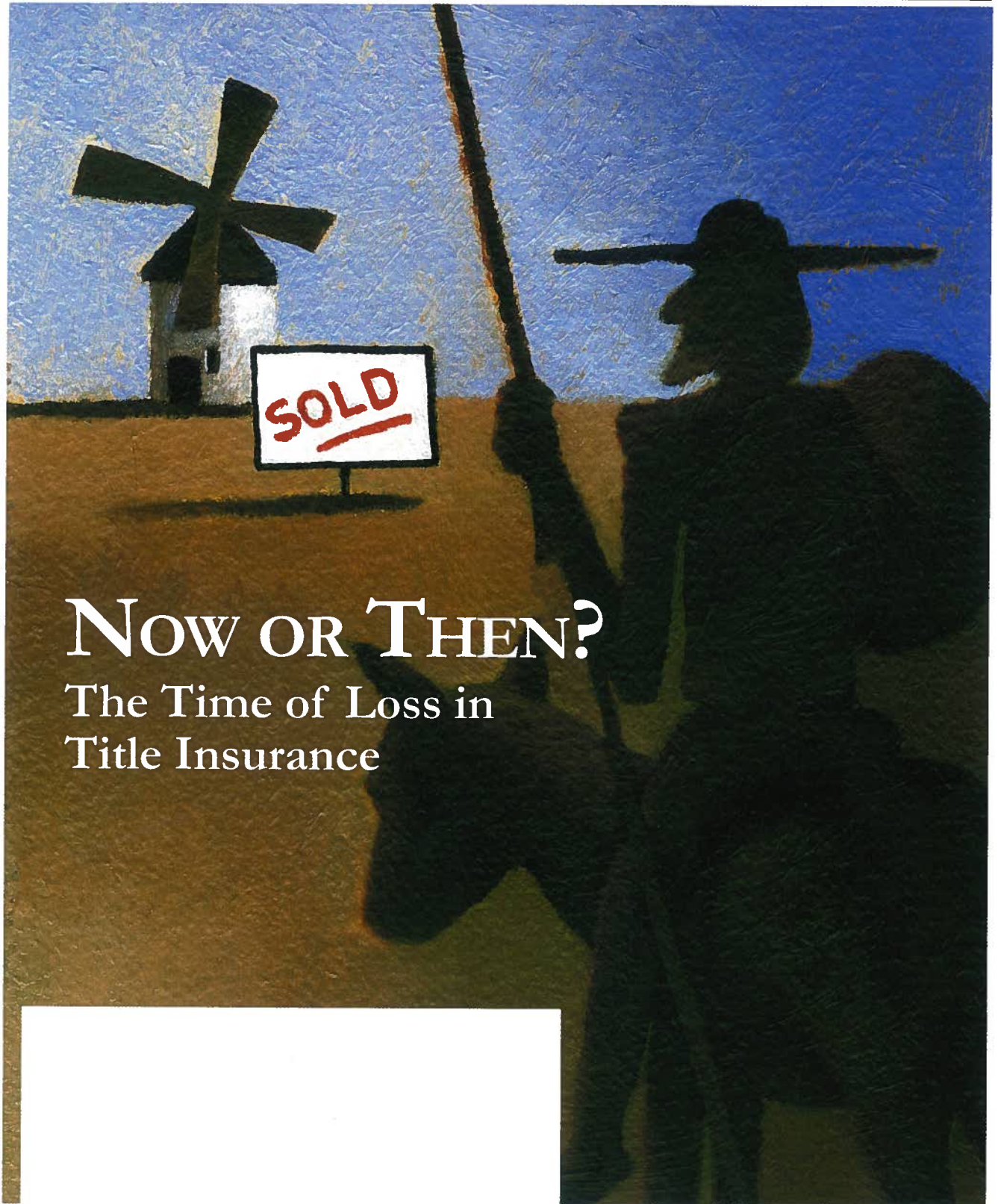


THE FLORIDA

VOLUME 85, NO. 10 DECEMBER 2011

BAR JOURNAL

ADVANCING THE COMPETENCE AND PUBLIC RESPONSIBILITY OF LAWYERS



NOW OR THEN?

The Time of Loss in
Title Insurance

Raising Arizona Law in Florida? *Part II*

This article is the second half of an article dealing with ongoing events in the world of immigration law as it relates to employer responsibility. Part one in last month's issue focused on state initiatives in Arizona and elsewhere and the court decisions relating to them. This part will focus on the E-Verify system, after a short update on a breaking event related to state laws of the kind discussed last month.

Last month, the author discussed the Beason-Hammond Alabama Taxpayer and Citizen Protection Act,¹ one of the toughest state laws in the nation. On September 28, 2011, Judge Sharon Lovelace Blackburn of the Northern District of Alabama, in a 115-page order, upheld most of the sections of the law, including those that allow the "reasonable suspicion" search during traffic stops and require public schools to check the immigration status of incoming students.² An appeal to the 11th Circuit Court of Appeals has already been filed.

What is E-Verify?

E-Verify was created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA)³ as a voluntary program that is growing into a mandatory program. It is Internet-based and administered by the U.S. Department of Homeland Security (DHS) and the Social Security Administration (SSA) to assist employers in verifying the work authorization of employees. USCIS reports that as of December 2010, more than 238,000 employers have

registered to use the program, and 16 million inquiries were run in fiscal year 2010. It is estimated that five percent of newly hired workers are verified using the system.⁴

Is E-Verify Going Away?

USCIS Director Alejandro Mayorkas has said, "[W]e remain committed to continually improving E-Verify and enhancing this tool's effectiveness for both workers and employers.... It is a very promising tool for ensuring a legal workforce in the U.S." Based on his words, the current enforcement trends and program enhancements, an expansion of E-Verify at both federal and state levels is foreseen.

One of the most recent expansions is the launch of the E-Verify RIDE (records and images from Department of Motor Vehicles) program in Mississippi. RIDE allows employers to verify the authenticity of an employee's driver's license, driver's permit, or state-issued ID card when presented as a Form I-9 identity document. RIDE is expected to improve E-Verify's accuracy rate and reduce false positive confirmations. The use of data from the Department of Motor Vehicles could result in an increased number of nonconfirmations as about 80 percent of employees provide their drivers' licenses to establish their identity. RIDE is expected to extend to all DMVs nationwide.

USCIS and SSA are preparing for a possible mandatory nationwide implementation of E-Verify, and employers should also. In June of this year, House Judiciary Committee Chair Lamar Smith, R-Texas, introduced the Legal Workforce Act (H.R. 2164),

a bill that mandated E-Verify use for all new hires by U.S. employers and preempted state E-Verify laws. On September 21, 2011, another version of the act (H.R. 2885) passed the U.S. House of Representatives Judiciary Committee. The act now moves to the full House, where it is believed to have strong support. The act would create a new employment verification system, the Employment Eligibility Verification System (EEVS), mandating compliance within two years and requiring all employers to utilize E-Verify for all new hires, thus, doing away with the paper I-9 system and preempting state and local laws requiring use of E-Verify.

How Does the Matching or Mismatching of Data Work?

After completing the paper I-9, the employer enters the I-9 information in E-Verify, where the data is compared against the DHS and SSA records. If the information matches, the employer receives a confirmation notice: "Employment authorized." If a match is not found, E-Verify will alert the employer through a tentative nonconfirmation (TNC) notice. The employee has the option to contest or not to contest the TNC.

If the employee chooses to contest, the employer initiates a referral in E-Verify and provides the employee with a TNC referral letter with instructions to contact SSA or DHS within eight federal government work days to resolve the case. If the employee chooses not to contest, the employer may terminate the employee and close the case.

While the TNC is being resolved

— which could take several months — the employer should regularly check the case status in E-Verify, but may not ask the employee for additional evidence of the case resolution to avoid a potential discrimination charge. The employer should not take any adverse action against the employee such as termination, suspension, delaying training, or withholding pay based on a TNC.

If the employer retains an employee who has received a final non-confirmation (FNC), the employer must notify DHS when closing the case in E-Verify. An employer can be found liable of knowingly employing an authorized worker if it is later discovered that the employee is not authorized to work. An employer can also face penalties if it continues to employ an employee after receipt of a FNC without notifying the DHS.

Due to inaccuracies in the DHS and SSA databases, some individuals who are authorized workers may not be confirmed through E-Verify. Employers should seek legal counsel prior to terminating a worker as a result of an E-Verify determination.

What Are Employers' Responsibilities Under the MOU and Other Considerations?

During the E-Verify enrollment, the employer is required to sign a memorandum of understanding (MOU). The MOU is not negotiable and creates some potential liability issues for the employer. By signing it, the employer agrees to:

cooperate with DHS and SSA in their compliance monitoring and evaluation of E-Verify, including by permitting DHS and SSA, upon reasonable notice, to review Forms I-9 and other employment records and to interview it and its employees regarding the employer's use of E-Verify, and to respond in a timely and accurate manner to DHS requests for information relating to their participation in E-Verify.

The employer agrees not to use E-Verify for pre-employment screening of job applicants in support of any unlawful employment practice or for any other use not authorized by the MOU. Employers that use E-Verify for unauthorized purposes are subject to legal action and termination of access.

The employer also agrees to comply with the I-9 rules except that List B documents proving identity must have a photograph and if an employee presents a permanent residency card or an employment authorization document, the employer must keep a copy of the document.

Pursuant to the MOU's authority, enrolled employers periodically receive telephone calls, emails, and/or letters from E-Verify to verify, update, and track the account. As employers increase their use of E-Verify at various sites, it is important for them to maintain a roster of all the accounts including the period of activity and states of use. Employers should also not close inactive accounts, as the information contained on those accounts could be useful in the event of an audit.

Who is Required to Participate?

Amended Executive Order 12989 and federal acquisition regulation (FAR) final rule⁵ requires that as of September 8, 2009, federal contractors and subcontractors with con-

SYNERGY
SETTLEMENT SERVICES

& mbc Medical Bill Clinic
A LAW FIRM

Two Companies...One Solution

- Complete Settlement Planning & Consulting
- Lien Resolution
- Medicare Set Aside & MSP Services
- Medicare Set Aside Administration
- Pooled Trust Services
- Settlement Asset Management Services
- Structured Settlements
- Medical Liens
- Hospital Lien Negotiation
- Hospital Lien Litigation
- L.O.P. Negotiation
- L.O.P. Litigation

Toll Free:
1.855.203.3522 | SynergyMBC.com

tracts containing the FAR E-Verify clause must use E-Verify.⁶ Also, a number of states are requiring participation at various levels. A contract that does not contain an E-Verify clause is subject to an amendment to include the clause.

In Florida, under Executive Order 11-02, effective January 4, 2011, all state agencies under the direction of the governor and their contractors and subcontractors were required to use E-Verify to check the employment eligibility of current and new employees. In May 27, 2011, Governor Scott issued Executive Order 11-116, which reinforced the flow down requirement provision, but also clarified that the E-Verify requirement was for only newly hired employees during the term of the contract.

Monitoring the compliance of covered subcontractors can be tricky. At a minimum, upstream contractors should ask to receive verification that the subcontractor has enrolled in E-Verify.

What Are the Consequences of Noncompliance?

Failure to comply with the terms of the MOU can create liability for civil monetary penalties of \$500 to \$1,000 per violation. Penalties also include termination of the employer's participation in the program.⁷

However, an overlooked and significant liability can arise from violations of the antidiscrimination

and unfair immigration-related employment practices under the Immigration and Nationality Act (INA) §274B.⁸ In this regard, USCIS, SSA, and the DOJ, Office of Special Counsel (OSC) have entered into a formal information sharing agreement.⁹ Under the MOU, the agencies will regularly share E-Verify data on potential discriminatory issues. Specifically, OSC will receive referrals of potential discrimination resulting from employer's misuse of E-Verify. USCIS will also provide OSC with data from the queries run through E-Verify and employer information to assist in identifying antidiscrimination violations.

OSC enforces the antidiscrimination provisions of the INA, which prohibit four types of employment-related discrimination: citizenship or immigration status discrimination, national origin discrimination, unfair documentary practices during the employment eligibility verification (Form I-9) process, and retaliation.

In addition to monetary fines, violations of the antidiscriminatory provisions can result in an order to cease and desist, hiring or rehiring injured individuals, payment of back pay, posting employee notices about their rights, education of hiring personnel, and attorneys' fees.

OSC is actively using its authority to investigate and prosecute discrimination charges. In August 22, 2011, the DOJ settled its lawsuit against

Farmland Foods, Inc., for \$290,000, the highest civil penalty paid since the enactment of the INA's antidiscrimination provision in 1986.

A Farmland employee, also a naturalized U.S. citizen, filed an unfair documentary practice charge, which OSC investigated and prosecuted. The Farmland complaint alleges that after receipt of an E-Verify TNC, Farmland asked the employee to present her naturalization certificate or other documents to prove her citizenship. The complaint further alleges that Farmland routinely engaged in a pattern of discriminatory documentary practices at its Monmouth, Illinois, plant. For example, Farmland specifically required lawful permanent residents to produce their permanent resident card (a List A document) in addition to other documents. However, U.S. citizens were allowed to produce List B and List C documents without restriction.

The complaint charges Farmland with discriminatory documentary policies and a pattern or practice of discrimination in connection with its determinations of employment eligibility under 8 U.S.C. §1324a and imposition of additional burdens on some employees because of their non-U.S. citizens or naturalized U.S. citizens status in violation of the antidiscrimination provision of the INA, 8 U.S.C. §1324b(a)(1) and (a)(6).

As part of the settlement, Farmland agreed that it will not discriminate against any applicant or employee on the basis of citizenship status, immigration status, or national origin in connection with any background check process. It further agreed to develop and engage in a training plan and review and re-issue written policies, procedures, manuals, and handbooks to prevent future discriminatory practices.

In light of *Farmland* and other similar settlement agreements, it is essential that employers ensure that those responsible for I-9 completion are trained and comply with the antidiscrimination provisions of the INA, that appropriate hiring and verification policies are in place, and that E-Verify TNC are managed appropriately with legal guidance.

CONFIDENTIAL

Counseling, Peer Support, and Professional Assistance

for lawyers, judges, and law students

DO YOU FEEL LIKE YOUR PERSONAL OR
PROFESSIONAL LIFE IS OUT OF CONTROL
BECAUSE OF A PROBLEM WITH ALCOHOL,
DRUGS, GAMBLING, STRESS, OR
DEPRESSION?

SO, YOU CAN CALL FLA 24/7 AT:
800-282-8981 or
954-566-9040



Does Participation in E-Verify Provide a "Safe Harbor" from Worksite Enforcement?

The E-Verify MOU provides that "a rebuttable presumption is established by §402(b) of IIRAIRA that the employer has not violated §274A(a)(1)(A) of the INA with respect to the hiring of any individual if it obtains confirmation of the identity and employment eligibility of the individual in compliance with the terms and conditions of E-Verify." However, participation in the program does not provide a "safe harbor" from worksite enforcement. Some states, such as Pennsylvania and Tennessee, encourage employers to use E-Verify by providing a safe harbor from state penalties for the hiring of unauthorized workers.

Is Data Submitted Through E-Verify Monitored for Potential Investigation?

Yes. E-Verify has about 35 monitoring and compliance analysts in Buffalo, New York, and more are being hired. The analysts are reviewing and tracking data to identify potential abuse or fraud. The data being tracked includes multiple use of the same SSN across E-Verify transactions, employers' failure to use E-Verify after registering with the program, submission of employees' verifications significantly beyond the hire date, and employers with a high number of uncontested TNCs. In FY 2010, E-Verify sent out about 14,000 compliance/warning letters to employers as a result of their monitoring.

What is Self-check?

On March 21, 2011, USCIS launched E-Verify Self-check, and in August, launched the program in Spanish. These are companion programs to E-Verify that allow U.S. workers to verify their own employment eligibility status against the government's database. These programs are currently available on a pilot basis in at least 16 states, not including Florida. Individuals who discover errors in their records can correct them with DHS and/or SSA. It is unlawful for employers to require applicants to

present self-check certifications as a condition of employment.

What Are Users and Nonusers of E-Verify Saying?

In January 2011, USCIS released an independent report of E-Verify prepared by the Government Accountability Office (GAO). The report provides that although the federal government has made significant strides to improve E-Verify, chal-

lenges remain to ensure the accuracy of the data and the verification system. On the positive side, GAO cited improvements in the accuracy of the data (97.4 percent), increased employer compliance, and availability of better safeguards for employees' personal information.

The GAO also noted that persistent E-Verify errors can create problems for many authorized workers who receive erroneous TNC and worse

At the end of the day...

Who's Really Watching Your Firm's 401(k)?

And, what is it costing you?

- Does your firm's 401(k) include professional investment fiduciary services?
- Is your firm's 401(k) subject to quarterly reviews by an independent board of directors?
- Does your firm's 401(k) feature no out-of-pocket fees?

If you answered no to any of these questions, contact the ABA Retirement Funds Program to learn how to keep a close watch over your 401(k).

Phone: (800) 826-8901
email: contactus@abaretirement.com
Web: www.abaretirement.com



Who's Watching Your Firm's 401(k)?

The American Bar Association Members/Northern Trust Collective Trust (the "Collective Trust") has filed a registration statement (including the prospectus therein (the "Prospectus")) with the Securities and Exchange Commission for the offering of Units representing pro rata beneficial interests in the collective investment funds established under the Collective Trust. The Collective Trust is a retirement program sponsored by the ABA Retirement Funds in which lawyers and law firms who are members or associates of the American Bar Association, most state and local bar associations and their employees and employees of certain organizations related to the practice of law are eligible to participate. Copies of the Prospectus may be obtained by calling (800) 826-8901, by visiting the website of the ABA Retirement Funds Program at www.abaretirement.com or by writing to ABA Retirement Funds, P.O. Box 5142, Boston, MA 02206-5142. This communication shall not constitute an offer to sell or the solicitation of an offer to buy, or a request of the recipient to indicate an interest in, Units of the Collective Trust, and is not a recommendation with respect to any of the collective investment funds established under the Collective Trust. Nor shall there be any sale of the Units of the Collective Trust in any state or other jurisdiction in which such offer, solicitation or sale would be unlawful prior to the registration or qualification under the securities laws of any such state or other jurisdiction.

C11-031B-012 (3/11)

yet, FNC. The TNCs generally tend to involve foreign-born employees, which can also lead to discrimination. The report also noted identity theft and employer fraud continues to be a problem.

Most users, however, are supportive of the program. They report that most workers are confirmed quickly and that USCIS has done a good job of improving the user interface and simplifying the program. Users believe that the program helps decrease undocumented workers and the use of fraudulent documents.¹⁰

Many employers that are not required to use E-Verify see no benefit in enrolling. They see it as time and resource consuming, difficult, and disruptive. They believe they are already complying with their obligation to verify employability by performing the I-9 process. They believe use of the program will increase the likelihood of a government audit or fine. Other criticisms include the length of the tutorial and the need to review a lengthy manual prior to using the program. Small business owners are particularly concerned about adhering to the three-day requirement to verify new hires when they have competing demands in the business.¹¹

Some employers have reported that they would be more supportive if using E-Verify resulted in eliminating the paper I-9 process, allowed for a formal appeal of a final nonconfirmation, and allowed verification of job applicants before a job decision is made.

What Should an Employer Consider When Contemplating Enrolling in E-Verify?

There are many factors to consider before enrolling in the program. For instance, will the enrollment include the entire company or only select locations? This decision will help facilitate the creation of a timeline for implementation of the program. Other considerations that must be taken into account are the size of the company, its current employment verification and antidiscrimination policies, and the human and technology resources that will be required. Responsibility also needs to be

delegated, whether it is someone in the human resources department or otherwise, to learn and operate the program for the employer and sign the MOU.

Employers must consider not only the logistical requirements of the enrollment, but also the risks. If the workforce is unionized, consider the potential negative implications. It is also important to realize that employees may be lost as a result of the process.

Once all preparations and risks have been addressed, it is important to conduct an ICE simulated I-9 audit in order to identify weaknesses and errors that may be present in the I-9 forms on file. The employer should proceed in enrolling in the program, and once they receive login information, they will be ready to begin using the system. Once an employee is confirmed, the employer must record the case verification number on the employee's Form I-9 or print the screen containing the case verification number and attach it to the employee's I-9.

Conclusion

E-Verify and the alarmingly inconsistent and evolving state laws relating to E-Verify and immigration enforcement present significant challenges to employers. Unfortunately, and against IRCA's intent to create uniform laws, we are likely to see an ongoing and rapid proliferation of a patchwork of state and local immigration laws and an increase in discrimination, harassment, and even detention of authorized workers, visitors, and legal persons for as long as Congress fails to agree on a comprehensive immigration reform bill.

An immigration "enforcement only" approach, like mandatory E-Verify and status verification, without other changes, such as an earned pathway to legalization for the undocumented workers already in the U.S. or a guest worker program, will not diminish the demand for willing workers. This approach pushes many hard-working, undocumented workers further into the shadows, making them more susceptible to abuse and exploita-

tion, both of which are against the freedoms and rights for which our country stands.

With no clear relief in sight and the increase sharing and analysis of E-Verify data, the message is that it is a good time for employers and their attorneys to review employment verification compliance and I-9 practices and recordkeeping. Employers should conduct audits and act on the results, train staff, and plan for the potential nationwide implementation of E-Verify. Likewise, employees should take proactive steps to obtain documentation of their legal status. □

¹ H.B. 56.

² *U.S. v. Bentley*, 11- cv-02746 (N.D. Ala. Sept. 28, 2011).

³ Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

⁴ E-Verify, Employment Eligibility Verification, <https://e-verify.uscis.gov/enroll> (instructions to register).

⁵ FAR case 2007-013, Employment Eligibility Verification.

⁶ See U.S. Citizenship and Immigration Services, Federal Contractor Flyer, http://www.uscis.gov/USCIS/Verification/E-Verify/E-Verify_Native_Documents/m1010federalcontractorflyer.pdf.

⁷ §402(c)(4) of Publ. L. 104-208, Div. C, Title IV, Subtitle A (per text of legislation), but §402(c)(3) in West's 2009 Federal Immig. Laws. & Regs., notes to INA 274A.

⁸ 8 U.S.C. §1324b.

⁹ See DHS Unveils Initiatives to Enhance E-Verify, Fact Sheet at <http://www.uscis.gov>.

¹⁰ See Government Accountability Office (GAO) Report, <http://www.gao.gov/new.items/d11146.pdf>.

¹¹ See *The Practices and Opinions of Employers Who Do Not Participate in E-Verify*, WESTAT REPORT (Dec. 2010).

Giselle Carson is a shareholder with Marks Gray, P.A., in Jacksonville. She practices primarily in the areas of U.S. and global immigration, business, civil litigation, wills, and estate planning. She is a frequent writer and lecturer on immigration issues, and she has represented clients in cases in the federal court and before federal and state agencies. She is the general counsel for the Jacksonville Regional Chamber of Commerce and a board member of the Jacksonville Bar Association.

This column is submitted on behalf of the Labor and Employment Law Section, Gregory Alan Hearing, chair, and Frank E. Brown, editor.